IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

(Alexandria Division)

THOMAS PORTER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:14-cv-1588 (LMB/IDD)
	)	
HAROLD W. CLARKE et al.,	)	
	)	
Defendants.	)	

STATEMENT OF POSITION OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, INC. AND THE RUTHERFORD INSTITUTE AS *AMICI CURIAE*

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CORPORATE AND FINANCIAL DISCLOSURE STATEMENT

Amici Curiae file this Corporate and Financial Disclosure statement as required by Local Civil Rule 7.1 of the Rules of the Eastern District of Virginia.

The American Civil Liberties Union Foundation of Virginia, Inc. ("ACLU of Virginia") certifies that there are no parents, trusts, subsidiaries, or affiliates of the ACLU of Virginia that have issued stock or debt securities to the public; that there are no publicly held entities that own any stock in the ACLU of Virginia; and that the ACLU of Virginia has nothing else to report in order to comply with the requirements of Local Civil Rule 7.1.

The Rutherford Institute certifies that there are no parents, trusts, subsidiaries, or affiliates of the Rutherford Institute that have issued stock or debt securities to the public; that there are no publicly held entities that own any stock in the Rutherford Institute; and that the Rutherford Institute has nothing else to report in order to comply with the requirements of Local Civil Rule 7.1.

INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union Foundation of Virginia, Inc. ("ACLU of Virginia") is the Virginia affiliate of the American Civil Liberties Union, with approximately 41,000 members across the Commonwealth. The ACLU of Virginia is a private, non-profit organization that promotes civil liberties and civil rights for everyone in the Commonwealth through public education, litigation, and advocacy with the goal of securing freedom and equality for all. It regularly appears before this Court and other federal and state courts in Virginia, both as *amicus* and as direct counsel. The ACLU of Virginia has a significant interest in the outcome of this case and in other cases across the country concerning the fundamental rights of those who are incarcerated.

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed numerous *amicus curiae* briefs in the federal Courts of Appeals and Supreme Court. The Rutherford Institute works to preserve the most basic freedoms of our Republic, including the rights conferred on prisoners by the Eighth Amendment.

SUMMARY OF ARGUMENT

The Plaintiffs, prisoners on death row in the Virginia Department of Corrections ("VDOC"), have suffered undeniably harsh conditions, including solitary confinement for 23 hours a day, cells measuring 71 square feet with no meaningful window, and no contact visitation with family. Despite a full evidentiary record compelling a finding that these conditions violated Plaintiffs' Eighth Amendment rights, Defendants urge the Court to avoid addressing the constitutionality of these policies and, instead, dismiss the case as moot because VDOC made temporary changes to its policies in the middle of this litigation. They do so despite substantial evidence in the record that VDOC could reinstate its prior conditions "immediately," at any time. Adopting Defendants' position would not only deprive Plaintiffs in this case of their right to an injunction precluding VDOC from reverting to the prior unconstitutional conditions, it would encourage VDOC and future civil rights defendants to avoid adverse rulings in other cases by simply modifying their behavior after litigation has begun, a defense ploy known as tactical mooting.

Dismissing Plaintiffs' case under the equitable mootness doctrine would undermine the system established by Congress and the Supreme Court to ensure that important civil rights are properly vindicated. Litigation by private citizens has long been recognized as critical to the effective enforcement of federal civil rights. However, under the so-called "American Rule," which dictates that each party to a lawsuit should bear its own legal costs, private enforcement of civil rights is often not financially viable because there are frequently little to no recoverable monetary damages. Recognizing the need for a structural solution to this challenge, Congress passed a number of fee-shifting statutes, including 42 U.S.C. § 1988, to permit an award of attorney's fees to "prevailing" parties in private civil rights actions. In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), the Supreme Court confined "prevailing party" status to those plaintiffs who have received a judgment or other judicial order altering the legal relationship between the parties. In doing so, the Court emphasized that the strict mootness standard it has endorsed would protect

the incentives put in place by fee-shifting statutes by ensuring that "mischievous defendants" could not easily moot lawsuits by changing their behavior during litigation.

The threat of tactical mooting and the corresponding erosion of private enforcement of civil rights are real. Despite the assurances of the *Buckhannon* majority, empirical studies performed after that decision evidence a demonstrable decline in public interest litigation because attorney's fee awards have become more unpredictable. Repeat players, such as government defendants, may also selectively engage in tactical mooting to avoid adverse precedential rulings in "bad" cases, while choosing to litigate the "good" cases, as part of a broader litigation strategy to create a body of law that is generally more favorable to them.

The empirical reality of tactical mooting underscores that rigorous adherence to a strict mootness standard is critical to ensure the continued viability of civil rights litigation. Here, Defendants' attempt to invoke the equitable mootness doctrine to avoid an injunction flies in the face of the strict mootness standard mandated by the Supreme Court and this Court. The Court should, accordingly, deny Defendants' request to dismiss Plaintiffs' case as moot, and proceed to rule on the merits of Plaintiffs' request for injunctive relief.

