No. 23-621

In The Supreme Court of the United States

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

Petitioner,

v.

DAMIAN STINNIE, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF GEORGIA, ALABAMA, ARKANSAS, FLORIDA, IDAHO, INDIANA, IOWA, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTERESTS OF THE *AMICI CURIAE*[1]

This case is about how to interpret the term "prevailing parties," the statutory threshold for deciding when parties in certain civil rights lawsuits are eligible for attorney's fees. 42 U.S.C. § 1988. The States have obvious sovereign interests in the proper construction of this threshold because state officials are often defendants in these cases, and the States will inevitably pay any fee awards against them. At the very least, the States need clear and predictable rules for when they might be exposed to such awards so they can structure their conduct—budgeting, litigation, and otherwise—accordingly.

Unfortunately, the circuit courts have not supplied clear, predictable rules for answering the question of fee eligibility presented by this case: When can a preliminary injunction serve as the basis for attorney's fees if the party seeking them never wins a final merits ruling? This question often arises when a state takes steps that resolve a plaintiff's concerns—for example, amending a voter ID law or changing an enforcement policy—after a preliminary injunction is issued. If the state's actions will expose it to a substantial fee award, the state needs to know that in advance so it can make an informed decision whether to press on with the lawsuit. Without clear rules to guide that decision, states are left to gamble with public money. The *amici* States therefore urge this Court to step in and clear up this

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[1] *Amici* have notified counsel for all parties of their intention to file this brief. *See* Sup. Ct. Rule 37.2.

question so states can make sound litigation and policy decisions on the public's behalf.

SUMMARY OF THE ARGUMENT

The petition identifies a recurring issue of great importance to the States. Under 42 U.S.C. § 1988 and a number of other federal statutes, plaintiffs regularly seek, and courts sometimes impose, substantial fee awards against state officials where the plaintiffs obtain a preliminary injunction but no final relief because the case becomes moot. Yet the circuit courts have not established clear or consistent standards for when, if ever, attorney's fees are authorized under these circumstances. Instead, the circuits apply amorphous, subjective tests that fall far short of this Court's repeated calls for "ready administrability" in fee eligibility standards. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001) (quoting *City of Burlington v. Dague*, 506 U.S. 557, 566 (1992)). These unstable and often contradictory tests impose needless costs on the States and their residents in the form of protracted secondary litigation over fees. This uncertainty then complicates the States' litigation and policy decisions, and it produces a perverse incentive to continue litigating cases to final judgment to avoid spending the public's money on attorney's fees.

Many circuits, including the Fourth Circuit here, allow fee awards to preliminary injunction winners under circumstances that conflict with the plain language of § 1988 and this Court's precedents. Those

precedents make clear that a party is not a "prevailing party" entitled to attorney's fees unless the party secures relief that is both (1) court-ordered and (2) enduring. Cobbling together these requirements from a preliminary injunction (court-ordered, but not enduring) and nonjudicial circumstances that moot the case (perhaps enduring, but not court-ordered) is not good enough. This Court should grant the petition to make that clear for all.

ARGUMENT

I. The question presented is recurring and important to the States.

The question presented is when, if ever, a plaintiff who wins a preliminary injunction but not a merits ruling is a "prevailing party" entitled to attorney's fees under 42 U.S.C. § 1988. This question is a recurring one because plaintiffs regularly seek attorney's fees in these circumstances, which mostly arise when the defendant's (or a third party's) actions resolve the plaintiff's concerns after a preliminary injunction is issued but before the court decides the merits of the case. And it is important for this Court to provide a clear answer to this question because the circuit courts have not; their tests for determining fee eligibility are subjective and unpredictable. This imposes unnecessary costs on the States and their residents.

A. Plaintiffs regularly seek and courts impose substantial fee awards against state officials based on preliminary injunctions when cases end without a merits judgment in the plaintiff's favor.

The plaintiffs in this case failed to win a merits ruling on any of their claims against the Commissioner before Virginia's independent and voluntary actions gave the plaintiffs what they sought and thus mooted their case. Yet, because the district court had earlier issued a preliminary injunction, the Fourth Circuit deemed them "prevailing parties" under § 1988 and put Virginia on the hook for hundreds of thousands of dollars in fees and expenses. *See* Mot. For Att'y Fees at 23, *Stinnie v. Holcomb*, No. 21-1756 (4th Cir. Aug. 21, 2023) (requesting $768,491.70 in appellate fees and expenses alone). The plaintiffs did not win their lawsuit, but now that it faces the possibility of a near-seven-figure fee award, Virginia can hardly be faulted for thinking it lost.

