No. 21-1756

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAMIAN STINNIE, et al.,
Plaintiffs-Appellants,
v.

RICHARD D. HOLCOMB, in his official capacity as the Commissioner of the VIRGINIA DEPARTMENT OF MOTOR VEHICLES,
Defendant-Appellee.

On appeal from the United States District Court
for the Western District of Virginia (No. 3:16-cv-44)

BRIEF OF APPELLEE

Mark R. Herring
Attorney General of Virginia

Donald D. Anderson
Deputy Attorney General

Julie M. Whitlock
Senior Assistant Attorney General &
Transportation Section Chief

Janet W. Baugh (VSB #44649)
Senior Assistant Attorney General

Christian A. Parrish (VSB #44427)
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
(804) 786-2071 – Telephone
(804) 786-4239 – Facsimile

Maya M. Eckstein (VSB #41413)
Trevor S. Cox (VSB #78396)
David M. Parker (VSB #85619)
HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
meckstein@HuntonAK.com
tcox@HuntonAK.com
dparker@huntonAK.com

Counsel for Defendant-Appellee
Richard D. Holcomb

December 15, 2021

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1756 Caption: Damian Stinnie, et al. v. Richard Holcomb

Pursuant to FRAP 26.1 and Local Rule 26.1,

Richard D. Holcomb, in his official capacity as the Commissioner of the Virginia Dep't of Motor Vehicles
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Maya M. Eckstein Date: 12/15/2021

Counsel for: Defendant-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Legislative Materials

Other Authorities

INTRODUCTION

Not until page 42 of their opening brief do Plaintiffs-Appellants ("Plaintiffs") address the decision that controls this appeal and dictates affirmance: *Smyth ex rel. v. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002). In *Smyth*, this Court squarely held, in circumstances identical to those raised here, that the entry of a preliminary injunction does not convey prevailing-party status on a plaintiff seeking attorney's fees under 42 U.S.C. § 1988. The Court understood that, because the inquiry at the preliminary injunction stage is "necessarily abbreviated" and involves only an "incomplete examination" of the merits, a preliminary injunction is an insufficient basis to convey prevailing-party status. *Id.* at 276, 277 n.8. In so holding, the *Smyth* Court considered and rejected the very arguments Plaintiffs raise here.

Twenty years later, *Smyth* remains the settled law of the circuit. Indeed, in a published opinion issued just *last week*, the Court relied on *Smyth* to help guide its decision, arising in a different context, that a plaintiff was not a prevailing party. *See Ge v. United States Citizenship & Immigr. Servs.*, No. 20-1582, --- F.4th ----, 2021 WL 5774725 (4th Cir. Dec. 7, 2021). Even if a panel of this Court were permitted to overrule *Smyth*—only the full Court, sitting en banc, can do that—Plaintiffs offer no convincing basis to do so. Nor has any subsequent decision of this Court or the U.S. Supreme Court called *Smyth* into question, much less clearly or specifically undermined its reasoning.

Contrary to Plaintiffs' suggestion, sound policy reasons underlie *Smyth*'s disallowance of fee recoveries based only on a preliminary injunction. Indeed, this case exemplifies why the *Smyth* Court's skepticism about preliminary merits determinations is warranted. Given the district court's "necessarily abbreviated" inquiry into the merits of Plaintiffs' claims, they were never seriously put to the test—and if they had been, the evidence and growing consensus of case law would have vindicated the position of Defendant-Appellee ("Defendant"). The approach embodied by *Smyth* recognizes that a district court's good-faith, but ultimately mistaken, prediction about a plaintiff's probability of success should not confer prevailing-party status. Moreover, *Smyth*'s bright-line rule promotes administrability and reduces secondary litigation—values the Supreme Court has emphasized in fee-eligibility cases.

This Court should not be moved by other circuits' contrary views on this issue. Not only are those decisions irrelevant in light of *Smyth*, they are inconsistent and do not all reflect standards that would confer prevailing-party status on Plaintiffs.

Defendant does not oppose the entitlement of civil rights organizations to fees when they have achieved victories on the merits—but that did not occur here. The Court should apply *Smyth* and affirm the denial of Plaintiffs' fee petition.[1]

[1] If the Court nonetheless finds that Plaintiffs are entitled to fees as prevailing parties, Defendant has reserved all arguments regarding the amount of recoverable

BACKGROUND

This fee dispute arises from a putative class-action challenge to the constitutionality of Virginia Code § 46.2-395, a now-repealed statute that required that Virginia "court[s] shall forthwith suspend" the driving privileges of those who fail or refuse to pay court-imposed fees and costs. *See* Va. Code Ann. § 46.2-395(B), *repealed by* 2020 Va. Acts ch. 965.

