Record No. 99-1848

In The
Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.;
THE WEST VIRGINIA RESIDENTIAL
BOARD AND CARE HOME ASSOCIATION;
and on behalf of all others similarly situated,

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

REPLY BRIEF FOR PETITIONERS

Webster J. Arceneaux, III*
LEWIS, GLASSER, CASEY
& ROLLINS, LLP
Suite 700, One Valley Square
Charleston, WV 25301
(304) 345-2000

Brian A. Glasser
BAILEY & GLASSER, LLP
227 Capitol Street
Charleston, WV 25301
(304) 345-6555

**Counsel of Record for Petitioners*

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE STATUTES

LEGISLATIVE HISTORY

MISCELLANEOUS

INTRODUCTION

The Plaintiffs moved for attorney's fees in the District Court under the catalyst theory. The District Court held that it was precluded from any such award based upon *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.)(*en banc*), *cert. denied*, 513 U.S. 876 (1994). The Plaintiffs now request this Court to consider the statutes at issue, this Court's prior decisions, a majority of the Courts of Appeals decisions, and hold that a party is deemed to have prevailed if there was a material alteration of the legal relationship between the parties that was caused by the lawsuit and the lawsuit was not frivolous, unreasonable, or groundless. This standard comports with the Congressional intent that private attorneys general be encouraged to file civil rights lawsuits in order that the public may be vindicated when laws are enforced.

The Defendants' Brief argues that the catalyst theory should be rejected under their view of *Farrar v. Hobby*, 506 U.S. 103 (1992). They argue that *Farrar* should be extended to establish a "bright line" test limiting the term "prevailing party" to one who achieves a judgment, settlement, or consent decree. They argue that this simple standard is preferable to the confusion that is engendered by the use of the catalyst theory. Alternatively, the Defendants assert that this Court should endorse a per se rule that attorney's fees are not available under the catalyst theory when a case is mooted by legislative action.

The catalyst theory has been embraced by the federal courts for over thirty years and this Court should hold that those

decisions are consistent with the intent of Congress. The Plaintiffs' seek nothing more from this Court than an affirmance of the catalyst theory and a remand to the District Court for consideration of their fee request. This Court should continue to allow development of the catalyst theory on a case by case basis and reject the Defendants' suggestion that a per se rule is necessary to preclude attorney's fees in all cases involving legislative action.

ARGUMENT

I. THE CATALYST THEORY IS CONSISTENT WITH THE PLAIN MEANING OF THE TERM "PREVAILING PARTY."

Both of the statutes at issue in this case, 42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205, allow an award of attorney's fees to a "prevailing party." In the Plaintiffs' initial brief, they assert that under this Court's prior decisions, the legislative history of these two statutes, and, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the term "prevailing party" encompasses the catalyst theory. The Defendants' Brief argues that this Court should eschew that legislative history and look only to the plain meaning of the term "prevailing party." Under their view, Congress did not intend to allow a recovery of attorney's fees under the catalyst theory. The Defendants further argue that this Court should extend its decision in *Farar* to hold that only when a party

achieves a judgment, settlement, or consent decree are they entitled to recover their attorney's fees. They argue that this simple standard will eliminate any confusion in the courts that may result from the use of the catalyst theory.

The Defendants and the *Amici* in Support of Respondents all argue that this Court should not accept the catalyst theory because the decision in *Farrar* restricts attorney's fees in civil rights cases involving only judgments, settlements and consent decrees. They argue that this provides a simple standard that may be easily implemented by the courts below without any confusion. This interpretation of *Farrar* is at odds with this Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 194 (2000), wherein it was recognized that *Farrar* "involved no catalytic effect." This statement explicitly recognizes that *Farrar* did not address the catalyst theory which arises in this case. Further, as this Court recognized in *Aleyska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), it is for Congress, not the Courts to establish the rules related to attorney's fees. Since Congress clearly endorsed the catalyst theory when it enacted § 1988 and the two statutes at issue in this case, this Court must uphold those enactments. This Court should reject the invitation of the Defendants and the *Amici* to create a standard to the contrary.

The Defendants' Brief, at pages 7-8, asserts that this Court should do nothing more than look at the plain language of the two statutes at issue and conclude:

> Indeed, the legal term "prevailing party" is defined by one leading legal dictionary as "A party in whose favor *a judgment is rendered*, regardless of the amount of damages awarded. <in certain cases, the court will award attorney's fees to the prevailing party.>" *Black's Law Dictionary* 1145 (7th ed. 1999). In short, a prevailing party is one who prevails *in* the litigation.

