IN THE SUPREME COURT OF THE UNITED STATES

No. A-___

RICHARD D. HOLCOMB, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES,
Applicant.

v.

DAMIAN STINNIE, ET AL.,
Respondents.

APPLICATION TO THE HON. JOHN G. ROBERTS, JR. FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to Rules 13.5 and 30.2 of this Court, Applicant Commissioner of the Virginia Department of Motor Vehicles[1] ("the Commissioner") hereby moves for an extension of time of 14 days, to and including Monday, November 20, 2023, within which to file a petition for a writ of certiorari to review the judgment in this case. The United States Court of Appeals for the Fourth Circuit rendered a decision on rehearing *en banc* on August 7, 2023. *Stinnie v. Holcomb*, 77 F.4th 200 (4th Cir. 2023) (App., *infra*, 1–58). Unless extended, the deadline to file a petition is Monday, November 6, 2023. This Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

In support of its request, the Commissioner states as follows:

[1] Richard D. Holcomb is the former Commissioner. The current Commissioner is Gerald Lackey.

1. This case raises important questions about the meaning of "prevailing party" under 42 U.S.C. § 1988. It arises from a constitutional challenge to now-repealed Virginia Code § 46.2-395, which required courts to revoke drivers' licenses of those convicted of a crime for failure to pay court fees. Respondents ("Plaintiffs") brought a putative class action in the United States District Court for the Western District of Virginia ("District Court"), which granted a preliminary injunction enjoining the enforcement of the statute against the named Plaintiffs and removing current suspensions on their licenses where there were no other restrictions. *Stinnie v. Holcomb*, 355 F.3d 514, 520 (W.D. Va. 2018). While this injunction was in effect, summary judgment and class certification motions were pending, and the case was awaiting trial, the Virginia General Assembly repealed the law, mooting the case and leading to a stipulation of dismissal.

2. Plaintiffs then sought fees under 42 U.S.C. § 1988, asserting that they achieved "prevailing party" status as a result of the limited preliminary injunction. Relying on *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), the District Court denied Plaintiffs' petition for fees, as *Smyth* held that the entry of a preliminary injunction, by itself, does not confer prevailing party status under 42 U.S.C. § 1988. *Stinnie v. Holcomb*, No. 3:16-cv-00044, 2021 WL 2292807 (W.D. Va. 2021). Plaintiffs appealed, and a panel of the Court of Appeals for the Fourth Circuit affirmed. *Stinnie v. Holcomb*, 37 F.4th 977 (4th Cir. 2022). Plaintiffs then moved for rehearing *en banc,* which the court granted. App., *infra*, 59–60. In a published decision, a divided (7–4) *en banc* court vacated and remanded. App.,

infra, 1–58. The majority overruled *Smyth*, holding that "[w]hen a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney's fees." *Id.* at 18.

3. Judge Quattlebaum dissented, joined by Judges Agee, Richardson, and Rushing. They would have affirmed and declined to overrule *Smyth* because a preliminary injunction granted on a mere "likelihood of success" "only predicts the outcome of a future decision" and "does not definitively decide the merits of anything." *Id.* at 50. The dissent also explained that, because the Virginia General Assembly provided the "lasting change" by repealing the law, the relief from the preliminary injunction was not sufficiently "enduring," as required by *Sole v. Wyner*, 551 U.S. 74 (2007). *Id*. at 52–53.

4. The Commissioner anticipates filing a petition for a writ of certiorari regarding two issues dividing the Fourth Circuit here and courts of appeals elsewhere: (1) whether, to prevail "on the merits" under 42 U.S.C. § 1988, a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, and (2) whether, to obtain an "enduring" change in the parties' legal relationship under 42 U.S.C. § 1988, a party must receive this change from a court order, as opposed to a nonjudicial act that moots the case. The resolution of both issues is important to clarifying the meaning of "prevailing party," a legal term of art present in "numerous statutes authorizing

awards of attorney's fees." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Hum. Res.*, 532 U.S. 598, 603 & n.4 (2001). Additionally, both issues must be resolved to ensure predictability of the circumstances in which fee awards are available under the law.

5. There are well-established, entrenched splits on both issues. *See Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715–16 (9th Cir. 2013) ("Lower courts have struggled to decide whether the requirements for prevailing-party status are met by a plaintiff who wins a preliminary injunction but does not litigate the case to final judgment."); *Dearmore v. City of Garland*, 519 F.3d 517, 526 (5th Cir. 2008) ("Without a Supreme Court decision on point, circuit courts considering this issue have announced fact-specific standards that are anything but uniform."); *Stinnie*, 77 F. 4th at 230 (App., *infra*, 57) (Quattlebaum, J., dissenting) ("[T]he standards and reasoning from these decisions are quite diverse . . . . So let's be clear. There is no unanimity of the circuit courts on this issue."). The Fourth Circuit's decision places that court on the wrong side of the circuit splits on both issues and conflicts with this Court's precedent.

6. The Commissioner's below noted counsel respectfully requests a 14-day extension of time, to and including November 20, 2023, within which to file a petition for a writ of certiorari. Below noted counsel recently has had and continues to have significant briefing and oral argument obligations—including oral argument in *Reid v. James Madison University*, No. 22-1441 (4th Cir. Oct. 27, 2023); oral argument in *Richardson v. Commonwealth*, No. 220499 (Va. Nov. 2, 2023); oral

argument in *Commonwealth v. Delaune*, No. 230127 (Va. Nov. 1, 2023); a brief in *Fogleman v. Commonwealth*, No. 230741 (Va. Nov. 6, 2023); and a brief and oral argument in *Ass'n of Clean Energy Professionals v. Va. State Air Pollution Control Bd.*, No. CL-2023-0012061 (Va. Cir. Ct. Oct. 25, 2023; Oct. 27, 2023)—and has numerous other upcoming deadlines in the Fourth Circuit, the Court of Appeals of Virginia, and the Supreme Court of Virginia.

For the foregoing reasons, the Commissioner requests that a 14-day extension of time, to and including Monday, November 20, 2023, be granted within which the Commissioner may file a petition for a writ of certiorari.

Respectfully submitted,

/s/ Maya M. Eckstein
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