No. 99-1848

IN THE
SUPREME COURT OF THE UNITED STATES

BUCKHANNON BOARD AND CARE HOME INC., et al.,
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR PUBLIC CITIZEN AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a plaintiff is a "prevailing party" for the purpose of fee-shifting statutes where, as a result of the litigation, the defendant provides the relief the plaintiff sought in the complaint.

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INTEREST OF AMICI[1]

Public Citizen is a non-profit, consumer advocacy organization with approximately 150,000 members nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the enforcement of a wide range of health, safety, environmental, and consumer legislation. Public Citizen has represented plaintiffs in litigation over federal fee-shifting statutes in a wide variety of cases. *See, e.g.*, *Shalala v. Schaefer*, 509 U.S. 292 (1993); *Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994); *Chesapeake Bay Found. v. United States Dep't of Agric.*, 11 F.3d 211 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 927 (1994); *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990). In all of these cases, Public Citizen has sought to further the policies behind federal fee-shifting legislation: providing a means for ordinary citizens to enforce federal law.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In pursuit of those goals, the ACLU maintains an active litigation program in all fifty states. In seeking to provide

[1] Counsel for the parties have consented to the filing of this *amici curiae* brief, and the letters of consent are being filed with the Court simultaneously with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than Public Citizen and the ACLU has made a monetary contribution to the preparation or submission of this brief.

access to the courts to victims of civil liberties and civil rights abuses, the ACLU relies in part on the recovery of court-awarded fees. The ACLU believes that the Fourth Circuit's restrictive interpretation of the fee-shifting statutes will hamper enforcement of the civil rights laws contrary to congressional intent. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as counsel for parties and as *amicus curiae.*[2]

STATEMENT OF THE CASE

Petitioners' lawsuit challenged certain West Virginia fire safety regulations (the "self-preservation rules") that required persons living in residential care homes to be able to evacuate without assistance in the event of danger. The complaint alleged that these rules discriminated against disabled nursing home residents in violation of the federal Fair Housing Amendments Act ("FHAA") and the Americans with Disabilities Act ("ADA").

The lawsuit was filed within days after state authorities issued Cease and Desist Orders to the petitioner Buckhannon Board and Care Home to expel its residents who could not self-evacuate, or to close its doors. At the TRO hearing, the defendants agreed to the entry of a court order indefinitely staying enforcement of the Cease and Desist Orders, and such an order was entered shortly thereafter. (Docket Entry No. 9)

[2] The ACLU of the National Capital Area is co-counsel in *Wade v. Coughlin*, *pet. for cert. pending*, No. 00-75 (filed July 14, 2000), which presents the same question as this case.

More than two years later, after extensive discovery and briefing, the defendants repealed the self-preservation rules (technically, that action was taken by the state legislature, which apparently must promulgate and amend all administrative rules, *see* W. Va. Code § 29A-3-1 et seq.). The lawsuit was then dismissed as moot.

Plaintiffs applied for attorney's fees under the applicable provisions of the FHAA, 42 U.S.C. § 3613(c)(2), and the ADA, 42 U.S.C. § 12205. The district court recognized that their lawsuit may well have been the catalyst for the repeal of the self-preservation rules. (Pet. App. A-17) Nonetheless, the court denied the fee request without making a finding of fact on that issue because the Fourth Circuit has ruled that a party that obtains the relief it seeks through unilateral action of the defendant, rather than through a formal judgment or settlement, cannot be a "prevailing party" under the various federal fee-shifting statutes. *See S-1 and S-2 v. State Bd. of Educ*., 21 F.3d 49 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 876 (1994). The Fourth Circuit affirmed. (Pet. App. A-9)

SUMMARY OF THE ARGUMENT

Fee-shifting statutes, which enable individuals to act as "private attorneys general," are a cornerstone of enforcement of vital federal laws involving civil rights, health, safety, and the environment. *Marek v. Chesney*, 473 U.S. 1, 43-51 (1985); *Evans v. Jeff D.*, 475 U.S. 717, 732, 741 (1986). For decades, federal courts have interpreted these fee-shifting statutes to allow recovery where the plaintiff's lawsuit acts as a "catalyst" for the defendant providing the relief sought by the plaintiff, even where there is no formal action by the court or settlement

agreement. *Friends of the Earth v. Laidlaw Envtl. Services*, 120 S. Ct. 693, 711 (2000) (collecting cases).

