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 OF AMICI CURIAE FIREARMS POLICY COALITION, INC. AND FPC ACTION FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that works to create a world of maximal human liberty and freedom.[1] It seeks to protect, defend, and advance the People's rights, especially but not limited to the inalienable, fundamental, and individual right to keep and bear arms. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Since its founding in 2014, FPC has emerged as a leading advocate for individual liberty in state and federal courts, regularly participating as a party or *amicus curiae*. In its defense of liberty, FPC is frequently awarded attorney's fees under 42 U.S.C. § 1988, and these fees serve a critical role in facilitating FPC's mission.

FPC Action Foundation (FPCAF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPCAF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPCAF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations. FPCAF's research and *amicus curiae*

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[1] Pursuant to SUP. CT. R. 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its prep-aration or submission, and no person other than *amicus* or their counsel made such a monetary contribution.

briefs have been relied on by judges and advocates across the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a narrow but important question left unanswered in *Sole v. Wyner*, 551 U.S. 74 (2007): whether a plaintiff awarded an unreversed preliminary injunction can be a "prevailing party" under 42 U.S.C. § 1988(b). The answer is yes. *Amici* fully endorses Respondents' arguments and the consensus approach among the courts of appeals that section 1988 permits an award of attorney's fees to a plaintiff granted a preliminary injunction. Under the plain meaning of the statute and this Court's precedents, fees are available to such plaintiffs when a preliminary injunction provides court-ordered relief that changes the legal relationship between the parties.

Among the civil rights protected by section 1988 is the natural right to keep and bear arms protected under the Second Amendment, which is a "'fundamental righ[t]'" that "is 'necessary to our system of ordered liberty.'" *Rogers v. Grewal*, 140 S. Ct. 1865, 1865 (2020) (Mem.) (Thomas, J., dissenting) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010)). It is in part because of provisions like section 1988 that, after a "decade-long failure to protect" the right to keep and bear arms, *id.* at 1875, it is no longer a "constitutional orphan," *Silvester v. Becerra,* 138 S. Ct. 945, 952 (2018) (Mem.) (Thomas, J., dissenting from denial of certiorari).

Vindicating the Second Amendment's promises through litigation is a resource-intensive undertaking.

Second Amendment litigation, as with other civil rights cases, is often "lengthy and arduous" and involves "a host of complex procedural, as well as substantive, objections." *Perdue v. Kenny A.*, 559 U.S. 542, 567 (2010) (Breyer, J., concurring in part and dissenting in part). Frequently, cases "yield damages too small to justify the expense of litigation," *Hudson v. Michigan*, 547 U.S. 586, 597–98 (2006), meaning that but for the prospect of some recovery of attorney's fees many Second Amendment infringements would go unchallenged.

Indeed, in many of the most high-profile Second Amendment cases before this Court, the plaintiffs have relied on section 1988 to recover fees. *See, e.g.*, *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), *remanded sub nom. N.Y. State Rifle & Pistol Ass'n v. Nigrelli*, No. 1:18-cv-00134 (N.D.N.Y. Sept. 22, 2023), ECF No. 75 (awarding plaintiffs' nearly $450,000); *District of Columbia v. Heller*, 554 U.S. 570 (2008), *remanded* 832 F. Supp. 2d 32, 37 (D.D.C. 2011) (awarding plaintiffs over $1.1 million); *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *remanded* No. 08-CV-3645 (N.D. Ill. Sept. 22, 2011), ECF No. 106; *Nat'l Rifle Ass'n of Am. Inc., v. City of Chicago*, No. 08-CV-3996 (N.D. Ill. Aug. 14, 2012), ECF No. 139 (awarding over $1.7 million to counsel in consolidated cases). So, too, with countless other Second Amendment cases in the lower courts.