This Court should not ignore the legislative history of the statutes at issue.[1] Instead, it should look to the legislative history of § 1988 as it has done in prior cases. This Court has consistently referred to the legislative history of § 1988 to discern the meaning of the term "prevailing party." *See e.g.*

---

[1] In support of their argument that legislative history has no relevancy to this Court's inquiry, the Defendants cite to Justice Scalia's concurring opinion in *Hirschey v. F.E.R.C.*, 777 F.2d 1, 8 n.1 (D.C. Cir. 1985). Justice Scalia frequently objects to this Court's consideration of legislative history. *See e.g. Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288, 2302 (2000)(Scalia, J. concurring) and *Bank One, Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J. concurring). This Court has continued to consider legislative history in appropriate cases. *See e.g. Crosby, supra* at 2301, n.23 (legislative history of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 570, 110 Stat. 3009-166); *Jones v. United States*, 526 U.S. 227, 237-38 (1999) (legislative history of the federal carjacking statute, 18 U.S.C. § 2119); *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 342 (1999) (legislative history of the Census Act, 13 U.S.C. §§ 1, *et seq.*); *Bank One, Chicago, supra* at 273, (legislative history of the Expedited Funds Availability Act, 12 U.S.C. §§ 4001, *et seq.*) *Negonsott v. Samuels*, 507 U.S. 99, 106-07 (1993) (legislative history of the Kansas Act, 18 U.S.C. § 3243).

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989); *Hensley v. Eckerhart*, 461 U.S. 754 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980); and, *Hanrahan v. Hampton*, 446 U.S. 754 (1980). *See also*, *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (legislative history of § 1988 considered at length regarding proper calculation of reasonable attorney's fees).

The Plaintiffs' initial brief sets forth their arguments that the legislative history of § 1988 and the two statutes at issue shows that Congress intended the term "prevailing party" to encompass an award of attorney's fees under the catalyst theory and this Court should adhere to that intent. Similar arguments regarding the legislative history of § 1988 and the statutes at issue are made by the *Amici* in Support of the Petitioners. *See* U.S. Brief at 9-10, n.4 and 21-22; Friends of the Earth Brief at 13-15; and, Public Citizen at 9-11.

Defendants do not dispute or address the Plaintiffs' assertion that the catalyst theory first arose from the decision in *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970) and that the theory has been applied for thirty years in the federal courts across this country. The Brief of *Amici* National Conference of State Legislatures in Support of the Respondents, at pp. 12-13, invites this Court to examine the decision in *Parham*. That *Amici* asserts that *Parham* is consistent with their interpretation of *Farrar* that attorney's fees are only to be awarded in cases involving judgments, settlements, and consent decrees. Based upon this assertion,

the *Amici* argues that citation to *Parham* in the legislative history of § 1988 should not been seen as supporting the Plaintiffs' argument that Congress has endorsed the catalyst theory.

There is no doubt that the plaintiff in *Parham* never obtained any judgment, settlement or consent decree. Both the District Court and the Court of Appeals concluded that no final injunctive relief was warranted because the defendant's voluntary conduct eliminated any discriminatory conduct against African-Americans, *supra* at 429. Thus, when Congress cited to *Parham*, and stated that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief*." S.Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) (emphasis added), it undoubtedly intended to recognize that a plaintiff is entitled to attorney's fees when their lawsuit leads to voluntary changes of unlawful conduct on the part of the defendant.[2]

The House Report, No. 1558, 94th Cong., 2d Sess. at 7 (1976) more forcefully relies upon *Parham* stating

[2] The Defendants' Brief, pp. 10-11 discusses this same passage of legislative history and suggest the language "without formally obtaining relief" only applies to settlements. Had Congress intended this limitation to settlements, it could have easily stated "or settlements." It did not so state. Rather it used very broad language "without formally obtaining relief," which includes settlements and the catalyst theory. Citation to *Parham* further evidences that Congress intended to allow the catalyst theory when it enacted § 1988 and the two statutes at issue in this case.

unequivocally that "[s]imilarly, after a complaint is filed a defendant might voluntarily cease the unlaswful practice. A court might still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed." When a plaintiff's lawsuit catalyzes a defendant into making changes consistent with the relief requested, there should be no dispute that Congress intended that they be considered a prevailing party the same as any other party who obtains a judgment, settlement or consent decree.