Unfortunately for the States, Virginia is not an outlier. Plaintiffs regularly seek and courts have been willing to impose substantial fee awards against state officials under § 1988 based on this same combination: a preliminary injunction, and a case that ends without the plaintiffs having won a merits judgment.

Take Georgia, for example. In *Common Cause/Georgia v. Billups*, the district court issued a preliminary injunction against enforcement of a voter ID law. 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005). But after

Georgia enacted a new law making it easier for voters to comply with the ID requirement, the court ultimately denied permanent injunctive relief because Georgia's "compelling interest in preventing fraud in voting" outweighed any burden that the updated ID requirement might have on the right to vote. 504 F. Supp. 2d 1333, 1382–83 (N.D. Ga. 2007), *aff'd in relevant part*, 554 F.3d 1340, 1355 (11th Cir. 2009). So the plaintiffs didn't just fail to win a merits judgment; they lost the case. Yet the State was forced to pay $112,235.03 in fees because the plaintiffs had obtained a preliminary injunction against the old law. 554 F.3d at 1356; No. 4:05-cv-0201, 2007 WL 9723985, at *22 (N.D. Ga. Dec. 27, 2007).

More recently, in *Common Cause Georgia v. Secretary, State of Georgia*, the plaintiffs argued that security issues in Georgia's voter registration system could result in the erroneous rejection of some provisional ballots. 17 F.4th 102, 105 (11th Cir. 2021). The district court granted a temporary restraining order—the most preliminary form of relief—directing Georgia's Secretary of State to take steps to ensure the accuracy of the November 2018 election results. *Id.* at 106. Before the district court could consider the plaintiffs' request for permanent relief, however, the State enacted two new voting laws that resolved the plaintiffs' concerns, and the parties agreed to dismiss the action with prejudice. *Id.* Based solely on the temporary restraining order, which the plaintiffs themselves acknowledged was "a very, very narrow order," the district court

awarded $166,210.09 in fees and expenses. *Id.* at 105–06.

Other states, and their political subdivisions too, have been made to pay large fee awards under the same basic set of circumstances:

- In *Chrysafis v. Marks*, the district court actually *denied* the plaintiffs' request to preliminarily enjoin a New York law limiting evictions during the COVID pandemic and dismissed their case. No. 21-cv-2516, 2023 WL 6158537, at *1 (E.D.N.Y. Sept. 21, 2023). The plaintiffs then secured a temporary injunction against the law pending appeal, but the law automatically expired by its own terms before the plaintiffs' appeal was resolved. *Id.* at *2. The Second Circuit dismissed the appeal as moot, but New York was subsequently ordered to pay almost $350,000 in fees and costs—based on nothing more than an injunction pending appeal. *Id.* at *3, 12.

- In *Tennessee State Conference of NAACP v. Hargett*, the plaintiffs challenged a suite of Tennessee laws regulating voter registration drives. 53 F.4th 406, 408–09 (6th Cir. 2022). The plaintiffs secured a preliminary injunction halting enforcement of the laws while their legality was under review, but Tennessee repealed the challenged laws less than seven months later—before the plaintiffs won any permanent relief on the merits—and the parties agreed to dismiss the case. *Id.* at 409. Tennessee was nevertheless ordered to pay roughly $800,000 in fees and expenses. *See*

No. 3:19-cv-00365, 2021 WL 4441262, at *11 (M.D. Tenn. Sept. 28, 2021).

- In *Kansas Judicial Watch v. Stout*, candidates for judicial office obtained a preliminary injunction preventing the Kansas Commission on Judicial Qualifications from disciplining them for responding to a candidate questionnaire. 653 F.3d 1230, 1233–34 (10th Cir. 2011). The Kansas Supreme Court revised the challenged canons before the district court decided the merits of the challenge. *Id.* at 1234. Still, Kansas was made to pay $151,470.08 in fees. *See* No. 06-4056, 2012 WL 1033634, at *14 (D. Kan. Mar. 27, 2012).

