No. 23-621

IN THE
Supreme Court of the United States

GERALD F. LACKEY, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES,

Petitioner,

v.

DAMIAN STINNIE, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

Angela A. Ciolfi
LEGAL AID JUSTICE CENTER
1000 Preston Avenue
Suite A
Charlottesville, VA 22903
(434) 529-1810

Brian D. Schmalzbach
Counsel of Record
Matthew A. Fitzgerald
John J. Woolard
MCGUIREWOODS LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
(804) 775-4746
bschmalzbach@mcguirewoods.com

(*Additional counsel on inside cover*)

Patrick Levy-Lavelle
LEGAL AID JUSTICE CENTER
626 East Broad Street
Suite 200
Richmond, VA 23219
(804) 643-1086

Jonathan T. Blank
MCGUIREWOODS LLP
323 Second Street SE
Suite 700
Charlottesville, VA 22902
(434) 977-2509

Counsel for Respondents Damian Stinnie, Melissa Adams, Adrainne Johnson, Williest Bandy, and Brianna Morgan

QUESTION PRESENTED

Are plaintiffs who win a court order that grants their requested relief and is never reversed nevertheless ineligible to be "prevailing parties" under 42 U.S.C. § 1988(b) when that order is a preliminary injunction?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Text, history, precedent, and common sense all agree: the winner of a preliminary injunction can qualify as a "prevailing party" eligible for fees under 42 U.S.C. § 1988(b). Yet Petitioner proposes to categorically exclude such winners from fee awards. Every circuit to consider the issue rejects Petitioner's proposal. This Court should too.

Respondents are the plaintiffs who won a life-changing injunction ending the suspension of their driver's licenses under a vindictive Virginia law. That injunction proved to be all the judicial relief Plaintiffs would ever need. Rather than defend the statute, Petitioner (the Commissioner of Virginia's Department of Motor Vehicles) sought a stay and then ran out the clock. The statute was repealed before Plaintiffs could try their case. The injunction thus barred the Commissioner from enforcing that statute against Plaintiffs as long as it remained on the books.

The court below recognized that the preliminary injunction gave Plaintiffs meaningful relief for as long as they needed it. That relief made them prevailing parties. So the lower court abandoned its outlier precedent excluding all preliminary injunction winners, joining instead the consensus of other circuits.

Yet the Commissioner insists that winning all the relief a plaintiff needs does *not* make a prevailing party. That defies common sense.

Like many preliminary injunction winners, these Plaintiffs got the judicial relief they needed. But the

Commissioner says that Congress excluded them because they won that relief *too soon* in the litigation.

In fact, the Commissioner says that governments should be able to use their powers over legislation and policy to moot these cases and insulate themselves from fee-shifting. But § 1988(b) was meant to encourage attorneys to enter the fray against governments. The Commissioner's rule does the opposite. That is a recipe for more constitutional violations, and less enforcement.

There is no good reason to interpret § 1988(b) that way. Nothing in the text discriminates against plaintiffs who win the relief they need before final judgment. The historical background confirms that Congress drew no such line. And this Court's precedent makes winning the requested relief the touchstone of "prevailing party" status.

So this Court should keep its existing prevailing-party rule: the winner of an unreversed judgment materially changing the parties' legal relationship has prevailed. That same rule applies to preliminary injunctions, which are *often* unreversed judgments that materially change the parties' legal relationship. For instance, these Plaintiffs won an injunction lifting the automatic statutory suspension of the licenses necessary to accomplish life's necessities. That change was material and never undone on the merits.

Plaintiffs thus qualify as prevailing parties. That threshold question of eligibility is the only one before this Court. On remand, the District Court has discretion to determine a reasonable amount of fees. That is the time to consider the Commissioner's

critique of the extent and duration of the relief Plaintiffs won. For now, this Court should reject the Commissioner's categorical eligibility bar, and affirm.

STATUTORY BACKGROUND

The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988(b), provides that in certain federal civil rights actions:

> [T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The impetus for § 1988(b) was *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that federal courts could not award attorney's fees to prevailing parties absent congressional authorization. The next year, § 1988(b) provided that authorization, effectively overruling *Alyeska Pipeline* for civil rights claims. S. Rep. No. 94-1011, at 4 (1976) ("Senate Report"); H.R. Rep. No. 94-1558, at 2-3 (1976) ("House Report").

Section 1988(b) originally applied to claims under "the civil rights acts which Congress ha[d] passed since 1866" like 42 U.S.C. § 1983 and Title IX, 20 U.S.C. § 1681 et seq. Senate Report 2. Congress later expanded § 1988(b) to civil rights statutes like the Religious Freedom Restoration Act of 1993 and the Religious Land Use and Institutionalized Persons Act of 2000. 42 U.S.C. § 2000bb et seq.; 42 U.S.C. § 2000cc et seq.

Section 1988 aims "to [e]nsure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts."

Pennsylvania 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). "Section 1988 serves an important public purpose by making it possible for persons without means to bring suit to vindicate their rights." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 559 (2010); *see also N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 590 U.S. 336, 360-61 (2020) (Alito, J., dissenting) ("The prospect of an award of attorney's fees ensures that private attorneys general can enforce the civil rights laws through civil litigation, even if they cannot afford legal counsel.").

STATEMENT OF THE CASE

I. Virginia's court-debt scheme suspended Plaintiffs' licenses automatically with no right to be heard.

This case challenged a statute disabling indigent Virginians from driving because of their indigency. Virginia Code § 46.2-395 required the Commissioner to automatically suspend driver's licenses for "failure or refusal" to pay court debt, without offering any process to determine ability to pay. Under this scheme, the Commissioner would not reinstate a license unless that individual satisfied all court debt or obtained payment plans from each creditor court. Even then, the Commissioner would extract a steep $145 reinstatment fee. J.A.82-83. Plaintiffs argued that the statute blindfolded the Commissioner to their inability to pay and so violated due process.

The District Court dismissed the initial complaint on jurisdictional grounds. On appeal, the Fourth Circuit "remand[ed] the case to the district court with instructions to allow Plaintiffs to amend." *Stinnie v. Holcomb*, 734 F. App'x 858, 860-63 (4th Cir. 2018). The dissent would have gone further, concluding on the merits that Virginia's "license-for-payment scheme" violated the Fourteenth Amendment by failing to "differentiate between those *unable* to pay from those *unwilling* to pay." *Id.* at 863-64.

II. Plaintiffs won a preliminary injunction.

On remand, Plaintiffs amended their complaint and requested a preliminary injunction (1) barring the Commissioner from enforcing § 46.2-395 against them without notice and a determination of ability to pay; (2) removing any current suspensions of Plaintiffs' driver's licenses imposed under § 46.2-395; and (3) preventing the Commissioner from charging a fee to reinstate Plaintiffs' licenses if otherwise eligible. The Commissioner had six weeks to file a response to that motion, three weeks to prepare for the preliminary injunction hearing, and then hours to offer its own witnesses and cross-examine Plaintiffs'. J.A.20-24, 172-349.

The District Court granted that injunction under the "govern[ing]" test from *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). J.A.366, 381.

The District Court first held that Plaintiffs made a "clear showing that [they are] likely to succeed" on the merits of their procedural due process claim. J.A.366-76. Plaintiffs had a protected interest in their driver's

licenses. J.A.368 & 376 (citing *Bell v. Burson*, 402 U.S. 535 (1971)). Section 46.2-395 deprived Plaintiffs of that interest without due process. In particular, § 46.2-395 allowed no hearing to contest license revocations. J.A.372 ("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.").

Plaintiffs thus were prevented from proving that their court debt persisted because they could not pay rather than would not pay. Their demonstrated inability to pay (J.A.362) was relevant because schemes depriving those who cannot pay of life, liberty, or property violate the Fourteenth Amendment. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 668 (1983); *see also Williams v. Illinois*, 399 U.S. 235, 242-44 nn.19-20 (1970) (distinguishing between "inability to pay court costs" and "willful refusal to pay fines or court costs"). So the lack of *any* hearing to prove their indigency as a defense to Virginia's scheme deprived Plaintiffs of due process. The District Court thus found a sufficient showing on the merits to satisfy *Winter*. J.A.372.

