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 OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, U. S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether attorney's fees may be awarded to civil rights plaintiffs where there was no judgment, consent decree, or settlement in their favor and the case was mooted by the legislative action of non-parties without any determination as to whether the defendants violated federal civil rights laws.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* and their members have a vital

[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or

interest in legal issues that affect the exposure of state and local governments to attorney's fee awards and that affect the exposure of state and local legislative decision-making processes to judicial scrutiny. *Amici* have submitted briefs in two other attorney's fees cases before this Court, *Farrar v. Hobby*, 506 U.S. 103 (1992), and *Hewitt v. Helms*, 482 U.S. 755 (1987).

Amici have a compelling interest in the issue presented in this case because their members are often defendants in cases involving fee-shifting statutes and because they believe that the catalyst theory of awarding attorney's fees, which was rejected by the court of appeals below, is inconsistent with the plain language, purpose, and legislative history of attorney's fees statutes. It also is inherently unworkable and exposes state and local governments to potentially unlimited liability for attorney's fees as well as unwarranted and impermissible judicial intrusion into their legislative processes.

Because of the importance of this issue to state and local governments, *amici* submit this brief to assist the Court in its resolution of this case.

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entity, other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT

1. Petitioners filed the instant lawsuit to challenge provisions of the West Virginia Code and accompanying regulations under the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. §§ 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*[2] The challenged provisions required persons residing in residential board and care homes, such as petitioner Buckhannon Board & Care Home, Inc., to be capable of "self-preservation," *i.e.*, to be capable of evacuating themselves without prompting in situations involving imminent danger such as fires.

The gravamen of the complaint was that defendants engaged in unlawful discrimination, including intentional discrimination, against the handicapped and the aged by enforcing the self-preservation requirement. *See, e.g.*, J.A. 83 (Count I, ¶ 54) ("Defendants' actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with handicaps" in violation of the FHAA); J.A. 86 (Count II, ¶ 66) ("Defendants' actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with disabilities and the aged" in violation of the ADA). The named defendants included the West Virginia Department of Health and Human Resources, the Office of Health Facility Licensure and Certification, the West Virginia Fire Commission, the West Virginia Office of the State Fire Marshal, the West Virginia State Board of Examiners for Registered Professional Nurses, the State of West Virginia and various state officials in their official capacities, including the Governor, the State Fire Marshal, and the

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[2] This statement is based on petitioners' amended complaint, which is reproduced in the Joint Appendix ("J.A.") 67-102, and on the opinions of the district court and court of appeals reproduced in the Petition Appendix ("Pet. App.").

individual State Fire Commissioners. J.A. 70-71. The West Virginia Legislature was not a named defendant, nor were any individual members of the West Virginia House or Senate. The complaint sought a judgment declaring West Virginia's self-preservation requirement to be unlawful under the ADA and the FHAA and an injunction prohibiting its enforcement.[3]

During the litigation, the West Virginia Legislature enacted legislation abolishing the "self-preservation" requirement. In light of this development, various defendants filed motions to dismiss the lawsuit as moot. These motions were granted. Because the lawsuit was dismissed as moot, the District Court made no findings as to whether any of the defendants violated the FHAA or ADA as alleged in the complaint.

2. The District Court also denied petitioners' request for attorney's fees. Pet. App. A17-A19. Petitioners had requested fees under the "catalyst theory," arguing that they are "prevailing" parties entitled to fees under the ADA and FHAA.[4] The District Court explained that the "catalyst theory" "deems a plaintiff to have prevailed when he or she obtains some portion of the relief originally sought through a defendant's voluntary conduct, even though no formal judgment in his or her favor has been rendered." *Id.* at A17. The District Court held that this argument was not "viable" because the Fourth Circuit had rejected the catalyst theory in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (en banc). Pet. App. A17. Because the District Court concluded that the catalyst theory was not viable, it did not make any findings concerning whether the instant lawsuit was a factor in the legislature's decision to abolish the self-preservation requirement, much less whether any member of either house of the legislature even knew about this lawsuit.[5]

[3] Petitioners originally sought compensatory and punitive damages, but later abandoned this claim. Pet. App. A11.

[4] The ADA provides that a court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. The FHAA similarly provides that a court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2).

3. The court of appeals affirmed the District Court's denial of fees in an unpublished, *per curiam* opinion. Pet. App. A4-A8. The panel concluded that it was bound by the *en banc* court's rejection of the catalyst theory in *S-1 and S-2*, and that the District Court had properly applied that decision. *Id.* at A8.

