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

REPLY BRIEF FOR PETITIONER

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

JASON S. MIYARES
Attorney General of Virginia

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

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
INTRODUCTION 1
ARGUMENT 3
I. Interlocutory orders that do not resolve the merits of any claim do not render plaintiffs the "prevailing party" 3
  A. Text and precedent confirm that Section 1988 requires a conclusive resolution on the merits or final judgment 3
  B. Respondents' appealable-order test is erroneous 9
II. Relief must be enduring to warrant fees, not just have "real-world effect" 13
III. Respondents' proposed rule creates perverse incentives and penalizes defendants who did not violate the law 17
CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. *Perez*, 585 U.S. 579 (2018)........................11
Astrue v. *Ratliff*, 560 U.S. 586 (2010)........................3
Brotherhood of Maintenance of Way Emps. v. *Chicago & Nw. Transp. Co.*, 827 F.2d 330 (8th Cir. 1987)................................20
Buckhannon Bd. & Care Home, Inc. v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001)....................1, 4, 5, 6, 7, 9, 11, 14, 15, 19, 21, 22, 23, 25
Chambers v. *NASCO, Inc.*, 501 U.S. 32 (1991) 10
Clancy v. *Geb*, 104 N.W. 746 (Wis. 1905)...................8
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)...10
De Jesus Nazario v. *Morris Rodriguez*, 554 F.3d 196 (1st Cir. 2009) 14
DiMartile v. *Hochul*, 80 F.4th 443 (2d Cir. 2023)................14, 15, 18, 19
Dupuy v. *Samuels*, 423 F.3d 714 (7th Cir. 2005).....18
Epic Sys. Corp. v. *Lewis*, 584 U.S. 497 (2018)............8
Exxon Mobil Corp. v. *Allapattah Servs., Inc.*, 545 U.S. 546 (2005)..8
Farrar v. *Hobby*, 506 U.S. 103 (1992).....1, 6, 7, 14, 24
Federal Bureau of Investigation v. *Fikre*, 601 U.S. 234 (2024)...22
Fleming v. *Gutierrez*, 785 F.3d 442 (10th Cir. 2015).............................20
Fowler v. *Benson*, 924 F.3d 247 (6th Cir. 2019).........................11, 12
George v. *McDonough*, 596 U.S. 740 (2022) 4

Hanrahan v. *Hampton*, 446 U.S. 754 (1980)........8, 16
Hewitt v. *Helms*, 482 U.S. 755 (1987).........5, 6, 13, 16
Independent Fed'n of Flight Attendants v. *Zipes*, 491 U.S. 754 (1989)..6
Kentucky v. *Graham*, 473 U.S. 159 (1985) 6
Lefemine v. *Wideman*, 568 U.S. 1 (2012) 7
Lewis v. *Continental Bank Corp.*, 494 U.S. 472 (1990)...17
Marceaux v. *Lafayette City-Par. Consol. Gov't*, 731 F.3d 488 (5th Cir. 2013)................................14
MCI Telecomms. Corp. v. *American Tel. & Tel. Co.*, 512 U.S. 218 (1994)..4
McQueary v. *Conway*, 614 F.3d 591 (2010).................................10, 18, 19
New York State Rifle & Pistol Ass'n, Inc. v. *City of New York*, 590 U.S. 336 (2020)..........22, 23
Niz-Chavez v. *Garland*, 593 U.S. 155 (2021) 4
Northern Cheyenne Tribe v. *Jackson*, 433 F.3d 1083 (8th Cir. 2006)..............................18
People Against Police Violence v. *City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008) 14
Roman Catholic Diocese of Brooklyn v. *Cuomo*, 592 U.S. 14 (2020)..22
Rufo v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992)..9
Sandifer v. *U.S. Steel Corp.*, 571 U.S. 220 (2014)......4
SecurityPoint Holdings, Inc. v. *Transportation Sec. Admin.*, 836 F.3d 32 (D.C. Cir. 2016)....................7
Shalala v. *Schaefer*, 509 U.S. 292 (1993) 7
Singer Mgmt. Consultants, Inc. v. *Milgram*, 650 F.3d 223 (3d Cir. 2011) 18

Sole v. *Wyner*,
551 U.S. 74 (2007) 1, 2, 11, 13, 14, 16, 19
South Bay United Pentecostal Church v. *Newsom*,
141 S. Ct. 716 (2021) 22
Starbucks Corp. v. *McKinney*,
144 S. Ct. 1570 (2024) 12
Stinnie v. *Holcomb*,
396 F. Supp. 3d 653 (W.D. Va. 2019) 25
Tennessee State Conf. of NAACP v. *Hargett*,
53 F.4th 406 (6th Cir. 2022) 14
Texas State Teachers Ass'n v. *Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989) 5, 6, 15
University of Tex. v. *Camenisch*,
451 U.S. 390 (1981) 12, 20
Uzuegbunam v. *Preczewski*, 141 S. Ct. 792 (2021) ... 23