ARGUMENT

I. FEE SHIFTING PROVISIONS ENABLE ACCESS TO JUSTICE TO ENFORCE CIVIL RIGHTS.

A. Fee shifting plays an important role in enabling poor and disenfranchised groups to enforce their civil rights.

Our legal system "depends largely on the efforts of private citizens" to ensure "[t]he effective enforcement of Federal civil rights statutes." H.R. Rep. 94-1558, at 1 (1976); *see* Admin. Office of the U.S. Courts, 2016 Annual Report of the Director, *Judicial Business of the United States Courts*, tbl. C-2 (2016) (reporting that the United States brought fewer than 1% of the civil rights suits in federal court in 2016). However, "a vast majority of the victims of civil rights violations cannot afford legal counsel." H.R. Rep. 94-1558, at 1. Moreover, while there are "often important principles to be gained in such litigation, and rights to be conferred and

enforced," there is "often no large promise of monetary recovery." 122 Cong. Rec. 33314 (1976) (statement of Sen. Kennedy). Because it is difficult to "attract competent counsel" to bring a lawsuit with a "low pecuniary value," civil rights litigants left to "rely on private-sector fee arrangements . . . might well [be] unable to obtain redress for their grievances." *City of Riverside v. Rivera*, 477 U.S. 561, 579-80 (1986) (plurality). By comparison, the government has "substantial resources" to defend against such suits, creating a "gap between citizens and government officials" that causes an "inequality of litigating strength." H.R. Rep. 94-1558, at 7.

Recognizing these challenges and the imbalance in available representation, Congress passed Section 1988 "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. 94-1558, at 1).[1] Section 1988 authorizes a "reasonable attorney's fee" award to a plaintiff who "prevail[s]" in an action to enforce civil rights. 42 U.S.C. § 1988(b) (2012).[2] As intended,

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[1] *See also City of Riverside*, 477 U.S. at 578 ("Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights" and determined that fee-shifting was necessary "[i]n order to ensure that lawyers would be willing to represent persons with legitimate civil rights grievances."); *Murphy v. Smith*, 864 F.3d 583, 585-86 (7th Cir. 2017) ("[Section 1988] encourages plaintiffs to act as private attorneys general to enforce federal rights, and particularly federal constitutional rights, especially where the economics of litigation would otherwise discourage even meritorious suits."); *Grosvenor v. Brienen*, 801 F.2d 944, 947 (7th Cir. 1986) ("[I]t is because Congress found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process that it enacted § 1988."); S. Rep. No. 94-1011, at 2 (1976) (explaining that "fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate" their civil rights because "[i]n many cases arising under the civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer"); 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney) ("If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.").

[2] Although the statute refers to a "prevailing party," a defendant may be awarded fees under Section 1988 only if it shows that the plaintiff's claim "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)). A lesser standard "would undercut the efforts of Congress to promote the vigorous enforcement" of civil rights. *Id.*

Section 1988 became "a powerful weapon" for the "victims of civil rights violations" by "improv[ing] their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights." *Evans v. Jeff D.*, 475 U.S. 717, 741 (1986). Countless civil rights have been vindicated in suits permitting the recovery of attorney's fees under Section 1988.

In determining whether a plaintiff qualified as a "prevailing party" entitled to an award of attorney's fees under the various fee-shifting provisions enacted by Congress, most Courts of Appeals had adopted the so-called "catalyst theory." *See Buckhannon*, 532 U.S. at 602.[3] Under the catalyst theory, a plaintiff was considered a "prevailing party" if it achieved its desired result because the lawsuit brought about a voluntary change in the defendant's conduct. *See id.* at 601. A civil rights plaintiff could be awarded attorney's fees under the catalyst theory even if the defendant's change in behavior occurred before the court had an opportunity to rule on the merits of the claim. In other words, a change in conduct that mooted the plaintiff's action did not preclude an award of attorney's fees.

B. The Supreme Court narrowed the standard for "prevailing party" but insisted a strict mootness doctrine would protect civil rights plaintiffs.

In 2001, the Supreme Court narrowed the standard for what constitutes a "prevailing party" for the purpose of awarding attorney's fees under fee-shifting provisions. In *Buckhannon*, the Court considered whether the Americans with Disabilities Act ("ADA") and Fair Housing Amendments Act ("FHAA")—which, like Section 1988, authorize a fee award to a "prevailing party"—permit an award of fees to a plaintiff who "achieves the desired result" not through a judgment or other court order, but "because the lawsuit brought about a voluntary change in the defendant's conduct." 532 U.S. at 601. Although the case focused on the ADA and the FHAA, the implications of the *Buckhannon* decision extend well beyond these two specific statutes, and apply to other statutes authorizing fee awards to "prevailing parties," including Section 1988. *See, e.g., Smyth v. Rivero*, 282 F.3d 268, 285 (4th Cir. 2002).