In *S-1 and S-2*, the *en banc* court held that "[t]he fact that a lawsuit may operate as a catalyst for postlitigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party." 21 F.3d at 51. The court "adopt[ed] as its own" the reasoning contained in the dissenting panel opinion of Judge Wilkinson. *Id.* Judge Wilkinson's dissenting panel opinion identified four reasons for rejecting the catalyst theory: (1) it "conflicts with the plain language" of provisions limiting fee awards to prevailing parties; (2) it "ignores the Supreme Court's recent decisions," including *Farrar v. Hobby*, 506 U.S. 103 (1992); (3) it "engenders confusion and unnecessary litigation" because it fails to set a coherent standard; and (4) it "discourages public officials from taking initiatives to revise outmoded ordinances or to improve institutional conditions" because they "may come to fear that worthwhile changes may be retroactively linked to a lawsuit

[5] The District Court also denied petitioners' request that it invoke its inherent power to award attorney's fees pursuant to the bad faith exception to the American rule, premised upon the alleged bad faith of two of the defendants, the State Fire Marshal and the State Fire Commission. Pet. App. A18-A19. In a later order, the District Court imposed Rule 11 sanctions in the amount of $3,252 on the State Fire Marshal, the State Fire Marshal's office, and the State Fire Commission. J.A. 142-48.

and result in a hefty bill for attorneys' fees." *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 170-72 (4th Cir. 1993), *rev'd*, 21 F.3d 49 (4th Cir. 1994) (en banc).

SUMMARY OF ARGUMENT

I. The catalyst theory employed by the lower courts is inconsistent with the plain language, purpose, and legislative history of the attorney's fees statutes. Those statutes authorize the award of attorney's fees to "prevailing" parties. This Court has held that plaintiffs "prevail" when they succeed on the merits of a significant issue in litigation. Thus, a court is authorized to award attorney's fees under the prevailing party provisions only when "it is awarding them against a violator of federal law." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978).

Ordinarily, a plaintiff satisfies this requirement by obtaining a judgment, consent decree, or settlement. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 111 (1992). The legislative history suggests only one other limited scenario where a plaintiff may be deemed to have prevailed without obtaining formal relief: where the plaintiff has secured a ruling on the merits and the defendant's own actions render the need for court-ordered relief unnecessary.

The catalyst theory is inconsistent with the plain language of the attorney's fees statutes and congressional intent, and is therefore invalid, because it does not require a determination that the plaintiff's claims were meritorious, *i.e.*, that the defendant violated federal law. Under the catalyst theory, courts may award attorney's fees when a defendant's voluntary actions, or the actions of non-defendant third parties such as legislative bodies, render a case moot, based merely on a finding that the plaintiff's claims were not frivolous. In fact, courts have awarded attorney's fees under the catalyst theory to plaintiffs who lost on the merits, or who would have lost had the case proceeded to judgment.

Congress, however, intended fee awards to be available only where the plaintiff's claims were in fact meritorious and the relief the plaintiff obtained was necessary to vindicate federally protected rights. Accordingly, the Fourth Circuit correctly concluded that the catalyst theory is invalid.

II. Even if this Court concludes that the catalyst theory is valid as a general matter, it should hold that the doctrine may not properly be applied in cases that are rendered moot by legislative action. In the context of legislative action, the causation inquiry courts must undertake under the catalyst theory is incoherent and utterly unworkable. It is impossible for courts to isolate the impact that a particular lawsuit may have had on a legislative decision from the innumerable other influences that come into play whenever a legislative body deliberates and takes action. The incoherence of the inquiry creates uncertainty for state and local governments concerning their potential liability for attorney's fees, which interferes with their ability to plan for and provide needed services to the public with limited funds.

Moreover, the judicial inquiry into legislative motive that the catalyst theory demands constitutes an impermissible intrusion into the legislative processes of state and local governments. This intrusion threatens to chill the passage of worthwhile reforms.

ARGUMENT

I. THE CATALYST THEORY IS INCONSISTENT WITH THE PLAIN LANGUAGE, PURPOSE, AND LEGISLATIVE HISTORY OF THE ATTORNEY'S FEES STATUTES.

As the court of appeals below correctly recognized, the catalyst theory employed by other circuits for awarding attorney's fees is essentially a judicial creation that has no mooring in the language or purpose of the attorney's fees statutes. In authorizing attorney's fee awards under the civil

rights statutes to "prevailing" parties, Congress authorized fees only when there is some basis for finding that the plaintiff has a meritorious civil rights claim, *i.e.*, that the defendant has violated federal law. The catalyst theory advocated by petitioners and their *amici*, however, permits the award of attorney's fees against a defendant who has never been shown to have violated any law. Accordingly, the catalyst theory cannot be reconciled with the text of the statutory provisions and, therefore, is invalid.