Statutes

28 U.S.C. § 1292 10
42 U.S.C. § 1988 5

Other Authorities

Black's Law Dictionary
(4th rev. ed. 1968) 4, 5, 11, 13
Black's Law Dictionary (5th ed. 1979) 4
11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*
(3d. ed. 2024) 10, 15
Fed. R. Civ. P. 23 10
Fed. R. Civ. P. 65 23

INTRODUCTION

Respondents agree that no circuit currently uses the correct test to determine whether a preliminary injunction renders a plaintiff the "prevailing party" under 42 U.S.C. § 1988. They jettison the test the Fourth Circuit adopted below and do not contend this Court should adopt any of the other circuits' varying tests. Instead, Respondents invent a novel test. Although their formulations of it vary, they appear to contend that an "appealable" order with "real-world effect" confers prevailing-party status. Resp.Br.25-27. Respondents' test is unmoored from the plain meaning of "prevailing party" and this Court's precedents. This Court should reject it.

First, Respondents do not defend the Fourth Circuit's erroneous holding that a preliminary injunction provides "relief on the merits." Pet.App.22a. Instead, Respondents attempt to erase any requirement that a prevailing party prove the merits, replacing it with a requirement of an unreversed appealable order. See Resp.Br.30-31. But this Court has repeatedly held that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim" or a final judgment in his favor. *Farrar* v. *Hobby*, 506 U.S. 103, 111 (1992); *Sole* v. *Wyner*, 551 U.S. 74, 78 (2007). An interlocutory order that does not establish liability on the merits does not show that the plaintiff has won the lawsuit. Just as in *Buckhannon*, the Court should reject Respondents' attempt to "abrogate the 'merit' requirement" for attorney's fees. *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 606 (2001).

Second, Respondents similarly make little attempt to defend the Fourth Circuit's incorrect ruling that a preliminary injunction provides "enduring" relief. Pet.App.25a. Instead, they again urge the Court to delete the requirement, replacing it with a "real-world effect" test. Resp.Br.25,36. But the statutory text and this Court's precedents provide that transient success on interlocutory orders does not make a party prevailing. *Sole*, 511 U.S. at 82 n.3, 86. And Respondents' "real-world effect" test is both unclear and overbroad, apparently sweeping beyond preliminary injunctions to numerous other interlocutory orders, such as temporary restraining orders, stays, gag orders, and receiverships.

Finally, Respondents' contention that their rule is administrable because it follows the "circuit consensus" fails. Resp.Br.14. There is no circuit consensus, and no circuit has adopted Respondents' proposed rule—including the Fourth Circuit below. Respondents' rejection of any requirement for a ruling on the merits or enduring relief would burden defendants with large fee awards when they violated no law and lacked an adequate opportunity to defend themselves in "hasty and abbreviated" emergency procedures. *Sole*, 551 U.S. at 84. Respondents' fears of "gamesmanship" are misplaced, Resp.Br.42, as both the separation of powers and mootness doctrine will generally prevent executive branch defendants from strategically mooting cases between a preliminary injunction and a ruling on the merits. Respondents' parade of horribles is thus highly implausible. And their contention that plaintiffs' counsel "have better things to

do" than prove the merits of their claims, Resp.Br.48, is no reason to award attorney's fees in partially litigated cases.

This Court should reverse.

ARGUMENT

I. Interlocutory orders that do not resolve the merits of any claim do not render plaintiffs the "prevailing party"

A. Text and precedent confirm that Section 1988 requires a conclusive resolution on the merits or final judgment

Respondents would dramatically expand the meaning of "prevailing party" by allowing fee awards without any ruling on the merits, if plaintiffs obtain some "appealable" order with "real-world effect." Resp.Br.25-26,30-31. This interpretation is contrary to the plain meaning of "prevailing party" and this Court's precedents.

1. First, Respondents' novel rule is contrary to the text of Section 1988. Legal dictionaries from the time Congress enacted Section 1988 make clear that "prevailing party" requires a conclusive ruling on the merits or final judgment. See Pet.Br.16-18. Respondents do not dispute that "prevailing party" is a "legal term of art." Resp.Br.15; *Astrue* v. *Ratliff*, 560 U.S. 586, 591 (2010) ("We have long held that the term 'prevailing party' in fee statutes is a 'term of art.'"). Yet Respondents urge the Court to look to non-legal dictionaries and supposed "common sense," not the term's legal

meaning. Resp.Br.1,15. But a term of art "*depart*[*s*] from ordinary meaning." *George* v. *McDonough*, 596 U.S. 740, 752 (2022). It has "acquired a specialized meaning in the legal context [and] must be accorded [its] *legal*" meaning. *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring); see *id*. at 603.

