No. 09-1848

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 LOS ANGELES COUNTY AND CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JEFFREY S. SUTTON
Counsel Of Record
RONALD E. LAYMON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3855

ELWOOD LUI
JONES, DAY, REAVIS & POGUE
Suite 4600
555 West Fifth Street
Los Angeles, CA 90013
(213) 489-3939

Counsel for Los Angeles County and California State Association of Counties

QUESTION PRESENTED

Whether the "catalyst" theory applies to federal fee-shifting statutes?

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RULE 37 STATEMENT

Counsel for the *amici curiae* authored this brief in whole and received no financial or other assistance from any other person or entity in doing so. The parties have consented to the filing of this brief, and their consent letters are on file with the Clerk's office.

STATEMENT OF *AMICI* INTEREST

Congress has enacted a variety of laws that authorize attorney-fee awards to successful plaintiffs and defendants. *See, e.g.*, 42 U.S.C. § 1988 (Civil Rights Attorney's Fees Awards Act of 1976); 42 U.S.C. § 3613(c)(2) (Fair Housing Amendments Act of 1988); 42 U.S.C. §§ 12117(a), 12188 (Americans with Disabilities Act); 42 U.S.C. § 1973l(e) (Voting Rights Act). In statutorily altering the "American Rule"—that customarily requires litigants to pay their own costs when they ask courts to resolve disputes—Congress has indicated that only "prevailing" parties are eligible for fees. At issue in this case is whether litigants may obtain fees even when they do not obtain a judgment or judicially-enforceable settlement over a contested issue, but instead claim merely to have been the "catalyst" of the other party's voluntary action to dismiss a case or alter challenged conduct.

Amici curiae are Los Angeles County and the California State Association of Counties. Both have a considerable stake in the outcome of this dispute and both believe that the "catalyst" theory cannot be squared with the words of the fee-shifting statutes, precedent or common sense.

As of January 2000, Los Angeles County had a population of 9.9 million residents, making it the most populous county in the nation and making it more populous than 42 States in the country. Roughly 29 percent of the residents of California—the most populous State—live in Los Angeles County.

As a subdivision of the state, the County is charged with providing numerous services that affect the lives of all

residents. Traditional mandatory services include law enforcement, property assessment, tax collection, public health protection, public social services and relief to indigents. Among the specialized services are flood control, water conservation, parks and recreation, and many diversified cultural activities. There are 88 cities within the County, each with its own city council. All of the cities, to one degree or another, contract with the County to provide municipal services. Thirty-seven cities contract for nearly all of their municipal services. More than 65% of the County is unincorporated. For the 1 million people living in those areas, the Board of Supervisors of Los Angeles County is their "city council" and County departments provide the municipal services.

The California State Association of Counties (CSAC) is a non-profit corporation, whose membership consists of all 58 California counties. Those counties range in population from nearly ten million to several hundred thousand. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Both Los Angeles County and the counties represented by CSAC face claims for attorney fees by private plaintiffs under 42 U.S.C. § 1988 and other fee-shifting statutes enacted by Congress. Each entity thus has a considerable interest in ensuring that statutes providing for attorney fees are not construed more broadly than Congress intended and that fees are awarded only where Congress has deliberately departed from the traditional "American" rule that each party bears its own litigation expenses.

SUMMARY OF ARGUMENT

The "catalyst" theory does not respect the words of the fee-shifting statutes, precedent or the everyday realities of government litigation.

As a matter of plain English, the fee-shifting statutes do not by their terms create "a relief Act for lawyers." *Farrar v. Hobby*, 506 U.S. 103, 122 (1992) (O'Connor, J., concurring) (quoting *Riverside v. Rivera*, 477 U.S. 561, 588 (1986) (Rehnquist, J., dissenting)). They apply only to "prevailing" plaintiffs and "prevailing" defendants, not to any party or any legal dispute. When combined with each statute's repeated reference to a relevant "party" and "action," the term "prevailing" requires fee-requesting litigants to obtain success through a court order or judicially-enforceable settlement that alters the legal relationship between the parties. A claim that one litigant has inspired, prompted, or catalyzed another litigant voluntarily to alter its conduct does not suffice.

