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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that important federal statutes, like 42 U.S.C. § 1988, are interpreted in accordance with their text and history and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

To prevail is to succeed. And by any sensible measure, Respondents succeeded in this case. In their suit challenging Virginia's suspension of their driver's licenses, a court ordered Virginia to undo those suspensions, and Respondents "were once again free to drive." Pet. App. 7a. That court order—a "judicially sanctioned change in the legal relationship of the parties," *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 605 (2001)—was never overturned, and Respondents remain free to drive today.

Under the original public meaning of the attorney's fees provision in 42 U.S.C. § 1988, Respondents are eligible for fees to compensate them for the costs of securing this victory. That result is compelled by the language of Section 1988, as well as the legal backdrop

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

against which Congress selected that language. Nothing in the statute's text or history supports Petitioner's claim that a "prevailing party" must secure "a conclusive merits ruling or final judgment." Pet. Br. 14.

In 1976, when Congress added Section 1988's fee-shifting provision, the term "prevailing party" had a straightforward meaning in both common parlance and legal discourse. It simply meant a party that succeeded in achieving its goals. To "prevail" was to "be successful," to "win mastery," or to "triumph." *Webster's Third New International Dictionary of the English Language Unabridged* 1797 (1966); *accord American Heritage Dictionary of the English Language* 1038 (1969) (to "become effective; succeed; win out" or "be greater in strength or influence"). A "prevailing" party, in short, was a party that achieved its desired outcome. *See infra* Part I.A.

Contemporary legal sources gave "prevailing party" the same intuitive definition: a party that succeeded in achieving its litigation goals. Contrary to Petitioner's assertion, these sources did not limit the type of success that could confer prevailing-party status to a final judgment or conclusive merits ruling. *Black's Law Dictionary*, for instance, defined "prevailing party" as "[t]hat one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of his original contention." *Black's Law Dictionary* 1352 (4th ed. rev. 1968).

Other sources gave the same broad definition—"the party who is successful or partially successful in an action," *Ballentine's Law Dictionary* 985 (3d ed. 1969)—which easily covers plaintiffs who win a preliminary injunction based on a court's preliminary conclusion that the defendant acted unlawfully, when that injunction is no longer at risk of being overturned.

The limits that Petitioner would impose on the types of success that qualify for prevailing-party status are nowhere to be found in these sources. What mattered was simply whether, at the end of the day, a party achieved a litigation victory that was no longer in jeopardy. *See infra* Part I.B.

The capacious definition of "prevailing party" in dictionaries and treatises reflected the contemporary judicial consensus on the meaning of that term. *See infra* Part II. By 1976, dozens of federal statutes authorized fee awards to a prevailing party, and the courts had extensively interpreted those provisions. Congress was deeply familiar with this case law and used the same term in Section 1988 to incorporate the same standards.

Under this case law, a "prevailing party" was, consistent with ordinary meaning, a party that achieved its desired outcome in a case. In construing the fee-shifting provisions that predated Section 1988's amendment, courts gave "prevailing party" an expansive scope reflecting a common-sense understanding of those words. Whether parties "prevailed" turned on whether they succeeded in obtaining their desired litigation outcomes.

Success did not require a final judgment or conclusive merits ruling. Indeed, there was "no question . . . that federal courts may award counsel fees based on benefits resulting from litigation efforts even where adjudication on the merits is never reached." *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975). "[T]he operative factor [was] success, not at which stage or how that success [was] achieved, i.e. trial or settlement." *Parker v. Matthews*, 411 F. Supp. 1059, 1063 (D.D.C. 1976), *aff'd sub nom. Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977). If a case became moot before final judgment, therefore, courts were not shy

about awarding fees to plaintiffs who were "successful" in securing the relief they sought, *Goldstein v. Levi*, 415 F. Supp. 303, 305 (D.D.C. 1976), and who likely "would have prevailed had the matter been ultimately decided," *Newport News Fire Fighters Ass'n Local 794 v. City of Newport News, Va.*, 339 F. Supp. 13, 17 (E.D. Va. 1972).

