No. 18-6257

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS PORTER, et al.,

Plaintiffs-Appellees,

v.

HAROLD W. CLARKE et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, INC. AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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No. 18-6257 Caption: Thomas Porter, et al. v. Harold W. Clarke, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Civil Liberties Union Foundation of Virginia, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
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1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ David W. DeBruin Date: August 28, 2018

Counsel for: ACLU Foundation of Virginia, Inc.

CERTIFICATE OF SERVICE

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I certify that on August 28, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ David W. DeBruin
(signature)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

The Rutherford Institute
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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union Foundation of Virginia, Inc. ("ACLU of Virginia") is the Virginia affiliate of the American Civil Liberties Union, with approximately 30,000 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

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* represent that all parties have consented to the filing of this brief *amici curiae*. Pursuant to Rule 29(e), the undersigned counsel further represent that no party or party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparation or submission of this brief; and that no person other than the *amici curiae* and counsel identified herein contributed money that was intended to fund preparation or submission of this brief.

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-Appellees, prisoners on death row in the Virginia Department of Corrections ("VDOC"), have suffered undeniably harsh conditions in violation of their Eighth Amendment rights, including solitary confinement for 23 hours a day, cells measuring 71 square feet with no meaningful window, and no contact visitation with family. When this case first came before this Court on appeal, the District Court below had dismissed the case as moot because VDOC made temporary changes to its policies in the middle of this litigation. In that appeal, this Court found that VDOC's post-litigation policy change, unaccompanied by any legally enforceable commitment not to revert to the challenged conditions, did not satisfy the strict standard for mootness. On remand, the VDOC presented the exact same factual arguments and argued that, under the prudential mootness doctrine, the case should be dismissed for lack of a remedy. The District Court rejected that argument and issued a permanent injunction prohibiting the VDOC from reinstituting the unconstitutional conditions.

In a proper exercise of its equitable discretion, the District Court carefully weighed, among other factors, the detrimental effects that a dismissal would have on the structure of private civil rights enforcement. The vindication of civil rights largely depends upon private enforcement by citizens represented by qualified counsel. Recognizing that civil rights plaintiffs face significant economic

challenges securing counsel in cases where there are often no recoverable monetary damages, Congress created a fee-shifting regime in which attorneys can recover their fees in cases where they are deemed the "prevailing party." The effectiveness of this regime is threatened, however, by a number of possible procedural maneuvers by mischievous defendants. In a defensive ploy known as "tactical mooting," defendants can preemptively secure a dismissal by changing their behavior during litigation before the litigation has reached the stage where a plaintiff would meet the standard set for qualifying as the "prevailing party." As a result of tactical mooting, plaintiff's counsel remains unable to collect any fees under the applicable fee-shifting statute. One protection against tactical mooting is the strict standard against constitutional mootness, which this Court upheld and applied on the first appeal. Further protection is left to the equitable discretion of the District Court judge. Here, the District Court properly exercised that discretion and recognized that a dismissal would effectively encourage tactical mooting and thereby upset the system of private civil rights enforcement. The decision below should be affirmed. The doctrine of prudential mootness should not become a backdoor for evading the protections against tactical mooting that this Court has already enforced.

ARGUMENT

I. FEE-SHIFTING PROVISIONS IN CIVIL RIGHTS CASES PROMOTE A VITAL PUBLIC INTEREST.

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, 2015 Annual Report of the Director, *Judicial Business of the United States Courts*, tbl. C-2 (2015) (reporting that the United States brought fewer than 1% of the civil rights suits in federal court in 2015). 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).[2] 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).[3] In enacting Section 1988, Congress affirmed that "the public as a whole has an interest in the vindication of the rights conferred

[2] *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."); 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.").

[3] 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.*

by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff." *Hensley*, 461 U.S. at 444, n. 4.

As intended, 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.

B. When the Supreme Court Narrowed the Standard For "Prevailing Party," It Recognized the Need for Judicial Protection Against the Use of Tactical Mooting.

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 under the so-called "catalyst theory." Under the catalyst theory, 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" is considered the prevailing party and thus entitled to an award of attorney's fees. *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 601 (2001). 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).

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 606-07, 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. The *Buckhannon* decision effectively ended use of the catalyst theory as a means for plaintiffs to recover attorney's fees under fee-shifting statutes, including Section 1988.