[3] The Fourth Circuit was the exception, having previously rejected the catalyst theory in *S-1 & S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994).

Relying on what it found to be the "clear meaning" of "prevailing party," the *Buckhannon* majority held that the ADA and FHAA do not authorize recovery of fees under the catalyst theory. 532 U.S. at 606-607, 610. Instead, *Buckhannon* held that a plaintiff may be considered the "prevailing party" for purposes of attorney's fees only if the litigation resulted in a court-ordered "alteration in the legal relationship of the parties." *Id.* at 605.

Echoing *amici curiae* and lower courts, the *Buckhannon* dissent argued that, not only was a rejection of the catalyst theory not compelled by the "prevailing party" language, but doing so would "impede access to the court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general." *Id.* at 623 (Ginsburg, J., dissenting). Specifically, the dissent cautioned that abolition of the catalyst theory would allow defendants to "escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray," *id.* at 622, by engaging in what the Fourth Circuit has referred to as "tactical mooting," *Goldstein v. Moatz*, 445 F.3d 747, 757 (4th Cir. 2006).[4] Justices Ginsburg, Stevens, Souter, and Breyer warned that this would undermine the incentives Congress put in place through fee-shifting provisions designed "to encourage private enforcement of laws designed to advance civil rights." 532 U.S. at 644.

The *Buckhannon* majority dismissed these concerns, insisting that its ruling would not result in "mischievous defendants" seeking to "unilaterally moot[] an action before judgment in an effort to avoid attorney's fees" for two reasons. *Id.* at 608-09. First, "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Id.* In other words, the danger of tactical mooting presents itself only in cases where the plaintiff

[4] This practice has also been called "strategic capitulation." *See, e.g.*, Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1091 (2007) (describing "strategic capitulation" as "situations in which defendants faced with likely adverse judgments attempt to moot the case and to defeat the plaintiff's fee petition by providing the requested relief before judgment").

seeks equitable relief alone.[5] Second, the mootness doctrine is narrow, permitting dismissal only where it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 609 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). Accordingly, as the dissent agreed, "a mootness dismissal is unlikely when recurrence of the controversy is under the defendant's control." *Id.* at 639.

The soundness of the *Buckhannon* decision, therefore, was predicated on an express understanding that a strict mootness doctrine would guard against any deleterious effects of requiring civil rights plaintiffs to obtain an adjudication of the merits before being eligible for attorney's fees.

II. GRANTING DEFENDANTS' REQUEST FOR DISMISSAL WOULD UNDERMINE THE STRICT MOOTNESS DOCTRINE MANDATED BY THE SUPREME COURT AND THE FOURTH CIRCIUT.

Granting Defendants' request for dismissal on mootness grounds would contravene the narrow constraints of the mootness doctrine, as established by the Supreme Court and the Fourth Circuit, and open the door for precisely the kind of unilateral mooting that *Buckhannon* sought to avoid. By all accounts, adopting Defendants' watered-down theory of "prudential mootness" would ignore the Supreme Court's holding in *Buckhannon* and encourage attempts by "mischievous defendants" to evade the strict standards required for a finding of mootness.

[5] Based in part on this reasoning, the Eleventh and Ninth Circuits have since held that *Buckhannon* did not invalidate use of the catalyst test as a basis for awarding attorney's fees in citizen suits under the Endangered Species Act ("ESA"), which authorizes only equitable relief. *See Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 307 F.3d 1318, 1326-27 (11th Cir. 2002) (holding that "the very policy consideration underlying the *Buckhannon* opinion . . . cuts the other way" in citizen suits under the ESA, which seek *only* equitable relief, and that application of *Buckhannon* to such suits would "cripple the citizen suit provision of the [ESA], in derogation of Congress's 'abundantly clear' intent to 'afford [] endangered species the highest of priorities") (alteration in original; citation omitted); *Ass'n of Cal. Water Agencies v. Evans*, 386 F.3d 879, 885 (9th Cir. 2004).

A. The Supreme Court and the Fourth Circuit have repeatedly emphasized the heavy burden a defendant must meet to obtain dismissal under the mootness doctrine.

As both the majority and dissent emphasized in *Buckhannon*, "'[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" 532 U.S. at 609, 639-40 (quoting *Friends of the Earth*, 528 U.S. at 189) (emphasis added). Accordingly, as Defendants previously acknowledged, *see* Dkt. No. 125 at 24, a defendant seeking dismissal under the mootness doctrine bears a "heavy burden" to show that it is "absolutely clear" that a challenged practice "has been terminated once and for all." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014).

Any other standard would be inadequate, as it would compel "the courts . . . to leave '[t]he defendant . . . free to return to his old ways.'" *Friends of the Earth*, 528 U.S. at 189 (quoting *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289 n.10 (1982)) (alterations in original); *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (cautioning that if "voluntary cessation of challenged conduct" were sufficient to "render a case moot," "a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed"). Thus, "when a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot." *Wall*, 741 F.3d at 497. It was this "formidable burden" that the *Buckhannon* Court assured would guard against a widespread practice of tactical mooting. *See* 532 U.S. at 609; *Friends of the Earth*, 528 U.S. at 170.