Legal dictionaries define "prevailing party" as "[t]he party ultimately prevailing when the matter is finally set at rest." Black's Law Dictionary 1352 (4th rev. ed. 1968). They explain that prevailing-party status depends on the outcome "at the end of the suit," not "the degree of success at different stages of the suit." *Ibid*. Thus, the plaintiff has not prevailed until the suit has reached either final judgment, or at least a conclusive determination that the defendant is liable on the merits. Pet.Br.16-18; U.S.Br.12-13.

Respondents chide the Commissioner for "lean[ing] on a dictionary predating § 1988(b)." Resp.Br.17. But this Court "normally seeks to afford the law's terms" their meaning "at the time Congress adopted them." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 160 (2021). Thus, the most relevant dictionaries are "dictionaries from the era of [the statute's] enactment." *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 227 (2014); see *MCI Telecomms. Corp.* v. *American Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (describing the year a disputed statute "became law" as "the most relevant time for determining a statutory term's meaning"). In any event, the subsequent edition of Black's Law Dictionary contained substantially the same definition. Black's Law Dictionary 1069 (5th ed. 1979).

Respondents rely on non-legal dictionaries and asserted "common sense" to define "prevailing" as "successful." See Resp.Br.14-17. But because "prevailing party" is a legal term of art, these non-legal sources are irrelevant, showing only that "the word 'prevailing' can have other meanings in other contexts." *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring). Section 1988 requires a specific type of "prevailing": as a "party" in an "action or proceeding to enforce" specified federal statutes. 42 U.S.C. § 1988(b). Thus, the "prevailing party" must succeed *in the lawsuit* "when the matter is finally set at rest." Black's Law Dictionary 1352 (4th rev. ed. 1968). "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." *Buckhannon*, 532 U.S. at 603 (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987)).

2. Respondents' proposed rule is also contrary to this Court's precedents. Respondents point to this Court's holdings that the "touchstone of the prevailing party inquiry" is a "material alteration of the legal relationship of the parties." Resp.Br.21. They overlook, however, this Court's repeated explanation of what a "material alteration" means: "the plaintiff must be able to point to *a resolution of the dispute* which changes the legal relationship between itself and the defendant." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (emphasis added). Thus, as *Buckhannon* explains, this Court has found a material alteration in only two circumstances: "enforceable judgments *on the merits* and court-ordered consent decrees create the 'material alteration

of the legal relationship of the parties' necessary to permit an award of attorney's fees." 532 U.S. at 604 (emphasis added).

The cases Respondents rely upon similarly define "material alteration." *Farrar*, for instance, holds that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim" or "comparable relief through a consent decree or settlement." 506 U.S. at 111; see *Buckhannon*, 532 U.S. at 604 (clarifying that only settlements incorporated into court orders qualify). "Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party." *Farrar*, 506 U.S. at 111. Similarly, *Garland* and *Hewitt* both hold that Section 1988 "requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Garland*, 489 U.S. at 792 (quoting *Hewitt*, 482 U.S. at 760).

Section 1988 imposes a merit requirement because "liability on the merits and responsibility for fees go hand in hand." *Kentucky* v. *Graham*, 473 U.S. 159, 165 (1985). Respondents attempt to distinguish *Graham* as holding "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." Resp.Br.32. But this Court repeated the same holding in multiple other contexts. *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 762 (1989) ("Our cases have emphasized the crucial connection

between liability for violation of federal law and liability for attorney's fees under federal fee-shifting statutes."); *Farrar*, 506 U.S. at 109 (similar).

As in *Buckhannon*, this Court should reject Respondents' attempt to "abrogate the 'merit' requirement of [the Court's] prior cases." 532 U.S. at 606.

3. Respondents' remaining arguments likewise do not support deleting the merit requirement. Respondents point to *Lefemine* v. *Wideman*, 568 U.S. 1 (2012) (per curiam), holding that an injunction conferred prevailing-party status. See Resp.Br.22-23. But "the injunction in *Lefemine* was permanent." Resp.Br.23. Unlike a preliminary injunction, a permanent injunction requires a "determin[ation] that the defendants had infringed [plaintiff]'s rights." *Lefemine*, 568 U.S. at 3. Indeed, *Lefemine* reiterated that a plaintiff "prevails" only "when actual relief on the merits of his claim" creates a material alteration. *Id.* at 4.

Respondents also rely on *Shalala* v. *Schaefer*, 509 U.S. 292 (1993) (cited at Resp.Br.31-32). But the plaintiff there obtained both a favorable final judgment and a conclusive ruling on the merits when the district court reversed an agency's adverse decision. *Id.* at 300-01. Although the court remanded to the agency for additional proceedings, *the court's* final judgment "terminate[d] the litigation with a victory for the plaintiff." *Ibid.*; see *SecurityPoint Holdings, Inc.* v. *Transportation Sec. Admin.*, 836 F.3d 32, 37-39 (D.C. Cir. 2016). Thus, *Schaefer* stands for the opposite of Respondents' position: a plaintiff can be a prevailing party without necessarily securing "real-

world" benefits (as the agency may again deny relief on remand), but he must obtain a final judgment or conclusive ruling on the merits.