The other *Winter* factors favored an injunction too. "Irreparable harm [was] clearly demonstrated through the facts surrounding Plaintiff Stinnie." J.A.377. And for the balance of equities and the public interest, Virginia had no interest "furthered by a license suspension scheme that neither consider[ed] an individual's ability to pay nor provide[d] him with an opportunity to be heard on the matter. " J.A.378. So the harm to Plaintiffs from § 46.2-395

"outweigh[ed] any harm the issuance of a preliminary injunction would cause others." *Ibid.*

The District Court thus upended the status quo in three ways. First, the Commissioner was "preliminarily enjoined from enforcing … § 46.2-395 against Plaintiffs unless or until … a hearing regarding license suspension and … adequate notice thereof." J.A.381. Second, he had to "remove any current suspensions of the Plaintiffs' driver's licenses imposed under … § 46.2-395." *Ibid.* Third, the Commissioner was "enjoined from charging a fee to reinstate Plaintiffs' driver's licenses if there [were] no other restrictions on their licenses." *Ibid.*

The Commissioner did not appeal that injunction. Nor did he ever ask the District Court to reconsider or vacate it. Instead, he acquiesced in the relief the District Court awarded to Plaintiffs.

III. The Commissioner sought a stay while the General Assembly repealed the offending statute as he urged.

That preliminary injunction sped to the Virginia General Assembly's attention. Less than a month later, Senator William M. Stanley (R), who sponsored legislation repealing § 46.2-395, remarked: "Hopefully with the preliminary injunction being granted, anybody who has doubts about [the bill to end the required license suspensions for nonpayment of court debt] will remove them. I hope the House of Delegates will join the Senate in fixing this problem." 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 Aug. 4, 2024).

Soon after, the General Assembly adopted a Budget Amendment providing temporary relief to victims of Virginia's automatic suspension scheme. 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 Aug. 4, 2024).

Weeks later, the Commissioner moved to dismiss the case as moot, or to stay it so the General Assembly could achieve permanent repeal. J.A.384-85. Plaintiffs opposed the motion, reiterating their request for a prompt trial. J.A.429. The District Court granted a stay pending the General Assembly's 2020 session (which would not start for six months). *Stinnie v. Holcomb*, 396 F. Supp. 3d 653, 661 (W.D. Va. 2019). The same day, the court canceled the trial set for August 2019. J.A.52.

During that 2020 session, the General Assembly considered legislation permanently eliminating the statute's unconstitutional mandate, including Senator Stanley's SB1. The Commissioner sent a letter to Senator Stanley regarding the legislation. J.A.407. That letter advocated how to repeal § 46.2-395 effectively and the need for repeal given this litigation:

> 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 *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.*

J.A.408-09 (emphasis added).

The General Assembly enacted SB1, repealing § 46.2-395 for good.

IV. The court of appeals adopted the circuit consensus and held that Plaintiffs were prevailing parties.

The parties then stipulated that this action was moot—over sixteen months after the preliminary injunction granted Plaintiffs the relief they sought. J.A.412. After the repeal mooted this case, the District Court retained jurisdiction to consider Plaintiffs' attorney's fees. J.A.420. The parties first briefed the threshold "prevailing party" issue. J.A.423. The amount of any award was reserved for later briefing. *Ibid.* It has yet to occur.

The District Court denied the fee petition under 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 later mooted could *never* make a "prevailing party." 282 F.3d at 277.

Plaintiffs appealed. A three-judge panel of the Fourth Circuit affirmed under *Smyth*. 37 F.4th 977, 982-83 (4th Cir. 2022). But en banc, the Fourth Circuit reversed course. 77 F.4th 200, 203 (4th Cir. 2023). *Smyth* was an "outlier"; "[e]very other circuit to consider the issue has held that a preliminary injunction may confer prevailing party status in appropriate circumstances." *Ibid.* The Fourth Circuit held instead that Plaintiffs "'prevailed' in every sense needed to make them eligible for a fee award." *Ibid.*

The Fourth Circuit stated:

> 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." 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(b).

Id. at 210.

The Fourth Circuit remanded to determine the amount of Plaintiffs' reasonable fees. Those proceedings remain pending.

SUMMARY OF ARGUMENT

The test to determine a "prevailing party" is whether a plaintiff wins tangible relief from a court order that is never undone on the merits. A preliminary injunction can satisfy that test, as every circuit to address the issue holds. This Court should reject the Commissioner's contrary categorical rule that preliminary injunctions never create a prevailing party.

I. The traditional tools of statutory construction support the circuit consensus: preliminary injunction winners can be "prevailing parties." First, the text compels that result. A plaintiff that persuades a court to grant the relief requested by the lawsuit "prevails" in any ordinary sense of the word. And this Court has always construed the term "prevailing party" with a view to that ordinary meaning. Legal dictionaries defining "prevailing party" only confirm that result.

Next, related statutes confirm that a prevailing party needs no final judgment. A predecessor to § 1988(b) conditioned fee eligibility on a prevailing party obtaining a "final order." 20 U.S.C. § 1617. Since Congress omitted that finality requirement from § 1988(b), this Court should not smuggle it back in.

The history of prevailing party awards also bolsters the circuit consensus. In equity, courts exercised discretion to award interim costs, including for winning a preliminary injunction. So the historical backdrop of § 1988(b) dispels any finality requirement.

II. Preliminary injunctions can meet all prevailing party qualifications under this Court's precedent. The touchstone of that inquiry is achieving a material alteration of the parties' legal relationship. Preliminary injunctions often unmistakably do that. They are responsible for righting countless constitutional wrongs by their own force, often providing all the relief that plaintiffs need.

Preliminary injunctions satisfy this Court's "judicial imprimatur" requirement because they are enforceable judgments. Preliminary injunctions are judgments because they are appealable by right under 28 U.S.C. § 1292(a)(1). Congress's decision to make them appealable is sensible, because preliminary injunctions can transform legal relationships and last for years. And those judgments are enforceable because they are backed by the threat of criminal contempt.

The Commissioner would affix two new requirements to this Court's test. The Court should reject both.

First, the Commissioner would add a requirement for a full merits adjudication. But this Court squarely rejected that requirement in approving merits-free consent decrees. *Maher v. Gagne*, 448 U.S. 122 (1980). Consent decrees (and default judgments) can make prevailing parties because they can materially change legal relationships—no conclusive merits adjudication is necessary. Besides, preliminary injunctions do require a clear showing of likely success on the merits. That element is enough to satisfy any merits requirement.

Second, the Commissioner would add a final-judgment requirement. No case from this Court imposes such a requirement. Of course, a preliminary injunction undone on the merits will not do; the loser is not the prevailing party. *Sole v. Wyner*, 551 U.S. 74, 84 (2007). But the unrealized possibility that an injunction might have been reversed does not devalue the relief it afforded. And this Court's rejection of the "catalyst theory" is irrelevant to plaintiffs who have won a ruling from a court that orders the relief they sought.

III. Recognizing that preliminary injunction winners are prevailing parties creates the right litigation incentives. The Commissioner's rule would invite governments to insulate themselves from fee liability after being enjoined. That means a free pass to violate civil rights, stop only when the courts order it, and still evade attorney's fees. Governments have proved willing and able to strategically moot cases

late in the game. And civil rights plaintiffs have little recourse to stop them. The Commissioner invites more unconstitutionality and less enforcement, flipping § 1988(b) on its head.

By contrast, the circuit consensus encourages no more litigation than necessary. Preliminary injunction winners who received the desired relief need not fight any longer just to trigger fee eligibility. Defendants will still have a powerful incentive to settle before an injunction. They have no artificial incentive to fight through trial since a preliminary injunction means they are unlikely to prevail. And if defendants think they are right, they can appeal. The result is a sound, easily administrable rule.

IV. These Plaintiffs are prevailing parties under any common-sense rule. They won an injunction materially changing their relationship with the Commissioner, who had to remove the statutory suspension of their licenses without charging any fee. That judgment was enforceable and bore the judicial imprimatur. And it was never undone on the merits. To the contrary, it lasted as long as it was needed. That is more than enough to cross the threshold of eligibility.

ARGUMENT

I. The text and history of § 1988(b) recognize preliminary injunction winners as "prevailing parties."

A. The ordinary meaning of "prevailing party" includes preliminary injunction winners.

"As always, we start with the statutory text." *Garland v. Cargill*, 602 U.S. 406, 415 (2024). Section 1988(b) empowers district courts to award fees to any "prevailing party" as part of the costs. When a court awards a party the relief it seeks, that party "prevails" in the ordinary sense of the word. *See* Webster's New International Dictionary (3d ed. 1961) ("to be or become effective or effectual: be successful"); The Compact Edition of the Oxford English Dictionary 2293 (1971) ("To be effectual or efficacious; to be successful, to succeed"; "to succeed in doing, attaining, etc."; "to succeed in persuading, inducing, or influencing"). So a plaintiff who challenges a law, requests an injunction halting the law's effect, and then receives that court-ordered relief has prevailed in any ordinary sense of the term. That the enjoined government capitulates before final judgment makes it *more* obvious that the plaintiff prevailed—not less. Any theory that a party winning its requested relief is still not a prevailing party has lost its moorings.