A. Congress Authorized Attorney's Fee Awards Only Against Violators Of Federal Law.

The general rule in American courts is that each party must bear its own attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Congress may abrogate that rule by statute. *Id.* at 269. In the absence of congressional authorization, however, federal courts have no power to devise their own fee-shifting rules, regardless of how desirable from a policy standpoint the shifting of fees may seem in a particular context. *Id.*

Congress has authorized attorney's fee awards under the FHAA and ADA, but only to a "prevailing party." 42 U.S.C. § 3613(c)(2) (FHAA); 42 U.S.C. § 12205 (ADA). The fee-shifting provisions of these statutes are modeled on the attorney's fees provision contained in 42 U.S.C. § 1988. *See* H.R. Rep. No. 101-485, pt. 2, at 140 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 423; H.R. Rep. No. 100-711, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184. Congress patterned section 1988, in turn, on the attorney's fees provisions of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e). *See* S. Rep. No. 94-1011, at 2 (1976); H.R. Rep. No. 94-1558, at 5 (1976).

The Court has held that plaintiffs "prevail" within the meaning of section 1988 when they "succeed on any

significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). That interpretation is compelled by the plain language of the statutes, since "to prevail" generally means to win or succeed. *Random House Dictionary of the English Language* 1534 (2d ed. 1987). Thus, this Court consistently has held that a "prevailing" plaintiff is one who advances a meritorious civil rights claim. *See Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (per curiam) (attorney's fees provisions "permit the award of counsel fees *only* to a party who has prevailed *on the merits of a claim*") (emphasis added). *See also Farrar v. Hobby*, 506 U.S. 103, 111 (1992) ("to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief *on the merits of his claim*") (emphasis added); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("[r]espect for ordinary language requires that a plaintiff receive at least some relief *on the merits of his claim* before he can be said to prevail") (emphasis added).

This Court's interpretation of the term "prevailing party" to require success on the merits of a claim also is in accordance with the congressional purpose underlying fee-shifting statutes. Congress enacted these statutes to encourage those whose civil rights have been violated to seek judicial relief, particularly those who cannot afford to hire private counsel. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); H.R. Rep. No. 94-1558, at 1. Congress emphasized that attorney's fees provisions are necessary to ensure that "those who violate the Nation's fundamental laws" do not "proceed with impunity." S. Rep. No. 94-1011, at 2. By requiring that plaintiffs achieve some success on the merits of their claims before being entitled to an award of attorney's fees, Congress deliberately narrowed the class of defendants against whom such fee awards could be imposed. Thus, as this Court has forcefully stated, "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them

against a violator of federal law." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (emphasis added).

The Court's decisions have strictly defined the circumstances in which a plaintiff may be deemed to have succeeded on the merits of a significant issue in litigation. Ordinarily, a plaintiff prevails in litigation by obtaining a judgment, consent decree, or settlement. *See, e.g., Farrar*, 506 U.S. at 111. A judgment for the plaintiff obviously reflects a court's determination that the plaintiff's claims are meritorious. Likewise with respect to consent decrees and settlements that afford plaintiffs the relief they sought: though such agreements do not always contain an explicit admission of wrongdoing by the defendant, *Maher v. Gagne*, 448 U.S. 122, 126 n.8 (1980), courts have sensibly treated them as a plaintiff victory that indicates the likely merits of the plaintiff's claims. At the very least, when a defendant voluntarily affords the plaintiff the requested relief through the mechanism of a consent decree or settlement, the defendant chooses to forego his right to contest the merits of the plaintiff's allegations of civil rights violations. Moreover, in the case of settlements and consent decrees, there can be no doubt that the defendant's voluntary actions were prompted by the plaintiff's lawsuit. Thus, the Court has properly concluded in this context that the prevailing party requirement does not condition an award of fees "on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129.

The legislative history of section 1988 confirms Congress' purpose to limit attorney's fee awards to plaintiffs who have vindicated the civil rights laws by advancing meritorious claims against blameworthy defendants. The House and Senate Reports suggest only two scenarios in which an award of attorney's fees would be proper in the absence of a final judgment, consent decree, or settlement. Significantly, in both scenarios, Congress made plain that a favorable ruling

on the merits of at least some of the plaintiff's claims is a prerequisite for the award of attorney's fees.

With respect to the first such scenario, the Senate Report states: "In appropriate circumstances, counsel fees . . . may be awarded pendente lite. Such awards are especially appropriate where a party *has prevailed on an important matter in the course of litigation*, even when he ultimately does not prevail on all issues." S. Rep. No. 94-1011, at 5 (citation omitted) (emphasis added); *see also* H.R. Rep. No. 94-1558, at 8. The Court addressed this legislative history in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), and effectively limited its reach, concluding that "Congress intended to permit the interim award of counsel fees *only* when a party has prevailed *on the merits* of at least some of his claims," whether in the trial court or on appeal. *Id.* at 757-58 (emphases added). The Court rejected the claim that plaintiffs who won reversal of a directed verdict against them could be deemed prevailing parties because they had not established their entitlement to relief on the merits of any of their claims. *Id.* at 758-59. Only where a plaintiff has prevailed on the merits of a claim, the Court stated, "has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Id.* at 758.