- In *People Against Police Violence v. City of Pittsburgh*, the plaintiffs challenged Pittsburgh's ordinance regulating parades and crowds in public forums. 520 F.3d 226, 229–30 (3d Cir. 2008). The court preliminarily enjoined the ordinance, and then the city passed a revised ordinance that satisfied the plaintiffs' concerns. *Id.* The parties never litigated the merits of the original ordinance, but the city still paid $103,718.89 in attorney's fees. *Id.*

- In *Rogers Group, Inc. v. City of Fayetteville*, the plaintiff challenged a city ordinance limiting its ability to operate a limestone quarry just outside the city limits. 683 F.3d 903, 904 (8th Cir. 2012). The plaintiff obtained a preliminary injunction, but the city independently and voluntarily repealed the ordinance before the court could rule on the plaintiff's request

for permanent relief. *Id.* Despite the absence of any decision on the merits of the plaintiff's claims, the city was forced to pay $110,419.71 in fees and costs. *Id.* at 907.

- In *Watson v. County of Riverside*, the plaintiff sought and obtained a preliminary injunction preventing the county from introducing a police report in his administrative termination proceedings. 300 F.3d 1092, 1094 (9th Cir. 2002). The court later granted judgment for the defendants on all claims except one—on which the court merely denied summary judgment—but because the administrative hearing was over, that claim was moot. *Id.* The county nevertheless paid $153,988.41 in fees, including fees for post-preliminary injunction work, even though the plaintiff did not prevail on the legal merits of any claim. *Id.* at 1095, 1097.

And those are just § 1988 cases. The same "prevailing party" language courts have used to award attorney's fees in moot § 1983 cases based on preliminary injunctions appears in many other federal statutes. *See* 15 U.S.C. § 1117(a) (Lanham Act); 20 U.S.C. § 1415(i)(3)(B)(i) (Individuals with Disabilities Education Act); 28 U.S.C. § 2412(d)(1)(A) (Equal Access to Justice Act); 42 U.S.C. § 2000e-5(k) (Civil Rights Act of 1964); 42 U.S.C. § 3613(c)(2) (Fair Housing Act); 42 U.S.C. § 12205 (Americans with Disabilities Act); 52 U.S.C. § 10310(e) (Voting Rights Act).

- In *Douglas v. District of Columbia*, a plaintiff sued under the Individuals with Disabilities

Education Act and obtained a preliminary injunction directing the public school to permit him to return to and complete a program for at-risk students. 67 F. Supp. 3d 36, 39 (D.D.C. 2014). Because the plaintiff was allowed to return to school, the case was mooted before any merits decision. *Id*. at 40. But the district court ordered the school system to pay $17,009.62 in attorney's fees and costs under 20 U.S.C. § 1415(i)(3)(B)(i). *Id.* at 39, 44.

- In *Tri-City Community Action Program, Inc. v. City of Malden*, the plaintiffs wished to retrofit a house to bring it into compliance with the ADA. 680 F. Supp. 2d 306, 308 (D. Mass. 2010). They sought and obtained a preliminary injunction preventing the city from interfering. *Id.* at 310. The construction ended, mooting the suit, before any further litigation occurred. *Id.* at 310–11. The City paid $49,999 in fees and costs under 42 U.S.C. § 3613(c)(2). *Id.* at 317.

- And in *Davis v. Perry*, the plaintiffs challenged a redistricting plan adopted by the Texas legislature. 991 F. Supp. 2d 809, 815 (W.D. Tex. 2014). The court enjoined the plan because it had not been precleared under the Voting Rights Act, and the court issued its own interim plan for the 2012 election. *Id.* at 816. After preclearance was denied by a different district court, the Texas Legislature passed a new plan, which mirrored the court's interim plan, mooting the case. *Id.* at 818. The district court ordered Texas to pay $363,378.43 in fees and costs under § 1988 and § 10310(e)

> because the plaintiffs obtained "judicially sanctioned relief." *Davis v. Abbott*, 781 F.3d 207, 213–14 (5th Cir. 2015). This time, however, the court of appeals reversed the fee award. *Id.* at 215–18 (holding that the plaintiffs were not prevailing parties because the preliminary relief did not arise from a prediction of future success on the merits).

In short: What happened to Virginia here happens a lot.

B. The circuit courts have failed to establish a clear and consistent test for when a preliminary injunction supports a fee award in a case that ends without a merits judgment.