"Prevailing party" may be a legal term of art. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 603 (2001). But this Court has always construed it with a close eye on "[r]espect for ordinary language." *Ibid.*

(quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)). "[T]he normal meaning of 'prevailing party' in litigation" is the winner of an "enforceable 'alteration of the legal relationship of the parties.'" *Buckhannon*, 532 U.S. at 622 (Scalia, J., concurring). "[T]here is no proper basis for departing from that normal meaning." *Ibid.*

Yet the Commissioner's argument that no preliminary injunction creates a prevailing party throws "respect for ordinary language" out the window. Under his categorical rule, *none* of these fully successful hypothetical plaintiffs—whose cases become moot after they succeed—could ever "prevail":

- A student is excluded from a school on the basis of race. He sues the school and wins a preliminary injunction requiring his admission. He then enrolls and earns his diploma before trial.

- A churchgoer is barred from services by her governor's COVID-19 declaration. She sues and wins a preliminary injunction that allows her to worship on Easter. Afterward, the governor revokes the declaration, re-opening all church doors.

- An activist is prohibited from protesting outside a political party convention. He sues and wins a preliminary injunction allowing him to protest there. He then carries out the protest as planned.

- A gun owner is prevented by local ordinance from buying a gun in common use. She sues

> and wins a preliminary injunction letting her complete that purchase. The offending ordinance is later repealed.

Of course all these plaintiffs are prevailing parties. Each obtained the relief they sought, by a court's judgment, which was never overturned when the cases became moot by happenstance, passage of time, or government surrender. Yet the Commissioner urges that *none* of those plaintiffs qualify.

The Commissioner leans on a dictionary predating § 1988(b)—and never cited in this Court's precedent defining "prevailing party"—to contend that "a conclusive ruling on the merits or final judgment" is required. Br. 17 ("[t]he party *ultimately* prevailing when the matter is *finally set at rest*." (quoting Black's Law Dictionary 1352 (4th rev. ed. 1968)). But even that definition supports Plaintiffs: when a case becomes moot after a preliminary injunction, plaintiffs have already received relief that "lasts for as long as it is needed." 77 F.4th at 217. And setting the matter at rest as moot just means that "the injunction by definition cannot be reversed, dissolved, or otherwise undone by a later order." *Id.* at 209. Plaintiffs here—just like the ones in the examples above—won substantive relief in court and never lost it.

B. Congress required finality in other statutes but excluded it from § 1988(b).

The history of civil rights fee-shifting statutes confirms that the "prevailing party" concept does not require finality. *Contra* Br. 22.

When § 1988(b) became law in 1976, the text of a closely related statute expressly required finality. The Emergency School Aid Act of 1972 authorized fee-shifting for the "prevailing party" in certain private discrimination actions only "[u]pon the entry of a *final order* by a court" against a government.[1] 20 U.S.C. § 1617 (emphasis added). That statute thus "ma[de] the existence of a final order a prerequisite to the award." *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 722 (1974); *see also* 117 Cong. Rec. 11,523 (1971) (Statement of Sen. Allen) (fee-shifting under § 1617 requires that a lawsuit "be prosecuted to a successful conclusion"). Adding that "final order" prerequisite to § 1617 thus confirmed that the "prevailing party" concept did not already require finality. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.").

Just four years later, Congress omitted that "final order" requirement from § 1988(b). That omission is meaningful because § 1617 and § 1988(b) overlapped considerably, and Congress "generally uses a particular word with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). The House Report highlighted this difference between the existing statute and the new § 1988(b): "[T]he word 'prevailing' is not intended to require the entry of a *final* order before fees may be

---

[1] That Act provides: "Upon the entry of a final order … 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."

recovered." House Report 8 (emphasis in original; citing *Bradley*, 416 U.S. at 723).

Congress has continued to condition fee-shifting on a "final order" in other statutes since then. *See, e.g.*, Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 5, 108 Stat. 1545, 1549 (1994) (codified at 15 U.S.C. § 6104(d)) ("The court, in issuing any final order in any action brought under subsection (a), may award costs of suit and reasonable fees for attorneys and expert witnesses to the prevailing party."); *see also* 16 U.S.C § 460tt(c)(1); 33 U.S.C. § 1910; 49 U.S.C. § 30171; 49 U.S.C. § 60129(B). And the Equal Access to Justice Act specifies that the "'prevailing party,' in the case of eminent domain proceedings, means a party who obtains a final judgment" of a certain amount. 28 U.S.C. § 2412(d)(2)(H); *see also* 5 U.S.C. § 504(a)(2) (requiring a "final disposition in [an] adversary adjudication" for EAJA fees). So when Congress wants to impose a finality requirement, it knows how. The Commissioner would rewrite § 1988(b) to insert that requirement where Congress left it out.

C. In equity, courts granted prevailing parties interim costs, including for preliminary injunctions.

The historical background of awarding costs to "prevailing parties" imputes no finality requirement excluding preliminary injunctions either. *Contra* U.S. Br. 12-13. That historical background included a venerable equitable tradition of awarding interim costs, including for a preliminary injunction. That history overcomes the United States' argument that

attorney's-fees-as-costs can be awarded only based on a final judgment. U.S. Br. 22-25.

In equity, from "the time of the emigration of our ancestors [from England], and down to the period when our constitution was formed," courts of equity "constantly exercised" the "discretion to award or refuse costs." *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 460, 462 (1855). The award of costs in equity rested "not upon express statutory enactment by Congress, but upon usage long continued." *Newton v. Consol. Gas Co. of New York*, 265 U.S. 78, 83 (1924).

This had long been the rule. Relying on an 1817 case, one court explained, "Costs in equity 'do not depend upon any statute, nor do they absolutely depend upon the event of a cause. They depend upon conscience, and upon a full and satisfactory view and determination of the whole merits of a case. They rest in sound discretion, to be exercised under a consideration of all the circumstances.'" *Consol. California & V. Min. Co. v. Baker*, 131 F. 989, 990 (C.C.D. Nev. 1904) (quoting *Eastburn v. Kirk*, 1817 WL 1578 (N.Y. Ch. 1817)); *see also Brooks v. Byam*, 4 F. Cas. 271, 271 (C.C.D. Mass. 1843) (Story, J., as circuit justice) ("costs in equity are altogether in the discretion of the court").

And in equity, it was well understood that courts "frequently give costs in intermediate stages of a cause, without waiting for the final decree." *Avery v. Wilson*, 20 F. 856, 859-60 (C.C.W.D.N.C. 1884); *see also Van Tieghem v. Sushenka*, 254 Ill. App. 409, 413 (Ill. App. Ct. 1929); *Benham v. Willmer*, 207 P. 592, 594 (1922).

That tradition of interim cost-shifting includes preliminary injunctions. For example, in *Clancy v. Geb*, the plaintiff won a temporary injunction, an "interlocutory remedy" by which "the protection of plaintiff's rights [was] fully accomplished." 104 N.W. 746, 747 (1905). The Supreme Court of Wisconsin held that the temporary injunction made the plaintiff "entitled to the usual favorable consideration of a *prevailing party* on the question of costs." *Id.* at 748 (emphasis added). Exercising its equitable authority, the court concluded "[w]e find nothing in the case that negatives the justness of plaintiff's claim to his costs, and they should in equity be awarded him." *Ibid.* So the equitable backdrop against which Congress wrote § 1988(b) rejects a finality requirement. Instead, it confirms that preliminary injunctions can warrant fees "as part of the costs."

II. Preliminary injunctions can satisfy all the prevailing party requirements under this Court's precedent.

The parties and the United States largely agree on the test that this Court has developed under § 1988. All agree that the "touchstone of the prevailing party inquiry" is a "material alteration of the legal relationship of the parties." *CRST Van Expedited v. EEOC*, 578 U.S. 419, 422 (2016); *see also* Br. 19, 33; U.S. Br. 21. All agree that the "change must be marked by judicial imprimatur." *CRST Van Expedited*, 578 U.S. at 422. And all agree that if the plaintiff's victory and gains are reversed, the plaintiff is not a prevailing party. *Sole*, 551 U.S. at 82. Preliminary injunctions can satisfy each part of this test.

A. Preliminary injunctions often meaningfully change legal relationships.

Preliminary injunctions often create a "material alteration of the legal relationship of the parties." *Sole*, 551 U.S. at 82. That material alteration is "the touchstone of the prevailing party inquiry." *Tex. State Teachers Ass'n v. Garland*, 489 U.S. 782, 792-93 (1989). This "generous formulation" ensures that parties prevail "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *see also Buckhannon*, 532 U.S. at 603 (distilling from prior cases "[t]his view that a prevailing party is one who has been awarded some relief by the court").