Even if this Court were to limit its inquiry to the express terms of the statute, as suggested by the Defendants, under the plain meaning of the term "prevailing party," the catalyst theory would be allowed. Significantly, when Congress enacted 42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205, it did not define the term "prevailing party" or place any restrictions on that term. Congress does not itself use the terms judgment, settlement, or consent decree in the statutes. Nor did Congress restrict the term "prevail" to conduct "*in* the litigation." Absent any restrictive language from Congress, this Court should not read in any such abridgments.[3]

[3] The *Amici* Alliance of Automobile Manufactures, Inc., at pp. 17-22, argue that not all fee shifting statutes use the same language. They state that the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2) provides "[i]f a consumer finally prevails in any action . . . he may be allowed by the court to recover as a part of the judgment" his attorney's fees. Were the term "judgment" included in the statutes at issue, the Defendants might have a different argument. However, the language of the Magnuson-Moss Warranty Act is not before this Court.

Furthermore, the definition of the term "prevail" has several meanings that support the catalyst theory.[4] A common first definition of the term "prevail" is to "become very strong, to gain vigour or force, to increase strength." *See Oxford English Dictionary* 1334 (1970), *See also, Random House Webster's Unabridged Dictionary* 1534 (2nd ed. 1987). Dictionaries also define the term "prevail" as "to get the better, to be victorious" and "to succeed in persuading, inducing or influencing." *Id.* These definitions support the catalyst theory. If a lawsuit induced or catalyzed the outcome that the plaintiff sought in the lawsuit, the plaintiff has prevailed.

The Plaintiffs lawsuit induced or catalyzed the Defendants to withdraw the self-preservation rules and under that definition, they can be seen as prevailing parties. Prior to any suit being filed, the State Fire Marshal adhered to the outdated self-preservation rules for eleven years after the National Fire Protection Association (NFPA) had issued the 1985 Life Safety Code standards for residential care homes. This caused the Office of Health Facility Licensure and Certification (OHFLAC) to issue three Cease and Desist Orders on October 18, 1996 requiring Buckhannon Board and Care

[4] The Defendants' Brief refers this Court to the definition of the term "prevailing party" in *Black's Law Dictionary* 1145 (7th ed. 1999). This definition is found under the definition of "party," not the term "prevail." The term "prevail" is defined in *Black's Law Dictionary* at 1206 as "[t]o obtain the relief sought in an action; to win a lawsuit." While this definition of "prevail" would include judgments, it also is arguably compatible with the Plaintiffs' claim that the catalyst theory is encompassed by the term "prevail."

Home (BBCH) to close its three residential care homes and expel all of its residents. (JA 46-66). Rather than comply with these orders, the Plaintiffs proceeded to District Court and obtained an Agreed Order prohibiting the closure and eviction of the residents.

The Plaintiffs prevailed by obtaining the entry of the Agreed Order. The Plaintiffs further prevailed when the District Court denied the Defendants' Motions to Dismiss (JA 102). Finally, the Plaintiffs prevailed when the State Fire Marshal decided after his deposition, and the depositions of the Plaintiffs' experts, to withdraw the self-preservation rules at issue. This is clearly a material alteration in the legal relationship between the parties that was caused by the lawsuit. Further, and most significantly, Plaintiff Dorsey Pierce was allowed to die with peace and dignity at BBCH at the age of 105, and no other persons in a residential care home in West Virginia were subject to evictions as a result of the rules.

In light of the plain meaning of the term "prevailing party," this Court should reaffirm that a party prevails when its lawsuit catalyzes the defendant into making changes consistent with the relief requested, even though the lawsuit does not proceed to judgment because it is rendered moot by the defendant's action. The Plaintiffs in this action clearly induced or catalyzed the Defendants into withdrawing their self-preservation rules and therefore, this Court should conclude that they are prevailing parties entitled to a hearing on their request for fees.

II. THE CATALYST THEORY HAS BEEN APPLIED FOR OVER THIRTY YEARS WITHOUT ANY CONFUSION OR DIFFICULTIES.

The Defendants and their *Amici* in Support have repeated the same four arguments against the catalyst theory first advanced by Chief Judge Wilkinson in his dissent in *S-1 and S-2 v. State Board of Education*, 6 F.3d 160 (4th Cir. 1993). The Plaintiffs addressed these arguments in their brief at pp.33-34. One of the arguments advanced by the Defendants and the *Amici* in Support of the Respondents, suggest that if this Court endorses the catalyst theory, it will open the floodgates of civil rights and other litigation across the country. It is pure conjecture that any litigation will increase as a result of the catalyst theory. No empirical evidence is offered by the Defendants or the *Amici*, that the catalyst theory has resulted in any additional civil rights litigation over the past thirty years.