Because this question of fee eligibility for preliminary injunction winners is a recurring one, it stands to reason that the rule for deciding it, like standards for fee eligibility in general, should be clear and easy to administer. *See Buckhannon*, 532 U.S. at 610. But most circuit courts have not provided such a rule. In addition to coming up with a number of different and often conflicting formulations of a rule to govern fee eligibility (as the petition demonstrates), circuit courts have mostly chosen amorphous, fact-specific rules over bright lines. *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008) ("[C]ircuit courts considering this issue have announced fact-specific standards that are anything but uniform.").

Only a few circuit courts have established a bright-line rule to govern the fee eligibility question

presented here. In the Third Circuit—and, until now, the Fourth Circuit—a plaintiff who wins a preliminary injunction is not a "prevailing party" on that basis alone because the plaintiff has not won anything on the merits. *See Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc); *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002), *overruled by Stinnie v. Holcomb*, 77 F.4th 200 (4th Cir. 2023) (en banc).[2] The First Circuit similarly holds that preliminary relief does not confer prevailing party status, at least where the opposing party "never receive[s] a fair opportunity to contest" the merits on a fully developed record. *Sinapi v. R.I. Bd. of Bar Exam'rs*, 910 F.3d 544, 551–52 (1st Cir. 2018).

Other circuits' rules are messier. Take, for instance, the Sixth Circuit, whose test is especially hard to pin down. The circuit's leading case on the question of fees for preliminary injunction winners never even articulated a clear standard, instead describing the inquiry as "contextual and case-specific." *McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir. 2010); *see also Hargett*, 53 F.4th at 410–11 (describing "a spectrum of cases" along which the relief granted ranges from "fleeting" to "enduring," the difference being only "one of degree").

The Eighth Circuit, too, injects needless subjectivity into this inquiry. Its test puts dispositive weight on

[2] Even the Third Circuit left room for uncertainty, however. In *Singer*, that court described a different case as "that rare situation where a merits-based determination is made at the injunction stage" and this *did* support a fee award. 650 F.3d at 229.

whether a preliminary injunction "merely maintains the status quo." *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006). Yet that question appears to turn not simply on whether the preliminary injunction preserved the existing state of affairs, but rather on a subjective determination of how "thorough[ly]" the district court considered the merits of the claim at issue in granting the injunction. *Compare id.* (denying a fee award after the defendants' voluntary action mooted the case because, although the preliminary injunction order addressed the likelihood of success on the merits, it "did not discuss whether those claims would entitle the Tribes to final relief on the merits against the Secretary"), *with Rogers Grp.*, 683 F.3d at 911 (granting a fee award based on a preliminary injunction that prevented new quarry regulations from going into effect because the order "engaged in a thorough analysis of the probability that Rogers Group would succeed on the merits of its claim," even though the injunction just maintained the real world status quo). The Second Circuit has likewise denied prevailing party status where a preliminary injunction, although supposedly merits-based, was premised on a "hasty and abbreviated" analysis. *DiMartile v. Hochul*, 80 F.4th 443, 451–54 (2d Cir. 2023). Exactly how "hasty" or "abbreviated" the analysis must be, however, was left unanswered.

Other circuits introduce uncertainty into their tests by asking whether the preliminary injunction was based on an "unambiguous indication of probable success on the merits" as opposed to a mere balancing of the equities in favor of the plaintiff. *Dearmore*, 519

F.3d at 524; *Kan. Judicial Watch*, 653 F.3d at 1239 (same); *see also*, *e.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 948 (D.C. Cir. 2005) (affirming fee award to a preliminary injunction winner and emphasizing that the "Milk Producers secured a preliminary injunction in this case largely because their likelihood of success on the merits was never seriously in doubt"). But a preliminary injunction, by its "very nature," is a "flexible" remedy that precludes "wooden application of the probability test." *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35–36 (2d Cir. 2010) (quotation omitted). Deciding whether the district court examined the merits "serious[ly]" enough in that context is a fraught endeavor, *id.*, and a particularly "unstable threshold to fee eligibility," *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989).[3]

In addition to the fuzzy "is it sufficiently merits-based?" inquiry, at least the Fifth Circuit has added

[3] This difficulty is compounded by the "bewildering variety of formulations" courts use to decide whether the likelihood of success on the merits is high enough to secure a preliminary injunction. 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.3 (3d ed. 2022) (listing fourteen different articulations). Many courts allow the requisite likelihood of success to increase or decrease on a sliding scale depending on the strength of the other preliminary-injunction factors. *See*, *e.g.*, *Hoosier Energy Rural Elec. Coop. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) ("How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief."); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C. Cir. 1998); *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017); *Citigroup Glob. Mkts., Inc.*, 598 F.3d at 36–38 & n.5 (all similar).