When this matter was last before the Court, the district court had dismissed the case for lack of subject matter jurisdiction, having found that "a suspension under § 46.2-395 is done *by the state court*, not the Commissioner." *Stinnie v. Holcomb*, No. 3:16-cv-00044, 2017 WL 963234, at *2 (W.D. Va. Mar. 13, 2017) [JA177]. After the Court dismissed Plaintiffs' appeal for lack of appellate jurisdiction, *Stinnie v. Holcomb*, 734 F. App'x 858 (4th Cir. 2018) [JA1284], an almost entirely new group of plaintiffs started over, filing an amended complaint, a motion for class certification and, most relevant here, a motion for a preliminary injunction. The district court was persuaded to reject the jurisdictional arguments it previously found barred the case. *Compare Stinnie v. Holcomb*, 355 F. Supp. 3d 514, 523–26 (W.D. Va. 2018) [JA828–32], *with Stinnie*, 2017 WL 963234, at *1 [JA176]. Based on the limited and still-developing case law at the time, as well as the factual submissions

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fees, including based on the limited degree of Plaintiffs' success in this litigation. *See* JA1017 (district court order bifurcating briefing).

of Plaintiffs, the district court granted a narrow preliminary injunction that provided some relief to only the named Plaintiffs. Rather than appeal the limited injunction, Defendant opted to proceed with the litigation. But the General Assembly's subsequent repeal of § 46.2-395, while Defendant's motion for summary judgment was pending, mooted the case and prevented the merits of the putative class's claims (and Defendant's defenses) from ever being resolved.

That procedural background is straightforward. Several further points, however, are warranted in response to Plaintiffs' "Statement of the Case." *See* Opening Br. of Appellants ("Pls.' Br.") at 4–19.

A. The preliminary injunction gave only narrow, temporary relief to the named Plaintiffs.

To the extent Plaintiffs suggest that the preliminary injunction fully "provided the relief the Plaintiffs had fought for," *id.* at 13, or "granted them the relief they requested," *id.* at 30, that is misleading. Plaintiffs sought expansive relief in this suit that they never received—not even close. They demanded, among other things:

- a declaratory judgment that now-repealed Virginia Code § 46.2-395, "as written and as implemented," was unconstitutional on its face and as applied, and that the Commissioner had violated their constitutional rights;
- a preliminary and permanent injunction against § 46.2-395's enforcement as to the hundreds of thousands of drivers with suspended licenses;
- reinstatement (without fees) of those hundreds of thousands of driver's licenses; and

- certification of a class of drivers whose licenses are suspended, as well as a class of drivers whose licenses will be suspended in the future.

JA269 [First. Am. Compl. at 44, Dkt. 84]. By contrast, the district court's preliminary injunction granted far more limited relief, and affected only a handful of Plaintiffs. *Compare* JA302 (proposed order) *with* JA843 (order). The Commissioner was required to "remove" the suspensions (*i.e.*, merely alter DMV's database to hide the courts' suspensions of their licenses) of the three Plaintiffs with suspended licenses, "reinstate" their licenses without fees, and not enforce § 46.2-395 against the named Plaintiffs unless or until notice and hearing was provided.[2] No court was ordered to vacate a suspension it had imposed.

Thus, at the time the case was dismissed, Plaintiffs had received no declaratory judgment about the facial and as-applied constitutionality of § 46.2-395; no preliminary and permanent injunction against § 46.2-395's enforcement as to thousands of other drivers with suspended licenses; and no reinstatement of those thousands of other drivers' licenses. Plaintiffs also had not received a final determination on the merits of ***any*** of their claims. In fact, Defendant moved for summary judgment on the basis that the claims were meritless—a motion that

[2] *See* JA843 & n.1 ("Until the Court determines 'that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole,' Fed. R. Civ. P. 23(b)(2), this Order applies only to named Plaintiffs . . . .").

remained pending at dismissal. JA942. Plaintiffs' motion for class certification, which Defendant opposed, also remained pending.

Plaintiffs' "greatest wish" was "for this practice [of license suspension] to end and for the one million people to get their licenses back." That was what they were "really asking for in the lawsuit."[3] While they eventually got their wish, it was not as a consequence of the preliminary injunction or anything to do with the lawsuit. *See infra* Background Part C.

B. Defendant's decision to forgo an appeal of the narrow and temporary relief and proceed straight to the merits was not a concession that his position was unconstitutional.

Plaintiffs also appear to suggest that, by choosing not to appeal the preliminary injunction, Defendant conceded that the Court's decision was correct or willingly exposed himself to fee liability. Pls.' Br. at 13, 41. Not so. Multiple reasons counseled in favor of proceeding immediately.