But a prevailing party need not achieve *all* litigation objectives. Rather, "[i]f 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." *Garland*, 489 U.S. at 791-92. "Once civil rights litigation materially alters the legal relationship between the parties, the degree of the plaintiff's overall success goes to the reasonableness of a fee award." *Farrar*, 506 U.S. at 114.

1. Preliminary injunctions often materially alter the parties' legal relationship. In cases involving § 1988(b), they can restore plaintiffs' civil rights.

Lefemine v. Wideman, for example, held that the winner of an injunction guaranteeing his right to

protest using graphic signs was a prevailing party. 568 U.S. 1, 4 (2012). As this Court explained, "[b]efore the ruling, the police intended to stop Lefemine from protesting with his signs; after the ruling, the police could not prevent him from demonstrating in that manner." *Ibid.* He was thus entitled to fees under § 1988(b) "[b]ecause the injunction ordered the defendant officials to change their behavior in a way that directly benefited [him]." *Id.* at 2. Although the injunction in *Lefemine* was permanent, a preliminary injunction would have caused the same "change [in] behavior," *ibid.*, and thus provided at least "some of the benefit the [plaintiff] sought in bringing suit," *Garland*, 489 U.S. at 791-92.

Preliminary injunctions often stop the government from violating civil rights:

- *Williams v. Wallace*, 240 F. Supp. 100, 109-10 (M.D. Ala. 1965) (prohibiting governor and state officials from interfering with civil rights marches from Selma to Montgomery).

- *McLaughlin by McLaughlin v. Bos. Sch. Comm.*, 938 F. Supp. 1001, 1018 (D. Mass. 1996) (enforcing Fourteenth Amendment rights not to be excluded from school on the basis of race; ordering a school to admit an eighth grader).

- *People Against Police Violence v. Pittsburgh*, 520 F.3d 226, 230 (3d Cir. 2008) (protecting First Amendment rights to speech and gather in public marches and protests).

- *Kansas Jud. Rev. v. Stout*, 562 F.3d 1240 (10th Cir. 2009) (guaranteeing the right of judicial candidates to make political speech in the form of campaign pledges).

- *Veasey v. Wilkins*, 158 F. Supp. 3d 466, 468 (E.D.N.C. 2016) (enforcing Second Amendment rights against a citizenship requirement).

- *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (ordering the government to allow in-person worship).

Injunctions like these do not just maintain the status quo or preserve the parties' positions. *Contra* Br. 23; U.S. Br. 25. Instead, preliminary injunctions often ensure that plaintiffs can exercise key rights already violated before the injunction. *See* John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 526 (1978) (observing that "the old chestnut that preliminary injunctions are always prohibitory rather than mandatory" is "demonstrably untrue"); *see also Univ. of Texas v. Camenisch*, 451 U.S. 390, 392-93 (1981) (addressing a preliminary injunction compelling a university to provide a previously refused interpreter).

2. Because preliminary injunctions can materially change real-world relationships, they are easily distinguished from everyday orders on internal litigation procedure. Br. 20-21.

In *Hewitt v. Helms*, for example, the plaintiff won reversal of summary judgment, but his case became moot before any judgment in his favor. 482 U.S. at 758-59. Since he received "[n]o injunction or

declaratory judgment" or "relief without benefit of a formal judgment—for example, through a consent decree," *ibid.*, the plaintiff received no "relief on the merits of his claim." *Id.* at 760-61.

The same lack of real-world effect doomed the fee claim in *Hanrahan v. Hampton*, where the plaintiff won only reversal of a directed verdict. 446 U.S. 754, 759 (1980). That new trial was a *chance* for a material alteration—not the material alteration itself. Thus, "[a]s is true of other procedural or evidentiary rulings," that reversal of a directed verdict "may affect the disposition on the merits," but was not itself a "matter[] on which a party could 'prevail' for purposes of shifting his counsel fees." *Ibid.* Preliminary injunctions can themselves change legal relationships in ways that remands for new trials cannot.

3. The Commissioner warns that accepting preliminary injunction winners as prevailing parties would require fine distinctions between status quo and non-status quo injunctions. Br. 38-39. No such parsing is necessary. Rather, courts simply ask whether the injunction materially changes the relationship between the parties. *See* 77 F.4th at 212 n.8 ("For our purposes, however, what matters is whether the injunction itself provided 'some of the benefit' the plaintiff ultimately 'sought in bringing suit.'" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). To be sure, some "so-called status quo injunctions … may not provide the plaintiff any of the relief he ultimately seeks at the conclusion of the litigation." *Id.* at 212. But the status quo vs. non-status quo distinction is a red herring. The touchstone remains material alteration. And there is no reason to think that the enjoining district court will

be unable to tell whether it has ordered a material alteration in the parties' relationship.

B. Preliminary injunctions are enforceable judgments bearing judicial imprimatur.

Buckhannon made clear that a prevailing party not only must achieve that material alteration, but must do so by a court order. 532 U.S. at 605 (requiring "judicial imprimatur"); *accord* U.S. Br. 19 ("To qualify as a 'prevailing party' in a lawsuit, a plaintiff must obtain a favorable judgment and tangible relief *from the court*."). Preliminary injunctions easily satisfy this rule.

Buckhannon was a challenge to a state law governing assisted-living facilities. 532 U.S. at 600-01. The challengers achieved no preliminary injunction or other appealable judgment. Before that could happen, the state legislature repealed the challenged statute. *Id.* at 601. The challengers sought attorney's fees as the "catalyst" of that repeal. *Id.* at 601-02.

This Court rejected that "catalyst theory." *Id.* at 602 n.3. A prevailing party must be "one who has been awarded some relief by the court." *Id.* at 603; *id.* at 605 (requiring a "judicially sanctioned change in the legal relationship of the parties"). Voluntary changes in government behavior, without any court order, "lack[ed] the necessary judicial *imprimatur* on the change." *Id.* at 605.

Preliminary injunctions carry the necessary judicial imprimatur. "[A]n enforceable judgment

against the defendant" satisfies that requirement. *Farrar*, 506 U.S. at 111; *Buckhannon*, 532 U.S. at 607 n.9 ("an enforceable judgment permits an award of attorney's fees").

Preliminary injunctions are enforceable judgments. *See Lefemine*, 568 U.S. at 4 ("[W]e have repeatedly held that an injunction … , like a damages award, will usually satisfy that test."). "The term 'judgment' includes 'a decree and any order from which an appeal lies.'" *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 948 (D.C. Cir. 2005) (quoting Black's Law Dictionary 846 (7th ed. 1999)); *accord* Fed. R. Civ. P. 54(a). Preliminary injunctions are appealable by right under 28 U.S.C. § 1292(a)(1) (conferring jurisdiction over "[i]nterlocutory orders … granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"); *see also Abbott v. Perez*, 585 U.S. 579, 595 (2018) (preliminary injunctions are appealable).

The rationale for "allowing interlocutory appeals from injunction orders should be readily apparent": they are a big deal. Interlocutory Injunction Appeals—In General, 16 Fed. Prac. & Proc. Juris. § 3921 (3d ed.). Their statutory appellate jurisdiction thus "seem[s] plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence." *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955), *overruled on other grounds by Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988); *see also Abbott*, 585 U.S. at 595 ("If an interlocutory injunction is improperly granted or

denied, much harm can occur before the final decision in the district court.").

Their longevity magnifies the significance of preliminary injunction judgments. The injunction here lasted over sixteen months. Preliminary injunctions often last even longer. *Schenck v. Pro-Choice Network of West New York* addressed a five-year preliminary injunction. 519 U.S. 357 (1997). *Ashcroft v. ACLU* upheld one that lasted eight years. 542 U.S. 656 (2004). And in *Agency for International Development v. Alliance for Open Society International, Inc.*, this Court affirmed a preliminary injunction that would remain in effect for eight and a half years. 570 U.S. 205 (2013).

Preliminary injunctions are also just as enforceable as their permanent-injunction siblings—including by criminal contempt. *See, e.g.*, *Muniz v. Hoffman*, 422 U.S. 454, 476-77 (1975) (affirming contempt conviction for violating a preliminary injunction). What is more, a preliminary injunction is enforceable by contempt even if that injunction is later found to be issued in error: "'[U]ntil [the lower court's] decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'" *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 439 (1976). That threat of jail generally makes litigants obey injunctions.

* * *

In sum, history proves that preliminary injunctions often materially change the legal

relationship of the parties. And common sense shows that preliminary injunctions—which are appealable judgments fully enforceable by contempt—carry judicial imprimatur. This Court's "generous formulation" of eligibility requires nothing more.