into its test the knotty question whether the preliminary injunction also "cause[d] the defendant to moot the action." *Dearmore*, 519 F.3d at 524; *see also Amawi v. Paxton*, 48 F.4th 412, 417–18 (5th Cir. 2022) (doubling down on *Dearmore*'s causation element). That question pushes courts not only to assess motives and mental states of government officials, but also to make a subjective judgment about just how strong the causative link between the injunction and the mooting action has to be. Did the defendants moot the action because they were enjoined, for some other reason, or for a combination of reasons? If the latter, which reason did they care about most? Hardly the stuff of "ready administrability." *Buckhannon*, 532 U.S. at 609–10 (quotation omitted); *see also Garland*, 489 U.S. at 791 (rejecting the "central issue" test for the "prevailing party" question because, "[b]y focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer," since it "appears to depend largely on the mental state of the parties").

With its decision here, the Fourth Circuit adds to the confusion. The court attempts to cobble together a "synthesize[d]" test based on the formulae applied in other circuits. *See Stinnie*, 77 F.4th at 216–17. But, as explained above and as even the Fourth Circuit acknowledges, the other circuits' tests are hardly models of clarity or consistency. *See id.* at 216 (recognizing that "there are some differences in the way [other circuits] assess prevailing party status" and many "impose additional, fact-specific barriers to prevailing

party status"). And the Fourth Circuit's new test suffers from the same ambiguity as other circuits'. It confers prevailing party status where a preliminary injunction is based on a likelihood of success on the merits, *id.*, but fails to explain how much of a likelihood is required or how thorough the court's merits analysis must be, *see* Pet. at 30–32. And it says that a party has secured enduring court-ordered relief if the preliminary injunction "lasts for as long as it is needed" and the case subsequently becomes moot such that the preliminary injunction cannot be "undone," *Stinnie*, 77 F.4th at 216–17, but fails to explain how the case could be mooted by anything other than a legislative act, which is decidedly *not* court-ordered, *see* Pet. at 33–35.

The circuit courts are deeply divided on the question of when preliminary injunction winners are "prevailing parties," and the confusing tests they have devised to answer that question—which vary significantly from circuit to circuit—provide no certainty for anyone.

C. Messy and unpredictable tests for fee eligibility impose needless costs on the States and their residents.

The circuit courts' amorphous, unpredictable tests are not just trouble for district and circuit courts trying to apply them; they are also costly in a number of ways for states and their officials.

First, these tests impose the same obvious cost as any "unstable threshold[s] to fee eligibility": a second major litigation when the case was supposed to be all

but over. *Garland*, 489 U.S. at 791. Time and again this Court has rejected complicated rules for fee eligibility to avoid subjecting parties to the needless costs—both time and resources—of litigating over fees. The Court rejected the "central issue" test for just this reason. *Id.* ("Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension."). Same with the "catalyst theory" tossed away in *Buckhannon*, 532 U.S. at 609–10 (rejecting the theory because it required a "highly factbound" and "nuanced 'three thresholds' test").

Second, these tests frustrate the States' ability to make informed litigation and policy decisions. When deciding whether and how to defend against a lawsuit, a state must balance a number of competing interests, including defending duly enacted laws, implementing effective policies, safeguarding citizens' rights, and protecting the public fisc. *See*, *e.g.*, *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002) (explaining that government lawyers have ethical duties to protect the public interest and the public fisc); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. Rev. 789, 789 (2000). A state's exposure to attorney's fees is an important variable in that calculus, and it ought to be a controllable one; the state should remain exposed to a costly fee award only so long as it continues the litigation, since fees are usually allowed only if the plaintiff actually

wins the case. But the circuit courts' tests replace this modicum of control with uncertainty because they often allow fee awards even when a state decides to stop litigating—for instance, because changing a law would better serve the public interest—after a preliminary injunction is entered. And worse, unlike before the preliminary injunction, the state can no longer assess its exposure to a fee award simply by evaluating the merits of the claims against it. Instead, it must try to predict the outcome of a subjective, "context-specific," and inconsistently applied legal test to figure out whether amending a law or changing a policy will also subject the state to a six-figure fee award.