For one, as just explained, the injunctive relief granted was extremely narrow (especially compared with the expansive relief Plaintiffs demanded), making compliance painless. It affected only a few individuals, and required merely that DMV alter its database to hide the fact that courts had suspended some of the named Plaintiffs' licenses. The preliminary injunction did not alter the court records of

[3] Katherine Knott, *Northam Proposes End to Driver's License Suspensions Over Court Fees*, Daily Progress (Mar. 26, 2019), https://tinyurl.com/y3wamh5n.

those named Plaintiffs' suspensions, nor enjoin courts from suspending other drivers.

What is more, Defendant was confident of prevailing if the merits of Plaintiffs' claims were actually put to the test. Plaintiffs assert, as if they were established facts, that the "Commonwealth of Virginia denied Plaintiffs procedural due process" by not "holding a hearing or invoking any process whatsoever to determine ability to pay," *id.* at 4, and that the Commissioner (*not* the courts, as provided in § 46.2-395, or the legislature) was responsible for Plaintiffs' license suspension.[4] Both charges are belied by the statutory scheme:

- following a court's suspension of driving privileges, the clerk of court was responsible for sending the "record of the person's failure or refusal and of the license suspension . . . to the Commissioner," Va. Code Ann. § 46.2-395(C);
- while a driver's suspension generally would continue until debts were paid, a suspending court could restore driving privileges by approving a deferred payment agreement, *id.* § 19.2-354(A); community service, *id.* § 19.2-354(C); or a restricted license, which permits driving for a variety of limited purposes, *id.* § 46.2-395(E);
- in addition to the public notice of possible suspension provided by § 46.2-395(B) itself, courts were required to follow certain notice procedures: the clerk of the court to which a defendant was indebted would "provide or cause to be sent to the person written notice of the suspension of his license or privilege to

[4] *See, e.g.*, *id.* at 52 ("For years, the Commissioner let this unconstitutional regime continue to deprive hundreds of thousands of Virginians of their dignity . . . ."); *id.* ("For years, the Commissioner imposed a nightmarish spiral that trapped Plaintiffs.") (punctuation and citation omitted).

> drive a motor vehicle in Virginia, effective 30 days from the date of conviction, if the [fines and costs are] not paid prior to the effective date of the suspension as stated on the notice," *id.* § 46.2-395(C), and the notice was mailed within five days of the date of conviction or delivered to the defendant at the time of trial, *id.*; and
>
> - drivers with concerns about their ability to pay had an opportunity to be heard at the time of sentencing, and again if they petitioned the suspending court for a payment plan or a community service alternative, *id.* §§ 19.2-354.1, 19.2-355(A), or to reduce or forgive the debt altogether, *id.* §§ 19.2-354, 19.2-354.1.

Although the district court made an initial prediction that Plaintiffs would likely succeed on their claim that they were denied due process, none of their claims ever faced "active, merits-based" scrutiny and no constitutional violation was ever proven. *See Stinnie v. Holcomb*, 396 F. Supp. 3d 653, 661 (W.D. Va. 2019) [JA953] ("if the General Assembly fails to repeal § 46.2-395, the Court will have ample time to address the merits of the case"). Although § 46.2-395's repeal ultimately denied Defendant the opportunity to rebut Plaintiffs' claims, his decision to proceed to the merits—rather than appeal the injunction ruling—was vindicated by fact discovery and by the deluge of case law from other jurisdictions rejecting claims like Plaintiffs'. *See infra* Argument Part II.A.

Finally, Defendant's decision not to appeal might have been different if Fourth Circuit law provided that a preliminary injunction sufficed to trigger fee liability.[5] But it didn't then, and it doesn't now. *See infra* Argument Part I.

C. Virginia's political branches did not repeal § 46.2-395 because of the preliminary injunction.

Plaintiffs prudently disclaim the "catalyst" theory in seeking fees. *See* Pls.' Br. at 29. Even if such a theory were available to them—which it is not, *see Buckhannon*, 532 U.S. 598—it would be unavailing. Contrary to their assertions, *see, e.g.*, Pls.' Br. at 13–17, the eventual repeal of § 46.2-395 was neither a direct response to the preliminary injunction order nor an admission that any of Plaintiffs' claims had merit. Rather, the repeal was the culmination of growing public opposition to the license-suspension policy, the changed political composition of the General Assembly, and years of legislative advocacy.

1. Long before Plaintiffs brought suit, public and political opposition to the license-suspension policy had been building.

For years before this suit or § 46.2-395's repeal, opposition was growing to Virginia's license-suspension policy. As early as 2007, O. Randolph Rollins, a former Virginia Secretary of Public Safety (and retired partner of Plaintiffs'

[5] Indeed, as discussed below, *see infra* Argument Part II.B, the Supreme Court has made the sensible observation that the prospect of fee liability may affect a defendant's choices. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608 (2001).

co-counsel McGuireWoods), formed an advocacy organization called Drive-to-Work to help restore drivers' licenses and advocate for changes to license-restoration laws. It claims success in helping pass more than a dozen new laws since 2008 to help drivers, including those whose licenses were suspended for failure to pay court-imposed debts. *See* Drive-to-Work, *Advocacy*, https://www.drivetowork.org/info/dtw-advocacy.cfm.