These courts follow the text and legislative history of the fee-shifting statutes. For example, the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 ("Section 1988"), provides fees to the "prevailing party," which plainly should include parties who prevail because the defendant provided the relief sought by the plaintiff in response to the litigation. The Senate Report accompanying Section 1988 states: "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976). *See also* H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 (1976) ("[A]fter a complaint is filed a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.").

This statutorily grounded catalyst rule has also been recognized in the decisions of this Court. For example, in *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987), this Court explained: "if a defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *See also Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("Nothing in the language of section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated.").

Finally, the catalyst rule is necessary to accomplish the congressional policies animating the fee-shifting statutes: obtaining competent counsel, and promoting compliance with federal law. *See* S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976). First, the catalyst rule helps parties attract counsel by ensuring payment of fees in cases where the litigation causes the defendant to materially alter its conduct. Second, the catalyst rule insures that fee-shifting statutes have their intended effect of promoting compliance with federal law by encouraging defendants promptly to alter their conduct in order to minimize their ultimate fee liability. In short, the catalyst rule is necessary if attorney's fees are to remain part of "the arsenal of remedies available to combat violations of civil rights." *Jeff D.*, 475 U.S. at 732.

The Fourth Circuit alone has rejected the catalyst theory. This ruling is contrary to the plain meaning and legislative history of the fee-shifting statutes, the teachings of this Court, and congressional policy. Accordingly, the decision below must be reversed.

ARGUMENT

More than 100 federal fee shifting statutes provide for an award of fees to successful plaintiffs. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (listing federal statutes authorizing awards of attorney's fees). Congress enacted these fee-shifting statutes to encourage enforcement of federal law by "private attorneys general." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989). Like most fee-shifting statutes, the Americans With Disabilities Act ("ADA") and the Fair Housing Amendments Act of 1988 ("FHAA")

provide for a reasonable attorney's fee for the "prevailing party." 42 U.S.C. § 12205; 42 U.S.C. § 3613(c)(2).

For two reasons, the catalyst rule is a critical component of these fee-shifting statutes. First, "Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights." *Jeff D.*, 475 U.S. at 731. *See also Newman v. Piggie Park Enters., Inc*., 390 U.S. 400, 402 (1968) (fee-shifting under Title II of 1964 Civil Rights Act allows individuals to employ counsel, obtain access to the courts, and vindicate their rights). Abandonment of the catalyst rule would undermine this goal. The catalyst rule ensures payment of fees where the defendant unilaterally changes its conduct, including in cases where the defendant does so after years of litigation. *See, e.g.*, *Ortiz de Arroyo v. Barcelo*, 765 F.2d 275 (1st Cir. 1985) (fees awarded where government lifted land use restrictions after two years of litigation under the Takings Clause, including discovery and failed settlement negotiations). Without the catalyst rule, counsel would obtain no fee even in cases with a successful result, and counsel thus would be less likely to take a case in which fee-shifting is the primary source of compensation. *See* S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976) ("If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.").

Second, "fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976). The catalyst rule insures that fee-shifting statutes have their intended effect

of promoting compliance with federal law by encouraging defendants promptly to alter their conduct in order to minimize their ultimate fee liability. *See, e.g., Luethje v. Peavine Sch. Dist.*, 872 F.2d 352 (10th Cir. 1989) (public school lifted gag order less than one month after employee filed First Amendment challenge); *DeMier v. Gondles*, 676 F.2d 92 (4th Cir. 1982) (sheriff suspended blanket strip-search policy at county jail less than two months after filing of Fourth Amendment challenge).

Time and again, the courts have properly relied upon the catalyst rule to reimburse plaintiffs who have vindicated important federal rights. As one would expect, the catalyst rule has been applied in cases that span the entire spectrum of views on important public policy questions. Plaintiffs who have been awarded fees under the catalyst rule include both individuals and organizations, and they are represented both by private practitioners (as in the cases above) and non-profit advocacy organizations. *See, e.g., Johnson v. LaFayette Fire Fighters Assoc., Local 472*, 51 F.3d 726 (7th Cir. 1995) (challenge to union's accounting procedures brought by non-union firefighters represented by National Right to Work Legal Defense Foundation); *Klamath Siskiyou Wildlands Ctr. v. Babbitt*, 105 F. Supp. 2d 1132 (D. Ore. 2000) (Endangered Species Act case brought by three environmental organizations); *K.L. v. Edgar*, No. 92 C 5722, 2000 WL 1499445 (N.D. Ill. Oct. 6, 2000) (challenge to conditions in nine psychiatric hospitals brought by class of patients represented by ACLU); *Jan R. Smith Constr. Co. v. DeKalb County*, 18 F. Supp. 2d 1365 (N.D. Ga. 1998) (challenge to government contract set-aside program for minorities and women brought by construction company represented by Southeastern Legal

Foundation).