B. Defendants urge the Court to adopt a watered-down mootness standard, thereby permitting tactical mooting in both this case and future litigation.

Defendants ask the Court to adopt a lower standard for mootness under the guise of "prudential mootness," one that authorizes dismissal any time a defendant disclaims an intent to return to its old ways (*see* Dkt. No. 194 at 31) — even if, as here, the defendant "refuse[s] to commit to keep the revised policies in place and not revert to the challenged practices." *Porter*

v. Clarke, 852 F.3d 358, 365 (4th Cir. 2017). Adopting Defendants' flawed position would inappropriately restrict the availability of injunctive relief. *See* Dkt. No. 194 at 31. In cases such as this, where important civil rights are at stake, using the doctrine of "prudential mootness" to side-step the "formidable burden" of Article III mootness would upset the checks-and-balances envisioned by *Buckhannon*.

This case involves conditions for prisoners on Death Row at VDOC that are undeniably severe. The Plaintiffs are housed in 71 square feet cells with no real window that are artificially illuminated 24 hours a day, seven days a week. *See* Dkt. No. 166 at 6; *see also* Dkt. No. 115 at 8; Dkt. No. 110 at 9. When this lawsuit was filed, the Plaintiffs were isolated alone in their cells for 23 hours per day. *See* Dkt. No. 32-2 at 13; *see also* Dkt. No. 115 at 7. The prisoners were also separated by at least one empty cell between them. *See* Dkt. No. 49 at 4; *see also* Dkt. No. 115-9 at 7; Dkt. No. 110-10 at 5. As a result, communication between cells was nearly impossible. *See* Dkt. No. 110-10 at 24; *see also* Dkt. No. 32-2 at 10; Dkt. No. 115-10 at 18:1-6. Contact with others was practically non-existent. The Plaintiffs ate all of their meals alone in their cells. *See* Dkt. No. 110 at 9. They were not allowed to engage in any recreational or religious activities with others. *See* Dkt. No. 115-9 at 8; *see also* Dkt. No. 110-10 at 6. They were even denied visitation with family members. *See* Dkt. No. 115-10 at 116; *see also* Dkt. No. 115-3 at 7.

The psychological damage caused by these physical conditions is severe. Numerous studies have shown that solitary confinement has a number of common adverse psychological effects including anxiety, headaches, lethargy, insomnia, and nightmares. *See* Dkt. No. 115-9 at 6-7; *see also* Dkt. No. 32-2 at 16-21. Symptoms may also include hallucinations, psychotic paranoia, delusions, dissociation, and suicidal ideations. *See* Dkt. No. 115-9 at 7. Unsurprisingly, given the harsh conditions at issue here, medical expert Michael L. Hendricks observed many of these classic symptoms when he examined the Plaintiffs. *See* Dkt. No. 115-9 at 11-18. Plaintiffs suffer from a range of physical symptoms including the inability to sleep for as long as 48 hours at a time, loss of appetite, psychogenic rashes, chronic headaches, and

significant weight gain. *Id.* The psychological damage has been even more severe and includes depression, thoughts of suicide, self-mutilation, and auditory and visual hallucinations. *Id.* Despite the predictable psychological harm associated with these conditions of confinement, VDOC does not provide reasonable mental health services. The mental health specialist makes the rounds only once per week, and she does not notify the prisoners when she is there and only consults with prisoners if she is approached by them, even though they are frequently asleep during the short time she is ostensibly available. *See* Dkt. No. 115-9 at 9; *see also* Dkt. No. 124-4 at 3.

When a previous prisoner on VDOC Death Row challenged virtually the same living conditions, the District Court described these policies as "dehumanizing." *Prieto v. Clarke*, No. 12-1199, 2013 WL 6019215, at *6-8 (E.D. Va. Nov. 12, 2013), *rev'd*, 780 F.3d 245 (4th Cir. 2015), *cert. dismissed*, 136 S. Ct. 319 (2015). On appeal from *Prieto*, the Fourth Circuit agreed that the conditions were "undeniably severe." *Prieto v. Clarke*, 780 F.3d 245, 254 (4th Cir. 2015).

When this case was filed, VDOC maintained and defended its solitary confinement policies on the ground that they did not violate the Eighth Amendment. *See* Dkt. No. 21 at 1, 3-7. VDOC implicitly changed its position, however, when it announced a set of *temporary* regulations during the pendency of this lawsuit. *See* Dkt. No. 85-1 at 2, 5-9. Curiously, VDOC announced these changes just days after Plaintiffs disclosed their expert reports detailing the inhumane conditions.