Of course, governments can argue against fees by asserting that a certain injunction did not materially change the parties' legal relationship. *See, e.g.*, *Garland*, 489 U.S. at 792. Or that a preliminary injunction *lost* its judicial imprimatur when it was later undone on the merits. *Sole*, 551 U.S. at 83; *see also* 77 F.4th at 216. They are also welcome to contend that a preliminary injunction awarding only partial relief warrants a smaller award. *See Hensley*, 461 U.S. at 439-40 ("extent of a plaintiff's success" shapes the reasonableness of a fee award); *see also* 77 F.4th at 218. But nothing supports the Commissioner's proposal to exclude preliminary injunction winners altogether.

C. The Court should reject the Commissioner's additional "prevailing party" requirements.

An unreversed judgment materially changing the relationship between the parties is sufficient under this Court's precedent. Yet the Commissioner would graft onto that test new requirements gerrymandered to exclude preliminary injunctions. He urges that a "defendant may be liable for fees only once a court has conclusively held that the defendant is liable on the merits or entered final judgment against it." Br. 2. Neither text, history, nor precedent supports those requirements.

1. Full merits adjudication is not required.

The Commissioner would limit prevailing parties unless "a ruling that conclusively decides the merits in [a plaintiff's] favor." Br. i. That limit would flout this Court's precedent. This Court has recognized that both consent decrees and default judgments—neither of which must decide the merits of a cause of action—can confer prevailing party status.

Maher v. Gagne held that obtaining a consent decree suffices to prevail under § 1988(b). 448 U.S. at 129. Yet consent decrees do not require *any* sort of merits adjudication. *See id.* at 126 n.8 ("As is customary, the consent decree did not purport to adjudicate respondent's statutory or constitutional claims."). The consent decree at issue in *Maher* even "explicitly stated that '[n]othing in this Consent Decree is intended to constitute an admission of fault.'" *Ibid.*

Still, this Court held that a consent decree could qualify based on the plain language of the statute: "Nothing in the language of § 1988(b) conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Maher*, 448 U.S. at 129. That holding was unanimous. *See id.* at 134 (Powell, J., concurring in judgment) ("§ 1988(b) does not require an adjudication on the merits of the constitutional claims. I agree with this conclusion"). *Maher* thus confirms that the touchstone of prevailing

party status is a judicial order changing the parties' relationship—not a determination on the merits.[2]

The Commissioner's attempts to limit *Maher* fail. First, the Commissioner accuses *Maher* of relying entirely on a Senate Report. Br. 21. But the *Maher* Court examined the plain text of the statute for the "merits" requirement the Commissioner now demands—and found no basis for it. The Senate Report merely confirmed that conclusion. 448 U.S. at 129. In any event, the House Report too confirms that there is no freestanding merits requirement outside the consent decree context. *See* House Report 7 ("The phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits.").

Second, the Commissioner contends that a consent decree uniquely suffices without a merits adjudication because the "parties are no longer free to dispute the merits." Br. 22. But of course the parties remain free to dispute the merits elsewhere—a consent decree (unlike a final adjudication) generally has no issue preclusive effect. *See Arizona v. California*, 530 U.S. 392, 414 (2000).

This Court too has forgone any post-*Maher* merits requirement. *Shalala v. Schaefer*, 509 U.S. 292 (1993), addressed a Social Security claimant whose district court challenge to a benefits denial won a remand to the agency for further proceedings. At that

---

[2] The Commissioner touts a reference in *Buckhannon* to "the 'merit' requirement of our prior cases." Br. 20 (citing 532 U.S. at 606). In context—including a citation to *Maher*'s holding—that requirement just restates the need for "judicial relief." 532 U.S. at 606; 77 F.4th at 212-13.

point, the district court had made no determination of the ultimate merits of his benefits claim. *Id.* at 294. And the remand "contemplate[d] additional administrative proceedings that will determine the merits of the claimant's application." *Id.* at 311 (Stevens, J., concurring in the judgment). Yet that claimant was still a prevailing party because (unlike in *Hanrahan* or *Hewitt*) he won an appealable judgment that forced the agency to change its behavior outside that civil action. *Id.* at 297-98. The claimant's success in the civil action—before final resolution of the merits—was enough to be a prevailing party. *Id.* at 302.

Default judgments also disprove any requirement for merits adjudication. As the United States admits, default judgments are "types of judicial orders that can confer prevailing-party status," even though they require no "independent judicial determination" of the merits. U.S. Br. 8; *see also id.* at 16 (citing *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 208 n.3 (2016)). After all, default judgments can materially alter the legal relationship of the parties, and they carry judicial imprimatur.

The Commissioner also tries to divine a merits requirement from the observation in *Kentucky v. Graham*, 473 U.S. 159, 165 (1985), that "'liability on the merits and responsibilit[ies] for fees go hand in hand.'" Br. 19. But that observation resolved a different question: *who* is responsible for attorney's fees. This Court thus held that a government is not liable for fees when a plaintiff fails to procure a judgment against that government or its employees in any official capacity. 473 U.S. at 163. That holding is

irrelevant to whether a plaintiff who *does* win such a judgment has prevailed.

In sum, consent decrees and default judgments suffice for prevailing party status because they are court-ordered "chang[es][in] the legal relationship between [the plaintiff] and the defendant." *Buckhannon*, 532 U.S. at 604. This Court has treated those enforceable grants of tangible relief as sufficient "relief on the merits." *Farrar*, 506 U.S. at 111. So although "respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail," such relief on the merits merely requires "resolution of the dispute which changes the legal relationship between itself and the defendant." *Garland*, 489 U.S. at 792; 77 F.4th at 212-13 ("In *Buckhannon*, the Supreme Court held that relief 'on the merits' requires a '*judicially sanctioned* change in the legal relationship of the parties.'"). A preliminary injunction provides that judicially sanctioned change.

2. In any event, preliminary injunctions are sufficiently based on the merits.

At any rate, preliminary injunctions are deeply enmeshed in the merits, as befits such powerful orders.

To win a preliminary injunction, a plaintiff "must make a clear showing that 'he is likely to succeed on the merits.'" *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024) (quoting *Winter*, 555 U.S. at 20, 22). That requirement has real teeth. Mere "reasonable cause" to expect success on the merits (among other

merits showings less than likely success) is insufficient. *Id.* at 1578. "There is an obvious difference between" that reasonable-cause standard and having the movant "show that it is 'likely' to succeed on the merits." *Ibid.* Even then, "a preliminary injunction is an 'extraordinary' equitable remedy that is 'never awarded as of right.'" *Id.* at 1576.

The Commissioner contends that *some* probability of success less than a likelihood may still suffice for a preliminary injunction. Br. 24-25. Not so. However strongly other factors favor injunctive relief, success on the merits must be more likely than not, and by a "clear showing." *Starbucks*, 144 S. Ct. at 1576. Laxer circuit standards under pre-*Winter* precedent (e.g., Br. 25 n.2) do not survive that requirement. *See Davis v. PBGC*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring) ("[T]he old sliding-scale approach to preliminary injunctions—under which a very strong likelihood of success could make up for a failure to show a likelihood of irreparable harm, or vice versa—is no longer controlling, or even viable"); *Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301, 1310 (10th Cir. 2016) (Gorsuch, J., dissenting) (*Winter* "cast doubt" on the notion that "the plaintiff 's burden on the likelihood of success factor may be relaxed when the other preliminary injunction factors are satisfied").

The Commissioner also suggests that preliminary injunction procedures can be too rushed, informal, or otherwise inadequate to make a genuine determination based on the merits. Br. 23-24. This contention fails.

First, many preliminary injunctions are not rushed or informal. Consider this case. The Commissioner litigated for 27 months before briefing the preliminary injunction. J.A.1-23. He then received six weeks to oppose Plaintiffs' motion for preliminary injunction, J.A.153-71, and nine weeks to prepare for a trial on that motion. J.A.20-24. That trial involved the testimony of six witnesses, each of whom the Commissioner could examine or cross-examine. J.A.175. The transcript of that trial runs nearly one-hundred eighty pages. J.A.172-349. The Commissioner could have developed any factual or legal arguments he wanted. His failure cannot be blamed on any lack of opportunity to present his case. Br. 24.

Second, many avenues can avoid trouble from overly rushed preliminary injunction motions. A judge who feels gamed or rushed can just deny the "extraordinary remedy" of a preliminary injunction. *Starbucks*, 144 S. Ct. at 1576. A defendant who feels the same can seek a stay and expedited appeal, or litigate onward and try to win the case (as in *Sole*). Again, nothing here warrants categorically excluding preliminary injunctions from prevailing party status.