This argument also ignores the fact that the catalyst theory is already the law in all circuits with the exception of the Fourth Circuit, which circuit also accepted that theory until the *en banc* decision in *S-1 and S-2* in 1994. This Court's decision to reaffirm the catalyst theory should preserve the *status quo* that has now existed for thirty years and one would not expect any increase in civil rights litigation.

Likewise, there is no empirical support for the Defendants' contention that the courts are confused in applying

the catalyst theory. A review of the case law that has developed over thirty years indicates that the district courts and courts of appeals apply the catalyst theory in an even handed manner. A majority of the courts have applied the *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) two part test without any confusion or discernable difficulty. *See* Pet. Brief at 31, n.13.

Lastly, Defendants argue that the catalyst theory inhibits public officials from voluntary action. Again, there is no empirical evidence offered by the Defendants or their *Amici* to support this assertion. When an agency is not in compliance with federal law, and that leads to litigation, a public officials actions to remedy the problem should be seen as induced or catalyzed conduct, not voluntary conduct. And under those circumstances, an award of fees is appropriate.

Furthermore, the facts of this case do not support the Defendants' argument. The District Court held as a matter of law that the Plaintiffs' Amended Complaint stated a valid cause of action under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601, *et seq*. and the Americans with Disability Act OF 1990, 42 U.S.C. §§ 12132, 12182 (JA 102). Only after this lawsuit was filed and the depositions of the State Fire Marshal and the Plaintiffs' experts took place, did the State Fire Marshal determine that it was time to withdraw the outdated rules.

After declaring the suit moot, the District Court held that it could not consider the Plaintiffs' fee request under the

catalyst theory because of the decision in *S-1 and S-2*, although he further opined that the Plaintiffs "might prevail on this theory" (Pet. App. A17). The District Court did not find that the State Fire Marshal's conduct was entirely without blame, particularly in light of the fact that the self-preservation rules were withdrawn without notice to the plaintiffs, their own counsel and the court. In upholding Rule 11 sanctions against the State Fire Marshal in this case, the District Court implicitly recognized that the rule change was related to this lawsuit (JA 147).

III. THIS COURT SHOULD REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

The Plaintiffs filed their Petition with this Court in order that their fee request could be considered in the District Court under the catalyst theory. The Plaintiffs have argued, as this Court stated in *Friends of the Earth, Inc., supra,* at 195, that it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." Despite that admonition, the Defendants have devoted a substantial portion of their Brief, pp. 12-17, to the proposition this Court should adopt a *per se* rule precluding fees in any case involving legislative activity. There is no basis for carving out an exception to the catalyst theory where the action that brought about the relief sought by the plaintiff was legislative action. Neither the statutory language or the legislative history suggests a different result if the relief sought in the lawsuit was obtained

through legislative action. Furthermore, the relief obtained here was not through legislative action. In the Plaintiffs' initial brief, at footnote three, the Plaintiffs explained that any legislative activity in this case is merely routine, mechanical oversight of rule-making in West Virginia. Therefore, the Defendants attempt to hide behind legislative activity in this case should be seen as oversimplified at best.[5]

The Defendants' arguments on legislative involvement in this case also overlooks two important points regarding West Virginia's rule-making process. First, the Defendants do not dispute the Plaintiffs' assertion in footnote three of the initial brief, that the vast majority of rules go through the legislature with little discussion or amendment. The second, and more significant point, is that this whole process is agency driven, *i.e.* the agency must promulgate the rules prior to the legislature having anything to act upon. A review of the exhibits attached to the Plaintiffs' Motion for attorney's fees establishes that the expected mechanical legislative oversight of the rule-making process under the West Virginia Code is precisely what occurred in this case. First, the State Fire Marshal proposed

---

[5] The laws in West Virginia regarding the rule-making process are simple and straightforward. Pursuant to W. Va. Code § 29A-3-9, an agency must first draft a proposed rule and then apply to the legislature for permission to promulgate the rule. W. Va. Code § 29A-3-11 next sets forth the procedure for the Legislative Rule-Making Review Committee to consider in recommending to the full legislature that the agency should be allowed to promulgate the requested rule. W. Va. Code § 29A-3-12 then sets forth how the legislature as a whole may approve or disapprove of the rules or may otherwise amend the rules.

rules to the State Fire Commission. The Commission in turn submitted proposed rules to the Legislative Rule-Making Review Committee and finally, the legislature as a whole approved the rules with little substantive changes.