I. The Text And Purpose Of Fee-Shifting Statutes Support A "Catalyst" Theory Of Fee Recovery.

The question in this case is whether a plaintiff has "prevailed" if she obtains the relief she seeks in her suit through the defendant's "voluntary" compliance with her demands. As noted above, the fee provisions of the ADA and the FHAA allow the court to award attorney's fees to the "prevailing party." "Prevail" means "to gain the victory." WEBSTER'S UNABRIDGED DICTIONARY 1426 (2d ed. 1979). Plaintiffs who bring suit to vindicate their federal rights and thereby compel defendants to change their conduct have "gain[ed] the victory" under any ordinary understanding of those words.

Thus, to "prevail" under the fee-shifting statutes, a plaintiff need not litigate the case to judgment, but need only obtain some of the relief that she sought, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), and in so doing materially alter the relationship between the parties. *Texas State Teachers Ass'n*, 489 U.S. at 792. Once that has occurred, the plaintiff need only show that the suit was a causal factor in obtaining the relief, *Hewitt v. Helms*, 482 U.S. 755, 761 (1987), and that the plaintiff's federal claim was not frivolous. *Maher v. Gagne*, 448 U.S. 122, 131 (1980); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994).

Unlike every other court of appeals to reach the issue,[3]

[3] *See, e.g., Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357-58 (8th Cir. 1998); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997); *Marbley v. Bane*, 57 F.3d 224, 233-35 (2d

the Fourth Circuit interprets the "prevailing party" statutory language and this Court's jurisprudence to preclude recovery under the well-established "catalyst" theory. The Fourth Circuit first rejected the catalyst theory in a case which interpreted Section 1988. *S-1 and S-2 v. State Board of Educ.*, 21 F.3d 49, 51 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 876 (1994). Later that year, it applied its "no catalyst" rule in two other Section 1988 cases. *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994); *Arvinger v. Mayor and City Council of Baltimore*, 31 F.3d 196, 202-03 (4th Cir. 1994). Two years later, the Fourth Circuit applied this rule to a Voting Rights Act case. *Statewide Reapportionment Advisory Cmte. v. Beasley*, 99 F.3d 134, 136-37 (4th Cir. 1996). Thereafter, it was applied to a Clean Water Act case, *Friends of the Earth v. Laidlaw Envtl. Services, Inc.*, 149 F.3d 303 (4th Cir. 1998), *rev'd on other grounds*, 120 S. Ct. 693 (2000), and even more recently to a case arising under the Rehabilitation Act, the ADA, and the Social Security Act, *Wade v. Coughlin*, 2000 U.S. App. LEXIS 11583 (4th Cir. May 24, 2000), *pet. for cert. pending*, No. 00-75 (filed July 14, 2000). Both in theory and in practice, then, the Fourth Circuit's rule dramatically narrows the grounds for fee awards to plaintiffs seeking to vindicate federal civil rights or enforce federal environmental and consumer statutes.

Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010-11 (9th Cir. 1995); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Beard v. Tedska*, 31 F.3d 942, 950-52 (10th Cir. 1994); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993); *Paris v. United States Dep't of Housing and Urban Dev.*, 988 F.2d 236, 238 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-58 (6th Cir. 1993).