As a matter of precedent, the Court's historic presumption against shifting responsibility for attorney fees bolsters this interpretation. In adhering to this "American rule," the Court has indicated "that attorney's fees generally are not a recoverable cost of litigation absent explicit congressional authorization." *Key Tronic Corp. v. United States*, 511 U.S. 809, 824 (1994) (quotation omitted). Congress's mere authorization of fees for "prevailing" parties hardly amounts to an "explicit" warrant to shift fees whenever litigants ineffably inspire change, as opposed to compel it. The Court's cases interpreting these provisions all follow this course. To be a "prevailing" party, the litigant must make a two-part showing. One, it " must obtain an enforceable judgment ... or comparable relief through a consent decree or settlement." *Farrar*, 506 U.S. at 111. Two, "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.* The litigant in other words must achieve the *end* of a direct benefit that alters the legal relationship between

the parties through the *means* of an enforceable judgment or judicially-enforceable settlement.

As a matter of mundane litigation realities, this interpretation also makes sense. For one, the clarity of this rule will preclude plaintiffs and defendants, both of whom after all may be treated as "prevailing" parties, from commencing time-consuming satellite litigation over fee awards. The vexing state-of-mind and cause-and-effect inquiries compelled by the "catalyst" theory, by contrast, will catalyze all manner of collateral fee litigation. "A request for attorney's fees," the Court has warned, "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). For another, a defendant's voluntary cessation of a challenged practice will not invariably deprive a federal court of its power to determine the legality of a challenged practice. Because the defendant bears a "heavy burden" of showing that the conduct will not recur, it is not the case that institutional litigation by civil rights plaintiffs will invariably stop merely because the defendant appears to end its challenged conduct. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000).

ARGUMENT

I. THE FEE-SHIFTING STATUTES PREMISE AWARDS ON A COURT ORDER OR JUDICIALLY-ENFORCEABLE SETTLEMENT ESTABLISHING THAT THE LITIGANT HAS "PREVAIL[ED]."

> In a civil *action* under subsection (a) of this section, the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee.

Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq.* (FHAA), 42 U.S.C. § 3613(c)(2) (emphasis added).

> In any *action* or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee.

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12205 (emphasis added).

> In any *action* or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 . . ., or title VI of the Civil Rights Act of 1964 . . ., the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (emphasis added).

All three of the pertinent statutes—the ADA and FHAA, as at issue here, and section 1988, as at issue in most cases—say that a district court's discretion to grant attorney fees does not apply to any legal "action" or at any time during that legal action. Only when a "party" has "prevail[ed]" on the merits, each law makes clear, may trial courts exercise the discretion Congress has given them to shift attorney fees from one litigant to the other in an "action" before them.

As the references to "party" and "action" in each of these statutes suggests, a "prevailing" litigant is not one who inspires change in governmental conduct but one who obtains a court order (or judicially-enforceable settlement) compelling it. No doubt that court order may come in a variety of forms, be it a temporary restraining order, preliminary injunction, judgment, settlement, consent decree or something else. But some judicially-enforceable directive must change the legal relationship between the parties. After all, one only "prevail[s]" in a lawsuit when an issue is mutually contested and a resolution is mutually enforceable, not when there is one-sided alteration in conduct. *See* Black's Law Dictionary, 1145

(7th ed. 1999) (defining "prevailing party" as "[t]he party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention").

A contrary rule—that ineffably asks whether one litigant was a "catalyst" of the other litigant's change in behavior—has no statutory mooring and no coherent principle to guide it. Unless tethered to a judicially-enforceable directive concerning a contested issue, an inquiry into "prevailing party" status will force lower courts into utterly speculative debates over why parties voluntarily dismiss cases or voluntarily change their conduct after cases are filed.