Respondents next argue that "the 'prevailing party' concept does not require finality." Resp.Br.17; see Resp.Br.18-21. This argument is a straw man; the Commissioner expressly noted that "Section 1988 allows interim fee awards." Pet.Br.21. The statute, however, "permit[s] the interim award of counsel fees *only* when a party has prevailed *on the merits* of at least some of his claims." *Hanrahan* v. *Hampton*, 446 U.S. 754, 758 (1980) (emphasis added). "[O]nly in that event has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Ibid.*

Respondents argue that there is a "venerable equitable tradition of awarding interim costs" for preliminary injunctions. Resp.Br.19. But they cite only a single century-old state-court case in support. Resp.Br.21 (citing *Clancy* v. *Geb*, 104 N.W. 746 (Wis. 1905)). And to the extent legislative history suggests that Section 1988 authorizes interim fees without a conclusive merits ruling, see Resp.Br.40, any such statements are contrary to this Court's precedents and entitled to no weight. "[L]egislative history is not the law," *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 523 (2018); rather, it often devolves into "looking over a crowd and picking out your friends," *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

Respondents also contend that because this Court has held fee awards are available for consent decrees, "a determination on the merits" is not part of the prevailing-party analysis. Resp.Br.30-31. But "a consent decree is a final judgment." *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 391 (1992). Section 1988 requires a conclusive ruling on the merits *or* a final judgment; a party prevails when it "wins the suit" by obtaining a final judgment in its favor. *Buckhannon*, 532 U.S. at 615; see Pet.Br.15-22. Although a final judgment for the plaintiff typically requires a merits ruling, there are exceptions when the defendant fails to contest its liability by defaulting or consenting to the entry of judgment against it. U.S.Br.15-16. Preliminary injunctions are different: they are not final judgments, are entered over defendants' objections, and do not resolve whether defendants are liable on the merits. See U.S.Br.16.n.2. They do not confer prevailing-party status.

B. Respondents' appealable-order test is erroneous

1. Respondents contend that "enforceable judgments," rather than merits rulings, confer prevailing-party status. Resp.Br.12,30-31. An order is enforceable, they argue, if it is "backed by the threat of criminal contempt." Resp.Br.12. And a "judgment" is "any order from which an appeal lies," including "interlocutory appeals." Resp.Br.27. No court has accepted this broad and atextual interpretation of "prevailing party," and it is erroneous.

First, Respondents' test that the order be enforceable through contempt power provides no limitation at all. "The power to punish for contempts is inherent in all courts," and thus essentially every court order is enforceable by contempt. *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 44 (1991) (quotation marks omitted).

Second, Respondents' test that the order be immediately appealable is contrary to the statutory text and this Court's precedent, which demonstrate that only a final judgment, or a conclusive ruling on the merits, can confer prevailing-party status. See Section I.A, *supra*. Whether an interlocutory order is immediately appealable has "nothing to do with success on the merits." *McQueary* v. *Conway*, 614 F.3d 591, 601 (2010). An order may determine that the defendant is liable on the merits without being immediately appealable. See 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 3914.28 (3d. ed. 2024) [hereinafter Wright & Miller] ("[A] summary judgment that determines liability but leaves damages or other relief open for further proceedings is not final."). Conversely, many appealable orders have little or nothing to do with the merits. Indeed, many interlocutory orders are appealable precisely because they are "separate from and 'collateral to' the merits of the claims." *Id.* § 3911; see *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949); 28 U.S.C. § 1292(a)(2) (order appointing a receiver, or refusing orders to wind up receiverships); Fed. R. Civ. P. 23(f) (class certification).

Thus, far from showing that a preliminary injunction is a conclusive victory, Congress's separate authorization of an interlocutory appeal underscores that preliminary injunctions do not provide "relief on the merits of [the plaintiff's] claim." *Buckhannon*, 532 U.S. at 603. Rather, Congress authorized interlocutory appeals of preliminary injunctions because "[i]f an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision in the district court," including that "[l]awful and important conduct may be barred." *Abbott* v. *Perez*, 585 U.S. 579, 595 (2018). Such interlocutory rulings are "a battle," not "the war." *Sole*, 551 U.S. at 86. They do not show that a party will be "ultimately prevailing when the matter is finally set at rest." Black's Law Dictionary 1352 (4th rev. ed. 1968).

2. Despite contending that the merits are irrelevant, Respondents spend significant time disputing them. See, *e.g.*, Resp.Br.4-11. But their arguments underscore the importance of the merit requirement to ensuring that defendants who never broke the law are not penalized with massive liability for fees.