When Congress used the term "prevailing party" in Section 1988, it incorporated the settled meaning of that term. *See infra* Part III. Congress knew it was not creating "a new remedy," but simply fixing "anomalous gaps in our civil rights laws" by authorizing "the familiar remedy of reasonable counsel fees to prevailing parties" under the laws that did not already permit such fees. S. Rep. No. 94-1011, at 1-4 (1976). Demonstrating a thorough knowledge of the "existing judicial standards" construing "prevailing party" in other statutes, Congress expected that courts applying Section 1988 would be "guided of course by the case law interpreting similar attorney's fee provisions." H.R. Rep. No. 94-1558, at 8 (1976).

Citing that case law, Congress was clear that the term "prevailing party" was "not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." *Id.* at 7. Rather, this term would "include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury." *Id.* Based on precedent, for instance, Congress understood that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, *supra*, at 5.

In sum, Congress recognized that courts had uniformly construed the term "prevailing party" to allow fees awards to plaintiffs who achieved the goals of their litigation—with or without a final judgment or

conclusive merits ruling. By replicating the language of the earlier statutes, Congress sought to ensure that Section 1988 would be given the same interpretation. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well").

Adopting this standard promoted Congress's aims in amending Section 1988. Recognizing that fee-shifting provisions had been "successful in enabling vigorous enforcement of modern civil rights legislation," S. Rep. No. 94-1011, *supra*, at 1, Congress mimicked those earlier provisions in Section 1988 "to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights," H.R. Rep. No. 94-1558, *supra*, at 1. Congress, in short, "intended that the standards for awarding fees [would] be generally the same" as under those earlier statutes, S. Rep. No. 94-1011, *supra*, at 4, and Congress chose the most direct means of achieving that goal: using the same language.

As originally understood, therefore, Section 1988's fee-shifting provision authorized fees awards whenever plaintiffs achieved the desired outcome of their litigation. Success did not require a final judgment or conclusive merits ruling.

And that makes sense. "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987). "Redress is sought *through* the court, but *from* the defendant." *Id.* As this Court has long recognized, therefore, "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'"

Hanrahan v. Hampton, 446 U.S. 754, 756-57 (1980) (quoting H.R. Rep. No. 94-1558, *supra*, at 7). Indeed, "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quotation marks omitted).

Ultimately, the goal of statutory interpretation is to "determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Here, Congress's language and intent could hardly have been clearer. The term "prevailing party" was used because courts had already construed it to permit fees awards when plaintiffs victimized by unlawful conduct succeeded in obtaining the redress they sought. Both Congress and the courts rejected any requirement of a final judgment or conclusive merits determination. This Court should do the same.

ARGUMENT

I. When Section 1988's Fees Provision Was Enacted, "Prevailing Party" Meant a Party That Succeeded in Achieving Its Litigation Goals, With or Without a Final Judgment or Conclusive Merits Ruling.

Whether "prevailing party" is given the ordinary meaning those words had in 1976, or whether it is understood as being a term of art, the result is the same: a "prevailing" party was simply a party that succeeded in achieving the goals of its litigation, or a portion of those goals. There is no support for Petitioner's claim that prevailing-party status required "a conclusive ruling on the merits or a final judgment." Pet. Br. 18.

A. It is a "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). To identify the ordinary public meaning of statutory language, this Court consults "[d]ictionaries from the era of [the statute]'s enactment." *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014).

In 1976, when Section 1988's fee provision was enacted, to "prevail" was universally defined as succeeding, achieving a desired outcome, or gaining advantage over an opponent. To prevail meant to "be successful," "triumph," "win mastery," or "gain victory by virtue of strength or superiority." *Webster's Third New International Dictionary of the English Language Unabridged* 1797 (1966); *accord American Heritage Dictionary of the English Language* 1038 (1969) (to "become effective; succeed; win out," "to be greater in strength or influence," "to triumph or win a victory"); *Random House Dictionary of the English Language* 1050 (coll. ed. 1968) ("to become dominant or win out," to "prove superior in power or influence"); *Merriam-Webster Dictionary* 550 (1974) (to "become effective; succeed," "to win mastery: triumph").

