No. 16-7044

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS PORTER, et al.,

Plaintiffs-Appellants,

v.

HAROLD W. CLARKE et al.,

Defendants-Appellees.

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

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 16-7044 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)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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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
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Davis W. Debruin Date: September 20, 2016

Counsel for: ACLU Foundation of Virginia, Inc.

CERTIFICATE OF SERVICE

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I certify that on September 20, 2016 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:

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No. 16-7044 Caption: Thomas Porter, et al. v. Harold W. Clarke, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Rutherford Institute
(name of party/amicus)

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Counsel for: 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 7,000 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-Appellants ("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. The District Court below refused to rule on the constitutionality of these policies and, instead, *sua sponte* dismissed the case as moot because VDOC made temporary changes to its policies in the middle of this litigation. In doing so, the District Court has made it easier for VDOC and future civil rights defendants to avoid adverse rulings by simply modifying their behavior after litigation has begun, a defense ploy known as tactical mooting.

The District Court's decision disrupts 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. The District Court's opinion below, however, failed to apply the

strict mootness standard mandated by the Supreme Court and this Court. Accordingly, the opinion below should be reversed.

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, 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] As intended, Section 1988 became "a powerful weapon" for the "victims of civil rights violations" by "improv[ing] their

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[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.*

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.[4] 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

[4] This 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).

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).

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 this Court has referred to as "tactical mooting," *Goldstein v. Moatz*, 445 F.3d 747, 757 (4th Cir. 2006).[5] 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 seeks

[5] 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").

equitable relief alone.[6] 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. THE DECISION BELOW ERRONEOUSLY ABANDONED THE STRICT MOOTNESS DOCTRINE.

Contrary to the reasoning of *Buckhannon*, the District Court below did not strictly adhere to the narrow constraints of the mootness doctrine, as established by both the Supreme Court and this Court. In doing so, the District Court has opened

[6] 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).

the door for precisely the kind of unilateral mooting that *Buckhannon* declared should not be a problem. By all accounts, the District Court's opinion will lead to a rise in the "mischievous defendants" that *Buckhannon* dismissed out of hand given the strict standards required for a finding of mootness.

A. The Supreme Court and this Court 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 Appellees acknowledged below, *see* JA1082,[7] 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

[7] "JA" refers to the Joint Appendix filed by Plaintiffs at ECF No. 17.

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. The District Court lowered the standard to establish mootness, thereby permitting tactical mooting in both this case and future litigation.

As explained in detail in Plaintiffs' Opening Brief, the District Court opinion in this case lowers the burden a defendant must meet to establish mootness. *See* ECF No. 16 at 18-39. By doing so, the opinion inappropriately restricts the availability of injunctive relief. *See id.* In cases such as this, where important civil rights are at stake, such a decision threatens to 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. JA1243, 538, 145. When this lawsuit was filed, the Plaintiffs were isolated alone in their cells for 23 hours per day. *See* JA57, 537. The prisoners were also separated by at least one empty cell between them. JA86, 867, 312. As a result, communication between cells was nearly impossible. *See* JA331; *see also* JA54, 917. Contact with others was practically non-existent. The Plaintiffs ate all of their meals alone in their cells. JA145. They were not allowed to engage in any recreational or religious activities with others. *See* JA868, 313. They were even denied contact visitation with family members. JA915, 677.

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* JA866-67; *see also* JA59-63. Symptoms may also include hallucinations, psychotic paranoia, delusions, dissociation, and suicidal ideations. JA867. 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* JA 871-78. 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. JA869; *see also* JA1049.

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*, this Court 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. JA25, 30-34. VDOC implicitly changed its position, however, when it announced a set of *temporary* regulations during the pendency of this lawsuit. *See* JA123, 126-30. 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* JA123-24. 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* JA1203; *see also* JA1197-98. The "final" regulations remain temporary, expressly providing that they will be reviewed annually and re-written in three years. JA1250. Moreover, VDOC retains sole authority under Virginia administrative law to modify or revoke them at any time. *See* Va. Code Ann. § 2.2-4007.01-.03; *see also* JA1162 (counsel for VDOC 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 . . . .").

Despite VDOC's implicit acknowledgment that these admittedly temporary regulations were insufficient to satisfy the "heavy burden" of the mootness doctrine, *see* JA1082, the District Court *sua sponte* dismissed the case as moot. It did so largely on the belief that the "physical changes and monetary investments"

made by VDOC suggest that it will "not revert to the previous conditions" on Death Row. JA1256. But, contrary to the District Court's reasoning, there is little connection between the renovations and the policy changes. The renovations have not, for instance, changed the deplorably small and inhumane cells that house the prisoners on Death Row. And nothing prevents VDOC from forcibly returning the prisoners to their cells for 23 hours a day and denying them any visitation or recreation.

There should be little doubt that VDOC has engaged, with some *sua sponte* assistance from the District Court, in textbook tactical mooting. 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* JA1078-79, 49, 32; *see also* JA1162. Indeed, internal VDOC communications indicate that the entire purpose of the changes was simply to "avoid[] a major legal issue." JA1223.

The facts of this case—and the critical rights at issue—are reason enough to reverse the District Court's erroneous dismissal. But the impact of the District Court's flawed reasoning on other litigants also counsels in favor of reversal. By improperly expanding the mootness doctrine, the District Court's opinion makes it

far easier for "mischievous defendants," like VDOC, to "unilaterally moot[]" lawsuits seeking equitable relief. *See Buckhannon*, 532 U.S. at 608-09. Under the District Court's reasoning, a defendant need only make "interim" changes to an unconstitutional practice to obtain dismissal of a plaintiff's lawsuit (*see* JA1256)—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). Moreover, because civil rights lawsuits, such as this one, frequently seek injunctive relief rather than damages, the District Court's opinion will have a disproportionate impact on plaintiffs seeking to enforce their civil rights.[8]

[8] *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"). 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.

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.[9] In 2004, Catherine R. Albiston and

[9] 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

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 fee recovery 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.

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complex impact litigation against government actors"). Perhaps not surprisingly, all three of these factors are present in this case.

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.*

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, the District Court's opinion will further add to these challenges, making it even more difficult for civil rights litigants in the Fourth Circuit to obtain counsel and litigate their grievances and undermining the important policies Section 1988 was intended to protect.

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[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).

IV. THE DISTRICT COURT OPINION ALSO MAKES IT EASIER FOR DEFENDANTS TO AVOID PRECEDENTIAL OPINIONS THAT WOULD HAVE BROADER IMPACT.

The District Court's opinion has 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)).[11]

The District Court's opinion adds 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 suit.

[11] *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").

See id. For example, under the District Court's 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* JA1256. Not only would this allow the defendant to avoid paying attorney's fees to the plaintiff (*see supra* at 10-15), 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 reversed.

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 5,407 words, and therefore complies with the type-volume limitations in Fed. R. App. P. 32(a)(7).

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