Finally, in addition to needlessly complicating the States' litigation and policy decisions, most of the circuits' tests distort the States' incentives in making those decisions. *See Evans v. Jeff D.*, 475 U.S. 717, 734–35 (1986) (explaining that uncertainty regarding fee exposure often prevents settlement, especially in § 1983 litigation where fee awards often represent "the most significant liability in the case" (quotation omitted)). The specter of high fee awards is usually a disincentive to litigate: All else equal, rational parties will try to avoid paying attorney's fees of six or seven figures, and the surest way to avoid that is to resolve the dispute before either party wins the case (and thus can be called a "prevailing party"). *See id.* at 733 (explaining that settlement is often in the best interests of both plaintiffs and defendants because it offers cost certainty and ensures relief "at an earlier date without the burdens, stress, and time of litigation" (quoting

Marek v. Chesny, 473 U.S. 1, 10 (1985))). And states should be especially averse to spending the public's money on such fees instead of for the public good.

But that incentive is reversed by unpredictable rules that can result in fee awards to a preliminary injunction winner. *See id.* at 736–37 (predicting that "parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby . . . unnecessaril[y] burdening the judicial system, and disserving civil rights litigants"). Under the shadow of such rules, the logical move for states that wish to avoid spending the public's money on large fee awards is to litigate cases to the hilt rather than explore other options that might better serve the public interest. *See Buckhannon*, 532 U.S. at 608 (explaining that a defendant may be deterred from "altering its conduct," especially if the conduct "may not be illegal," if doing so will result in a fee award). After all, under these rules, a state's alternatives to continuing litigation—for example, amending a challenged law or regulation, reversing a challenged action, or declining to enforce a challenged policy—could actually lock in a substantial fee award against it. *See*, *e.g.*, *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717–18 (9th Cir. 2013) (affirming a fee award because the city's compromise solution with the plaintiffs "transformed what had been temporary relief capable of being undone . . . into a lasting alteration of the parties' legal relationship"); *Dearmore*, 519 F.3d at 526 (holding that the plaintiff was a prevailing party, despite not obtaining a final judgment, because the city amended

the ordinance rather than litigating to finality); *People Against Police Violence*, 520 F.3d at 234 (same).

Consider, for example, how *Common Cause/Georgia v. Billups* and *Common Cause Georgia v. Secretary, State of Georgia* have the potential to shape Georgia's response to future § 1983 suits. In the former, the court issued a preliminary injunction against enforcement of Georgia's voter ID law. *Billups*, 554 F.3d at 1346. In response, Georgia enacted a new voter ID law, and it ultimately defended the law successfully because the court held that the State's interest in preventing voter fraud outweighed any burden on voters. *Id.* at 1348. Given the district court's holding, Georgia might well have prevailed on the merits had it defended the original law, too. But because Georgia chose a legislative solution instead, it was rewarded with a $112,235.03 bill for attorney's fees. *Billups*, 2007 WL 9723985, at *22. And in the latter case, although there was no court order requiring it to do so, Georgia took legislative steps to remedy the plaintiffs' concerns about the potential for error in the State's procedures for handling provisional ballots. *Sec'y, State of Georgia*, 17 F.4th at 106. That left the State on the hook for $166,210.09 in fees and expenses. *Id.* at 105–06. The lesson from these cases is doubly clear: Even if the public interest might otherwise be best served by a legislative fix, Georgia should litigate to the bitter end if it wants to protect the public fisc.

II. The Fourth Circuit below, and other circuit courts, apply tests for fee eligibility that conflict with this Court's precedents.

Section 1988 authorizes courts to award a reasonable attorney's fee to a "prevailing party" in civil rights actions. That term of art imposes a pair of basic requirements for fee eligibility. First, the party must have won a "court-ordered 'change in the legal relationship between'" the parties. *Buckhannon*, 532 U.S. at 604 (quoting *Garland*, 489 U.S. at 792) (alterations adopted). Thus, *Buckhannon* rejected the circuit courts' "catalyst theory" of fee eligibility, under which they had allowed a fee award "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601. Second, the requisite court-ordered change in legal relationship must be "enduring," in the sense that the ordered relief lives on after the case is closed. *Sole v. Wyner*, 551 U.S. 74, 86 (2007). In *Sole*, for example, winning a preliminary injunction against enforcement of a state rule prohibiting nudity in state parks did not make the plaintiff a prevailing party because by the end of the case, she had lost on the merits and the challenged rule remained in place. *Id.* In short, a "prevailing party" is one who, at the end of the day, wins the lawsuit; they get their desired court-ordered and enduring change in the legal relationship between the parties.