Thus, the word "prevail" had the same intuitive meaning in 1976 that it has today: it simply meant "to be superior in strength or influence; to have or gain the superiority or advantage; to get the better, gain the mastery or ascendancy; to be victorious," to "have superiority over, outstrip," or "to be effectual or efficacious; to be successful, to succeed." 8 *Oxford English Dictionary* 1884 (1970 ed.). To prevail, in common parlance, simply meant "to produce or achieve the desired

effect; be effective; succeed." *Webster's New World Dictionary of the American Language* 1127 (2d coll. ed. 1970).

While contemporary definitions of "prevailing" largely focused on irrelevant uses of that word—e.g., "generally current," *Webster's Third New International Dictionary*, *supra*, at 1797—the relevant definitions were all in accord with the understanding of "prevail" described above. *See, e.g.*, *id.* (defining "prevailing" as "having superior force or influence: efficacious"); *Random House Dictionary*, *supra*, at 1050 ("having superior power or influence," "effectual"); *Oxford English Dictionary*, *supra*, at 1884 ("the having or gaining of the mastery or predominance," "[one] [t]hat is or proves to be superior in any contest; victorious; ruling; effective, influential").

Under the ordinary meaning of the word, therefore, a party that "prevailed" in a contest was the party that succeeded, triumphed, won out, gained the advantage, or was more effective or influential than its opponent. In short, it was the party that achieved its desired outcome.

B. Although ordinary meaning normally governs statutory interpretation, Congress also uses terms of art—a "phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." *Black's Law Dictionary* (12th ed. 2024). Terms of art sometimes "depart from ordinary meaning." *George v. McDonough*, 596 U.S. 740, 752 (2022) (quoting *W. Va. Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 92, n.5 (1991)).

Not here, though. Legal dictionaries and treatises that defined "prevailing party" in 1976 show that there was no "*distinctly* legal meaning associated with that language." *Borden v. United States*, 593 U.S. 420, 435

(2021) (emphasis added). Instead, the legal meaning of "prevailing party" was the same as its ordinary meaning: a party that succeeded in achieving a desired outcome.

Petitioner claims that "prevailing party" was "consistently defined to require a conclusive ruling on the merits or final judgment." Pet. Br. 16-17. Untrue. Here is the complete definition of "prevailing party" in *Black's Law Dictionary* at the time:

> That one of the parties to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of his original contention.

Black's Law Dictionary 1352 (4th ed. rev. 1968). This definition requires neither a final judgment nor a conclusive merits determination. For instance, a plaintiff who wins a preliminary injunction that is never overturned—based on a court's preliminary finding that the defendant acted unlawfully—can certainly be said to have "successfully prosecute[d] the action" and "prevail[ed] on the main issue, even though not to the extent of his original contention." *Id.*

Petitioner, probably recognizing as much, blows past the actual definition of "prevailing party" in *Black's Law Dictionary* and selectively quotes from the summary of decisions that follows it—portraying these quotes as coming from the definition itself. *See* Pet. Br. 17. But even this questionable approach doesn't yield the result Petitioner needs.

Only a single comment on the term "prevailing party" in the summary of decisions from which Petitioner quotes makes any reference to judgment—and a fleeting reference at that. *See Black's Law Diction-*

ary, *supra*, at 1352 ("The one in whose favor the decision or verdict is rendered and judgment entered.").[2] The text goes on to make clear that prevailing-party status did *not* require securing a final judgment or conclusive merits ruling in one's favor: "where the court grants defendant a new trial after verdict for plaintiff, defendant is the 'prevailing party' on that trial, and entitled to costs, *although the plaintiff again gets verdict on retrial*." *Id.* (emphasis added) (citing *Klock Produce Co. v. Diamond Ice & Storage Co.*, 168 P. 476, 478 (Wash. 1917)).

Far from reflecting any technical focus on the specific type of relief obtained, what mattered was simply whether, at the end of the day, a party achieved a victory that was not in jeopardy: "The party ultimately prevailing *when the matter is finally set at rest*." *Id.* (emphasis added). To be a prevailing party hinged on "whether, at the end of the suit, or other proceeding, *the party who has made a claim against the other, has successfully maintained it*." *Id.* (emphasis added).

Just like under the ordinary meaning of "prevailing," therefore, the touchstone was whether a party could reasonably be judged to have succeeded in its efforts.