The importance of these fees is also underscored by the ongoing barrage of attacks on fundamental rights protected by the Second Amendment. In recent terms, for instance, this Court has seen efforts by high-ranking government officials to suppress groups promoting the right to keep and bear arms, *see Nat'l*

Rifle Ass'n of Am. v. Vullo, 602 U.S. 175 (2024), as well as deliberate efforts to manipulate the Court's Second Amendment docket, *see N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 590 U.S. 336, 341–42 (2020) (*per curiam*).

Similarly, state governments have introduced extreme laws deliberately thwarting the Second Amendment and the rights protected thereunder. One California law, for example, attempts to punish litigants and their attorneys for challenging unconstitutional restrictions on the right to keep and bear arms by requiring them to pay the State's attorney's fees. Other laws ban ownership of the most popular firearms in the country. These kinds of egregious laws are an expression of the overwhelming resistance to the natural right that the Second Amendment protects; they attempt to burden the resources of Second Amendment advocates, undercutting litigants' ability to defend the right to keep and bear arms.

Petitioner's interpretation of section 1988 would invite further Second Amendment infringements by incentivizing governments to strategically moot cases after a preliminary injunction has been entered to deprive plaintiffs of attorney's fees. This risk is especially high for local governments because they can act faster than state legislatures to respond to litigation, and their smaller budgets mean attorney's fees may represent a significant expense. A diluted reading of section 1988 thus threatens to embolden efforts by Second Amendment opponents to wrongfully "water[ ] down the right." *United States v. Rahimi*, 144 S. Ct. 1889, 1926 (2024) (Barrett, J., concurring).

ARGUMENT

I. An Unreversed Preliminary Injunction that Materially Alters the Relationship Between the Parties Conveys "Prevailing Party" Status Under Section 1988.

A. Section 1988 gives courts discretion to award "a reasonable attorney's fee" to a "prevailing party" in civil rights litigation. 42 U.S.C. § 1988(b). In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), this Court reaffirmed that a plaintiff can "prevail" when "some" court-ordered relief results in a "material alteration of the legal relationship of the parties." 532 U.S. at 604. Respondents are correct that a preliminary injunction that is never reversed can provide such relief despite the absence of a final judgment on the merits.

That conclusion is first confirmed by the plain meaning of section 1988's text. In interpreting a statute, "each word" must be given "its 'ordinary, contemporary, common meaning.'" *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (quoting *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)). Here, Respondents "prevailed" with a preliminary injunction when the relief they sought became "effective." *See Prevail*, BLACK'S LAW DICTIONARY 1597 (4th ed. 1968) (defining "prevail," as "[t]o be or become effective or effectual"); *see also* WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1426 (1979) ("to gain the victory"); *id.* at 1534 (1989) ("to succeed; become dominant; win out"). The preliminary injunction was "effective" because it provided the relief sought, and it

was not superseded by a subsequent judicial order. The plain meaning of "prevail" does not suggest that a plaintiff must also receive a final adjudication on the merits to recover fees as a prevailing party.

Congress's inclusion of a finality requirement in other statutes confirms this understanding. Statutes pre-dating section 1988 authorized attorney's fees for a prevailing party only where a "final order" had been entered by a court, while section 1988 omitted this requirement. *See, e.g.*, *Bradley v. Sch. Bd. of the City of Richmond*, 416 U.S. 696, 710 n.12 (1974) (quoting Education Amendments of 1972, Pub. L. No. 92-318, § 718, 86 Stat. 235, 369). And other statutes enacted after section 1988 continued to require a "final order." *See, e.g.*, Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, 108 Stat. 1545, 1549 (Aug. 16, 1994). Given the Court's "role to make sense[,] rather than nonsense, out of the *corpus juris*," it should not "eliminate [the] clearly expressed inconsistency of policy" across these statutes. *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991) (Scalia, J.).