Over time, reform efforts began to take root in Virginia's government. For instance, in May 2015, the Judicial Council of Virginia submitted to the General Assembly and the Supreme Court of Virginia recommendations for the collection of unpaid court fines and costs. *See* Judicial Council of Virginia, *Report to the General Assembly and Supreme Court of Virginia* (2015) at 2, http://www.courts.state.va.us/courtadmin/judpolicies/2015_jcv_report.pdf. And in March 2016, the General Assembly created a joint committee to study the use of driver's license suspension as a collection method for unpaid court fines and costs. H.J. 69 (Va. 2016).

To be sure, Plaintiffs' co-counsel the Legal Aid Justice Center (LAJC) was among the groups across the country bringing public attention to the plight of drivers whose licenses had been suspended for failure to pay court debt. By the time LAJC issued its report *Driven Deeper Into Debt* in May 2016, it was clear that "growing national attention [was] focusing on court debt and the ways in which assessment

and recoupment systems do—or do not—give adequate attention to indigence and inability to pay."[6] The report cited national license-suspension reform efforts by organizations from the American Association of Motor Vehicle Administrators, *id.* at 6, to the Civil Rights Division of the U.S. Department of Justice, *id.* at 17 n.14. *See also* Mario Salas & Angela Ciolfi, LAJC, *Driven by Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt* (Fall 2017) at 1 ("Despite their widespread use, license-for-payment systems are increasingly drawing critical scrutiny from motor vehicle safety professionals, anti-poverty and civil rights advocates, and policymakers.").

2. Political will to reform Virginia's license-suspension policy continued to build even as Plaintiffs' litigation efforts foundered.

Opposition to Virginia's license-suspension policy that began years before Plaintiffs' suit continued to grow afterward. Indeed, during the period that the district court dismissed Plaintiffs' initial complaint and this Court dismissed their appeal, legislative advocacy and reform efforts were bearing fruit. In November 2016, for instance, the Supreme Court promulgated a new rule requiring courts to give written notice of the availability of deferred and installment payment plans, as well as community-service options, and to ensure that the length of payment

[6] LAJC, *Driven Deeper Into Debt: Unrealistic Repayment Options Hurt Low-Income Court Debtors* (May 2016) at 17, https://tinyurl.com/yxo8xve3.

agreements and the payment amounts are reasonable in light of a defendant's financial resources and obligations. *See* Va. Sup. Ct. R. 1:24(d). The General Assembly codified that rule the following year, *see* 2017 Va. Acts chs. 802, 806 (adding Code § 19.2-354.1), prompting a leading reform advocate to praise the "shift in mindset" among the legislative leadership.[7]

Not all were content with the pace of reform, though; LAJC leadership, for instance, felt that "a stronger political solution would have been to dump the automatic suspension policy completely."[8] But momentum ***was*** growing among lawmakers to do just that. By the fall of 2016, Governor McAuliffe was already planning to "make a push . . . for legislation in the 2017 session to change the state's policy of suspending those who don't pay court costs,"[9] and he followed through on

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[7] *See* Travis Fain, *McAuliffe signs bill on drivers license suspensions*, Daily Press (May 25, 2017), https://www.dailypress.com/government/dp-nws-mcauliffe-drivers-license-bill-20170525-story.html ("Claire Gastañaga, who lobbies in Richmond for the American Civil Liberties Union, called the bills 'a wonderful step forward.' She also said the philosophical change among state leaders on these issues is also important. . . . 'I really like the shift in mindset,' Gastañaga said.").

[8] Dean Seal, *New law doesn't put automatic driver's license suspension issues to bed, critics say*, Daily Progress (June 29, 2017), https://tinyurl.com/y3k74239.