Respondents do not defend the district court's ruling that they were likely to succeed on their standalone procedural due process claim. See Pet.Br.27-31. They admit that inability to pay was not a statutory defense, making an indigency hearing pointless "procedure for procedure's sake." *Fowler* v. *Benson*, 924 F.3d 247, 259 (6th Cir. 2019); see Resp.Br.4. Respondents contend that such procedure was nonetheless required by *substantive* due process,

arguing that States cannot "depriv[e] those who cannot pay of life, liberty, or property." Resp.Br.6. But the district court expressly declined to consider whether Respondents were likely to succeed on their substantive due process claim. J.A.376.n.9. Respondents cannot contend that they "prevailed" on a claim on which the district court *never ruled*. Without such a ruling, the district court's procedural due process analysis cannot stand.

Nor was Respondents' substantive due process claim meritorious. The statute provided defendants opportunities to raise their indigency in court. See Pet.Br.4,6. And as other courts of appeals held in rejecting similar claims, there is no constitutionally protected property interest for "the indigent, who cannot pay court debt, to be exempt from driver's-license suspension on the basis of unpaid court debt." *Fowler*, 924 F.3d at 258; see Pet.Br.28-29.

Because preliminary injunctions involve only an initial prediction of the likelihood of success designed "to preserve the relative positions of the parties until a trial on the merits can be held," *Starbucks Corp.* v. *McKinney*, 144 S. Ct. 1570, 1576 (2024) (quoting *University of Tex.* v. *Camenisch*, 451 U.S. 390, 395 (1981)), they do not "definitively decide the merits of anything," Pet.App.61a (Quattlebaum, J., dissenting). They therefore do not render the plaintiff a prevailing party.

II. Relief must be enduring to warrant fees, not just have "real-world effect"

Respondents also err in erasing the "requirement of 'enduring change.'" Resp.Br.36. Respondents argue that any unreversed appealable order confers prevailing-party status if it has "real-world effect." Resp.Br.25. No circuit has adopted this unclear and unbounded standard. Nor should this Court; it is contrary to the statutory text and precedent.

1. Respondents assert that a prevailing party need obtain no "enduring" change, so long as a court order "materially chang[es] the parties' legal relationship." Resp.Br.2. Although their formulation of their test varies, they appear to define a "material alteration" as a "real-world effect," even if temporary. Resp.Br.25. This argument is contrary to the statutory text; whether a party prevails turns upon its status at "the end of the suit," not whether it achieved temporary "success at different stages." Black's Law Dictionary 1352 (4th rev. ed. 1968). It is also contrary to this Court's precedent holding that the change in the parties' legal relationship must be "enduring." *Sole*, 551 U.S. at 86; see *Hewitt*, 482 U.S. at 760-61 (holding favorable "interlocutory ruling" insufficient). And although *Sole* reserved the question presented here, it unanimously recognized that "*temporary* relief gained" does not render a party prevailing. 551 U.S. at 82 n.3.

Thus, since *Sole*, the circuits have uniformly recognized that the alteration of the legal relationship must be "enduring." See, *e.g.*, Pet.App.13a

("[P]laintiff's success must be 'enduring' rather than 'ephemeral.'"); *De Jesus Nazario* v. *Morris Rodriguez*, 554 F.3d 196, 203 (1st Cir. 2009) (holding the plaintiff's "relationship with the defendants has changed in the requisite enduring manner"); *DiMartile* v. *Hochul*, 80 F.4th 443, 452 (2d Cir. 2023) (similar); *People Against Police Violence* v. *City of Pittsburgh*, 520 F.3d 226, 234 (3d Cir. 2008) (similar); *Tennessee State Conf. of NAACP* v. *Hargett*, 53 F.4th 406, 410 (6th Cir. 2022) (similar).

Conversely, this Court has not held that an order must have "real-world effect" to confer prevailing-party status. *Schaefer*, for instance, held that the plaintiff was a prevailing party without requiring proof that the judgment would confer "real-world" benefits. See pp.7-8, *supra*. And although the "dissenters in *Buckhannon*" would have held that a plaintiff prevails when it obtains "the real-world outcome it sought," the majority disagreed. *Sole*, 551 U.S. at 82 n.3; see *Buckhannon*, 532 U.S. at 605-06. In addition, *Farrar* held that "the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry." 506 U.S. at 114.

Respondents' proposed "real-world effect" rule is overbroad and unclear. Numerous appealable interlocutory orders may have some "real-world effect," including stays, temporary restraining orders, gag orders, and orders appointing receivers, in addition to preliminary injunctions. See, *e.g.*, *Marceaux* v. *Lafayette City-Par. Consol. Gov't*, 731 F.3d 488, 490 (5th Cir. 2013) (allowing interlocutory appeal of gag order);

Wright & Miller § 3922.1 (although temporary restraining orders do not fall within § 1292(a)(1), "appellate review often can be achieved"); *id.* § 3914.13 ("appeal is permitted from an order granting a stay" "[i]n some circumstances"); see p.10, *supra*. Again, many such interlocutory orders have little or nothing to do with the merits or with which party will ultimately prevail in the suit. And although Respondents emphasize the "longevity" of some preliminary injunctions, their rule would apparently apply equally to orders that become moot shortly after they are entered. Resp.Br.28,35; see, *e.g.*, *DiMartile*, 80 F.4th at 449.