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 this Court 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* decision acknowledged the reality and seriousness of the concerns about tactical mooting, even while abandoning the catalyst doctrine. The decision in *Buckhannon* was predicated on a number of doctrinal protections that the majority believed would be sufficient to protect against "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 seeks equitable relief alone.[5] Second, the

[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").

[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

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 legal protections against tactical mooting were necessary. The majority believed that, at least in most circumstances, a strict mootness doctrine would be sufficient to provide such a defense. Indeed, when this case first came up on appeal, this Court reaffirmed the demanding character of the constitutional mootness doctrine. At that time this Court found that "Defendants cannot meet their formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to return." *Porter v. Clarke*, 852 F. 3d 358, 366 (4th Cir. 2017) (quoting *Friends of the Earth*, 528 U.S. at 190) (internal quotations removed). In doing so, this Court adhered to

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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).

the strict mootness standard at the heart of the *Buckhannon* decision, and thus preserved in this case the judicial defenses against the practice of tactical mooting.

II. THE DISTRICT COURT PROPERLY REJECTED APPELLANTS' ARGUMENT FOR PRUDENTIAL MOOTNESS AS UNDERMINING THE STRUCTURE OF PRIVATE CIVIL RIGHTS ENFORCEMENT.

A. The Appellants Advance an Argument That Would Improperly Constrain the District Court's Discretion to Issue an Injunction.

Appellants now seek to circumvent the defenses against tactical mooting that *Buckhannon* and this Court have rightly put in place. On this new appeal, Appellants argue that this case should be dismissed for lack of a remedy. Invoking the doctrine of prudential or equitable mootness, Appellants assert the same unavailing arguments for dismissing the case as they did when the case was up for appeal the first time. In so doing, they repackage the same arguments they raised previously and present them as sufficient to avoid an injunction. However, the Appellants' argument, if accepted, would still effectively result in a mooting of the matter. The Appellants' attempt to tactically moot this case should be denied.

The Appellants effectively urge this Court to assist them in evading the judicial protections against tactical mooting by discounting the broad scope of the District Court's equitable discretion. When this case was remanded after the first appeal, it still remained for the District Court to determine if "there exists some cognizable danger of recurrent violation." JA2548 (citing *United States v. W.T. Grant*, 345 U.S. 629, 633 (1953)). However, unlike the heavy burden faced by

Appellants in arguing for constitutional mootness, the showing of a "cognizable danger" required of Appellees is much lower. Indeed, when making this determination, the Court's "discretion is necessarily broad and a strong showing of abuse must be made to reverse it." *W.T. Grant*, 345 U.S. at 633. In making its decision, the District Court is to consider and weigh "all the circumstances" of the case. *Id*. The fact that the District Court has considerable discretion when hearing an argument for "prudential mootness" does not mean that the concerns expressed by *Buckhannon* are any less substantial. On the contrary, the concern over the misuse of tactical mootness should weigh in the proper exercise of that discretion.

Having considered the totality of the circumstances, the District Court here found that the Appellees had shown a "cognizable danger of recurrent violation" and that, taken in their totality, prudential concerns actually weighed in favor of issuing an injunction. JA2462-64. As the District Court below correctly recognized, in cases such as this in which important civil rights are at stake, using the doctrine of "prudential mootness" to sidestep the "formidable burden" of Article III mootness would upset the checks-and-balances envisioned by *Buckhannon*. The District Court's decision below should be affirmed.

B. The District Court Properly Exercised Its Broad Discretion in Issuing the Injunction.

1. The Appellants only changed their practices after litigation began and have refused to commit themselves to keeping the new policies in place.

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* D.E. 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* D.E. 85-1 at 2, 5-9. Curiously, VDOC announced these changes just days after Plaintiffs disclosed their expert reports detailing the inhumane conditions. 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. JA1535. The "final" regulations remain temporary, expressly providing that they will be reviewed annually and re-written in three years. JA1596. 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. Indeed, the VDOC has refused to enter into a consent decree because "the department didn't want to be hampered by some sort of agreement that if things were to change . . . they didn't want anything in place that would necessarily bind us." JA1493; *see also* JA1615.