This view—that a prevailing party was the one that succeeded in the litigation—was echoed in other contemporary legal dictionaries. *Ballentine's Law Dictionary*, for example, defined "prevailing party" as "[t]he party who is successful or partially successful in

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[2] In the cases cited for this proposition, the courts did not discuss the need for a final judgment or conclusive merits determination. Instead, they simply rejected the contention that plaintiffs should be denied costs if they prevailed on only some of their claims. *E.g.*, *United States v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 235 F. 951, 955 (D. Minn. 1916).

an action, so as to be entitled to costs." *Ballentine's Law Dictionary* 985 (3d ed. 1969) (citing 20 Am. Jur. 2d *Costs* §§ 14, 15). Like *Black's*, *Ballentine's* emphasized the importance of the outcome at the end of the suit, but it did not suggest that a final judgment or conclusive merits determination was necessary to make one a "prevailing party."

Instead, the question was simply whether the party had achieved "success" at the end of the litigation: "To be a prevailing party does not depend upon the degree of success at different stages of the suit; but upon whether at the end of the suit or other proceeding, the party, who has made a claim against the other, has successfully maintained it. If he has, he is the prevailing party." *Id.* (citing *Bangor & Piscataquis R.R. Co. v. Chamberlain*, 60 Me. 285, 286 (1872)); *accord* Pet. Br. 18 (citing the identical definition in 3 *Bouvier's Law Dictionary* (8th ed. 1914) for the proposition that a "prevailing party" is a party that, "'at the end of the suit,' had 'successfully maintained' its claim").

To the extent that legal treatises addressed the term "prevailing party," they agreed. For example, Speiser's treatise on attorney's fees, discussing the fee provisions of the Civil Rights Act of 1964, repeatedly characterized "prevailing part[ies]" as "successful plaintiffs," without suggesting that the plaintiffs needed to have succeeded in any specific way. *See* Stuart M. Speiser, *Attorneys' Fees* § 12:61, at 549-51 (1973).

In sum, both general-use dictionaries and specialized legal sources offered the same broad definition of "prevailing" party in 1976—a party that succeeded in achieving its desired outcome. Nothing in these sources corroborates the notion that the term meant only "the party who had obtained a conclusive ruling on the merits or a final judgment in its favor." Pet. Br.

18. That definition is one of Petitioner's own invention.

The broad understanding of "prevailing party" reflected in contemporary dictionaries and treatises was mirrored in the case law addressing fee-shifting statutes, as the next section discusses.

II. Federal Case Law Interpreting Identically Worded Fees Provisions Also Defined "Prevailing Party" as a Party That Succeeded in Achieving Its Litigation Goals, With or Without a Final Judgment or Conclusive Merits Ruling.

Congress amended Section 1988 to provide for attorney's fees against a backdrop of judicial decisions that interpreted the term "prevailing party" in other fee-shifting statutes. Under those decisions, a "prevailing" party was simply a party that succeeded in achieving its desired outcome in a case. By using this familiar term in Section 1988, Congress incorporated its settled meaning.

When Congress uses language that courts have "consistently construed" as having a particular meaning in other statutes, Congress "presumptively was aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning." *Lamar, Archer & Cofrin, Llp v. Appling*, 584 U.S. 709, 721-22 (2018) (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)); *see Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("[R]epetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.").

And here no presumption is even necessary. We *know* that Congress was familiar with the judicial con-

struction of "prevailing party," and used the same language in Section 1988 to incorporate the same expansive meaning. *See* H.R. Rep. No. 94-1558, at 8 (1976) ("[E]xisting judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460."); S. Rep. No. 94-1011, at 2 (1976) (describing "fees to prevailing parties" as a "familiar remedy"); *see also infra* Part III.

A. When Congress used the term "prevailing party" in Section 1988, it was not writing on a blank slate. Congress began using fee-shifting provisions in 1870. *See* S. Rep. No. 94-1011, *supra*, at 3. Their use expanded during the 1960s and 1970s, when Congress incorporated fee-shifting provisions into most civil rights and environmental legislation. *See* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & Contemp. Prob. 9, 30 (1984). By 1976, a "wide variety of statutes" contained attorney's fees provisions. H.R. Rep. No. 94-1558, *supra*, at 3.