[9] Travis Fain, *McAuliffe: Most of my legislative goals met*, Daily Press (Oct. 6, 2016), https://www.dailypress.com/government/local/dp-mcauliffe-most-of-my-legislative-goals-met-20161006-post.html ("McAuliffe said he's told Department of Motor Vehicles Commissioner Richard Holcomb to put together a presentation on the issue. 'I'm having Rick and his team come over and we will talk about it,' McAuliffe said. . . . 'I do think we need to do something about it.'").

those plans.[10] Despite support from organizations like Plaintiffs' amicus American Civil Liberties Union,[11] repeal efforts were unsuccessful.[12] Again in 2018, legislators sponsored bills to repeal § 46.2-395. Senator William Stanley's repeal bill, for instance, was among the LAJC's top legislative priorities,[13] but after passing the Senate it was killed in a House subcommittee.[14]

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[10] Graham Moomaw, *McAuliffe looks to roll back driver's license suspensions as part of criminal justice reform package*, Richmond Times-Dispatch (Jan. 3, 2017), https://tinyurl.com/y24bg9mg. *See also Governor Terry McAuliffe delivers final State of the Commonwealth Address*, WSLS 10 (Jan. 11, 2017), https://www.wsls.com/news/2017/01/11/governor-terry-mcauliffe-delivers-final-state-of-the-commonwealth-address/ ("Another step we can take to protect Virginians' economic productivity is to limit the number of people whose driver's licenses are suspended due to unpaid court costs and non-driving related offenses.").

[11] *See* Letter from Claire Guthrie Gastañaga, ACLU to Governor Terry McAuliffe at 3 (Mar. 17, 2017), https://tinyurl.com/y4r4mpxu.

[12] *See, e.g.*, Va.'s Legislative Info. Sys., 2017 Session, S.B. 1280, https://lis.virginia.gov/cgi-bin/legp604.exe?ses=171&typ=bil&val=sb1280.

[13] LAJC, Our 2018 VA Legislative Priorities (Jan. 16, 2018), https://www.justice4all.org/2018/01/16/our-2018-va-legislative-priorities/.

[14] *See, e.g.*, Va.'s Legislative Info. Sys., 2018 Session, S.B. 181, https://lis.virginia.gov/cgi-bin/legp604.exe?181+sum+SB181.

3. Even after the preliminary injunction, Republican members of a House subcommittee continued to block legislation repealing § 46.2-395; months later, the full General Assembly imposed a temporary suspension of § 46.2-395, and the case was stayed.

Weeks after its entry, the preliminary injunction order triggered no response in the General Assembly's 2019 regular session. Although legislators renewed their efforts to revise or repeal § 46.2-395 as previously promised, these efforts again were blocked. While Senator Stanley's S.B. 1013 won overwhelming approval in the Senate,[15] Republican members of the House Courts of Justice subcommittee voted to pass by the bill indefinitely.[16] Senator Stanley "guarantee[d]" he would reintroduce repeal legislation in the 2020 session,[17] and LAJC representatives also promised to do so.[18]

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[15] Va.'s Legislative Info. Sys., 2019 Session, S.B. 1013, https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=sb1013.

[16] Va.'s Legislative Info. Sys., 2019 Session, S.B. 1013, February 11, 2019 House Subcommittee Recommendation, http://lis.virginia.gov/cgi-bin/legp604.exe?191+vot+H0801V0134+SB1013.

[17] *See* Paul Collins, *Four Republicans who Comprise Henry/Patrick Legislative Delegation Explain their Successes (Tax Cuts) and their Frustrations (Executive Branch Turmoil)*, Martinsville Bulletin (Mar. 11, 2019), https://tinyurl.com/y6t5drt3.

[18] NBC29.com, *LAJC Continuing Fight to End Driver's License Suspension Due to Fees* (Feb. 13, 2019), https://www.nbc29.com/story/39959526/lajc-drivers-license-fee-fight-02-13-2019.

After the legislature's failure to take any action during its regular session, Governor Northam proposed an amendment to the 2018–2020 budget that suspended the license-suspension policy in the budget's second year (July 1, 2019 to June 30, 2020).[19] Announcing his proposal on March 26, 2019, Governor Northam explained that the amendment would also "reinstate driving privileges for the more than 627,000 Virginians who currently have their licenses suspended."[20]

Although there is no evidence that this litigation had any impact on the budget amendment,[21] without doubt the legislation had an impact on the litigation. After Governor Northam's announcement, LAJC leaders informed the press that the

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[19] Consistent with how § 46.2-395 operated, the amendment effectuated that policy shift by disabling the courts from exercising their suspending power. *See* Va.'s Legislative Info. Sys., 2019 Session, H.B. 1700 at Amendment 33, https://budget.lis.virginia.gov/amendment/2019/1/HB1700/Enrolled/GE/ (providing that, "notwithstanding the provisions of § 46.2-395 of the Code of Virginia, no court shall suspend any person's privilege to drive a motor vehicle solely for failure to pay any fines [or] court costs").

[20] Press Release, Governor Ralph Northam, *Governor Northam Announces Budget Amendment to Eliminate Driver's License Suspensions for Nonpayment of Court Fines and Costs* (Mar. 26, 2019), https://www.governor.virginia.gov/newsroom/all-releases/2019/march/headline-839710-en.html.