Take plaintiffs who choose voluntarily to dismiss their claims against government defendants. They of course are no more immune from attorney-fee awards than defendants. Prevailing defendants, like prevailing plaintiffs, may invoke these fee-shifting statutes, which by their terms apply to any "prevailing party" and any "action." *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983) (Title VII and section 1988 apply the same fee-shifting "standard[]"). On what basis, however, would a trial court determine whether the defendant had "prevail[ed]" in such a case? In one sense, a plaintiff's decision voluntarily to dismiss a claim would seem to be the epitome of an "action [that] was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.*, 434 U.S. at 421. Why else dismiss a case that one has initiated? But in another sense, that may not be true—as a civil-rights plaintiff may voluntarily dismiss an action for an endless assortment of reasons. They may decide that other lawsuits deserve more priority; they may decide to challenge the

underlying government policy in the legislature rather than in the courts; or their lead lawyer may simply change jobs. One's capacity for imagination is the only limit to the number of possibilities.

So too with government defendants. Like private plaintiffs, they may choose voluntarily to change their conduct for a variety of reasons—many of which have little if anything to do with the merits of the case or, more precisely, with prevailing-party status. An election may lead to a new government proposal on the underlying policy issue at stake in the litigation; an intervening precedent may change the legal landscape; or the legislature may change a law based on policy, as opposed to federal constitutional or statutory, grounds. At bottom, it is no more possible fairly to label a government defendant a "prevailing" party than it is to label a private plaintiff that way—at least in the absence of a judicial order (or judicially-enforceable settlement) resolving a contested issue.

In the final analysis, the fee-shifting statutes by their terms require a legal as opposed to a causal connection between the lawsuit and the end result. "For individuals to recover fees, they must prevail in their status as parties, not in their role as agents of reform." *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 170 (4th Cir. 1993) (Wilkinson, J., dissenting), *rev'd en banc and dissenting opinion adopted*, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994).

II. PRECEDENT CONFIRMS THIS READING OF THE FEE-SHIFTING STATUTES.

Even if there were doubt regarding the meaning of these statutes, precedent resolves that doubt against petitioners in at least two ways. First, the presumption against such awards confirms that any ambiguity regarding "prevailing" party status should be construed against disrupting the American Rule. Second, the Court's cases have frequently indicated that a

judicial order regarding a contested issue, not an unbridled inquiry into causation, establishes "prevailing" party status.

While the words of the fee-shifting statutes alone answer the question presented, the presumption against such fee awards cements the conclusion. "Our cases establish," the Court has indicated, "that attorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional authorization.'" *Key Tronic Corp. v. United States*, 511 U.S. 809, 824 (1994) (quoting *Runyon v. McCrary*, 427 U.S. 160, 185) (1976)). "[T]he availability of attorney's fees therefore requires a determination that 'Congress intended to set aside this longstanding American rule of law.'" *Id.* (quoting *Runyon*, 427 U.S., at 185-186). *See also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (even "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser"); *Summit Valley Industries, Inc. v. Local 112, United Broth. of Carpenters and Joiners*, 456 U.S. 717, 727 (1982) ("the American Rule presumes that the word 'damages' means damages exclusive of fees"). Whatever else may be said about the terms of these statutes, the mere phrase "prevailing party" does not overcome this presumption when it comes to a decision by a plaintiff on the one hand voluntarily to dismiss a suit or by a public defendant on the other hand voluntarily to alter a government policy. Unlike a judgment, settlement or consent decree, this type of litigation-ending conduct does not bind anyone or in any way alter the relationship between the parties. What a litigant may voluntarily do, it of course may voluntarily undo. Absent some judicial order or judicially-enforceable settlement, it thus is utterly speculative to maintain that one litigant has "prevail[ed]" over the other.

The Court's decisions follow this path. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court held that to "qualify as a prevailing party," a plaintiff must satisfy two requirements. "[T]he plaintiff must obtain an enforceable judgment ... or

comparable relief through a consent decree or settlement." *Id.* at 111. And "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.* Put another way, a prevailing party must achieve the *end* of a direct benefit through the *means* of an enforceable judgment or other comparable relief. "Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party." *Id.* (quoting *Texas Teachers Ass'n v. Garland Sch. Dist.*, 489 U.S. 782, 792-793 (1989)).