The legislative history of section 1988 suggests only one other scenario in which a plaintiff might be entitled to an award of attorney's fees in the absence of a final judgment, consent decree, or settlement. The Senate Report states that "parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief." S. Rep. No. 94-1011, at 5. The Senate Report then cites a number of cases, including *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970), presumably as illustrative examples. Similarly, the House Report observes that, "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. No. 94-1558, at 7. The House Report also cites *Parham* as an illustration of this principle.

The *Parham* case warrants closer examination because petitioners and their *amici* rely heavily on the language from the House and Senate Reports as support for the catalyst theory. In addition, a proper understanding of *Parham* is important because it is often cited as the case that first articulated the catalyst theory. *See* Pet. Br. 21. Far from supporting petitioners' argument, *Parham* confirms that the catalyst theory is inconsistent with congressional intent.

Parham was a Title VII case in which the plaintiff sought damages and injunctive relief, both individually and on behalf of a class, to remedy the defendant-employer's racially discriminatory employment practices. The plaintiff did not obtain any relief on his individual claims, as both the district court and the court of appeals found that the defendant had refused to hire the plaintiff for legitimate, non-discriminatory reasons. 433 F.2d at 428. However, the court of appeals concluded—on the merits—that the plaintiff *had established a Title VII violation* with respect to the class claims, in light of the evidence demonstrating that the defendant had unlawfully refused to hire black employees between 1965 and 1967. *Id.* at 426.

The court of appeals nonetheless agreed with the district court that no injunctive relief was warranted because by the time of trial the defendant had voluntarily amended its hiring policies to eliminate the past discriminatory practices. *Id.* at 429. Although the plaintiff had not obtained formal relief on any of his claims, the court of appeals held that he was entitled to an award of attorney's fees as a "prevailing party" under 42 U.S.C. § 2000e-5(k). The court justified the award on the ground that the plaintiff had "prevailed in his

contentions of racial discrimination against blacks generally prior to February, 1967," and his lawsuit had "acted as a catalyst which prompted the [defendant] to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII." 433 F.2d at 429-30. Thus, attorney's fees were awarded in *Parham* because the court found that the plaintiff had advanced a meritorious civil rights claim (that is, that the defendant had violated the civil rights laws), even though the court ultimately concluded that no judicial action was necessary to remedy the violation.[6]

The legislative history's reliance on *Parham* thus indicates that Congress contemplated awards of attorney's fees in the absence of a judgment, consent decree, or settlement only in the limited circumstance when plaintiffs have obtained a ruling on the merits of at least some of their claims. Indeed, the language of the House Report quoted prominently in the briefs of petitioners and their *amici* (Pet. Br. 24; U.S. Br. 22; Public Citizen Br. 10-11; Friends of the Earth Br. 14) confirms this view by emphasizing that a court may award fees after a defendant voluntarily ceases an "*unlawful* practice," H.R. Rep. No. 94-1558, at 7 (emphasis added), even though the court might conclude, as a matter of equity, that no formal injunctive relief is needed—an exact description of *Parham* itself. Since federal courts do not

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[6] The other civil rights cases cited in the House and Senate Reports in which plaintiffs recovered attorney's fees in the absence of obtaining formal relief all involved plaintiffs who had won favorable rulings on the merits. *See Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972) (plaintiff proved Title VII violation with respect to class claims); *Lea v. Cone Mills Corp.*, 438 F.2d 86, 87 (4th Cir. 1971) (plaintiffs proved Title VII violation); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 340-41 (D. Or. 1969) (district court found Title VII violation). The same is true with respect to all of the Title VII cases cited by the Solicitor General as examples of the catalyst theory's early application. *See* U.S. Br. 22 n.11.

issue injunctions except to remedy or prevent violations of the law, this passage merely reiterates Congress' intent to impose attorney's fee awards only on defendants who are "violator[s] of federal law." *Christiansburg Garment Co.*, 434 U.S. at 418.

Petitioners and their *amici* contend that language in this Court's decision in *Hewitt v. Helms*, 482 U.S. 755 (1987), supports the catalyst theory because it suggests that Congress contemplated an additional category of cases beyond those involving judgments, consent decrees, and settlements in which attorney's fees may be awarded. Specifically, petitioners and their *amici* quote the following passage from the Court's opinion (Pet. Br. 25; U.S. Br. 12; Public Citizen Br. 11-12; Friends of the Earth Br. 5):

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. 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.

Hewitt, 482 U.S. at 760-61.

This Court, of course, has never approved the award of attorney's fees in any case that did not involve a judgment, consent decree, or settlement. More importantly, as the foregoing analysis of the legislative history demonstrates, Congress contemplated the award of attorney's fees in the absence of a judgment, consent decree, or settlement only in an extremely narrow and limited category of cases: where the court determines that the plaintiff has advanced a meritorious civil rights claim, but the defendant's own actions render the need for court-ordered relief unnecessary. Accordingly, in order to be consonant with congressional intent, the language

in *Hewitt* concerning voluntary action by a defendant must be construed to authorize attorney's fees in the absence of a judgment, consent decree, or settlement only when the plaintiff *has otherwise demonstrated a meritorious civil rights claim*. That in fact was the case in *Hewitt*, where the plaintiff won a ruling from the court of appeals that his due process rights had been violated when he was convicted of a misconduct charge based solely on the word of an unidentified informant. *Id.* at 758. Any other construction of the language in *Hewitt* would ignore this Court's holding that Congress authorized awards of attorney's fees only against violators of federal law. Accordingly, the language in *Hewitt* does not support the validity of the catalyst theory which, as demonstrated below, authorizes attorney's fee awards in circumstances where there has been no determination that the defendant violated any law.