B. In construing the fee-shifting provisions that predated Section 1988's amendment, the judiciary gave "prevailing party" an expansive scope reflecting a common-sense understanding of those words. Whether parties "prevailed" turned on whether they achieved their desired litigation outcomes. In essence, the prevailing party was the party that "succeeded."

Success could take many forms and did not require a final judgment or conclusive ruling on the merits. *See Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975) ("There is no question . . . that federal courts may award counsel fees based on benefits resulting from litigation efforts even where adjudication on the merits is never reached, e.g., after a settlement."). As explained in one case cited by the House report on Section 1988, "the operative factor is success,

not at which stage or how that success is achieved, i.e. trial or settlement." *Parker v. Matthews*, 411 F. Supp. 1059, 1063 (D.D.C. 1976), *aff'd sub nom. Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977); *see id.* ("the same conclusion has been reached by other courts").

Instead of demanding a final merits determination, courts simply asked whether, in the end, the plaintiffs achieved the goals sought by their litigation. That meant obtaining a desired outcome that was not at risk of being reversed—an enduring victory.

As illustrated by another case referenced in the House report on Section 1988, this standard called for a straightforward appraisal of a party's success. *See Aspira of New York, Inc. v. Bd. of Educ.*, 65 F.R.D. 541, 542-43 (S.D.N.Y. 1975) (concluding that the plaintiffs were "prevailing parties" because "[t]he [consent] decree gives the relief they sought . . . after more than a year and half of bitter resistance"). Plaintiffs "prevailed" and were entitled to fees when they achieved their basic litigation goals. *See Richardson v. Civ. Serv. Comm'n*, 420 F. Supp. 64, 67 (S.D.N.Y. 1976) ("Plaintiffs sought placement in the position of Drug Abuse Rehabilitation Counselor. This they achieved. Also, plaintiffs sought and achieved the implementation of procedures for attaining the position of Rehabilitation Counselor based on prior work experience."); *see id.* (rejecting requirement of "an adjudication on the merits after the trial of the action").

Illustrating that a definitive ruling on the merits was unnecessary, settlement agreements could confer prevailing-party status if the outcome was what the plaintiffs had sought. *See Incarcerated Men of Allen Cnty. Jail v. Fair*, 507 F.2d 281, 283 (6th Cir. 1974) (finding attorney's fees permissible following consent order to remediate county jail conditions). This was true of private settlement of civil rights lawsuits where

the settlement equated to a victory for the plaintiffs. *See Parker*, 411 F. Supp. at 1064 (examining terms of settlement and whether plaintiffs succeeded "with respect to the central issue—discrimination"). And this was also true of settlement agreements enforced through consent decrees. *See Aspira*, 65 F.R.D. at 542-43; *Foster v. Boise-Cascade, Inc.*, 420 F. Supp. 674, 683 (S.D. Tex. 1976), *aff'd*, 577 F.2d 335 (5th Cir. 1978) ("[T]he Court has no difficulty in determining that the named plaintiff has prevailed in this litigation. The proposed Consent Decree permanently enjoins defendant from engaging in any employment practice which has the purpose or effect of discriminating against any female on the basis of sex.").

In short, under the contemporary judicial consensus, a party was successful, and thus prevailing, when it achieved the outcome it desired—whether or not that outcome resulted from a final judgment or conclusive merits determination.

C. This broad view of prevailing-party status was consistently applied in cases that became moot after plaintiffs achieved their litigation goals—as here. For example, in *Goldstein v. Levi*, 415 F. Supp. 303 (D.D.C. 1976), a Freedom of Information Act (FOIA) suit was resolved at an early stage of litigation after the government turned over the requested documents. Awarding fees, the court described the plaintiff as "successful" and thus as satisfying FOIA's fee-shifting standard of having "substantially prevailed." *Id.* at 305. Although no court ordered the government to release the documents, it was evident that the release resulted from the litigation: "plaintiff was unsuccessful in obtaining the information for three years but was successful within a few weeks of filing a court action." *Id.*; *accord Howerton v. Miss. Cnty., Ark.*, 361 F.