Respondents' proposed rule also lacks "ready administrability." *Buckhannon*, 532 U.S. at 610. Respondents make little attempt to explain what constitutes "real-world effect." Resp.Br.25. Instead, Respondents simply assert that a court will "be []able to tell whether it has ordered a material alteration." Resp.Br.25-26. But if the test is whether the order "matters" to the plaintiff in some practical sense, that creates the same administrability problems that led this Court to reject the "central issue" test: "By focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer." *Garland*, 489 U.S. at 791. Alternatively, Respondents sometimes suggest that the question is whether the order altered an existing status quo. Resp.Br.52 (arguing that the preliminary injunction constituted a "material change" because "Plaintiffs' licenses *were* suspended, and the injunction ordered the Commissioner to '*remove* any current suspensions'"). If so, Respondents fail to explain how their version of

the status quo test functions, and how it differs from the Fourth Circuit test that Respondents dismiss as "a red herring." Resp.Br.25; see Pet.Br.38-41.

In addition, after eliminating any requirement of "relief on the merits," see Section I, *supra*, Respondents insert an inquiry into whether the order was "*undone* on the merits," Resp.Br.11 (emphasis added). Respondents provide no support for this atextual test. *Sole* held that prevailing-party status "does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." 551 U.S. at 83. It did not hold that plaintiffs prevail unless an order is "undone on the merits." To the contrary, plaintiffs do not prevail when the court ultimately enters judgment for defendants on non-merits grounds, such as immunity or untimeliness. *Hewitt*, 482 U.S. at 762. And where, as here, the court dismisses a case as moot, that final judgment dissolves the preliminary injunction. Pet.Br.36; J.A.420. Thus, when a case is dismissed as moot before a final merits judgment or conclusive determination, neither party has "prevailed" in the lawsuit.[1]

---

[1] Mootness *after* a final merits judgment or conclusive determination—such as when a permanent injunction subsequently becomes moot, see Resp.Br.38—presents entirely different questions. The plaintiff would then have "established his entitlement to some relief on the merits of his claim" before the dispute was resolved. *Hanrahan*, 446 U.S. at 757. This Court has noted, however, that the availability of fees where a case becomes moot "be-

Here, any enduring change in the parties' relationship came not from the preliminary injunction, but "because the General Assembly of Virginia decided to change the law," a decision that lacks judicial imprimatur. Pet.App.62a (Quattlebaum, J., dissenting). Respondents are not prevailing parties under Section 1988.

III. Respondents' proposed rule creates perverse incentives and penalizes defendants who did not violate the law

Respondents' test also would create perverse incentives and impede judicial efficiency while penalizing defendants who never violated the law. Respondents' assertion that their test is necessary to prevent "gamesmanship," Resp.Br.42, is unfounded.

1. Respondents argue that "no . . . problem" would arise from their test because "unanimous circuit law now holds that preliminary injunctions can suffice for fees." Resp.Br.42. But no "circuit consensus" exists; the circuits have adopted a wide variety of tests. See Pet.13-23. And Respondents reject all of these tests—including the test the Fourth Circuit adopted below—instead proposing a novel test that no circuit has ever followed. See pp.9-10,13-14, *supra*.

Under Respondents' proposed test, an appealable order with real-world effect confers prevailing-party

---

fore the losing party could challenge its validity on appeal" presents a "question of some difficulty." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 483 (1990).

status. Resp.Br.25-26. This test is ill-defined but appears to be extremely broad, potentially encompassing a host of interlocutory orders such as stays, temporary restraining orders, gag orders, and receiverships, in addition to preliminary injunctions. See pp.14-15, *supra*.

Respondents' test would eliminate significant restrictions that many circuits have adopted. The Third Circuit, for instance, has held that "merely a finding of a likelihood of success" is insufficient for fee-shifting; the district court must include a definitive merits holding in its preliminary injunction ruling. *Singer Mgmt. Consultants, Inc.* v. *Milgram*, 650 F.3d 223, 230 n.4 (3d Cir. 2011); see *McQueary*, 614 F.3d at 598 (requiring an "unambiguous indication of probable success"). Some circuits deny fees if a preliminary injunction was "hastily entered." *DiMartile*, 80 F.4th at 453. Others require that the preliminary relief be "not defeasible," *Dupuy* v. *Samuels*, 423 F.3d 714, 719 (7th Cir. 2005), or "sufficiently akin to final relief on the merits," *Northern Cheyenne Tribe* v. *Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006). Under several of these standards, preliminary injunctions rarely confer prevailing-party status. See, *e.g.*, *McQueary*, 614 F.3d at 601.