The decision below departed from this straightforward test. As the petition explains, the district court's preliminary injunction was not an *enduring* victory for the plaintiffs because it provided only temporary relief

pending the district court's resolution of their request for a permanent injunction. *Stinnie*, 77 F.4th at 203–04. Indeed, the preliminary injunction was in effect for less than four months before the Virginia General Assembly, on its own initiative, paused enforcement of the State's license suspension scheme. *Id.* at 204; Doc. 143 at 9, *Stinnie v. Holcomb*, No. 3:16-cv-00044 (W.D. Va. Apr. 23, 2019). The preliminary injunction, moreover, "did not give" the plaintiffs everything they asked for. *Stinnie*, 77 F.4th at 228 (Quattlebaum, J., dissenting). They requested both temporary and permanent relief enjoining enforcement of the license suspension statute, but the district court granted only the former. *Id.* at 219. In other words, the plaintiffs may have "got[ten] what they wanted" eventually, but "they did not get what they wanted because a federal court decided the merits of their challenge." *Id.* at 227; *see also id.* at 228 (noting that the district court's preliminary injunction was necessarily "ephemeral" (quoting *Sole*, 551 U.S. at 86)). And the real-world outcome that actually did end the lawsuit was not *court-ordered*; it resulted instead from Virginia's independent and voluntary decision to amend its laws. *Id.* at 228.

Sole and *Buckhannon* respectively held that neither of these circumstances is enough to make someone a "prevailing party." *See Sole*, 551 U.S. at 84, 86 (precluding fee awards where the plaintiff's initial victory is "ephemeral" and has "no preclusive effect in the continuing litigation"); *Buckhannon*, 532 U.S. at 606 ("Never have we awarded attorney's fees for a nonjudicial 'alteration of actual circumstances.'" (citation

omitted)). Cobbling together the combination—a preliminary injunction that does not provide enduring relief, and a desired outcome that did not come from a court order—as a recipe for attorney's fees conflicts with those clear holdings.

Other circuit courts have made the same mistake. *See Higher Taste*, 717 F.3d at 718 (allowing a fee award to a preliminary injunction winner because a settlement between the parties was supposedly "enduring" relief); *Billups*, 554 F.3d at 1356 (affirming a fee award even though the preliminary injunction was dissolved when Georgia "repealed the enjoined statute," not "by any judicial decision"); *Hargett*, 53 F.4th at 409–11 (approving a fee award where the district court's order provided only temporary relief and then "the Tennessee legislature itself repealed the challenged provisions"). The Fifth Circuit even appears to have revived the circuits' old catalyst theory by declaring a party eligible for a fee award if it wins a preliminary injunction "that *causes the defendant* to moot the action" by giving the plaintiffs the relief they sought in the lawsuit. *Dearmore*, 519 F.3d at 524 (emphasis added); *see also Buckhannon*, 532 U.S. at 601 (defining the "catalyst" theory as permitting recovery if the plaintiff "achieve[d] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct"). Just like the catalyst theory *Buckhannon* rejected, this test expressly allows fees where the plaintiff's lawsuit purportedly brought about nonjudicial relief. *See id.* at 605 ("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.").

This is not to say this Court's current precedents leave no opening for a preliminary injunction to ever serve as the basis for attorney's fees. *See Sole*, 551 U.S. at 86 (leaving open 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"). A preliminary injunction that itself moots the suit by providing all the relief the plaintiff sought—for instance, by permitting a plaintiff to hold a parade, where that is the only thing the plaintiff sought from the lawsuit—presents a slightly harder question (although even there, it seems that without a final judgment on the merits, there is no prevailing party). But, consistent with the plain language of § 1988, the Court's precedents always require a plaintiff to win (1) court-ordered (2) enduring relief before they are a "prevailing party." *Buckhannon*, 532 U.S. at 605–06 (explaining that the "plain language of the statutes" forbids awarding "attorney's fees for a nonjudicial 'alteration of actual circumstances' " (citation omitted)); *Garland*, 489 U.S. at 792 (holding that the "ordinary" meaning of § 1988 means that the plaintiff prevails only if he can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant"); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("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."). Allowing fee

awards when a preliminary injunction order does not fit that bill exceeds the authority granted to courts under that statute.

CONCLUSION

For the reasons stated above, the Court should grant the Commissioner's petition.

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Respectfully submitted,

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