Supp. 356 (E.D. Ark. 1973) (awarding costs to plaintiffs where defendants made the changes plaintiffs sought after a class action suit against them was filed); *see also Am. Fed'n of Gov't Emp., AFL-CIO v. Rosen*, 418 F. Supp. 205 (N.D. Ill. 1976) (similar).

Likewise, in a case resembling this one, policemen and firemen sued the city of Newport News, Virginia, for issuing regulations that banned them from joining labor unions. This claim became moot after the city changed the rules deep into the discovery process. But the court later deemed the plaintiffs the prevailing party and awarded them fees, based largely on the court's determination of "which party would have prevailed had the matter been ultimately decided." *Newport News Fire Fighters Ass'n Local 794 v. City of Newport News, Va.*, 339 F. Supp. 13, 17 (E.D. Va. 1972).

D. More generally, the courts consistently interpreted fee-shifting provisions in civil rights statutes generously, to effectuate Congress's plan in adopting such provisions. As this Court explained in *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968), Congress "enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief under Title II." Therefore, "one who succeeds in obtaining an injunction . . . should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.*

Lower courts followed this Court's lead. *See, e.g.*, *Califano*, 561 F.2d at 330 ("Courts construing the fees and costs provisions of Title VII have adopted the Piggie Park rationale that statutes authorizing award of attorneys' fees as part of private enforcement schemes in the Civil Rights Act should be broadly interpreted."); *Johnson v. Ga. Highway Exp., Inc.*, 488 F.2d 714, 716 (5th Cir. 1974) ("This Court . . . has liberally

applied the attorney's fees provision of Title VII, recognizing the importance of private enforcement of civil rights legislation."). Not long before Section 1988 was amended, this Court reiterated that "the award [of attorney's fees] should be made to the successful plaintiff absent exceptional circumstances." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975); *see also Northcross v. Bd. of Ed. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (same).

In sum, at the time Congress passed Section 1988's fees provision, prevailing-party status did not require a conclusive merits determination or final judgment. A prevailing party was the party that succeeded in achieving its litigation goals. When Congress amended Section 1988 to make attorney's fees available under the civil rights laws that lacked fee-shifting provisions, it incorporated this governing standard, as the next section discusses.

III. Congress Adopted the Ordinary Meaning and Well-Established Judicial Interpretation of "Prevailing Party" in Section 1988.

The "purpose and effect" of Section 1988's fees provision was "simple—it [was] designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since 1866." S. Rep. No. 94-1011, *supra*, at 2. The legislation addressed "anomalous gaps in our civil rights laws" whereby fees awards were not expressly authorized under some of the nation's most venerable civil rights statutes. *Id.* at 4. "In order to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights, it [was] necessary to add an attorney fee authorization to those civil rights acts which [did] not presently contain such a provision." H.R. Rep. No. 94-1558, *supra*, at 1.

In other words, Congress amended Section 1988 "to achieve consistency" in the availability of attorney's fees awards across federal civil rights statutes, recognizing that fee-shifting provisions were "successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy." S. Rep. No. 94-1011, *supra*, at 1, 4. To that end, Congress mimicked the language of the civil rights statutes that already permitted fees awards—seeking to ensure that Section 1988 would be given the same generous interpretation as those earlier provisions.

A. The impetus for Section 1988's fees provision was this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that awards of attorney's fees must be expressly authorized by legislation. *See* H.R. Rep. No. 94-1558, *supra*, at 2-3; S. Rep. No. 94-1011, *supra*, at 2. The *Alyeska* decision ended the practice of awarding fees under the courts' equitable powers based on a "private attorney general" rationale, reasoning that it was the role of Congress, not the courts, to determine "the circumstances under which attorney's fees are to be awarded." 421 U.S. at 262.

Heeding this Court's call for "legislative guidance" as to when fees awards should be allowed, *id.* at 263-64, Congress responded, explaining that Section 1988's fee-shifting provision would make attorney's fees available under seven specifically identified civil rights laws. S. Rep. No. 94-1011, *supra*, at 1; *see id.* at 4 (noting that after *Alyeska*, attorney's fees awards were "suddenly unavailable in the most fundamental civil rights cases"); *see also* H.R. Rep. No. 94-1558, *supra*, at 2 (describing hearing testimony which "indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision").