The determinate requirements of the *Farrar* test cannot be squared with the free-form "catalyst" theory. A voluntary decision by government to change a policy, like a decision by a plaintiff to dismiss a case, binds no one. Least of all does it do so through a judicially-enforceable decree. Because "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant," *id.* at 113, it cannot fairly be said that the plaintiff (or defendant) has prevailed in these circumstances. "[W]ithout a demonstrated legal entitlement, plaintiffs cannot be deemed to have prevailed." *S-1 and S-2*, 6 F.3d at 168 (Wilkinson, J.).

Nor may the "catalyst" theory be salvaged by appealing to earlier Supreme Court precedent. The two-part *Farrar* requirement of (1) a judgment, consent decree, or settlement that (2) alters the legal relationship between the parties builds on precedent; it does not alter that precedent. As to the first requirement, case after case indicates that "liability on the merits and responsibility for fees go hand in hand." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). *See Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam) (consent decree) ("Congress intended to permit the . . . award of counsel fees only when a party has prevailed on the merits."); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (settlement)

(prevailing party must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit") (quotation omitted); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect 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.").

As to the second requirement, the Court has warned litigants that it is not enough merely to obtain a favorable judgment to qualify as "prevailing." *See Hewitt*, 482 U.S. at 763 ("a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'"). Such a judgment "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (per curiam). In the end, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas Teachers Ass'n v. Garland Sch. Dist.*, 489 U.S. 782, 792 (1989). *See id.* at 791-792 ("plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit") (quotation and citation omitted). To our knowledge, the Court has never held that a party may obtain attorney fees where it was not "entitled to enforce a judgment, consent decree, or settlement against the defendant." *Farrar*, 506 U.S. at 113.

Hewitt v. Helms is not to the contrary. There, an appellate court found that the government violated the due process rights of a former prison inmate, Aaron Helms, by using hearsay testimony of an undisclosed informant against him. The court of appeals ordered the district court to enter summary judgment for Helms unless the prison officials could show that they were immune from suit. On remand, Helms pursued only his claim for damages. In particular, Helms' counsel never sought a declaratory judgment or an expungement order. The district court ultimately entered judgment for the officials on the ground that they were entitled to qualified immunity, and the appellate court affirmed. *See Hewitt*, 482 U.S. 757-759.

Helms nonetheless sought attorney fees, arguing that he had prevailed, for purposes of 42 U.S.C. § 1988, by obtaining a ruling that the government violated his constitutional rights by using hearsay testimony against him. *Id.* at 759. The Court disagreed. As an initial matter, the Court explained, "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'" *Id.* at 763.

> Helms obtained no relief. Because of the defendants' official immunity he received no damages award. No injunction or declaratory judgment was entered in his favor. Nor did Helms obtain relief without benefit of a formal judgment—for example, through a consent decree or settlement.

Id. at 760 (citing *Hanrahan*, 446 U.S. at 758-759, and *Maher v. Gagne*, 448 U.S. 122, 129 (1980)).

In the course of rejecting the claim for fees, the Court also observed:

> 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. *See Maher*, *supra*, at 129.

Hewitt at 760-761 (emphasis added).

Contrary to petitioners' suggestion as well as the suggestion of their *amici*, the italicized language does not address a wholly voluntary change in conduct and certainly does not represent an endorsement of the "catalyst" theory. The citation to *Maher* confirms that this *dictum* refers to monetary and injunctive "settlements." And that of course is all *Maher* says: "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." 448 U.S. at 129. Any ambiguity on this score is removed by the Court's explicit directive to readers of the opinion *not* to draw any conclusions regarding the merits of the "catalyst" theory. In the Court's words: "We need not decide the circumstances, if any, under which [the] 'catalyst' theory could justify a fee award under section 1988." *Hewitt*, 482 U.S. at 763.

Hewitt in the last analysis represents an exceedingly slim reed on which to rest the claim that *Farrar* does not control the resolution of this case. The decision *rejected* a claim for fees, predated *Farrar* by five years, and explicitly declined to address the "catalyst" theory. What matters instead, as *Farrar* makes clear, is (1) whether the litigant is "entitled to enforce a judgment, consent decree, or settlement against the defendant," and (2) whether that order or agreement creates a "material alteration of the legal relationship of the parties." *Farrar*, 506 U.S. at 111, 113. *See also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 382 (1994) ("If the parties wish to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so. ... Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.").