Next, the Commissioner claims that had he fought onward, he might have won based on a subsequent split decision turning on Michigan law. Br. 28 (citing *Fowler v. Benson*, 924 F.3d 247, 259 (6th Cir. 2019)). But that post hoc bravado is misplaced. Unlike the government in *Fowler*, the Commissioner chose not to appeal his injunction. 924 F.3d at 256. Then he ditched both his fully briefed summary judgment motion and plan to proceed to trial. J.A.46-52. Instead, the Commissioner obtained a stay over

Plaintiffs' objection and worked with the legislature to repeal the law. After jumping ship is not the time for a collateral attack on the merits.

Anyway, this Court has recognized that a final merits adjudication can be made in addressing a preliminary injunction. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 691 (2008) ("There are occasions … when it is appropriate to proceed further and address the merits."); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 757 (1986) (final merits determination appropriate when a preliminary injunction "rests solely on a premise as to the applicable rule of law"). The Commissioner and the United States do not dispute it. Br. 31; U.S. Br. 26 n.5.

That ability to resolve the merits at the preliminary injunction stage thus confirms that the Commissioner's proposed categorical rule is wrong. *See* U.S. Br. 26 n.5. In any event, such a final merits determination is unnecessary to achieve prevailing party status because it does not affect whether the plaintiff receives an enforceable judgment that materially changes the parties' relationship.

3. Prevailing party status requires no enduring change beyond what a preliminary injunction can accomplish.

The Commissioner contends that *Sole* created a new requirement of "enduring change" that rules out preliminary injunctions altogether. Br. 33. But *Sole* does not support his categorical rule. Neither does any other decision from this Court.

1. *Sole* itself announces that it does not address the question posed here. The Court reserved "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." 551 U.S. at 86. Rather than address that question, this Court "h[e]ld *only* that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees under § 1988(b) if the merits of the case are ultimately decided against her." *Ibid.* (emphasis added).

2. *Sole*'s unanimous holding that the loser is not the winner does not help the Commissioner either.

In response to Ms. Wyner's initial "motion for temporary restraining order/preliminary injunction," she received temporary relief allowing a nude performance as long as defendants could set up a barrier to protect unwilling viewers. 551 U.S. at 80. That barrier proved ineffective because the performers "ignored" it. *Ibid.* The district court later denied a permanent injunction because their "deliberate failure … to remain behind the screen" confirmed that the nudity ban was necessary enough to withstand First Amendment scrutiny. *Id.* at 80-81.

That "dispositive adjudication on the merits" is what prevented that plaintiff from being "a 'prevailing party' within the compass of § 1988(b)." *Id.* at 77. Thus, "the plaintiff's preliminary victory was deemed 'fleeting' not because it failed to reach final judgment, but because the plaintiff's 'temporary success rested on a premise the District Court ultimately rejected.'" 77 F.4th at 215 (quoting *Sole*, 551 U.S. at 85); *see also*

U.S. Br. 28 (acknowledging that a mootness dismissal rather than a resolution "against [plaintiffs] on the merits" is a "significant" difference from *Sole*). A preliminary injunction is not "enduring" when its premise is rejected on the merits in that same case.[3]

3. Anyway, *Sole* does not say that the *possibility* of eventual undoing on the merits bars a plaintiff from prevailing. If it did, then even a *permanent* injunction would fall short (*contra Lefemine*, 568 U.S. at 4) because it could be appealed or the district court itself could reopen it. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 214-16 (1997) (addressing district courts' obligation to modify an injunction in light of "'a significant change either in factual conditions or in law'" (quoting Fed. R. Civ. P. 60(b)(5))). Indeed, a permanent injunction might be vacated as moot *for the same reason as a preliminary injunction*. *See, e.g.*, *Allee v. Medrano*, 416 U.S. 802 (1974) (repeal of permanently enjoined statute renders judgment moot); *Freedom from Religion Found., Inc. v. Abbott*, 58 F.4th 824, 837 (5th Cir. 2023) ("Ordinarily, a permanent injunction relating to a challenged law or regulation cannot continue after the law or regulation is removed." (citing *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 652 (1961)).

---

[3] So too in *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990); Br. 35. While a bank's initially successful Commerce Clause challenge to a state law discriminating against out-of-state bank holding companies was on appeal, Congress passed an amendment blessing that discrimination. *Id.* at 478. That legislative change made the plaintiff lose, rather than cement a win. Of course prevailing party fees were unavailable. *Id.* at 480.

And there is no practical difference between a preliminary injunction mooted the day *before* final judgment versus a permanent injunction mooted the day after. In the case of the former, "the relief the plaintiff receives is as 'enduring' as if she has received a permanent injunction to the same effect." 77 F.4th at 215.

4. Nor does *Buckhannon* combine with *Sole* to undermine prevailing parties at the preliminary injunction stage. Br. 33. All *Buckhannon* requires is that the relief itself carry a "judicial imprimatur." 532 U.S. at 605; *see also Initiative & Referendum Inst. v. U.S. Postal Serv.*, 794 F.3d 21, 24 (D.C. Cir. 2015) (Kavanaugh, J.) (appellate remand order that prompted the defendant to amend the challenged regulation was sufficient judicial imprimatur). A preliminary injunction bears that judicial imprimatur. And "[o]nce a plaintiff earns 'some relief'" by a preliminary injunction, "he steps outside *Buckhannon*'s domain." *Roberts v. Neace*, 65 F.4th 280, 285 (6th Cir. 2023) (Sutton, C.J.) (quoting *Buckhannon*, 532 U.S. at 603).

The Commissioner argues that voluntary repeal of the law is what made the relief "enduring" and implicates the "catalyst theory" from *Buckhannon*. Br. 33. But a judicial order—not any voluntary act—gave Plaintiffs the tangible relief that makes them prevailing parties. And that preliminary injunction was never undone on the merits. Indeed, it *cannot* be undone on the merits because the case is over. 77 F.4th at 215. So unlike the misbegotten injunction in *Sole*, the relief here was enduring. *Ibid.* Both *Buckhannon* and *Sole* thus are satisfied in cases like this.

5. Other precedent refutes any need for a final judgment to become a prevailing party. 77 F.4th at 225 (Quattlebaum, J., dissenting) (admitting that "the Supreme Court may not have expressly said that relief must be final"). *Maher*'s plain-language interpretation of § 1988(b) also rejects that requirement because "[n]othing in the language of § 1988(b) conditions the district court's power to award fees on full litigation of the issues." 448 U.S. at 129.

Indeed, this Court has recognized that the oft-cited legislative history of § 1988(b) rejects any final-judgment requirement. In *Hanrahan*, for example, the Court observed that "[t]he legislative history of [§ 1988(b)] indicates that a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" 446 U.S. at 756-57 (quoting House Report 7; citing Senate Report 5). In particular, the Court noted that "Congress contemplated the award of fees pendente lite." *Id.* at 757. And as *Garland* confirmed, "Congress clearly contemplated that interim fee awards would be available 'where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues.'" 489 U.S. at 790 (quoting Senate Report 5).

Nor is the validation of fee awards for interim orders mere dicta. U.S. Br. 18. To the contrary, the availability of interim fee awards was a key reason why *Garland* rejected the "central issue" test. The Court rejected the idea that plaintiffs must succeed on their "central theory" because of the "clear congressional intent that interim fee awards be

available to partially prevailing civil rights plaintiffs." 489 U.S. at 790. Thus, the Court held that a "prevailing party [is] one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation." *Id.* at 791.[4]

For its part, the United States seems to admit that *sometimes* a plaintiff can prevail at the preliminary injunction stage. U.S. Br. 26 n.5 (suggesting that in some cases, legal rulings on a preliminary injunction appeal would create a prevailing party). But the United States' test for *when* a preliminary injunction winner prevails is murky: when is such an injunction sufficiently "analogous" to "partial summary judgment on liability"? And there is no principled reason to limit fees to the "rare" preliminary injunction winners whose cases are reviewed by the Supreme Court. *Ibid.*[5] But the United States at least

---

[4] The United States argues (at 20) that a defendant cannot become a prevailing party until the litigation's close, so a plaintiff cannot either. But § 1988(b) and other civil rights fee-shifting statutes treat plaintiffs and defendants wildly differently. Plaintiffs assume the mantle "of 'a private attorney general,' vindicating a policy that Congress considered of the highest priority." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978). So they "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Ibid.* Prevailing defendants, by contrast, cannot recover fees unless the "the plaintiff's claim was frivolous, unreasonable, or groundless." *CRST Van Expedited*, 578 U.S. at 431. It makes little sense to draw on the stingy rule for defendants to hamstring prevailing plaintiffs.

[5] *Sole* stated in dicta that a "fee request at the initial stage" would have been "premature." 551 U.S. at 84. The United States confuses this reference to the logistics of a fee application with

recognizes that there is nothing intrinsic to the preliminary injunction stage that excludes it from the prevailing party threshold.