B. In amending Section 1988 and explicitly making attorney's fees available under the civil rights laws that previously lacked fee-shifting provisions, Congress was, of course, doing nothing new. *See* S. Rep. No. 94-1011, *supra*, at 3 (observing that the use of fee-shifting to encourage private enforcement was not "a new remedy"). Indeed, Congress intentionally modeled Section 1988 on the modern civil rights laws that allowed fee-shifting to "prevailing parties." *See id.* at 2 (explaining that the bill "follows the language of Titles II and VII of the Civil Rights Act of 1964 . . . and section 402 of the Voting Rights Act Amendments of 1975"); H.R. Rep. No. 94-1558, *supra*, at 5 (same); *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (explaining that Section 1988's fees provision "was patterned upon" these earlier statutes).

By replicating the language of these fee-shifting provisions, Congress sought to ensure consistency not only in the availability of attorney's fees, but also in the standards that courts would apply in awarding them: "Because other statutes follow this approach, the courts are familiar with these terms and in fact have reviewed, examined, and interpreted them at some length." H.R. Rep. No. 94-1558, *supra*, at 6; *see id.* at 8 (noting that courts applying Section 1988 would be "guided of course by the case law interpreting similar attorney's fee provisions").

Congress, in short, "intended that the standards for awarding fees [would] be generally the same as under the fee provisions of the 1964 Civil Rights Act," S. Rep. No. 94-1011, *supra*, at 4, and it chose the most direct means of achieving that goal: using the same language. As this Court had only recently explained, "The similarity of language" between two fee-shifting provisions "is, of course, a strong indication that the

two statutes should be interpreted pari passu." *Northcross*, 412 U.S. at 428; *cf.* H.R. Rep. No. 94-1558, *supra*, at 6 (citing *Northcross*).

C. Congress understood the existing legal standards to permit fees awards in a wide range of circumstances—without requiring a final judgment or conclusive merits determination. Consistent with the established case law applying identical language, *see supra* Part II, Congress expected Section 1988 to be generously construed to authorize fee awards to plaintiffs that achieved the goals of their litigation.

Indeed, the House report was unmistakably clear that the term "prevailing party" was "not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H.R. Rep. No. 94-1558, *supra*, at 7. Instead, the term would "include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury." *Id.* An award of attorney's fees would be proper, for example, if "the litigation terminates by consent decree." *Id.*; *see id.* ("A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion.").

The Senate Report agreed: "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, *supra*, at 5 (citing cases).

In some situations, Congress recognized, it would even be proper to award attorney's fees while a case was still ongoing. *See id.* ("In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite."). Such interim awards, the Senate Report explained, were "especially appropriate where a party has prevailed on an important matter in the

course of litigation, even when he ultimately does not prevail on all issues." *Id.* (citing *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696 (1974), and *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970)); *accord* H.R. Rep. No. 94-1558, *supra*, at 8.

D. Although Petitioner otherwise ignores Section 1988's history, he argues that the congressional reports' reference to *Bradley* and *Mills* means that fees awards were considered proper without a final judgment only if a party had "established his entitlement to some relief on the merits." Pet. Br. 21 (quoting *Hanrahan*, 446 U.S. at 757). Those cases, however, simply made clear that, during the course of *ongoing* litigation, courts "must have discretion to award fees and costs incident to the final disposition of interim matters." H.R. Rep. No. 94-1558, *supra*, at 8 (quoting *Bradley*, 416 U.S. at 723). Neither *Bradley*, *Mills*, nor the congressional reports suggested that the *only* interim matter that could justify a fee award during the course of litigation was an order establishing entitlement to relief on the merits. As the House report explained, "the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made" while a case was still in the middle of "protracted litigation." *Id.*

Moreover, this entire discussion and the quoted passage of *Bradley* were exclusively concerned with fees awards that were based on interim rulings *while a case was still being litigated*—"pendente lite." S. Rep. No. 94-1011, *supra*, at 5. Even if it were true that an order determining "substantial rights of the parties," H.R. Rep. No. 94-1558, *supra*, at 8 (quoting *Bradley*, 416 U.S. at 722 n.28), was the only recognized justification for a fees award in the midst of continuing litigation—an assertion not supported by *Bradley* or the

congressional reports—it still would not follow that this was the only justification for a fees award after a case ended. Indeed, that rule would flatly contradict the judicial consensus, which Congress endorsed, that parties could obtain attorney's fees after achieving their litigation goals through settlement, consent decree, or without any formal relief.