Respondents would sweep away all of these limits. They deny that prevailing-party status requires any examination of the merits at all, much less a more searching inquiry than likelihood of success. See Section I, *supra*. They also deny that there is any requirement that the relief be enduring. See Section II, *supra*.

Respondents' test would thus be a sweeping change, not a continuation of a nationwide "consensus."

This change would be highly problematic. By deleting any merits requirement, Respondents would allow fees based on orders providing "no insight into whether one party or the other will prevail at the end of the case." *McQueary*, 614 F.3d at 600. They would also allow fees based on orders that are "hastily entered" in an emergency posture. *DiMartile*, 80 F.4th at 453. Such emergency settings frequently give "defendants little opportunity to oppose," and "no time for discovery, nor for adequate review of documents or preparation and presentation of witnesses." *Sole*, 551 U.S. at 84. The "rapid timeline" for such motions also "restrict[s] the time available for the district court to consider the legal issues," sometimes to mere "hours." *DiMartile*, 80 F.4th at 454.

Respondents' proposed rule would thus vastly increase the number of cases in which defendants will be held liable for fees even though they never violated federal law. And it would encourage plaintiffs' counsel to bring cases in an emergency posture, "resulting in a hurried litigation timeline that enable[s] them to obtain provisional relief at the threshold of their case." *DiMartile*, 80 F.4th at 458. Such emergency motions burden courts and deprive defendants of a full opportunity to respond. Section 1988 does not allow "the law to be the very instrument of wrong—exacting the payment of attorney's fees to the extortionist" who obtains provisional relief on faulty claims. *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring).

Respondents contend that a "judge who feels gamed or rushed can just deny" emergency relief. Resp.Br.35. But denying emergency relief can leave plaintiffs irreparably harmed. *Camenisch*, 451 U.S. at 395. Rushed and uncertain rulings for provisional relief based on limited records are thus sometimes necessary. *Ibid*. That does not make them conclusive merits determinations sufficient to trigger fee liability.

Respondents' argument that "if defendants think they are right, they can appeal," also offers no panacea. Resp.Br.14. An appeal "is limited to the record before the district court at the time it issued the preliminary injunction." *Brotherhood of Maintenance of Way Emps.* v. *Chicago & Nw. Transp. Co.*, 827 F.2d 330, 337 n.6 (8th Cir. 1987). An appeal also considers the "likelihood of success," a much lower threshold than actual success on the merits. Pet.Br.24-25. An appeal of a preliminary injunction thus perpetuates rather than solves the procedural disadvantages to defendants. See *Camenisch*, 451 U.S. at 396. And in some cases, defendants lack any opportunity to appeal because the orders become moot shortly after they are issued. See, *e.g.*, *Fleming* v. *Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015).

Even where defendants can appeal, forcing appeals of preliminary injunctions to avoid fee liability is unwarranted and judicially inefficient. See Pet.Br.49-50; States.Br.21-23. Here, for instance, the preliminary injunction was extremely limited, requiring the Commissioner simply to alter a database not to reflect the court suspensions of a few individual Respondents' licenses. See Pet.Br.32. It thus made far

more sense for the Commissioner to litigate summary judgment than to pursue interlocutory appeal. Indeed, the fuller factual record demonstrated that the district court erred in preliminarily finding that the Commissioner, rather than the state courts, suspended licenses. Pet.Br.29.n.6. Had actual litigation on the merits occurred, it would have demonstrated that the statute was constitutional. See Pet.Br.27-29; pp.11-12, *supra*.

Respondents' test would also perversely "disincentiv[ize]" a government "to voluntarily change its conduct, conduct that may not be illegal." *Buckhannon*, 532 U.S. at 608. As here, governments may wish to change a challenged law or rule for reasons apart from the litigation, such as changed circumstances or policy decisions. See Pet.Br.49-50. Respondents' test incentivizes the prolonged existence of laws that no one wants on pain of transferring taxpayer dollars to the pockets of plaintiffs' counsel.

2. By contrast, Respondents' policy concerns with the Commissioner's bright-line test are misplaced.

First, Respondents contend that their proposed rule is necessary because "governments . . . have proved adept" at strategically mooting claims. Resp.Br.44-45. But Respondents' citations are not to cases that became moot after courts issued preliminary injunctions; their proposed rule would thus have no effect. If anything, these cases demonstrate that litigation can become moot at any stage, and that "fear

of mischievous defendants" provides no basis to "abrogate the 'merit' requirement of [this Court's] prior cases." *Buckhannon*, 532 U.S. at 606, 608.