B. The Catalyst Theory Is Inconsistent With The Plain Language of Attorney's Fees Statutes, And Is Therefore Invalid, Because It Does Not Require A Determination That The Defendant Violated Federal Law.

The catalyst theory employed by a majority of the circuits today traces its roots to cases like *Parham*, but it extends the circumstances in which attorney's fees may be awarded in the absence of a judgment, consent decree, or settlement far beyond the narrow and limited circumstances described in that case. Indeed, the Solicitor General declines even to use the term "catalyst theory," candidly acknowledging that in reality it is a "shorthand phrase" that "embraces several different approaches to the question presented here." U.S. Br. 8 n.2. Because the catalyst theory indeed encompasses many different "approaches," it is hard to discern any clear limits or boundaries to the theory as applied by the lower courts.

In practice, the catalyst theory now authorizes attorney's fees in *any* case in which post-complaint action by the

defendant (or even by non-defendant third parties such as legislative bodies) has rendered the plaintiff's request for relief moot, regardless of whether the district court made any determination regarding the merits of the plaintiff's claims. *See, e.g., Morris v. City of W. Palm Beach*, 194 F.3d 1203 (11th Cir. 1999) (city amended challenged parade ordinance; no ruling that original ordinance violated First Amendment); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541 (3d Cir. 1994) (local housing authority amended development plan to which public housing tenants objected; no ruling that original plan violated federal housing laws); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255 (6th Cir. 1993) (local school board amended challenged policy regarding speakers at public meetings; no ruling that previous policy violated First Amendment). The lower courts have thus created a world that Congress never contemplated, where attorney's fees are routinely awarded to plaintiffs who have never established that the relief they obtained was necessary to vindicate federal rights.

Over the past 25 years, lower courts have developed and followed a two-pronged test to govern application of the catalyst theory, although there is considerable variation in the precise wording of each prong. Under the first prong of the test, courts typically attempt to determine whether there was a "causal connection" between the plaintiff's lawsuit and the relief obtained. *See, e.g., New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998); *Payne v. Board of Educ.*, 88 F.3d 392, 397-98 (6th Cir. 1996). Under the second prong of the test, courts typically permit the award of attorney's fees so long as the plaintiff's claims are not "frivolous, unreasonable, or groundless." *See, e.g., Zinn v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski*, 17 F.3d 260, 262 (8th Cir. 1994); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). This latter prong is ostensibly designed to screen out cases in which the defendant agreed to afford the plaintiff the requested relief simply to avoid the hassle or

expense of litigation. *See Brown v. Griggsville Comty. Unit Sch. Dist. No. 4*, 12 F.3d 681, 684 (7th Cir. 1993) ("it would be odd to reward with attorney's fees a plaintiff who had induced the defendant to toss him a bone merely to avoid the expense of defending against an unmeritorious suit"). One circuit has established an even lower hurdle for the award of attorney's fees, holding that fees may be awarded so long as the defendant's voluntary action was "not a wholly gratuitous response to an action that in itself was frivolous." *Morris*, 194 F.3d at 1210. *But see American Council of the Blind, Inc. v. Romer*, 992 F.2d 249, 250 (10th Cir. 1993) (plaintiff must show that defendant's conduct in response to lawsuit was "required by law").

The catalyst theory cannot be squared with either the plain language or purpose of the attorney's fees statutes. Essentially, the lower courts have jettisoned the requirement that attorney's fees be awarded only against defendants who have violated federal law. By focusing solely on whether the plaintiff ultimately achieved his desired end (whether through action of a defendant or not), and eliminating any requirement that the court actually determine whether the plaintiff's civil rights claims had merit, the catalyst theory flouts the congressional purpose underlying the attorney's fees statutes and leaves the doctrine with no anchor in the statutory language.

The catalyst theory is particularly problematic and inequitable when it is invoked against defendants who contested the plaintiff's allegations, but were unable to obtain a final ruling on the merits because the actions of a *third party* rendered the case moot. In these situations, there can be no pretense that the attorney's fees were requested based on a determination that *the defendant* violated federal law. *See, e.g., Foreman v. Dallas County*, 193 F.3d 314, 318 (5th Cir. 1999) (state legislature passed law mooting plaintiffs' claims; fees sought from county defendants); *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 162 (4th Cir. 1993) (plaintiffs

settled with City Board of Education, mooting case; fees sought against State Board of Education), *rev'd*, 21 F.3d 49 (4th Cir. 1994) (en banc). *Cf. Alioto v. Williams*, 450 U.S. 1012 (1981) (Rehnquist, J., dissenting from denial of certiorari) (noting unfairness of awarding attorney's fees against defendants who attempted to appeal preliminary injunction but were unable to obtain ruling on validity of injunction because case subsequently rendered moot).