The interim regulations relaxed some of the harshest conditions. Prisoners would now be allowed weekly contact visits with family, for instance, and permitted outdoor recreation five days a week. *See* Dkt. No. 85-1 at 2-3. The interim regulations also anticipated the constructions of a new outdoor recreation yard and a multipurpose day room. *Id.* Other basic realities of the prisoners' daily life remained unaffected, however. Their cells remain the same size, still have no real windows, and continue to be perpetually illuminated with artificial light. Moreover, the interim regulations did not become finalized until the day before VDOC was

required by the District Court to provide an update regarding their status. *See* Dkt. No. 161-1 at 4; *see also* Dkt. No. 161 at 1-2. The "final" regulations remain temporary, expressly providing that they will be reviewed annually and re-written in three years. *See* Dkt. No. 166 at 13. Moreover, VDOC retains sole authority under Virginia administrative law to modify or revoke these modifications at any time. *See* Va. Code Ann. §§ 2.2-4009, 2.2-4007.01–.03, 2.2-4027.

Despite Defendants' prior acknowledgment that these admittedly temporary regulations were insufficient to satisfy the "heavy burden" of the mootness doctrine, *see* Dkt. No. 125 at 24, they now urge the Court to adopt the very same result under the guise of "prudential mootness." According to Defendants, prudential considerations favor dismissal here because – in light of VDOC's recent modifications to the conditions of confinement on Death Row – "there is no ongoing constitutional violation to be redressed" and "no real and immediate threat that VDOC will reinstitute the prior conditions of confinement on death row". Dkt. No. 194 at 31.

Defendants' attempt to invoke the "prudential mootness" doctrine both exaggerates the scope of this doctrine's application, and grossly understates the threat that VDOC will revert its conditions of confinement to their previous state. The doctrine of "prudential mootness," also known as "equitable mootness," was designed to be "limited in scope and cautiously applied," and typically arises in highly complex bankruptcy cases where fashioning relief is difficult, and where dismissal of the case "can prevent substantial harm to numerous parties." *In re Cont'l Airlines*, 91 F.3d 553, 559 (3d Cir. 1996); *see also In re Anderson*, 349 B.R. 448, 454 (E.D. Va. 2006) ("[t]he doctrine of equitable mootness applies chiefly in bankruptcy proceedings" and its application depends upon "whether prudence counsels against upsetting the plan of reorganization"); *In re Semcrude, L.P.*, 728 F.3d 314, 320 (3d Cir. 2013) (emphasizing the "'virtually unflagging obligation' of federal courts to exercise the jurisdiction conferred on them," and holding that equitable mootness is only a "valid consideration" where granting relief would be "almost certain to produce a 'perverse' outcome"). As Plaintiffs have explained, the doctrine has fallen into disfavor among federal courts, including two recent Supreme Court decisions rejecting reliance on prudential concerns in deciding issues of justiciability. *See* Dkt.

No. 198 at 13-14 (discussing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014), and *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014)).

Setting aside the precise scope of the doctrine, it is clear that prudential mootness does not apply where – as here – there is strong evidence that the defendant will return to its pre-litigation conduct in the future. Contrary to Defendants' assertion, this risk is not merely a product of "the imagination of counsel" (Dkt. No. 194 at 31-32); a review of the evidentiary record leaves little doubt that Defendants are attempting to engage in textbook tactical mooting.

As explained in Plaintiffs' briefing, there is every reason to believe that, absent a court order, VDOC will reinstate the conditions challenged by the Plaintiffs. VDOC has refused to admit that the changes are intended to bring the conditions on Death Row into compliance with the Eighth Amendment or to guarantee that the new conditions will remain permanently in place. *See* Dkt. No. 125 at 20-21; *see also* Dkt. No. 32-2 at 6-7; Dkt. No. 21 at 5; Dkt. No. 131 at 6:17-22; Dkt. No. 131 at 6:17-22 (Defendants' counsel explaining VDOC could not guarantee the new regulations will remain in place because "the department didn't want to be hampered by some sort of agreement . . . .").

Indeed, internal VDOC communications compel the conclusion that these changes were undertaken solely in response to the litigation. These documents refer to the construction-related changes as being done on an "emergency" basis, state that the changes were initiated "in July 2015 after a lawsuit was started by death row inmates," and that the changes were intended "[t]o quell this and avoid legal issues." Dkt. No. 192 at 22. Moreover, the rate of progress of VDOC's modifications indicate the changes were a litigation-driven strategy – with progress slowing after the Court granted a stay of proceedings, *see* Dkt. 115-3 ¶ 23, and then picking up with renewed urgency a few weeks before the summary judgment hearing in this case, *see* Dkt. No. 192 at 22. This uncontested documentary evidence compels the conclusion that this litigation was the impetus for VDOC's limited modifications to conditions on Death Row. As the Fourth Circuit recognized: (1) VDOC's changes to confinement conditions "were made only after this case was initiated" and after VDOC had "resist[ed] changes for several years"; (2)