The Fourth Circuit's rule is contrary to the language and purpose of the civil rights laws. Like other such laws, the FHAA contains enforcement provisions allowing private citizens a full range of equitable relief and compensatory and punitive damages. 42 U.S.C. § 3613(a) - (e). The obvious purpose of this provision is to compensate individuals harmed by discrimination, and to deter discrimination in the first place. *See, e.g.,* H.R. Rep. 100-711, 100th Cong., 2d Sess. 39-40 (1988), *reprinted in* 1998 U.S.C.C.A.N. 2200-01 (FHAA lifted limit on punitive damages to provide incentive to bring private enforcement action and to deter wrongful conduct). Without the possibility of a fee award after a successful suit, citizens seeking to enforce this statute will all too often find it difficult to retain counsel. As a result, these rights will exist in name only – out of the reach of ordinary citizens. *See* H.R. Rep. 94-1558, 94th Cong. 2d Sess. 1-3 (1976) (report accompanying enactment of Section 1988).[4] The legislative history of the FHAA made this very point, noting that there was a lack of effective enforcement because of "disadvantageous limitations on punitive damages and attorney's fees" in the then-current version of the Fair Housing Act. H.R. Rep. 100-711, 100th Cong., 2d Sess. 16 (1988), *reprinted in* 1998 U.S.C.C.A.N.

[4] The legislative history of the ADA's attorney's fee provision specifically notes that it is to "be interpreted in a manner consistent with the Civil Rights Attorney's Fees Act, including that statute's definition of prevailing party, as construed by the Supreme Court." H.R. Rep. 101-485, pt. III, 101st Cong., 2d Sess. 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 496 (footnotes omitted). *See also* H.R. Rep. 101-422, pt. II, 101st Cong., 2d Sess. 140 (1990), *reprinted in* 1990 U.S.C.C.A.N. 423 ("It is intended that the term 'prevailing party' be interpreted consistently with other civil rights laws").

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Indeed, the House Report accompanying Section 1988 expressly endorses a fee award in cases where a defendant's "voluntary" compliance affords the plaintiff the requested relief, as well as in cases where the plaintiff wins a favorable judgment on the merits, a settlement, or a consent decree.

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits . . . If the litigation is terminated by consent decree, for example, it would be proper to award counsel fees . . . . A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 (1976). Similarly, legislative materials accompanying the 1987 amendments to the

[5] Prior to the FHAA, the Fair Housing Act limited fees to those who were "not financially able to assume" the cost of fees. *See Ragin v. Harry Macklowe Real Estate Co.*, 870 F. Supp. 510, 515 (S.D.N.Y. 1994) (quoting 42 U.S.C. 3612(c)). Congress understood that the old provision impeded private enforcement of the Act because it required plaintiffs of modest means to choose between filing a discrimination lawsuit and paying for important necessities.

Clean Water Act demonstrate that a "prevailing party" is one who settles the case as surely as one who litigates to judgment. *See* S. Rep. 99-50, 99th Cong., 1st Sess. 33 (1985) ("The Committee recognizes that a party may 'prevail' by achieving a successful settlement."); *see also* S. Rep. 98-233, 98th Cong., 1st Sess. 24-25 (1983).

II. This Court's Decisions Teach That The Fourth Circuit's Ruling Is Wrong.

This Court has repeatedly endorsed the catalyst theory of attorney's fee awards, recognizing that a final judgment on the merits is not a necessary prerequisite to achieving "prevailing party" status. For instance, in *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court acknowledged the catalyst theory: "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under section 1988." *Id.* at 761. As if to reject the very theory later adopted by the Fourth Circuit, the Court further noted that "[a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment – *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor." *Id*. at 760-61. After all, what one seeks in a lawsuit is not a judicial pronouncement for its own sake, but to change the behavior of the defendant in some way. *Id.* Thus, "if a defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *Id*.

Similarly, in *Maher v. Gagne*, 448 U.S. 122 (1980), the Court stated that "[n]othing in the language of section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129. The Court rejected the argument that a settlement without a judgment on the merits cannot provide "prevailing party" status, quoting a passage of the Senate Report accompanying Section 1988: "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Id.* (quoting S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976)). *See also Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1979) (per curiam) (recognizing that a person may "in some circumstances be a 'prevailing party'" if his rights are vindicated "without formally obtaining relief"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (prevailing party is one who "succeeds on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit").