[21] Plaintiffs speculate that the "General Assembly's passage of the Budget Amendment was undoubtedly influenced by this litigation." Pls.' Br. at 14–15. But the only supposed evidence they offer is irrelevant—a comment by Delegate Jones about the disposition of funds within the budget to make up revenue lost by DMV and the Trauma Center Fund in the absence of license reinstatement fees. *Id.* at 15.

proposed amendment, if passed, would "render the lawsuit moot."[22] Pass it did, by wide margins: 70–29 in the House, and 30–8 in the Senate.[23]

In the wake of the amendment's adoption, the district court granted Defendant's motion to stay the case pending the General Assembly's 2020 session. The district court reasoned that, "if the General Assembly fails to repeal § 46.2-395, the [district court] will have ample time to address the merits of the case, or at the very least class certification and the continued application of the preliminary injunction to class members . . . ." *Stinnie v. Holcomb*, 396 F. Supp. 3d 653, 661 (W.D. Va. 2019). As it turned out, the district court never did "address the merits of the case."

4. In the 2020 session of the General Assembly, newly controlled by Democrats, § 46.2-395 was permanently repealed.

As a result of the November 2019 general election, Democrats were able to form majorities in both the House of Delegates and the Senate, bringing new leadership to committees that previously killed bills to repeal § 46.2-395.

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[22] *See, e.g.*, Katherine Knott, *Northam Proposes End to Driver's License Suspensions Over Court Fees*, Daily Progress (Mar. 26, 2019), https://tinyurl.com/y3wamh5n ("[Director of LAJC Angela] Ciolfi said if the General Assembly passes Northam's amendment, then that would render the lawsuit moot.").

[23] Va.'s Legislative Info. Sys., 2019 Session, H.B. 1700, Summary, https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=HB1700.

Addressing this new General Assembly at the start of its 2020 session in January, Governor Northam identified eliminating the license-suspension requirement as among his top criminal justice priorities. He specifically called on legislators to "mak[e] permanent the temporary policy you passed last year—the one that says no more suspended drivers licenses, just because you owe court fines."[24]

The General Assembly responded, considering at least seven bills to permanently repeal the license-suspension requirement. Senator Stanley's S.B. 1—a version of what he proposed in 2018 and 2019—emerged as the lead proposal, and both chambers passed it overwhelmingly: 75–25 in the House, and 38–1 in the Senate.[25] Governor Northam signed it into law on April 9, 2020. Effective July 1, 2020, the legislation eliminated § 46.2-395 from the Code of Virginia and required the DMV Commissioner to reinstate, without payment of fees, driving privileges that were suspended by courts under § 46.2-395. *See* 2020 Va. Acts ch. 965.

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[24] Press Release, Governor Ralph Northam, *Governor Northam Delivers State of the Commonwealth Address* (Jan. 8, 2020), https://www.governor.virginia.gov/newsroom/allreleases/2020/january/headline-850663-en.html. *See also id.* (explaining that "[t]his temporary policy is working. Let's make it permanent."). In his proposed budget for the 2020–2022 biennium, Governor Northam also included language that would extend the temporary elimination of the suspension requirement, which would have provided a backstop if permanent-repeal legislation failed. *See* H.B. 30, Item 3-6.03, https://budget.lis.virginia.gov/item/2020/1/hb30/introduced/3/3-6.03/.

[25] *See* Va.'s Legislative Info. Sys., 2020 Session, S.B. 1, https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=sb1.

* * *

As summarized above, Virginia's license-suspension policy was eliminated ***not*** because of this litigation, but only after years of advocacy, reform efforts, and political opposition. Plaintiffs' co-counsel LAJC deserves credit for assisting in that long process, which accomplished what they did not accomplish through this litigation. There is no evidence that either the alleged unconstitutionality of the license-suspension policy or this Court's entry of a preliminary injunction was ***the***—or even ***a***—motivating factor behind repeal.[26]

LEGAL STANDARDS

Under the "American Rule" of fee liability, "attorney's fees will not be awarded absent 'explicit statutory authority.'" *Buckhannon*, 532 U.S. at 608 (quoting *Key Tronic Corp. v. United States,* 511 U.S. 809, 819 (1994)). Congress created an exception in 42 U.S.C. § 1988(b), allowing "the prevailing party" in a § 1983 suit "a reasonable attorney's fee as part of the costs." But attorney's fees are awarded "only when a party has prevailed on the merits of at least some of his claims." *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam). *See also Hewitt v. Helms*, 482

[26] Plaintiffs cite a letter from Commissioner Holcomb to Senator Stanley to show the purported "direct impact this case was having on the legislative process." Pls.' Br. at 16 (quoting JA968–69). But the fact that, more than a year after the preliminary injunction, the Commissioner suggested accelerating the effective date of repeal legislation (which, in fact, did not occur) says nothing about the merits of Plaintiffs' claims or of his defense against them.