B. The sufficiency of a preliminary injunction for prevailing party status is also confirmed by this Court's decision in *Maher v. Gagne*, which held that a favorable consent decree can convey prevailing party status under section 1988. 448 U.S. 122, 129 (1980). The Court in *Maher* reasoned that "[n]othing in the language of § 1988 conditions" a 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." *Id.* On that point, the Court was unanimous. *See id.* at 134 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment)

(concluding that "the award of attorney's fees under § 1988 does not require an adjudication on the merits of the constitutional claims"); *see also Buckhannon*, 532 U.S. at 604.

A consent decree is a type of "settlement agreement subject to continued judicial policing." *United States v. Bd. of Cnty. Comm'rs of Hamilton Cnty.*, 937 F.3d 679, 688 (6th Cir. 2019) (citation omitted). Consent decrees "have attributes both of contracts and judicial decrees." *Martin v. Wilks*, 490 U.S. 755, 788 n.27 (1989). While violation of a consent decree can result in a finding of contempt, the decree itself "does not always include an admission of liability." *Buckhannon*, 532 U.S. at 604. Under *Maher*, even though consent decrees remain subject to potential modification and continuing compliance review and do not necessarily involve full merits adjudications, they can still make a plaintiff a prevailing party.

Indeed, consent decrees are often divorced from adjudication of the underlying legal issues of a dispute. For a court to approve a consent decree it needs to ensure only that it has jurisdiction over the case; the decree "come[s] within the general scope of the case made by the pleadings"; and that it "further[s] the objectives of the law upon which the complaint was based." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (*citing Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986)).

With a consent decree, a court does not undertake the same analysis of the merits as it would in other contexts because the consent decree is rooted in "the agreement of the parties, rather than the force of the

law upon which the complaint was originally based." *Firefighters*, 478 U.S. at 522. In other words, the central concern of the court in reviewing a proposed consent decree is the "reasonableness of the settlement, not the merits of the dispute" because "the judgment results not from adjudication but from a basically contractual agreement of the parties." 18A WRIGHT & MILLER, FED. PRAC. & PROC. JURIS. § 4443 (3d ed. 2024). *See also United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (noting that approval of a consent decree does not necessarily involve evaluating whether "the plaintiff established his factual claims and legal theories"); *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (observing a court may enter a consent decree against a government defendant without finding that a statutory or constitutional violation has occurred, "inquir[ing] into the precise legal rights of the parties," or even "reach[ing] and resolv[ing] the merits of the claims or controversy").

In cases involving consent decrees, a court's discretion can also be restricted compared to a typical adjudication on the merits. It is an abuse of discretion for a court to disapprove a consent decree where the parties have satisfied the *Firefighters* criteria. *See, e.g.*, *Durrett v. Hous. Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990). And some circuits even permit relief in a consent decree that otherwise "could not have [been] granted" had the court "entered a judgment on the merits." *See, e.g.*, *In re Consol. Non-Filing Ins. Fee Litig.*, 431 F. App'x 835, 843 (11th Cir. 2011). Moreover, like preliminary injunctions, consent decrees can be entered on exceedingly short timelines; parties sometimes simultaneously file a complaint

with a consent decree—hardly the stuff of full adjudication on the merits.

Consent decrees can also vary widely in their degree of finality. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 394 (1992) (citation omitted) (noting a consent decree can be modified if there is "a significant change either in factual conditions or in law"). As the Seventh Circuit recently observed in revisiting a consent decree originally entered in 1972, rather than a final resolution of the case, the decree seemingly resulted in "indefinite federal judicial supervision." *Shakman v. Pritzker*, 43 F.4th 723, 726 (7th Cir. 2022). In the 50 years after the decree in that case took effect, it yielded "over 10,000 entries" on the docket, passed through the hands of "six different federal judges," and had "at least 1,000 status reports." *Id.* Compared to that decree, the preliminary injunction at issue in this case offered a far more definitive resolution of the dispute.

Many consent decrees involve ongoing reevaluation. Some consent decrees, for instance, build in extension dates for a court to revisit the decree after a set period. And as these modifications—which are appealable—typically remain with the original presiding judge, consent decrees can appear much more like a continuation of the case than the end of the suit.