In the Fourth Circuit's view, however, this Court's endorsement of the catalyst theory over the course of a decade was overruled *sub silentio* by *Farrar v. Hobby*, 506 U.S. 103 (1992). No other circuit has adopted that interpretation of *Farrar*, and for good reason: The Court in *Farrar* did not rule on or even consider the validity of the catalyst theory, as this Court noted just last Term in *Laidlaw*, 120 S. Ct. at 167. Rather, the issue in *Farrar* was whether a fee award of $280,000 was reasonable, assuming the plaintiff had technically prevailed through an award of $1 in a suit seeking $17 million. In the course of a general discussion of fee awards under Section 1988, the Court stated that to be a prevailing party, a

"plaintiff must obtain at least some relief on the merits of his claim," an "enforceable judgment against the defendant," or "comparable relief through a consent decree or settlement." *Id.* at 111. Citing to the test articulated in *Texas State Teachers*, the Court explained that a "plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111 (citing 489 U.S. at 792).

The Fourth Circuit incorrectly construed the comments in *Farrar* about obtaining relief through an enforceable judgment, consent decree, or settlement as an exhaustive list, foreclosing the possibility of a fee award where the plaintiff achieves relief through voluntary compliance by the defendant. In *S-1 and S-2*, a one-vote *en banc* majority held that a "prevailing party" must achieve success by virtue of "a court's authority," and not by any other means. 21 F.3d at 51. Under that interpretation, fees would not be available even in cases that settle, for an out-of-court settlement usually does not depend on any court action. But that result would directly contradict *Maher v. Gagne*. Nothing in *Farrar*'s holding suggests that prevailing party status may not be achieved in other ways. In fact, the context demonstrates that the list in *Farrar* was not exhaustive, and that the core inquiry remains the one articulated in *Texas State Teachers, Maher, Hewitt,* and *Hensley* – alteration of the relationship between a plaintiff and a defendant in a way that benefits the plaintiff. 506 U.S. at 111. As the Third Circuit has noted, "it is not likely that the Supreme Court would overturn such a widespread theory without even once mentioning it, particularly when it was inapplicable to the case at hand." *Baumgartner v. Harrisburg*

Hous. Auth., 21 F.3d 541, 546-50 (3d Cir. 1994); *accord Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994).

The language in *Texas State Teachers* and *Farrar* that a prevailing party must demonstrate a "material alteration of the legal relationship" was meant to clarify that mere technical victories might be too insignificant to meet the prevailing party threshold. *See* 489 U.S. at 792-93. Once the defendant's behavior has changed to moot the factual basis of the complaint, the legal relationship has been altered because the defendant is no longer acting in violation of legal rights held by the plaintiff. This language cannot be read to require an enforceable judgment before a litigant may be a "prevailing party."

To the contrary, *Texas State Teachers* and *Farrar* reaffirmed the well-established rule that the threshold test for prevailing party status is whether the plaintiff "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar*, 506 U.S. at 109 (citing *Hensley*, 461 U.S. at 433); *Texas State Teachers*, 489 U.S. at 789 (citing *Hensley*, 461 U.S. at 433). As Justice O'Connor's concurrence in *Farrar* made clear, the inquiry remains one of causation: whether the plaintiffs succeeded, through the vehicle of the lawsuit, in achieving at least some of the practical relief that they sought by changing the "behavior of the defendant towards the plaintiffs." *Farrar*, 506 U.S. at 116 (O'Connor, J., concurring) (citing *Hewitt*, 482 U.S. at 761). Once the conditions of causation and substantial benefit to the plaintiff are satisfied, there is no need for the additional requirement that the change in conduct or law be judicially mandated or formalized by judicial decree. *See, e.g., Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1994); *Baumgartner*, 21 F.3d

at 547.

In some cases, like *Texas State Teachers* and *Farrar*, success in the litigation will take the form of a judgment in plaintiff's favor. *See also Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (party who wins a declaratory judgment prevails if judgment affects "behavior of the defendant toward the plaintiff"). But even if there is no legal judgment to enforce, a change in the defendant's behavior that has the practical effect of redressing the plaintiff's alleged injuries, and the legal effect of mooting out the complaint, means that the plaintiff has "prevailed" as surely as obtaining a declaratory judgment or securing nominal relief. *See Maher*, 448 U.S. at 129. In many cases, a defendant's cessation of illegal conduct will confer a far greater benefit to a plaintiff than the nominal relief embodied in a judgment in *Farrar*. In sum, the decision in *Farrar* does not foreclose a catalyst theory of fee recovery and the Fourth Circuit's holding is contrary to the teachings of this Court's cases.