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.").

To confer prevailing-party status, a plaintiff's merits victory must have "the necessary judicial *imprimatur*." *Buckhannon*, 532 U.S. at 604. For instance, "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989) (punctuation omitted). By contrast, a "defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur*." *Id.* The term "prevailing party" does not characterize "a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." *Id.* at 606.

A plaintiff "who secure[s] a permanent injunction but no monetary damages" may be a prevailing party. *Lefemine v. Wideman*, 568 U.S. 1, 2 (2012). But "[p]revailing party status . . . does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole v. Wyner*, 551 U.S. 74, 83 (2007). Such an "initial victory" is "ephemeral." *Id.* at 86. Thus, a "plaintiff who achieves a transient victory at the

threshold of an action can gain no award under [§ 1988(b)] if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded." *Id.* at 78. Rather, the "'change in the legal relationship' between [the plaintiff] and the state officials she sued" must be "enduring." *Id.* at 86 (quoting *Tex. State Teachers Ass'n*, 489 U.S. at 792).

SUMMARY OF ARGUMENT

This Court's unanimous, published decision in *Smyth* remains binding law in this circuit and precludes the conclusion that Plaintiffs are prevailing parties entitled to recover fees. The Court should affirm the district court's denial of fees for three overarching reasons.

First, *Smyth* squarely controls. In that case, which arose in procedurally identical circumstances, the Court held that the granting of a preliminary injunction "by no means represents a determination that the claim in question will or ought to succeed ultimately," *Smyth*, 282 F.3d at 276, and therefore is not a valid basis for prevailing-party status. In the course of so holding, the Court rejected the very arguments Plaintiffs raise here. Contrary to Plaintiffs' assertion, no Supreme Court decision—whether *Winter*, *Lefemine*, or the denial of certiorari in *Planned Parenthood*—calls *Smyth* into doubt. Until clearly undermined by the Supreme Court or overruled by this Court, sitting en banc, *Smyth* remains good law.

Second, policy considerations show that the rule laid down in *Smyth* is the correct one. Indeed, this case illustrates why courts should be hesitant to rely on a preliminary injunction as determinative of prevailing-party status. As later developments in this case showed, the incomplete, abbreviated record at the preliminary injunction stage gave a misleading sense of Plaintiffs' probability of success. Moreover, *Smyth*'s bright-line rule promotes other values the Supreme Court has emphasized in fee-eligibility cases.

Third, Plaintiffs offer no compelling reason to abandon *Smyth* and follow the decisions in other circuits. Not only are those decisions irrelevant in light of *Smyth*, they are hardly uniform in their approaches; indeed, Plaintiffs themselves would not be considered prevailing parties under all those standards.

The Could should apply the rule in *Smyth* and affirm the denial of Plaintiffs' fee petition.

ARGUMENT

I. Under this Court's published decision in *Smyth*, which remains the law of the circuit, Plaintiffs are not prevailing parties.

While the Supreme Court has expressly left open "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, the success in gaining a preliminary injunction may sometimes warrant an award of counsel fees," *Sole*, 551 U.S. at 86, the question is settled in this circuit. In *Smyth*, a unanimous panel of this Court unequivocally answered that question in the negative,

holding that a preliminary injunction does not render a party "prevailing" for purposes of entitlement to fees under 42 U.S.C. § 1988.

This case is controlled by that decision, which "is still the law in this Circuit" and which the Court is "bound to follow . . . here." *Stahle v. CTS Corp.*, 817 F.3d 96, 100 (4th Cir. 2016). *See also United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court."); JA1261 (district court's recognition of the same point); *but see* Pls.' Br. at 3 (positing "this Court is not constrained by its decision in *Smyth*"). Indeed, this Court very recently relied on *Smyth* to deny prevailing-party status to a plaintiff. *See Ge*, 2021 WL 5774725, at *4 (concluding that, as "an interlocutory order, [the remand order in the case] was more in the nature of the orders described by *Buckhannon* and *Smyth* as failing to satisfy the prevailing party requirements").

Although it is telling that Plaintiffs put off discussing *Smyth* until late in their brief, *see* Pls.' Br. at 42–47, this Court's binding precedent is entitled to consideration first.

A. Under *Smyth*, obtaining a preliminary injunction is insufficient to qualify as a prevailing party.

Plaintiffs do not dispute that *Smyth* is squarely on point here—nor could they validly do so. As shown below, the circumstances of *Smyth* are substantially identical to the situation raised here.

1. The district court awarded prevailing-party status to the *Smyth* plaintiffs, for the same reasons claimed by Plaintiffs here.