In sum, consent decrees frequently involve a far less conclusive resolution of the merits of a case than preliminary injunctions. This Court held in *Maher* that a consent decree can convey prevailing party status under section 1988, and that decision shows that Petitioner is wrong that only "a conclusive ruling on the merits" will suffice. Brief of Pet. at 22. Rather,

the "touchstone" remains a court-ordered "chang[e] [in] the legal relationship between [the plaintiff] and the defendant," *Buckhannon*, 532 U.S. at 604 (brackets in original), and that requirement can be satisfied by a preliminary injunction that is never overturned.

II. Section 1988 Fees Are Critical to the Defense of the Natural Rights Protected by the Second Amendment.

"Section 1988 attorney's fees are an important component of civil rights enforcement." *N.Y. State Rifle & Pistol Ass'n, Inc.*, 590 U.S. at 341–42, 360 (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting). The potential for fees "ensures that 'private attorneys general' can enforce the civil rights laws through civil litigation, even if they 'cannot afford legal counsel.'" *Id.* at 360–61 (quoting *Buckhannon*, 532 U.S. at 635–36 (Ginsburg, J., dissenting)). These realities are especially true in the context of Second Amendment litigation.

A. Petitioner's theory of the case would incentivize defendants to strategically moot cases involving Second Amendment challenges.

A categorical bar on section 1988 attorney's fees in cases where a court had awarded a preliminary injunction on the merits that is subsequently mooted by the actions of a defendant would have disastrous effects for Second Amendment plaintiffs. Such a rule would lend a perverse incentive to defendants to "game" the system by altering their behavior when an adverse ruling seemed imminent. Plaintiffs would be stuck with the bill, disincentivizing future challenges

to unconstitutional infringements on the right to keep and bear arms.

The City of New York's "herculean, late-breaking efforts" to moot *New York State Rifle & Pistol Ass'n, Inc. v. City of New York* are a prime example. Tr. of Oral Argument at 29, No. 18-280 (Gorsuch, J.). In the court below, the City had "vigorously and successfully" defended the constitutionality of its ordinance, which "prohibited law-abiding New Yorkers with a license . . . from taking that weapon to a firing range outside the City." 590 U.S. at 341–42 (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting).

After this Court granted *certiorari*, however, the City apparently had an "epiphany," "spr[inging] into action to prevent [the Court] from deciding th[e] case" by modifying its ordinance. *Id.* at 341. "And for good measure the State enacted a law making the old New York City ordinance illegal." *Id.* The City then moved to have the case dismissed, asserting that it was now moot. *Id.* One "prominent brief supporting the City" suggested if the Court did not dismiss the case as moot, "the public would realize that the Court is 'motivated mainly by politics, rather than by adherence to the law,' and the Court would face the possibility of legislative reprisal." *Id.* at 342 (quoting Br. of Sen. Sheldon Whitehouse, et al. as *Amici Curiae* in Support of Respondents, at 9–18, *N.Y. State Pistol & Rifle Ass'n v. City of New York*, No. 18-280).

In a *per curiam* opinion, a majority of the Court concluded that the City's actions rendered the relevant claims moot by providing the "precise relief that petitioners requested." *N.Y. State Rifle & Pistol Ass'n, Inc.*, 590 U.S. at 338–39. So, despite fighting "tooth and nail" in the courts below and "insisting that

its old ordinance served important public safety purposes," the City was able to "essentially . . . impose a unilateral settlement that deprived petitioners of attorney's fees." *Id.* at 361 (Alito, J., dissenting). The City's "litigation strategy" enabled it to "deprive[]" plaintiffs of "very substantial attorney's fees" from "five years of intensive litigation—everything from the drafting of the complaint, through multiple rounds of District Court motion practice, to appellate review, and proceedings in this Court." *Id.* at 360–61.