The only sense in which some courts consider the merits of the plaintiff's claims is by setting the threshold for fee eligibility at non-frivolousness. But this standard falls far short of what the prevailing party requirement mandates. Congress intended attorney's fee awards to be available only where the plaintiff's claims were in fact meritorious and the relief the plaintiff obtained was necessary to vindicate important federal rights. *See* S. Rep. No. 94-1011, at 2; H.R. Rep. No. 94-1558, at 1. Yet the catalyst theory permits district courts to award attorney's fees to plaintiffs who have obtained their desired outcome through the voluntary action of the defendant (or a non-defendant third party), regardless of whether the court ultimately could have ordered that change in conduct following a trial on the merits.

Indeed, courts have awarded attorney's fees under the catalyst theory to plaintiffs who lost on the merits, or would have lost had the case proceeded to judgment. *See Paris v. United States Dep't of Hous. and Urban Dev.*, 988 F.2d 236 (1st Cir. 1993) (fees awarded where court of appeals ruled *against* plaintiffs on the merits, and Congress passed legislation that overruled court of appeals' decision); *Little Rock Sch. Dist. v. Pulaski*, 17 F.3d 260 (8th Cir. 1994) (fees awarded where district court stated it would have ruled against plaintiffs on the merits had the case not been rendered moot, because challenged actions of defendant school district were lawful). Permitting an award of fees in such circumstances means that "the defendant's reward could be a second lawyer's bill—this one payable to those who wrongly

accused it of violating the law." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692 (1983). Had "Congress intended such a novel result . . . it would have said so in far plainer language than that employed here." *Id.* at 693-94.

Unlike petitioners, the Solicitor General recognizes the problems raised by the catalyst theory in this regard, and proposes that courts scrutinize a plaintiff's complaint to determine whether the claims asserted would be capable of withstanding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. U.S. Br. 27. As an initial matter, it is notable that not a single circuit that awards attorney's fees under the catalyst theory actually uses the Solicitor General's proposed test, and indeed the only authority cited in support of the test is a student law-review note. *See id.* at 27 n.16. More fundamentally, however, the standard proposed by the Solicitor General does not render the catalyst theory consistent with the statutory language. As noted above, Congress intended to permit attorney's fee awards only against defendants who have been determined to be violators of federal law. Whether a plaintiff's complaint has withstood a motion to dismiss (or could withstand a motion to dismiss) obviously does not determine whether a defendant actually violated the law. A motion to dismiss merely tests the legal sufficiency of the plaintiff's allegations, based on the assumption that the plaintiff will be able to adduce facts to support those allegations. *See Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). A finding that a plaintiff's claims could meet the very low threshold of withstanding a motion to dismiss therefore is in no sense a substitute for a determination that the plaintiff ultimately would prevail following a trial on the merits. Thus, the test proposed by the Solicitor General is no more adequate to bring the catalyst theory in line with the statutory language and congressional intent than the various standards currently employed by the courts of appeals.

For the foregoing reasons, the catalyst theory employed by the lower courts today cannot be reconciled with the plain language or purpose of the attorney's fees statutes and, therefore, is invalid. The Court should hold that, in the absence of a judgment, consent decree, or settlement, attorney's fees may be awarded only where the plaintiff secures a favorable ruling on the merits and the defendant's own actions have rendered the need for formal, court-ordered relief unnecessary. Since petitioners did not obtain a judgment, consent decree, or settlement in their favor and there has been no determination that respondents violated either the FHAA or the ADA, the District Court correctly refused to award attorney's fees here.

II. EVEN IF THIS COURT CONCLUDES THAT THE CATALYST THEORY IS VALID AS A GENERAL MATTER, IT SHOULD AFFIRM THE DECISION BELOW AND HOLD THAT THE CATALYST THEORY MAY NOT PROPERLY BE APPLIED IN CASES RENDERED MOOT BY LEGISLATIVE ACTION.

The Solicitor General candidly acknowledges, as he must, that cases rendered moot by legislative action raise "particular problems of proof" under the catalyst theory because legislatures may elect to change laws "for policy reasons unrelated to pending litigation." U.S. Br. 29 n.17. *Amici* submit that the catalyst theory is not merely difficult to apply in the context of legislative action, but that it is incoherent and utterly unworkable. Further, the causation inquiry that courts must undertake under the catalyst theory necessarily leads to impermissible and intolerable judicial intrusion into the legislative processes of state and local governments. For these reasons, even if the Court concludes that the catalyst theory is permissible in some form, it should hold that the catalyst theory may not properly be applied in cases, such as

this one, where a lawsuit was rendered moot by legislative action. The decision below should therefore be affirmed.