VDOC retains the ability to "revert[] to the challenged policies in the future"; and (3) VDOC's refusal to commit to making the changes permanent makes it "more than a 'mere possibility' that Defendants will alter Plaintiffs' current conditions of confinement." *Porter*, 852 F.3d at 365.[6] VDOC's refusal to commit to make its temporary modifications permanent – and its forceful resistance to a Court order that would have this effect – should leave little doubt that a return to pre-litigation confinement conditions is a likely future outcome should the Court decline to rule on the merits. The inhumane conditions of confinement that gave rise to this litigation, if allowed to return, will undeniably cause irreparable harm to Plaintiffs, and enforcing their constitutional rights will require an entirely new round of resource-intensive litigation. The facts of this case – and the critical rights at issue – are reason enough to deny Defendants' improper request for dismissal. But the impact of a mootness dismissal on other litigants also counsels against Defendants' position. By improperly expanding the mootness doctrine, granting Defendants' request would make it far easier for "mischievous defendants," like VDOC, to "unilaterally moot[]" lawsuits seeking equitable relief. *See Buckhannon*, 532 U.S. at 608-09.

Under Defendants' theory, a defendant need only make "interim" changes to an unconstitutional practice to obtain dismissal of a plaintiff's lawsuit (*see* Dkt. No. 166 at 19) — leaving the plaintiff in a financial hole with no assurance that the defendant will not simply revert to the prior practice (and the specter of having to invest further resources into a subsequent lawsuit if it does so). *See Kholyavskiy v. Schlect*, 479 F. Supp. 2d 897, 906 (E.D. Wisc. 2007) ("When a plaintiff sues the government, she often seeks only equitable relief. In such circumstances, the government can litigate vigorously to wear down the plaintiff and then 'tactically moot' the case prior to judicial action.") (quoting *Goldstein*, 445 F.3d at 752). Moreover, because civil rights lawsuits, such as this one, frequently seek injunctive relief rather

[6] *See also Golden v. City of Columbus*, 404 F.3d 950, 962 & n.10 (6th Cir. 2005) (holding that a "new rule" implemented by the City "after the events that prompted [the plaintiff] to bring this action" challenging the prior practices as unconstitutional did not moot the case because there was "no way of knowing whether the new rule [wa]s permanent or temporary").

than damages, an opinion adopting Defendants' position would have a disproportionate impact on plaintiffs seeking to enforce their civil rights.[7]

III. EMPIRICAL DATA SHOWS A DECLINE IN PUBLIC INTEREST LITIGATION AFTER *BUCKHANNON*, DEMONSTRATING THE NEED FOR A STRICT MOOTNESS STANDARD.

In addition to cabining the impact of its ruling to what it viewed as a narrow category of cases, *i.e.*, those (1) seeking solely equitable relief, in which (2) it is "absolutely clear" that the challenged conduct will not recur, the majority in *Buckhannon* rejected the dissent's concerns as "entirely speculative and unsupported by any empirical evidence." 532 U.S. at 608-09. But empirical studies since *Buckhannon* have shown that the dissent's concerns were, in fact, well grounded; and the importance of a strict mootness doctrine for protecting the economic viability of civil rights cases has become all the more important.

Data gathered since *Buckhannon* has confirmed the dissent's fears: public interest cases seeking injunctive relief on behalf of impoverished and disenfranchised groups, such as impact litigation and civil rights lawsuits against government actors, are particularly vulnerable to tactical mooting. Albiston & Nielsen, 54 UCLA L. REV. at 1092, 1120-21.[8] In 2004, Catherine

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[7] *See Hensley*, 461 U.S. at 445 n.5 (acknowledging that "monetary damages are often not an important part of the recovery sought" by civil rights actions and, further, "doctrines of official immunity often limit the availability of damages against governmental defendants"); Landyn Wm. Rookard, *Don't Let the Facts Get in the Way of the Truth: Revisiting How* Buckhannon *and* Aleyeska Pipeline *Messed Up the American Rule*, 92 IND. L.J. 1247, 1274 (Summer 2017) (explaining that because "damages are frequently unavailable in private attorney general suits against state actors, . . . [s]trategic capitulation . . . disproportionately" impacts "public interest litigants"). Even when monetary relief is available to civil rights plaintiffs, recovery is frequently limited to nominal damages. *See, e.g.*, *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). And although "a nominal damages award does render a plaintiff a prevailing party by allowing him to vindicate his 'absolute' right to procedural due process," the Supreme Court has held that "the only reasonable fee" award when a plaintiff recovers nominal damages "is usually no fee at all." *Id.* at 112-13, 115. Accordingly, tactical mooting may be employed to deny attorney's fees not only in cases seeking equitable relief alone, but also in those in which a plaintiff's monetary recovery may be limited to nominal damages.