Examples of similar procedural postures involving cessation of unconstitutional government action following the filing of a lawsuit are legion in Second Amendment cases. In another case involving New York, *amicus* FPC, along with several other plaintiffs, challenged a state statute that prohibited concealed carry permit holders from carrying firearms in churches. The district court held the statute facially unconstitutional. *Hardaway v. Nigrelli*, 639 F. Supp. 3d 422, 439–41 (W.D.N.Y. 2022). While that hard-fought preliminary injunction was on appeal, the New York legislature amended the statutory provision at issue, prompting the Second Circuit to deem FPC's challenge moot. *See Antonyuk v. Chiumento*, 89 F.4th 271, 344–45 (2d Cir. 2023).

A similar fate befell a challenge to a North Carolina statute that "required a person to demonstrate American citizenship prior to obtaining a concealed carry permit." *See Veasey v. Wilkins*, 158 F. Supp. 3d 466, 468 (E.D.N.C. 2016). After the district court awarded the plaintiff a preliminary injunction, the state mooted the case by amending the law. *See id.*

In another case, the Governor of Michigan issued an executive order during the COVID-19 pandemic, ordering the closure of "all activities deemed not essential to sustain or protect life," including "the operation of firearm stores." *Beemer v. Whitmer*, No. 22-1232, 2022 WL 4374914, at *1 (6th Cir. Sept. 22, 2022), *cert. denied*, 143 S. Ct. 979 (2023). A little over a week after the plaintiffs sued, the Governor rescinded the order, resulting in the case being dismissed as moot.

The examples are endless. *See, e.g.*, *Mitchell v. Trame*, No. 18-cv-3274, 2020 WL 6729066 (C.D. Ill. Nov. 16, 2020) (finding a plaintiff's lawsuit challenging denial of a firearms license by state police was mooted by issuance of the license); *Shepard v. Madigan*, 958 F. Supp. 2d 996 (S.D. Ill. 2013), *aff'd*, 734 F.3d 748 (7th Cir. Nov. 5, 2013) (challenge to Illinois firearms law was rendered moot by legislature's passage of Illinois Firearm Conceal Carry Act); *Dark Storm Indus. LLC v. Cuomo*, 471 F. Supp. 3d 482 (N.D.N.Y. 2020) (challenge to New York Governor's COVID-19 restrictions that prohibited in-person sales by a firearms business to civilian customers was mooted by subsequent recission of order); *Connecticut Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439 (2d Cir. 2021) (challenge to government order that empowered local law enforcement to refuse to fingerprint firearms license applicants—a requirement to be licensed—was mooted by order's repeal).

Petitioner attempts to wave away these concerns in the context of legislative action as "impracticable," arguing it is too difficult for a legislature to coordinate these actions. Brief of Pet. at 51. The coordination

between New York City and the state legislature in *New York State Rifle & Pistol Ass'n, Inc.* belies that argument. But even if the argument were persuasive as applied to state legislative action, the argument overlooks the threat of unconstitutional anti-gun actions by *local* governments.

Local jurisdictions are often more responsive to litigation dynamics. Legislative or adjudicative bodies at the local level can usually repeal town ordinances or vacate adjudications of firearms permits quicker than state legislators can repeal state laws; as they are smaller bodies, they often are able to act in a matter of weeks, if not days. *See, e.g.*, *Taveras v. New York City, N.Y.*, No. 20-cv-1200, 2023 WL 3026871, at *8 (S.D.N.Y. Apr. 20, 2023) (concluding challenge to denial of firearm permit was mooted by city's approval of application following plaintiff's filing of a lawsuit); *Celona v. Scott*, No. 15-CV-11759, 2016 WL 1411340 (D. Mass. Apr. 8, 2016) (similar posture involving denial of firearms license by local police department); *Second Amend. Arms v. City of Chicago*, 135 F. Supp. 3d 743 (N.D. Ill. 2015) (finding challenge to Chicago ordinance to be moot after City repealed registration requirement); *Stafford v. Baker*, 520 F. Supp. 3d 803 (E.D.N.C. 2021) (challenge to county sheriff's suspension of acceptance of firearms permits was mooted by change in sheriff's policy).