A. The Catalyst Theory Does Not Provide A Workable Standard To Determine Whether A Plaintiff's Lawsuit Has "Caused" The Passage Or Repeal Of Legislation.

The causation inquiry that is central to the catalyst theory is inherently vague and fails to provide courts with a workable standard. Not surprisingly, no clear standard has emerged to determine when a particular lawsuit can be deemed to have caused a voluntary change in conduct by the defendant, much less whether a particular lawsuit can be deemed to have caused a legislative change undertaken by third parties. The different approaches taken by the circuits in defining the causation inquiry all suffer from the same shortcoming: they provide no meaningful guidance to district courts. For example, the test variously has been phrased as whether the plaintiff's lawsuit was a "catalytic, necessary, or substantial factor in attaining the relief";[7] whether the plaintiff's lawsuit was a "substantial factor or significant catalyst in motivating the defendants to alter their behavior";[8] whether the plaintiff's lawsuit was a "necessary and important factor in achieving the relief desired";[9] and whether the plaintiff's lawsuit "served a provocative function in the calculus of relief."[10] These statements of the causation test are little more than empty formulations that fail to establish a judicially manageable standard.

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[7] *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995) (internal quotation marks omitted).

[8] *Foreman v. Dallas County*, 193 F.3d 314, 320-21 (5th Cir. 1999) (internal quotation marks omitted). *See also Morris v. City of W. Palm Beach*, 194 F.3d 1203, 1209 (11th Cir. 1999).

[9] *Payne v. Board of Educ.*, 88 F.3d 392, 397-98 (6th Cir. 1996) (internal quotation marks omitted).

[10] *New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998).

In practice, then, courts have been forced to rely heavily on a simple chronology of events in determining whether the requisite causal connection is present. *See, e.g., Morris v. City of W. Palm Beach*, 194 F.3d 1203, 1209 (11th Cir. 1999); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257 (6th Cir. 1993); *Ross v. Horn*, 598 F.2d 1312, 1322 (3d Cir. 1979). Chronology can be highly misleading, however, particularly where legislative action has rendered a case moot. Merely because legislation was passed or repealed after the filing of a lawsuit does not mean that the legislature took such action based on an assessment that the lawsuit was meritorious. Yet none of the standards devised by the courts of appeals is capable of reliably separating "coincidence from effect." *New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998).

Moreover, no such standard *could* be devised in this context. It is simply impossible—for a court or anybody else—to isolate the impact that a lawsuit may have had on a legislative decision from the innumerable other influences that come into play whenever a legislative body deliberates and takes action. *See* Alan Rosenthal, *Legislative Life: People, Process, and Performance in the States* 264-65 (1981) (noting role that interest groups, the press, and national legislative trends play in shaping direction of legislative policy). The Fifth Circuit's observations in a case involving congressional action are just as apt with respect to state and local legislative bodies: "The mere possibility that Congress acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes." *Milton v. Shalala*, 17 F.3d 812, 815 (5th Cir. 1994). Courts are not competent to sift through and weigh the relative importance of competing influences on a legislative body's members, and there is no basis for concluding that, in enacting the fee-shifting statutes, Congress authorized courts to engage in any such endeavor.

Moreover, by requiring courts to engage in this endeavor without a workable standard, the catalyst theory raises the specter of many difficulties for state and local governments and the individuals who serve as state and local officials. *First*, because the catalyst theory fails to provide meaningful guidance to district courts, state and local governments—which are often defendants in cases involving fee-shifting statutes—face considerable uncertainty regarding their potential liability for attorney's fees. Because attorney's fee awards can be a significant burden on the budgets of state and local governments, particularly local governments which endeavor to provide a variety of important services to their constituents with limited resources, this uncertainty interferes with their ability to plan for and provide needed services to the public.

Second, because there is seldom a public record documenting each legislator's reasons for supporting a proposal, the catalyst theory raises the prospect that parties will be compelled to obtain testimony from public officials (whether by way of deposition or affidavit) about why they proposed or voted for a particular piece of legislation. The prospect of courts receiving testimony from public officials to determine the reasons that legislative action was taken gives rise to a number of concerns. For example, courts have held that affidavits from individual legislators, standing alone, are insufficient to establish what motivated the legislature as a collective body to take action. *See, e.g., Foreman*, 193 F.3d at 322; *American Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981). Obtaining testimony from a large number of state or local legislators in order to establish causation under the catalyst theory would obviously impose an unwarranted burden on elected officials preoccupied with more pressing concerns. Moreover, in the event the district court received conflicting affidavits from various legislators, it presumably would be required to hold an evidentiary hearing to resolve such conflicts and possibly compel elected

officials to testify—a spectacle Congress cannot possibly have intended to authorize when it afforded attorney's fees to prevailing parties. Finally, given the uncertainty that can surround the sequence of events when changes in government policy moot a lawsuit, public officials will be forced to provide such testimony at their peril. *See Kilgore v. City of Pasadena*, 53 F.3d 1007, 1011 n.5 (9th Cir. 1995) (directing district court to investigate mayor for perjury after court of appeals disagreed with mayor's statement in affidavit that city had decided to change policy well before plaintiff filed lawsuit).