Therefore, this is a case about agency conduct, not legislative activity. This Court should recognize that upon remand, the District Court may only focus on the State Fire Marshal and the State Fire Commission's decision to withdraw the self-preservation rules and not the actions of the West Virginia Legislature approving of those changes. Alternatively, the District Court may focus on the fact that the lawsuit prevented the Defendants from enforcing their Cease and Desist Orders from the inception of the lawsuit, until it was dismissed as moot.

Not only are the Defendants' arguments not factually supported in this case, they are also misplaced as a matter of law. There is no indication in cases applying the catalyst theory that courts have had difficulty applying it to cases involving legislative action such that a *per se* exception is warranted. Defendants argue that the determination whether legislative action was catalyzed by a lawsuit will inevitably be "complex," "intrusive," "long, drawn-out" and "unworkable." Defendants' Brief at pp. 12-13. While it may sometimes be difficult to determine whether legislative action was catalyzed by a lawsuit, that is also sometimes true with regard to agency actions and at other times the determination will be easy.

Four of the cases cited by Defendants involved claims that individual lawsuits had catalyzed enactment of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794; the courts easily concluded that no individual plaintiff could establish that his lawsuit was the catalyst for this major congressional action. *See Milton v. Shalala*, 17 F.3d 812 (5th Cir. 1994), *Petrone v. Secretary of Health and Human Services*, 936 F.2d 428 (9th Cir. 1991) (*per curiam*), *Hendricks v. Bowen*, 847 F.2d 1255 (7th Cir. 1988), and *Truax v. Bowen*, 842 F.2d 995 (8th Cir. 1988). Similarly, in *New York State Association of Career Schools v. New York State Education Department*, 762 F.Supp. 1124 (S.D.N.Y. 1991), the court denied fees where there was simply "no evidence that either the Legislature or the Governor was at all aware of plaintiffs' lawsuit, let alone moved to enact the reform legislation as a result of it." *Id.* at 1126-27. And in the other case cited by defendants, *Foreman v. Dallas County*, 193 F.3d 314 (5th Cir. 1999), the court concluded that the plaintiffs were not catalysts because there was "no ... evidence in the legislative record" showing that the lawsuit was a significant basis for the action, and that "the ... legislature began the process of amending the [relevant statute] well before the plaintiffs initiated this action." *Id.* at 322.

Other courts have had equally little difficulty finding that litigation was the catalyst for legislative action. For example, in *Church of Scientology v. City of Clearwater*, 2 F.3d 1509 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994), the court found it "*undisputed* that the suit brought by

[Plaintiff] caused the City to amend the [unconstitutional] Ordinance." 2 F.3d. at 1513 (emphasis added). And *Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993), the court ordered fees awarded under a catalyst theory where "Congress specifically mentioned the case in the legislative history [of the amended statute] as being the "necessary" force behind its enactment." *Id.* at 241.

Finally, Defendants' policy-based argument that a legislature should be free to act in the public interest without facing the constraint of a potential fee award has no more force than the same argument made in regard to an executive official, who should also act in the public interest. Congress has made the judgment that attorney's fees should be available to prevailing parties in civil rights litigation, and that is the relevant public policy to be applied here.

Thus, there is no inherent obstacle to applying the catalyst theory to cases involving legislative action and this Court should reject a *per se* rule precluding awards of attorney's fees in such cases. In any event, this case should be remanded to the district court to make an appropriate determination under the catalyst theory.

IV. THE *NADEAU* TEST IS THE BETTER STANDARD UNDER THE CATALYST THEORY FOR CONSIDERATION OF A MOTION FOR ATTORNEY'S FEES.

The Plaintiffs' initial brief, at pages 40-43, asserts that this Court should follow the *Nadeau* two part test as the proper standard to be applied under the catalyst theory. This standard is used by a majority of the courts and it has been cited previously with approval by this Court. The Defendants have not addressed this argument but, the Solicitor General's Brief, at pp. 27-29, has proposed a different standard.