Under the Fourth Circuit's prohibition on catalyst fee awards, plaintiffs are deprived of any fee award despite their success in vindicating federal rights. If the Fourth Circuit's rule stands, it will virtually assure that fewer meritorious suits to enforce federal rights will be brought. Such a result is contrary to Congress's intent to provide a means for ordinary citizens harmed by violations of federal civil rights, environmental, and other statutes to serve as "private attorneys general."

III. The Fourth Circuit's Rule Leads To Anomalous Results.

The Fourth Circuit's "no-catalyst" rule is not only at odds with the text and purpose of federal fee-shifting statutes, and with this Court's decisions, but it also leads to anomalous results that further underscore the need for reversal.

Under *Maher v. Gagne*, a plaintiff who settles a case favorably without litigating the case to judgment "prevails" for fee-shifting purposes. 448 U.S. at 129. This ruling follows the ordinary meaning of the word "prevail" and congressional intent. *Maher* is also consistent with the policy in favor of settlement, *see Jeff D.*, 475 U.S. at 733, because if the rule were otherwise, cases would be far less likely to settle.

The "catalyst" cases, where the Fourth Circuit denies fees, are analytically indistinguishable from the "settlement" cases, where this Court allows fees. In both kinds of cases, no court has found a violation of federal law, because the defendant's actions have eliminated the need to do so. And in both cases, the defendant has altered its conduct with respect to the plaintiff as a result of a lawsuit alleging a violation of federal law. There is no reason to treat the two situations differently for fee shifting purposes, as the following hypothetical example illustrates:

Assume, for instance, that the plaintiff sues to enjoin a county prosecutor's policy for conducting arraignment and probable cause hearings for accused prisoners, arguing that the county's policy of conducting such hearings within 72 hours of arrest violates the Fourth Amendment. After the filing of summary judgment briefs and an argument before the court that reveals the court's serious concerns about the constitutionality of the county's conduct, the parties enter into settlement

discussions. The county tentatively agrees to do what the plaintiff maintains the Constitution requires – hold probable cause determinations within 48 hours of arrest. A settlement agreement is drafted in which the defendant agrees to adopt a new policy and the plaintiff agrees to release his claims, reserving the right to apply for attorney's fees. Then, before a settlement is signed, the county simply announces that it has changed its policy and moves to dismiss the case as moot. The plaintiff acknowledges that the new policy is lawful. *See County of Riverside v. McGlaughlin*, 500 U.S. 44 (1991). The court then dismisses the case on mootness grounds, accepting the defendant's representation that the change of policy is permanent.

In such circumstances,plaintiff should be entitled to fees on a catalyst theory, because the objectives of federal law have been well served, despite the absence of a formal settlement agreement. More importantly, if fees are not awarded on a catalyst theory, defendants will avoid fees by unilaterally ending their misconduct and refusing to enter a formal settlement agreement, as happened in this case and in *Wade v. Coughlin*, 2000 U.S. App. LEXIS 11583, *pet. for cert. pending*, No. 00-75 (filed July 14, 2000) (state abandoned challenged policy after more than four years of litigation, shortly before trial). In fact, the Fourth Circuit's repudiation of the catalyst theory acts to encourage defendants to delay abandonment of their wrongful conduct. Defendants may protract the litigation, hoping to exhaust the plaintiff's resources, secure in the knowledge that they can wait until the eleventh hour before changing their position – and still avoid payment of any attorney's fees.

With lawyers aware of this reality, individuals whose federal rights are being violated will find it more difficult to find counsel willing to handle their cases without payment of fees in advance. *See Baumgartner*, 21 F.3d at 548. Contrary to congressional intent, this would effectively remove attorney's fees from the "arsenal of remedies available to combat violations of civil rights." *Jeff D.*, 475 U.S. at 732. As discussed earlier, *see* p. 6, *supra*, the threat of an adverse fee award encourages many defendants to conform their conduct to the law at the earliest point in time. If the coercive effect of fee-shifting statutes is eroded by the abandonment of the catalyst theory, plaintiffs as well as the courts will lose an important and valuable tool in the resolution of public interest litigation.

This Court should reject such anomalous results, recognizing that the permanent cessation of illegal conduct in response to a lawsuit is, in effect, a form of settlement for which fees may be awarded under *Maher v. Gagne*.

CONCLUSION

The decision of the court of appeals should be reversed, and the case remanded for a determination whether petitioners are entitled to fees under a catalyst theory.

Respectfully submitted,

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