Moreover, while the financial incentives posed by shifting attorney's fees may only be background motivation for relatively deep-pocked state governments, the incentives to avoid paying out attorney's fees would be heightened for cases involving local governments. Municipalities can often be liable for attorney's fees as large as would be

assessed in a case involving a state but would have to pay those fees out of a much smaller budget.

Finally, exceptions to mootness doctrines such as where a violation is "capable of repetition, yet evading review," *DeFunis v. Odegaard*, 416 U.S. 312, 318–19 (1974) (*per curiam*) (citation omitted), are unlikely to assist many civil rights plaintiffs. In many circuits, the thumb is on the scale for the government because courts apply a presumption of good faith when the government voluntarily ceases its conduct.[2] And this Court has counseled that "caution" should be taken "to avoid carrying forward a moot case solely to vindicate a plaintiff's interest in recovering attorneys' fees." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 192 n.5 (2000).

Given these dynamics, Petitioner's interpretation of "prevailing party" would further entrench and expand hurdles to fee recovery for victorious Second Amendment plaintiffs. And because "[m]ootness manipulation can occur in any area where government regulates," it would jeopardize a wide array of other civil rights plaintiffs as well. *Tucker v.*

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[2] *See, e.g.*, *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 767 (6th Cir. 2019) ("[T]he burden in showing mootness is lower when it is the government that has voluntarily ceased its conduct."); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328–29 (11th Cir. 2004) ("[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."); *Ragsdale v. Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988) (similar). *See also* Joseph C. Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary Cessation Doctrine*, 129 YALE L.J. F. 325, 328 (2019).

Gaddis, 40 F.4th 289, 297 (5th Cir. 2022) (Ho, J., concurring).

B. Recent attacks on the Second Amendment underscore the need for robust defense of these rights.

The importance of a ruling for Respondents is further underscored by the recent barrage of attacks against the right to keep and bear arms. Many of these efforts are patently unconstitutional infringements aimed explicitly at weakening the ability of litigants to vindicate the natural rights protected by the Second Amendment by making litigation more resource intensive. Without section 1988 fees in cases similar to this one, Second Amendment advocates could easily be drained of the resources that are necessary to combat these unconstitutional schemes.

California's extraordinary attempt to require plaintiffs and lawyers protecting the fundamental rights protected by the Second Amendment to pay attorney's fees to the State is a case in point. In 2022, the California Legislature enacted S.B. 1327 (CAL. CODE CIV. PROC. § 1021.11), an anti-Second Amendment law so extreme that the Governor had to intervene to defend the law as California's Attorney General has labeled it "blatantly unconstitutional." *Miller v. Bonta*, 646 F. Supp. 3d 1218, 1222 (S.D. Cal. 2022).

The statute, which applies only to plaintiffs challenging state or local firearms laws, imposes joint and several liability on the plaintiff and the plaintiff's attorneys for the entirety of the government's attorney's fees if the case does not result in victory on

every single claim raised. CAL. CODE CIV. PROC. § 1021.11(a). And it explicitly provides that a plaintiff seeking declaratory or injunctive relief can never be a "prevailing party." *Miller*, 646 F. Supp. 3d at 1224 (citing CAL. CODE CIV. PROC. § 1021.11(e)).

Worse yet, the law extends the right to the government to recover these fees up to three years after the end of appellate review. This framework "severely chills" the rights protected by both the First and Second Amendments by "threaten[ing] to financially punish plaintiffs and their attorneys who seek judicial review of laws impinging on federal constitutional rights." *Id.* at 1224.