[8] The authors identify three "structural conditions" commonly present in public interest cases that make these lawsuits particularly susceptible to tactical mooting: they (1) seek to enforce important constitutional or statutory rights; (2) seek a change or judicial mandate that

R. Albiston and Laura Beth Nielsen conducted a national survey of 221 public interest organizations to determine the extent to which *Buckhannon* had made it harder for public interest organizations to pursue their objectives and deterred attorneys from representing civil rights plaintiffs. *Id.* at 1116-18. They concluded that "*Buckhannon* has had a chilling effect on the very forms of public interest litigation that Congress intended to encourage through fee-shifting provisions," including "discourag[ing] both public interest organizations and private counsel from taking on enforcement actions" by making recovery of fees more doubtful. *Id.* at 1092, 1128-31.

Albisten and Nielsen's findings echo the evidence Congress relied upon in enacting Section 1988 in 1976. Before 1975, a number of courts had awarded attorney's fees to plaintiffs performing the services of a "private attorney general," on the ground that such individuals had acted to vindicate "important statutory rights of all citizens." *Wilderness Soc'y v. Morton*, 495 F.2d 1026, 1032 (D.C. Cir. 1974); *see also, e.g.*, *Lytle v. Comm'rs of Election of Union Cty.*, 65 F.R.D. 699, 703 (D.S.C. 1975) (discussing the history of the private attorney general doctrine). However, in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975), the Supreme Court held that courts could not shift attorney's fees without statutory authorization.

During congressional hearings addressing the impact of that decision, civil rights attorneys, including representatives from the Lawyers Committee for Civil Rights Under Law, the Council for Public Interest Law, and the American Bar Association Special Committee on Public Interest Practice, testified that *Alyeska Pipeline* had a "devastating impact . . . on litigation in the civil rights area." H.R. Rep. No. 94-1558, at 2-3. Surveys disclosed that civil rights plaintiffs "were the hardest hit by the decision," and other evidence revealed that "private

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government actors comply with the law; and (3) seek injunctive or other equitable relief. 54 UCLA L. REV. at 1104; *see also* Brian J. Sutherland, *Voting Rights Rollback: The Effect of* Buckhannon *on the Private Enforcement of Voting Rights*, 30 N.C. CENT. L. REV. 267, 275-76 (2008) (explaining why *Buckhannon* "comes down hardest on enforcement actions and complex impact litigation against government actors"). Perhaps not surprisingly, all three of these factors are present in this case.

lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so." *Id.* at 3. This evidence compelled a Congressional subcommittee to propose a bill allowing an award of fees to prevailing civil rights litigants, which was ultimately enacted as Section 1988. *See id.*

Additional contemporary studies buttress the commonsense conclusion that the imposition of obstacles to recovering attorney's fees makes it more difficult for civil rights victims to obtain counsel, resulting in fewer civil rights suits being filed (and, of those filed, a larger percentage of litigants proceeding *pro se*). For example, a study published earlier this year found that prisoner filings in federal court have declined 60 percent nationwide since the Prison Litigation Reform Act ("PLRA") was enacted in 1996. Margo Schlanger, *The Just Barely Sustainable California Prisoners' Rights Ecosystem*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 62, 64 (Mar. 2016). Likewise, while nearly 17 percent of prisoners who filed cases in federal court in 1996 were represented, only 5 percent of cases filed in 2012 had counsel. *Id.* The author attributes these declines, in part, to the PLRA's fee-shifting provision, including its $213 hourly cap, which makes "prisoners' rights cases . . . both low paid and risky." *Id.* at 69-70.

A consideration of the Individuals with Disabilities Education Act ("IDEA") context is also instructive. The Seventh Circuit has explained that the rule established in *Buckhannon* "falls particularly hard on parents of disabled children litigating under the IDEA." *Bingham v. New Berlin Sch. Dist.*, 550 F.3d 601, 604 (7th Cir. 2008). A number of the factors that contribute to this result are shared by civil rights lawsuits in other contexts. For example, those litigating under the IDEA "tend to seek equitable relief" and "are unlikely to have significant financial resources to expend on legal fees." *Id.* The Seventh Circuit found that "the very real risk of losing attorney's fees" through tactical mooting would "significantly decrease the pool of attorneys willing to represent clients other than those who are very wealthy and can afford to pay fees on their own." *Id.*[9]

[9] *See also* Jeffrey Kosbie, *Donor Preferences and the Crisis in Public Interest Law*, 57 SANTA CLARA L. REV. 43, 44 (2017) (reporting that "[l]egal aid offices around the country decline half

A recent analysis of post-*Buckhannon* IDEA claims reveals that many claimants do in fact proceed *pro se*, likely because they are unable to afford an attorney. *See* Kevin Hoagland-Hanson, *Getting Their Due (Process): Parents & Lawyers in Special Education Due Process Hearings in Pennsylvania*, 163 U. PA. L. REV. 1805, 1827-28 (May 2015) (noting that roughly 25% of parents in IDEA due process hearings in Pennsylvania were unrepresented and 37.9% of Philadelphia public school students were below the federal poverty line); *see also, e.g.*, *id.* at 1819 (citing an Illinois study revealing that attorneys represented the parents in only 44% of IDEA due process hearings). It also concluded that an inability to retain counsel has a detrimental impact on IDEA claimants; indeed, "having an attorney is crucial to parent success in due process hearings." *Id.* at 1819. For example, out of 343 IDEA due process hearings in Illinois over a five-year period, "parents who were represented succeeded in obtaining relief 50.4% of the time, while parents proceeding pro se succeeded only 16.8% of the time." *Id.*[10]