Regardless, these cases do not suggest a widespread problem with governments "strategically mooting cases." Resp.Br.42. *South Bay United Pentecostal Church* v. *Newsom*, 141 S. Ct. 716 (2021), for example, is not a mootness case at all. And *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U.S. 14 (2020), *refused* to dismiss the case as moot because the challenged COVID restriction was likely to recur. *Id.* at 20. The case thus confirms that a proper application of mootness doctrine will typically prevent defendants from strategically altering their conduct to moot cases before a merits ruling. "[A] defendant's voluntary cessation of a challenged practice will moot a case only if the defendant can show that the practice cannot reasonably be expected to recur." *Federal Bureau of Investigation* v. *Fikre*, 601 U.S. 234, 241 (2024) (cleaned up). This standard is a "formidable burden" for "governmental defendants no less than for private ones." *Ibid.*

The dissent in *New York State Rifle & Pistol Ass'n, Inc.* v. *City of New York*, 590 U.S. 336 (2020), expressed concerns with defendants raising "a spurious claim of mootness" to avoid fees. *Id.* at 360 (Alito, J., dissenting). But it also remarked that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change" for fee-shifting. *Ibid.* (quoting *Buckhannon*, 532 U.S. at 605). And it further explained

that a "case is not dead" where plaintiffs "got most, but not all, of the prospective relief they wanted," or could seek damages—including "nominal damages"—for a constitutional violation. *Id*. at 354-55. The majority did not disagree, remanding the case for the lower courts to consider claims for additional prospective relief or damages. *Id*. at 339. Thus, far from showing rampant government "gamesmanship" evading fees, the case demonstrates that even where the law changes during litigation, the availability of damages for most constitutional claims typically prevents mootness. See *Buckhannon*, 532 U.S. at 608-09.[2]

Second, Respondents offer a parade of horribles, positing "hypothetical plaintiffs—whose cases become moot after they succeed" on a preliminary injunction. Resp.Br.16-17,23-24. But Respondents fail to explain why most of these cases would be moot at all. Some—such as a Governor's unilateral change to a declaration, Resp.Br.16—appear to be classic examples of voluntary cessation of challenged conduct. Others—such as exclusions from school on the basis of race, or violations of constitutional rights to free speech, free exercise, or bear arms—would give rise to damages claims, including for nominal damages. *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021) ("an award of

---

[2] Courts also have discretion in appropriate cases to "consolidate" preliminary injunction proceedings "with the trial on the merits." Fed. R. Civ. P. 65(a)(2). Such an order would confer prevailing-party status. Thus, attorney's fees could be available even in time-limited disputes involving only prospective relief.

nominal damages by itself" prevents mootness); *Farrar*, 506 U.S. at 112 ("[A] plaintiff who wins nominal damages is a prevailing party under § 1988."). Respondents' only answer is that plaintiffs' counsel have "better things to do than litigate nominal damages." Resp.Br.48. Counsel may well prefer not to have to prove their claims before seeking hefty fee awards. But this preference provides no basis to erase Section 1988's merit requirement.

Respondents' contention that "the government" engaged in "gamesmanship" here also fails. Resp.Br.44. Respondents ignore the separation of powers. The case became moot because the legislature repealed the statute. Pet.App.8a. The legislature is not a party to the suit; it is a separate and independent branch of government. Pet.Br.42. The defendant Commissioner had no power to decide whether or when the legislature would act. See Pet.Br.44.n.7. The possibility that an independent branch of government may repeal a statute during litigation is not gamesmanship, much less "a free pass" for executive officials "to violate civil rights . . . and still evade attorney's fees." Resp.Br.13.

Further, the record does not support Respondents' contention that the legislature repealed the statute to moot the litigation. Respondents point to a remark by a single legislator—who had sponsored repeal bills before the preliminary injunction—that he "hope[d]" the injunction would bolster his efforts. Resp.Br.7. But in fact, a subcommittee continued to block repeal bills, and the statute was not repealed until well over a year after the preliminary injunction, hardly showing that the legislature "sped" to moot the case. Resp.Br.7;

Pet.Br.8-9. "[S]hifting political winds" caused the repeal, not the preliminary injunction. *Stinnie* v. *Holcomb*, 396 F. Supp. 3d 653, 658-59 (W.D. Va. 2019). Following the 2019 election, new leadership who opposed the license-suspension policy came to power and repealed the entire statutory regime—not just the narrow aspects that Respondents challenged. Pet.Br.9. Respondents also point to a letter from the Commissioner to the repeal bill's sponsor, Resp.Br.8-9, suggesting that the bill include an "emergency enactment clause" so that "the pending litigation [would be] dismissed," Pet.Br.44.n.7. But Respondents fail to mention that the legislature *rejected* that suggestion. Thus, the letter only underscores the legislature's independence.

The plain text of Section 1988, as well as this Court's precedent, requires that a plaintiff actually prevail on the merits or obtain final judgment before the defendant can be on the hook for a potentially massive fee award. Pet.Br.16-18. Where the merits "will never be determined" because a case becomes moot, the default American Rule applies. *Buckhannon*, 532 U.S. at 606.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

JASON S. MIYARES
Attorney General of Virginia

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

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

Counsel for Petitioner