In sum, no workable causation standard exists or could be devised under the catalyst theory for addressing the situation where legislative action renders a case moot. The confusion and uncertainty engendered by application of the catalyst theory in this context will inevitably result in the need for protracted and unproductive "satellite litigation" over matters far removed from the core concerns of federal civil rights laws. *See S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 171 (4th Cir. 1993) (Wilkinson, J., dissenting), *rev'd*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (adopting Judge Wilkinson's dissent as opinion of the court). Indeed, the Court's reasoning in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), which rejected the "central issue" test, is fully applicable here: "Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension." *Id.* at 791.

B. The Catalyst Theory Requires Impermissible Judicial Intrusion Into the Legislative Processes of State and Local Governments.

Application of the catalyst theory in the legislative context also implicates concerns of a far graver nature. Even if the catalyst theory provided a reliable means of determining

when a legislative body had changed a law in response to a particular lawsuit, the inquiry demanded of courts would involve an impermissible intrusion into the legislative processes of state and local governments.

This Court has long held that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Yet that is precisely what the catalyst theory requires when legislative action has rendered a case moot. Given the innumerable political, economic, and policy concerns that influence the passage or repeal of legislation, courts attempting to divine causation will necessarily have to probe the motives of those legislators who voted to take a particular legislative action. Judicial inquiry into the reasons that motivated members of state and local legislatures to vote as they did could not be more intrusive on the deliberative processes of those bodies. Such inquiry amounts to "judicial interference" with the "exercise of legislative discretion," and is not permitted by this Court's cases. *See Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *Spallone v. United States*, 493 U.S. 265, 279 (1990).

Judicial inquiry into legislative motive also threatens to chill the passage of worthwhile reforms. State and local governments are constantly alert to new ways of addressing policy issues, and pay particular attention to reforms underway in other jurisdictions. Frequently, state and local governments decide to change their laws as a result of broader law reform efforts that have proved their merit elsewhere. For example, the Council of State Governments frequently proposes model legislation, and the National Conference of State Legislatures and the National Governors' Association are instrumental in transmitting legislative proposals to their members. Rosenthal, *supra*, at 265. Legislators fearful that a change in policy might be "retroactively linked" to a pending lawsuit may hesitate to adopt reforms that they deem to be beneficial and in the

public interest. *See S-1 and S-2*, 6 F.3d at 172 (Wilkinson, J., dissenting).

The record in this case suggests why such hesitancy might be justified if the catalyst theory were applicable. Evidence in the record indicates that the West Virginia Legislature had plausible public policy reasons for repealing the self-preservation regulations at issue in this case in response to a nationwide law-reform movement that began well before petitioners filed suit. Specifically, petitioners themselves point out that the debate over self-preservation requirements was "not unique to West Virginia," and in fact had taken place on a national level following the adoption in 1985 of the National Fire Protection Association's Life Safety Code. Pet. Br. 4. Petitioner's own expert testified that, 20 years ago, "all states had self-preservation requirements for residential care homes," but that a majority of states had abandoned those requirements in light of the proposals set forth in the 1985 Life Safety Code. *Id.* at 5-6. Thus, the West Virginia Legislature may well have been motivated by sound policy concerns in repealing the self-preservation requirements challenged by petitioners, rather than by any concern over the prospect of losing petitioners' lawsuit. In such circumstances, a legislature cognizant of the catalyst theory might decide to delay repeal of the regulations solely to avoid subjecting taxpayers to liability for the opposing party's attorney's fees.

Finally, the suggestion of petitioners' *amici* that the catalyst theory is necessary to prevent gamesmanship by state and local government defendants is implausible at best. *Amici* assert that without the catalyst theory in place, defendants will be likely to moot lawsuits at the last minute by repealing a challenged regulation, rather than risk losing on the merits and being ordered to pay the plaintiff's attorney's fees. *See* Public Citizen Br. 17. However, defendants must incur their own attorney's fees during

litigation, and thus have no incentive to prolong litigation when they are considering a change in the law that may end up mooting the case. In addition, the actions of state and local officials are subject to the scrutiny of the electorate and coverage by the news media. The electoral process and the forces of public opinion are systemic checks against behavior by legislative officials that is motivated by strategic considerations rather than sound legislative decision-making. And at the very least, both the "bad faith" exception to the American rule, which allows attorney's fees to be shifted where litigation tactics are pursued in bad faith, *see Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991), and Federal Rule of Civil Procedure 11, are further checks against such gamesmanship.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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