These studies underscore the challenges faced by civil rights plaintiffs when attorney's fees become more difficult to obtain. By lowering the mootness bar, and thereby broadening the scope of claims susceptible to tactical mooting, adopting Defendants' position would further add to these challenges, making it even more difficult for civil rights litigants in this District to obtain counsel and litigate their grievances, and undermining the important policies Section 1988 was intended to protect.[11]

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of the requests that they receive because of insufficient resources" and "[l]ow-income households are able to obtain legal aid for less than 20% of their legal needs"; "because of their limited resources," "public interest lawyers report that they pay insufficient attention to many serious violations of rights").

[10] *See also* Hoagland-Hanson, 163 U. PA. L. REV. at 1819 (26% of hearings in Wisconsin and Minnesota over a 10-year period involved unrepresented parents, and none of them resulted in a victory for the parents); *id.* at 1820 (represented parents in Pennsylvania prevailed 58.75% of the time, while *pro se* parents prevailed only 16.28% of the time).

[11] Dismissing this case on mootness grounds would also have a very real impact on the individual Plaintiffs, who would be left with uncertainty as to their future conditions, and their attorneys. Certain of Plaintiffs' attorneys, like many civil rights lawyers, represent Plaintiffs (and most of their other clients) on a contingent fee basis. Adopting Defendants' proposed watered-down mootness doctrine would make it far more difficult for them, and other attorneys,

IV. ADOPTING DEFENDANTS' POSITION WOULD ALSO MAKE IT EASIER FOR DEFENDANTS TO AVOID PRECEDENTIAL OPINIONS THAT WOULD HAVE BROADER IMPACT.

Adopting Defendants' position would have an additional consequence for litigation involving repeat players, such as government defendants, that will disproportionately impact those suffering civil rights violations and make it harder for plaintiffs seeking to compel compliance with civil rights. Because of their sophistication and involvement in numerous lawsuits, "repeat defendants" are able to "seize on the rule-making potential of published judicial decisions while one-time plaintiffs are more likely to prevail at trial or accept a settlement, neither of which generally yields precedential authority." Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 972 n. 140 (2011) (discussing Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 877 (1999)).[12]

Endorsing Defendants' watered-down "prudential mootness" doctrine would add an additional weapon – tactical mooting – to the arsenal of repeat defendants seeking to avoid an adverse precedential opinion that may have an impact beyond the plaintiffs litigating a particular

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to accept civil rights matters and pursue them as vigorously as Plaintiffs' counsel has here. Other of Plaintiffs' attorneys are representing Plaintiffs on a *pro bono* basis. While they may not rely on attorneys' fee awards to the same extent, fee awards remain an important source of financial support for law firm *pro bono* programs, allowing their attorneys to devote time and resources to representing indigent clients and protecting important legal rights. *See* Brief for The Association of the Bar of the City of New York and the New York County Lawyers' Association as Amici Curiae Supporting Plaintiffs, *Arbor Hill Concerned Citizens Neighborhood Ass'n. v. County of Albany* (No. 06-0086-cv), 2007 WL 5269516 at *11 ("Reducing the attorneys' fees award[s] in civil rights cases because a law firm is motivated to act in the public interest is likely to have a domino effect of reducing the resources available for law firms to make donations to civil rights organizations that retain them, their pro bono programs, or other charitable purposes.").

[12] *See also* Shauhin Talesh, *How the "Haves" Come Out Ahead in the Twenty-First Century*, 62 DEPAUL L. REV. 519, 523 (Winter 2013) (explaining that "repeat players play the odds in their repetitive interactions and engagements by settling cases that are likely to produce adverse precedent and litigating cases that are likely to produce rules that promote their interests," and that "unequal resources and incentives . . . may allow repeat players to control and determine the content of law").

suit. *See id.* For example, under Defendants' reasoning, a prison defendant may choose to implement a policy change (such as the "interim" measures adopted here) in order to obtain a dismissal under the mootness doctrine. *See* Dkt. No. 166 at 19. Not only would this allow the defendant to avoid paying attorney's fees to the plaintiff (*see supra* at 6-12), it removes the risk of an adverse precedential opinion that may be used by litigants in other prisons, or different categories of prisoners subject to other unlawful policies, to seek broader reform. Meanwhile, the defendant may choose to litigate challenges that, for one reason or another, provide a stronger likelihood of success, resulting in a precedential opinion that may, in turn, make it more difficult for other litigants to challenge similar policies or practices.

CONCLUSION

For the reasons set forth above, Defendants' request for dismissal of Plaintiffs' lawsuit on mootness grounds should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2017, I electronically filed the foregoing document for which conventional service is required with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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/s/ Hope R. Amezquita