III. The circuit consensus optimizes litigation incentives.

In enacting § 1988(b), Congress did not burden the courts with a fee-shifting standard that creates perverse incentives for government behavior. *See Buckhannon*, 532 U.S. at 608-09. Since unanimous circuit law now holds that preliminary injunctions can suffice for fees, the evidence shows that the circuit consensus creates no such problem. The Commissioner, by contrast, seeks to undo settled law nationwide and impose a new rule that would prolong litigation and encourage government defendants to game the system by strategically mooting cases. Those incentives would undermine the enforcement § 1988(b) is meant to promote.

A. The Commissioner's rule invites gamesmanship that would undermine civil rights enforcement.

Carving preliminary injunctions out of § 1988(b) would encourage "governmental defendants to game the system" by strategically mooting cases once a preliminary injunction puts the writing on the wall. That gamesmanship would defeat the statutory

---

eligibility for fees. U.S. Br. 29. But *when* a plaintiff may request fees does not control *whether* the plaintiff can ever make that request. Anyway, Plaintiffs requested fees after all other proceedings were complete. J.A.56.

mechanism of promoting compensation for bringing civil rights claims. 77 F.4th at 210.

1. Accepting the Commissioner's rule would let defendants insulate themselves from fees after plaintiffs already won tangible relief. "[A] defendant may freely litigate the case through the preliminary injunction phase." 77 F.4th at 210. But once the court telegraphs its view of the merits, "the government will have ample time to cease the challenged conduct, moot the case, and avoid paying fees." *Ibid.* The plaintiff is left "holding the bag." *Ibid.*; *see also, e.g.*, *N.Y. State Rifle & Pistol Ass'n*, 590 U.S. at 360 (Alito, J., dissenting) ("dismissing the case as moot means that petitioners are stuck with the attorney's fees they incurred in challenging a rule that the City ultimately abandoned"). That predictable result is a powerful disincentive for attorneys to take up the enforcement § 1988(b) is meant to encourage.

The Commissioner demurs that strategic mootness is "generally impracticable." Br. 15. But government defendants have proved able and willing to put that tactic to use.

This case is a good example. After winning their preliminary injunction, Plaintiffs were eager to press on to trial to vindicate *all* indigent Virginians' rights. 77 F.4th at 210. In fact, Plaintiffs would have had their final day in court *before* the statute was repealed. J.A.52. But the Commissioner obtained a stay over their objection. J.A.385. During that stay, he "provided significant input on how to structure the repeal." 77 F.4th at 210. The Commissioner thus *prevented* the final judgment that he now says is necessary.

That behavior was savvy strategy at the time. The Commissioner managed to litigate until a judge told him his case was a loser, then stop the litigation, fix the problem, and evade all attorney's fees. Congress did not intend to foment such gamesmanship. 77 F.4th at 210 (the Commissioner's rule allows the government to cut off "civil rights plaintiffs whenever their success seems imminent").

Smyth itself illustrates the gamesmanship of the rule named after that case. Br. 46. Those plaintiffs won a preliminary injunction barring Virginia's Commissioner of Social Services from enforcing a benefits restriction against them. 282 F.3d at 272. The government chose not to appeal. *Id.* at 273-74. Instead, the government modified the challenged restriction so that it would continue to apply, but not to the plaintiffs. *Id.* at 273. The government kept its offending rule, yet the plaintiffs' case was dismissed as moot. The government thus avoided fees for the half-decade of successful legal work for the named plaintiffs. *Id.* at 277.

2. Other governments also have proved adept at mooting civil rights claims.

For instance, the COVID pandemic highlighted governments' mooting prowess. "Government actors have been moving the goalposts on pandemic-related sacrifices for months, adopting new benchmarks that always seem to put restoration of liberty just around the corner." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (Gorsuch, J.). Defendants moved goalposts with great success to moot lawsuits standing up to restrictions on worship and other gatherings. Even after this Court

intervened in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 20 (2020) (per curiam) (holding that COVID-related suits are not per se moot after regulatory changes), courts continued to hold that Free Exercise and other challenges were moot when governmental defendants changed the rules.[6]

This Court's own experience with strategic mootness shows government defendants' success with the tactic. Consider *N.Y. State Rifle & Pistol Association, Inc. v. City of New York*, 590 U.S. 336 (2020). Soon after this Court granted the petition, the city amended the challenged firearm licensing statute, mooting the lawsuit. *Id.* at 337-39. The city's strategy was not subtle: after fighting the challenge "tooth and nail" to that point, it "essentially attempted to impose a unilateral settlement." *Id.* at 361 (Alito, J., dissenting). As a result, the challengers were "stuck with the attorney's fees they incurred in challenging a rule that the City ultimately abandoned—and which it now admits was not needed for public safety." *Id.* at 360.

---

[6] *See, e.g.*, *Resurrection Sch. v. Hertel*, 35 F.4th 524 (6th Cir. 2022) (en banc) (Free Exercise Clause challenge to Michigan's mask mandate moot when Michigan repealed all mask mandates); *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157 (4th Cir. 2021) (Free Exercise challenge to Virginia gathering restriction moot after state of emergency declared over); *Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3 (1st Cir. 2021) (challenge to arcade closure moot after governor lifted closure; *Hawse v. Page*, 7 F.4th 685 (8th Cir. 2021) (challenge to county gathering restrictions moot when the county lifted COVID emergency orders); *Pleasant View Baptist Church v. Beshear*, 838 F. App'x 936, 939 (6th Cir. 2020) (challenge to Kentucky's social gatherings limitations moot after the Governor denied intent to impose additional restrictions).

The Commissioner scarcely addresses strategic mootness generally, spotlighting instead mootness by legislative repeal. Br. 50-52. But it makes no sense to craft a rule for the mootness genus based on that species alone. Anyway, the Commissioner's suggestion that strategic repeals "will typically be impracticable" is overstated. Br. 51. *Buckhannon* itself involved the West Virginia legislature's repeal of the challenged law weeks after an adverse ruling. 532 U.S. at 601; *id.* at 624 (Ginsburg, J., dissenting). Other examples are legion.[7]

3. Plaintiffs have little defense to such gamesmanship. Damages are an inadequate safeguard against mootness. Br. 52. Often, as here, "immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." *Pulliam v. Allen*, 466 U.S. 522, 528 n.4 (1984) (quoting House Report 9).

Even when defendants lack immunity, the rights at issue may not support damages. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) ("[T]he abstract value of a constitutional right may not form the basis for § 1983 damages."); Senate Report 6 ("the rights involved may be nonpecuniary in nature"). And in any event, "in a large number of cases brought under the provisions covered by

---

[7] *See, e.g.*, *Kremens v. Bartley*, 431 U.S. 119, 128 (1977) ("The fact that the [Pennsylvania] Act was passed after the decision below does not save the named appellees' claims from mootness."); *Fusari v. Steinberg*, 419 U.S. 379, 385 (1975) ("[f]ollowing our notation of probable jurisdiction, the Connecticut legislature enacted major revisions"); *Amawi v. Paxton*, 956 F.3d 816, 821 (5th Cir. 2020) (mootness by state statutory amendment).

[§ 1988(b)], only injunctive relief is sought." *Pulliam*, 466 U.S. at 528 n.4 (quoting House Report 9). Because more easily mooted equitable claims are the primary (if not exclusive) relief in much civil rights litigation, governmental mootness tactics are deadly. Those tactics would suppress the incentive to enforce civil rights since counsel could expect to be regularly mooted out of fees.

The Commissioner's rule would also *eliminate* that incentive in some categories of cases. The threat from allowing mootness to defeat prevailing party status is most acute for "those whose urgent situations call for interim relief." 77 F.4th at 210. Consider the "canonical" plaintiff "who wins a preliminary injunction permitting a protest at a specific event." *Id.* at 215. Once the event ends, the litigation will be moot "because the plaintiff has received all the court-ordered assistance required." *Ibid.* Such plaintiffs have been able to obtain counsel because the "circuits have little difficulty finding prevailing party status in such circumstances." *Ibid.* But the Commissioner admits that his rule categorically bars the winners of such injunctions. For them, § 1988(b) would be a dead letter.

B. The circuit consensus discourages unnecessary post-injunction proceedings.

The Commissioner's rule also creates incentives for unnecessary litigation that the circuit consensus avoids.

1. Under the circuit consensus, plaintiffs need not prolong the fight for remedies they care little about.

Single-event plaintiffs may care little for permanent injunctions once their events are complete. And damages may be beside the point (or not worth the candle) for many civil rights plaintiffs. Because those plaintiffs are already prevailing parties once they win preliminary injunctions under the circuit consensus, there is no incentive to drag out the litigation after that.