III. IN REQUIRING PARTIES TO PREVAIL THROUGH A JUDICIAL ORDER OR A JUDICIALLY-ENFORCEABLE SETTLEMENT, THE STATUTE SETS UP A CLEAR TEST THAT WILL STEM VEXATIOUS COLLATERAL-FEE LITIGATION WHILE STILL PERMITTING DESERVING LITIGANTS TO OBTAIN FEES.

Moving from the sacred to the mundane, this interpretation also makes sense. This construction as a preliminary matter will assuredly stem satellite litigation over attorney-fee awards. As the Court has warned, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The clarity of this two-part test—requiring a judicial order or judicially-enforceable settlement that alters the legal relationship between the parties—promises to advance this objective.

In conspicuous contrast, the elusive state-of-mind and cause-and-effect inquiries compelled by the "catalyst" theory would prompt, and indeed have engendered, all manner of collateral-fee litigation. And that risk is particularly acute when the government alters its conduct through an act of the legislature—as occurred in this case. On what basis will courts determine why the law was passed under those circumstances? Did the change in law flow from the litigation, press coverage, or run-of-the-mill constituent complaints? One trial court's guess frequently will be as good as another's. The Court's bright-line test eliminates this confusion and what often comes with it—unproductive and resource-sapping litigation.

What ultimately makes this case hard are not the terms of the statute, case law, or even (in most cases) the objectives of the fee-shifting statutes. All make clear that litigants are not entitled to fees until they have obtained a judgment or judicially-enforceable settlement that alters the legal relationship between the parties. The difficulty instead is the apparent gap in the statute left by this construction—namely,

the risk that a government litigant could voluntarily dismiss a lawsuit on the eve of an adverse ruling, leaving a civil rights plaintiff with no judgment or alteration in the legal relationship between the parties, just a lot of unpaid fees. But in the end this risk is more perceived than real.

Contrary to petitioner's suggestion, a government defendant may not so readily moot a plaintiff's action. As the Court held just last Term, "[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." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quotation and citation omitted). Defendants who wish to end a legal dispute through voluntary action, *Friends of the Earth* establishes, must satisfy "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (quotation, citation and brackets omitted). Because a defendant that alters its conduct merely to moot a plaintiff's meritorious case is not apt to meet this "heavy burden," plaintiffs will remain free to obtain a judicial determination that alters the legal relationship of the parties.

For like reasons, actions that are "capable of repetition, yet evading review" also will allow some civil rights plaintiffs to proceed to judgment on legal issues even when a case otherwise becomes moot. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). Thus, for example, when "a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action." *Friends of the Earth*, 528 U.S. at 215. *See also Norman v. Reed*, 502 U.S. 279, 300 (1992) (action involving challenge to statutory requirements for political party to gain place on the ballot would be considered even though the election had been concluded, as the issue was one capable of repetition yet evading review).

No doubt these avenues of relief do not exhaust every possible scenario in which a government defendant (or civil rights plaintiff) voluntary alters their conduct. But it was never the point of the fee-shifting statutes to make good on every fee claim. Neither section 1988 nor any of these other statutes is "a relief Act for lawyers." *Farrar*, 113 S. Ct. at 578 (O'Connor, J., concurring). "By providing a clear rule for achieving prevailing party status," *S-1 and S-2*, 6 F.3d 160, 171 (Wilkinson, J.), the *Farrar* requirement that a litigant obtain "an enforceable judgment ... or comparable relief through a consent decree or settlement" that alters the legal relationship between the parties, 506 U.S. at 111, necessarily does what all bright lines do—place some cases on one side and some cases on the other side of it. At the same time, this rule shows fidelity to the words of the statute, respects this Court's precedents, and ultimately eliminates a far-more trying and vexatious cycle of litigation.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

JEFFREY S. SUTTON
Counsel of Record
RONALD E. LAYMON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3855

December 2000

ELWOOD LUI
JONES, DAY, REAVIS & POGUE
Suite 4600
555 West Fifth Street
Los Angeles, CA 90013
(213) 489-3939

Counsel for Amici Curiae Los Angeles County and California State Association of Counties