The Solicitor General argues that a plaintiff whose lawsuit induces voluntary compliance should only obtain attorney's fees if the suit had "legal merit." U.S. Brief at 27. This standard extends beyond the second part of the *Nadeau* test that only examines whether the legal premise of the suit was not "'frivolous, unreasonable, or groundless.'" *Nadeau, supra* at 281 (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978)). This test "requires courts to dismiss fee claims based wholly on frivolous lawsuits, but simultaneously constrains them from holding a full trial, or from making *ad hoc* predictions about [a] plaintiff's chances for success, on the merits." *Miller v. Staats*, 706 F.2d 336, 341 n.31 (D.C. Cir. 1983).

The *Nadeau* two part formulation has been followed in almost every circuit, in cases interpreting a variety of similarly worded federal fee-shifting statutes under which attorney's fees may be awarded to the prevailing party. Under it, courts have established a minimal threshold for testing the substantiality of a federal claim, and they have expressly rejected a searching

review to determine whether the plaintiff would have won on the merits of the claim.[6]

Although the U.S. Brief at 27 n.14, cites *Nadeau* with apparent favor, it goes on to ask this Court to adopt the standard: "whether the plaintiff's complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction *or* failure to state a claim on which relief may be granted." Brief at 27 (citing Fed. R. Civ. P. 12(b)) (emphasis added). This Court should reject this rule for two reasons.

First, while this standard is met in this case, some cases may be concluded prior to any ruling on a motion to dismiss. Utilization of this standard then will effectively require the fee-seeking party to obtain a legal ruling on the merits after the case has been adjudged moot. Indeed, for the courts to stray beyond *Nadeau* in cases that are moot on the merits would appear to require them, in effect, to issue advisory opinions.

---

[6] *See, e.g., Collins v. Romer*, 962 F.2d 1508, 1514 (10th Cir. 1992) (not "frivolous or groundless"); *Associated Builders & Contractors of Louisiana v. Orleans Parish School Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (lacks "colorable merit"); *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir. 1990) (not "frivolous, unreasonable, or groundless"); *Sablan v. Department of Finance of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988) (same); *Miller v. Staats*, 706 F.2d 336, 341 & n.31 (D.C. Cir. 1983) ("not wholly frivolous"); *Johnston v. Jago*, 691 F.2d 283, 287 (6th Cir. 1982) (not "patently frivolous"); *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir. 1981) *cert. denied* 455 U.S. 993 (1982) (not "frivolous, unreasonable, or groundless"); *Staten v. Housing Authority of City of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980) ("not frivolous"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (not "frivolous, unreasonable, or groundless").

Second, adopting a Rule 12(b)(6) standard as suggested by the Solicitor General is at odds with this Court's prior holding in *Maher v. Gagne*, 448 U.S. 122 (1980), wherein this Court affirmed an award of fees under § 1988 to plaintiffs who had obtained a consent decree, and would set a higher standard for an award of fees in catalyst cases than in cases resolved through consent decree. In *Maher*, the defendant's argued that fees could not be awarded where no formal judicial relief on the merits had been entered. This Court rejected that argument and strongly suggested that the settlement of non-frivolous claims, without more, is sufficient to entitle plaintiffs to fees. It is difficult to square *Maher* with a standard that requires district courts to decide the legal merits of cases in the context of fee disputes.[7]

---

[7] The Rule 12(b)(6) approach is also at odds with this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The EAJA provides the government with an unusual defense if it can show that its position on the merits was "substantially justified." But even under EAJA, this Court has cautioned other courts against deciding the merits during a fee dispute in a way that "effectively establish[es] circuit law in a most peculiar, second-handed fashion." *Pierce, supra* at 561. If, under EAJA, where the statutory defense demands that the district court look at the merits to some degree, this Court has said that legal rulings on the merits should not be announced in resolving fee disputes, there is no basis for a standard requiring merits determinations in mooted cases where the only requirement is that the plaintiff has prevailed.

CONCLUSION

Based upon the foregoing, this Court should hold that a party prevails when its lawsuit catalyzes the defendant into making changes consistent with the relief requested, even though the lawsuit does not proceed to judgment because it is rendered moot by the defendant's action. This Court should remand this case to the district court to consider the Plaintiffs' request for attorney's fees.

Respectfully submitted,

Webster J. Arceneaux, III*
LEWIS, GLASSER, CASEY & ROLLINS, LLP
Suite 700, One Valley Square
Charleston, West Virginia 25301
(304) 345-2000
**Counsel of Record*

Brian A. Glasser
BAILEY & GLASSER, LLP
227 Capitol Street
Charleston, WV 25301
(304) 345-6555

Counsel for Petitioners

January 5, 2001