As the district court observed in enjoining California officials from enforcing this law, "[t]hat threat of liability has already scared away plaintiffs and attorneys from filing or maintaining cases." *Id.* at 1226. Such a system "undercuts and attempts to nullify" section 1988 and is "completely contrary" to Congress's goals. *Id.* at 1228–29. California understood and intended the results of the law would be to incapacitate Second Amendment defenders by depriving them of the financial resources necessary to pursue these cases. *Id.* at 1226 (noting "[t]he legislative history of [the statute] suggests" the state "understood the punitive effect of the law, but enacted it anyway").

California's mistaken belief that the fundamental right to keep and bear arms is a second-class right is not an outlier. Other states have similarly attempted to impose clearly unconstitutional firearms regulations that burden the resources of gun rights plaintiffs. In 2023, for instance, the Governor of New Mexico issued an "emergency" executive order that

attempted to use "public health" as a pretext to justify temporarily banning open and concealed carry of firearms in the state's most populous county. *See* Exec. Order 2023-130, Declaring State of Public Health Emergency Due to Gun Violence (Sept. 7, 2023), https://tinyurl.com/5xkww4e5; *We the Patriots, Inc. v. Grisham*, 2023 WL 6622042, at *2 (D.N.M. Oct. 11, 2023).

In Illinois, a statute went into effect earlier this year that "makes it a felony to possess . . . 'the most popular semi-automatic rifle' in America," *Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (statement of Thomas, J.) (quoting *Heller v. District of Columbia*, 670 F. 3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). *See* House Bill 5471 (codified at ILL. COMP. STAT., ch. 720, § 5/24–1.9(a)(1)(J)(ii)(II)). Likewise, a similar ban out of Maryland was recently upheld by the *en banc* Fourth Circuit. *See Bianchi v. Brown*, No. 21-1255, 2024 WL 3666180 (4th Cir. Aug. 6, 2024). *Cf. Rogers*, 140 S. Ct. at 1866 (Thomas, J., dissenting) (observing that "many courts have resisted our decisions in *Heller* and *McDonald*").

Just this past term, in *National Rifle Ass'n of America v. Vullo*, this Court witnessed direct efforts by government officials to drain resources from Second Amendment advocates by inducing other entities to withdraw their support, holding unanimously that the National Rifle Association "plausibly alleged" a New York agency head unconstitutionally pressured "regulated entities to help her stifle the NRA's pro-gun advocacy by threatening enforcement actions against those entities that refused to disassociate from the NRA and

other gun-promotion advocacy groups." 602 U.S. 175, 180–81 (2024).

These kinds of deliberate efforts to hamper the defense of the natural rights protected by the Second Amendment are part of a broader increase in the volume of Second Amendment litigation, fueled in part by this Court's recognition in *Bruen* of the proper scope of the right after years of resistance by lower courts. Such cases exemplify the importance of Respondents' position for Second Amendment defense.

Indeed, "[t]he pace of [Second Amendment] litigation after [*Bruen*] has far surpassed the tremendous pace of litigation after *Heller*." Eric Ruben, et al., *One Year Post-Bruen*, 110 VA. L. REV. ONLINE 20, 24 (2024). Between October 2022 to March 2023, for instance, "courts issued an average of 32 opinions and addressed an average of 48 challenges per month." *Id.* at 29. By comparison, "[m]ore Second Amendment claims were addressed in a single calendar year following *Bruen* than from 2009 through 2011, the first three full years after *Heller*." *Id.* at 30. And notably, "the success rate of Second Amendment claims also far surpasses the post-*Heller* success rate." *Id.* at 24.

This high-volume success makes the availability of attorney's fees under section 1988 critically important to the vindication of the basic rights protected by the Second Amendment. If section 1988 fees are unavailable in cases like this one, government defendants in Second Amendment cases can continue to target the defense of the right to keep and bear arms, waging a war of attrition by saddling meritorious plaintiffs with attorney's fees through enacting unconstitutional laws. In that dark world,

Second Amendment violations could continue to proliferate, and "law-abiding citizens" could be wrongfully "barred from exercising the fundamental right to bear arms." *Rogers*, 140 S. Ct. at 1865 (Thomas, J., dissenting).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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