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, stating 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." JA1877. 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* JA558 ¶ 23, and then picking up with renewed urgency a few weeks before the summary judgment hearing in this case, *see* JA1877. This uncontested documentary evidence compels the conclusion that this litigation was the impetus for VDOC's limited modifications to conditions on Death Row.

Moreover, as explained in Appellee's briefing, there is also every reason to believe that, absent a court order, VDOC will likely 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*, *e.g.*, JA1493 (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 . . . ."); *see also* JA1615, 1621-22.

These facts have not changed since this case was first before this Court on appeal. At that time, this Court 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." JA1622. Now, in this second appeal, the Appellants present the same set of facts and argue that prudential considerations favor an equitable dismissal. While the technical legal standard may have changed, the underlying facts and their significance have not. More importantly, given the equitable discretion to be exercised by the District Court, the concerns about tactical mooting likewise remain and weigh in favor of an injunction. Accordingly, the District Court was well within the bounds of its broad discretion when it found that "dismissing plaintiff's claims on equitable mootness grounds would undercut [the] logic" behind the *Buckhannon* decision. JA2464.

2. Empirical data shows the threat posed by tactical mooting to public interest litigation.

The District Court's finding and equitable decision is further supported by the empirical evidence into the harms tactical mooting has had on public interest litigation. Indeed, empirical studies since *Buckhannon* have shown that the

dissent's concerns were, in fact, well-grounded; and the importance of 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.[6] In 2004, Catherine 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.

[6] 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 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.

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 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.*[7]

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

[7] *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 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").

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.*[8]

These studies underscore the challenges faced by civil rights plaintiffs when attorney's fees become more difficult to obtain. If this Court were to reverse and endorse the Appellants' use of equitable mootness as a means of sidestepping the judicial controls against tactical mooting, then such a decision 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. The District Court did not abuse its discretion when issuing the injunction and properly heeded the important policies Section 1988 was intended to protect. The District Court's decision should be affirmed.

3. The seriousness of the civil rights violations further support the District Court's decision to issue an injunction.

This case involves conditions for prisoners on Death Row at VDOC that are undeniably severe and which constitute an egregious violation of their Eighth Amendment rights. The importance of the rights at issue and the extent of their violation make it all the more important to guard against tactical mooting in such

[8] *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).

cases. *See Centro Tepeyac v. Montgomery Cty*., 722 F.3d. 184, 191 (4th Cir. 2013) ("upholding constitutional rights surely serves the public interest"); *Veasey v. Abbott*, 870 F.3d 387, 394 (5th Cir. 2017) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights.")

The Plaintiffs are housed, with no real window, in 71 square feet cells that are artificially illuminated 24 hours a day, seven days a week. JA45, 57, 1589-91, 1612. When this lawsuit was filed, the Plaintiffs were isolated alone in their cells for 23 hours per day. *Id.* The prisoners were also separated by at least one empty cell between them. JA45-46, 194, 925. As a result, communication between cells was nearly impossible. JA213, 929, 975. Contact with others was practically non-existent. The Plaintiffs ate all of their meals alone in their cells. JA 46, 58. They were not allowed to engage in any recreational or religious activities with others. JA46, 1612. They were even denied visitation with family members. JA600, 998, 1612.

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. JA923. Symptoms may also include hallucinations, psychotic paranoia, delusions, dissociation, and suicidal ideations. *Id.* 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* JA925-37. 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 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. JA927, 938-40.

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).

III. ADOPTING APPELLANTS' 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)).[9]

Endorsing Appellants' use of the prudential or equitable mootness doctrine to sidestep the strict bar established by the doctrine of constitutional mootness would add an additional weapon – tactical mooting – to the arsenal of repeat defendants seeking to avoid an adverse precedential opinion that may have an

[9] *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").

impact beyond the plaintiffs litigating a particular suit. *See id.* For example, under Appellants' reasoning, a prison defendant may choose to implement a policy change (such as the "interim" measures adopted here) and seek a dismissal under the prudential 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, the opinion of the District Court must be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

Amici curiae certify that they complied with the above-referenced rule and that according to the word processor used to prepare this brief, Microsoft Word 2013, this brief, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), contains 5,704 words, and therefore complies with the type-volume limitations in Fed. R. App. P. 32(a)(7).

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August, 2018, 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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