Taking a restrained approach to fee awards during the course of ongoing litigation made sense, because while litigation is ongoing, it is impossible to know which party will succeed in the end. *See Grubbs v. Butz*, 548 F.2d 973, 976-77 (D.C. Cir. 1976) ("If attorneys' fees were assessed against [a party] at this point in the litigation, the *ultimately successful party* might end up having subsidized a large segment of the losing party's suit against him." (emphasis added)). But once a case is over, that problem evaporates—enabling the court to decide which party, if any, was ultimately successful in achieving its goals and thus entitled to fees.

Far from supporting Petitioner's narrow approach, therefore, these decisions and Congress's reference to them only underscore the contemporary understanding that "prevailing party" was to be interpreted in a generous, common-sense fashion that allowed fees awards when plaintiffs achieved success in their cases.

E. Adopting the then-governing standard for the award of attorney's fees was consistent with Congress's plan in amending Section 1988, which was to ensure that the availability of attorney's fees would help realize effective enforcement of the nation's civil rights laws.

Congress recognized that "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." H.R. Rep. No. 94-1558, *supra*, at 1; *see* S. Rep. No. 94-1011, *supra*, at 5

("In several hearings held over a period of years, the Committee has found that fee awards are essential if the Federal statutes to which [the proposed legislation] applies are to be fully enforced."). Ensuring the availability of attorney's fees to prevailing parties was "designed to give [victims of civil rights violations] effective access to the judicial process." H.R. Rep. No. 94-1558, *supra*, at 1; *see id.* at 9 ("[T]hese standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys.").

In short, Congress understood that "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 94-1011, *supra*, at 2.

Congress was particularly concerned about the injustice imposed upon "victims of unlawful discrimination or unconstitutional conduct" by "the additional burden of counsel fees when they seek to invoke the jurisdiction of the federal courts." H.R. Rep. No. 94-1558, *supra*, at 6. After all, "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." S. Rep. No. 94-1011, *supra*, at 2. Otherwise, "few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the Federal courts." *Id.* at 3 (quoting *Newman*, 390 U.S. at 402).

Congress was aware, moreover, that under the existing fee-shifting statutes, awarding attorney's fees to

successful plaintiffs was the default. Although a prevailing party's entitlement to fees was within "the discretion of the court," this Court had repeatedly recognized that "Congress intended that the award should be made to the successful plaintiff absent exceptional circumstances." *Alyeska*, 421 U.S. at 261-62. Congress expected the same default rule to apply under Section 1988's identical language. *See* S. Rep. No. 94-1011, *supra*, at 4 ("A party seeking to enforce the rights protected by the statutes covered by [Section 1988], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" (quoting *Newman*, 390 U.S. at 402)); *see* H.R. Rep. No. 94-1558, *supra*, at 6 (same).

Congress's plan, in sum, was to "promote the enforcement of the Federal civil rights acts" and "achieve uniformity in those statutes and justice for all citizens." H.R. Rep. No. 94-1558, *supra*, at 9. There is no support for Petitioner's restrictive gloss on "prevailing party" in the language of Section 1988, the history of its fees provision, or the backdrop of case law against which Congress acted.

* * *

In *Alyeska*, this Court recognized that it was up to Congress, not the courts, to determine when attorney's fees should be available. Congress responded to this Court's call for action by passing Section 1988's fees provision. In doing so, Congress could scarcely have been clearer about its aims and its understanding of how Section 1988 would operate. It could also scarcely have chosen language better suited to those goals. Just like under the identically worded statutes that courts had already construed, a "prevailing party" would be a party that succeeded in achieving its desired outcome. No final judgment or conclusive merits

determination would be required. This Court should respect Congress's judgment now.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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