The Commissioner, by contrast, would make their fees contingent on winning some final judgment, no matter how tangential to their litigation strategy. But most parties have better things to do than litigate nominal damages, as he recommends. Br. 52. And why bother contesting mootness to make a preliminary injunction permanent when the plaintiff already has all the relief sought? *Ibid.* (citing Fed. R. Civ. P. 65). Congress meant to encourage the litigation of civil rights remedies that plaintiffs care about—not makeweights to trigger fees.

2. The Commissioner suggests that current law discourages repeals or the voluntary cessation of challenged policy. Br. 49. Not so. *Buckhannon* still insulates voluntary changes *before* a judgment (like a preliminary injunction) is entered. 532 U.S. at 605; *N.Y. State Rifle & Pistol Ass'n*, 590 U.S. at 360 (Alito, J., dissenting). If anything, the circuit consensus encourages *prompter* changes in conduct: government defendants avoid fee liability only if they avoid burdening courts with the need to resolve preliminary injunction motions. Or they could settle the dispute and negotiate fees then. *See Evans v. Jeff D.*, 475 U.S. 717, 735-37 (1986).

Nor does the circuit consensus encourage defendants to pursue unnecessary trials. Br. 50. Quite the contrary. A prudent defendant is unlikely to throw good money after bad for fee purposes when the court has already found the plaintiff likely to succeed. That defendant has his *own* fees to worry about too. The Commissioner, for example, has been spending to deploy his own AmLaw 100 firm throughout this case. And a defendant who remains convinced of the merits of his own case after a preliminary injunction can appeal rather than force a case all the way to trial. If the circuit consensus were bloating trial calendars, there would be ample evidence since that rule has been operative in most circuits for many years.

To the contrary, history bears out that the circuit consensus correctly aligns litigation incentives. And the Commissioner identifies no practical reason to scramble them.

Instead, the Commissioner's steps highlight his wasted opportunities to defeat or minimize any fee award. During the 29 months of litigation before the preliminary injunction, he could have worked for repeal, freeing him from any fees under *Buckhannon*. After the injunction, he could have appealed if he were so confident on the merits. Or he could have asked the District Court to rule on his fully briefed summary judgment motion, as in *Sole*. 551 U.S. at 80. And the Commissioner could have negotiated a consent decree at any time to address fees.

The Commissioner took none of those off-ramps. He litigated doggedly through the preliminary injunction. When beaten, he obeyed the injunction

without appealing. Then he begged for a stay and ran out the clock. Eventually the General Assembly repealed the law, ending the lawsuit and vindicating Plaintiffs. That litigation strategy is a not a blueprint for what defendants should be encouraged to do.

C. The circuit consensus is readily administrable.

Applying the ordinary meaning and this Court's corresponding interpretation of "prevailing party" to preliminary injunctions entails "ready administrability." *Buckhannon*, 532 U.S. at 610. All unreversed preliminary injunctions are enforceable judgments bearing judicial imprimatur. Part II.B. So the only question left is whether the legal change wrought by the injunction is material. Part II.A. This Court's precedent already requires that inquiry, and has for decades. *See Garland*, 489 U.S. at 792-93. So it entails no "second litigation of significant dimension." *Buckhannon*, 532 U.S. at 609.

Given the circuit consensus, "[e]xperience proves the point." *City of San Antonio, Texas v. Hotels.com, L.P.*, 593 U.S. 330, 342 (2021). Most circuits have long recognized that preliminary injunction winners can be prevailing parties. Yet Petitioner and his amici "ha[ve] not identified any substantial number of cases" in which factual disputes "have imposed real difficulties." *Ibid.* Instead, they offer "entirely speculative" assertions about what may come to pass if this Court agrees with what the lower courts are largely doing already. *Buckhannon*, 532 U.S. at 608. The lack of any substantial administrability problems favors maintaining current law.

Besides, the putative simplicity of the Commissioner's "bright-line" rule is overstated. Br. 46. He and the United States acknowledge that sometimes the merits *are* finally adjudicated at the preliminary injunction stage. Br. 31; U.S. Br. 26 n.5. And the United States seems to agree that sometimes preliminary injunctions lead to prevailing parties. But which times? The United States offers no clear test to separate the final wheat from the non-final chaff. *See* Br. 21 (proposing a "comparable to a judgment on the merits" test that includes consent decrees); U.S. Br. 16 & n.2 (similar for default judgments).

IV. These Plaintiffs are prevailing parties.

Plaintiffs are prevailing parties within the ordinary meaning of the term, under historical and modern precedent, and by any plausible rule short of the Commissioner's categorical bar.

First, the injunction materially changed the legal relationship between Plaintiffs and the Commissioner. Before the injunction, Va. Code § 46.2-395 imposed on Plaintiffs a legal disability preventing them from driving. That inability to drive cost Plaintiffs jobs and promotions; prevented them from reaching the grocery store; and even left them unable to meet medical needs. 355 F. Supp. 3d 514, 520-23 (W.D. Va. 2018); 77 F.4th at 211 n.7. The injunction removed that disability. 77 F.4th at 211. Regaining the right to drive is not just material—it is life-changing. *Ibid.* ("[N]o matter what happened at the conclusion of the litigation, this injunction, for the time it remained in effect, allowed the plaintiffs to again drive to their jobs and personal engagements,

providing concrete, irreversible economic and non-economic benefits that the plaintiffs sought in bringing suit.").

The Commissioner misstates that the "injunction did no more than prevent the suspension of [Plaintiffs'] driver's licenses while the suit was pending." Br. 40. In fact, Plaintiffs' licenses *were* suspended, and the injunction ordered the Commissioner to "*remove* any current suspensions of the Plaintiffs' driver's licenses imposed under Va. Code § 46.2-395." J.A.381 (emphasis added). And it barred him "from charging a fee to reinstate Plaintiffs' driver's licenses if there are no other restrictions on their licenses." *Ibid.* That reinstatement fee alone was a significant—"and possibly insurmountable"—obstacle to Plaintiffs driving legally. J.A.362-63.

Second, Plaintiffs won an enforceable judgment. The Commissioner had the right to appeal the preliminary injunction order, but never did. (The United States thus errs in assuming that "judgment was never entered against him." U.S. Br. 31.) Instead, he complied with that order and ceased depriving Plaintiffs of the ability to drive under § 46.2-395. Had he failed to comply, he would be exposed to contempt sanctions.

Third, the material relief from that injunctive judgment had the necessary judicial imprimatur because the District Court did the awarding. And the judgment never lost that judicial imprimatur because it was never "reversed, dissolved, or otherwise undone" by a later decision on the merits. *Sole*, 551 U.S. at 83. To the contrary, Plaintiffs received that relief "for as long as [they] need[ed] it," i.e. "for as long

as the statute remain[ed] on the books." 77 F.4th at 215.[8]

Plaintiffs thus cross the prevailing party threshold. On remand, the District Court "in its discretion" should address the "reasonable" amount of fees. 42 U.S.C. § 1988(b). *See Farrar*, 506 U.S. at 114 ("[O]nce civil rights litigation materially alters the legal relationship between the parties, the degree of the plaintiff's overall success goes to the reasonableness of a fee award."). Then the District Court will have ample discretion to consider at the *reasonableness* stage many arguments the Commissioner mistakenly asserts against *eligibility*. *See Hensley*, 461 U.S. at 437; 77 F.4th at 218; *see also* Br. 41.

CONCLUSION

The judgment should be affirmed, and the case should be remanded for determination of a reasonable attorney's fee.

---

[8] No party asks this Court to adopt the Fifth Circuit's inquiry into the cause of mootness. Yet if the Court incorporates a causation inquiry, this record offers ample evidence from the repeal's timing and the Commissioner's participation in that process to find the low bar of causation satisfied. Pet.App.21a-22a. But in that event, this Court may wish to remand "in view of the district court's superior understanding of the litigation." *Hensley*, 461 U.S. at 437; *see also CRST Van Expedited*, 578 U.S. at 435 (remanding to let the district court "reach and settle [a] fact-sensitive issue" in the first instance).

Respectfully submitted,

Brian D. Schmalzbach
Counsel of Record
Matthew A. Fitzgerald
John J. Woolard
McGuireWoods LLP
Gateway Plaza
800 East Canal Street
Richmond, VA 23219
(804) 775-4746
bschmalzbach@mcguirewoods.com

Jonathan T. Blank
McGuireWoods LLP
323 Second Street SE
Suite 700
Charlottesville, VA 22902
(434) 977-2509

Angela A. Ciolfi
Legal Aid Justice Center
1000 Preston Avenue
Suite A
Charlottesville, VA 22903
(434) 529-1810

Patrick Levy-Lavelle
Legal Aid Justice Center
626 East Broad Street
Suite 200
Richmond, VA 23219
(804) 643-1086

August 5, 2024