Like this case, *Smyth* involved the constitutionality of Virginia governmental policy. Several recipients of Aid to Families with Dependent Children (AFDC)—a welfare program funded by the federal government and administered by the States—sued the Commissioner of the Virginia Department of Social Services (VDSS) challenging the Commonwealth's policy of requiring recipients to share paternity information for their children. The plaintiffs asserted various violations of the Social Security Act and related regulations, as well as the Supremacy and Equal Protection Clauses of the U.S. Constitution. *See generally Smyth v. Carter*, 168 F.R.D. 28 (W.D. Va. 1996); *Smyth v. Carter*, No. Civ. A 5:96CV00089, 2000 WL 1567168, at *1 (W.D. Va. Oct. 17, 2000). The district court granted the plaintiffs a preliminary injunction enjoining the VDSS Commissioner from denying benefits to AFDC applicants or recipients who provided incomplete paternity information or attested under penalty of perjury that they lacked such information. *Smyth*, 168 F.R.D. at 34. In so doing, the district court determined that the "plaintiffs will likely succeed on

the merits," *id.* at 31, because VDSS's policy was "impossible to square" with the "clear meaning of the [federal government's] regulations," *id.* at 32. *See also Smyth*, 282 F.3d at 272 (noting the district court's conclusion that the plaintiffs were "likely to succeed on the merits"). "Due to the preliminary injunction, the plaintiffs continued to receive [welfare] benefits [while] VDSS's original paternity identification policy was in effect." *Smyth v. Carter*, 88 F. Supp. 2d 567, 568 (W.D. Va. 2000).

Then the case became moot. "As a result of the plaintiffs' likely success on the merits of [their] argument, the defendant entered into a partial settlement agreement with the plaintiffs one day before the hearing on the plaintiffs' summary judgment motion, and also subsequently changed his policy." 2000 WL 1567168, at *4. Accordingly, the Court dismissed the case. *Smyth v. Carter*, 88 F. Supp. 2d 567 (W.D. Va. 2000). *See also Smyth*, 282 F.3d at 273.

When the plaintiffs later filed a petition for fees and costs, the defendant disputed their entitlement to prevailing-party status, arguing that "preliminary injunctions are not sufficiently final to establish a plaintiff as a prevailing party." *Smyth*, 2000 WL 1567168, at *4. The district court rejected that argument. It held that the defendant "voluntarily ceased his unlawful behavior in response to the plaintiffs' litigation against him, thereby depriving the plaintiffs of the opportunity to obtain a favorable final judgment on the merits." *Id.* Accordingly, "the plaintiffs

[could] be considered prevailing parties by virtue of their success in obtaining the preliminary injunction." *Id.* Putting a fine point on its analysis, the district court distanced itself from the catalyst argument (just as Plaintiffs do here):

> The court makes these observations not to show that the plaintiffs' lawsuit operated as a catalyst for post-litigation changes in the defendant's conduct . . . but to show that, prior to dismissal of the case as moot, the plaintiff obtained a judgment against the defendant (the preliminary injunction), . . . which materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefitted the plaintiff.

Id. at *5. *Accord* Pls.' Br. at 29 ("Plaintiff's theory for entitlement to attorneys' fees is not the catalyst theory. . . . Plaintiffs do not advance the 'catalyst theory' that *Buckhannon* disavowed."). The district court then awarded the plaintiffs fees. *Smyth*, 2000 WL 1567168, at *11.

2. This Court reversed the district court, finding that the preliminary injunction did not entitle the *Smyth* plaintiffs to prevailing-party status.

This Court reversed, concluding that the district court "erred in characterizing [the plaintiffs] as prevailing parties and granting them attorney's fees on that basis." 282 F.3d at 285. A panel of this Court unanimously rejected the plaintiffs' argument that "the preliminary injunction they were awarded by the district court . . . effected the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees" and therefore was "sufficient . . . to constitute an

'enforceable judgment[ ] on the merits.'" 282 F.3d at 274–75 (quoting *Buckhannon*, 532 U.S. at 604 (punctuation altered and quotation omitted).

Critical to this Court's conclusion was its observations about the nature of the preliminary injunction inquiry. As it explained, "[w]hile granting such an injunction does involve an inquiry into the merits of a party's claim, and is, like any court order, 'enforceable,' the merits inquiry in the preliminary injunction context is necessarily abbreviated." *Id.* at 276 (citation omitted). Thus, a "district court's determination that such a showing [of likelihood of success on the merits] has been made is best understood as a prediction of a probable, but necessarily uncertain, outcome." *Id.* "The fact that a preliminary injunction is granted in a given circumstance . . . by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction." *Id.* Thus, at bottom, because of "the preliminary, incomplete examination of the merits involved," a preliminary injunction conclusion "is ill-suited to guide the prevailing party determination." *Id.* at 277 n.8.

This Court also rejected the plaintiffs' other arguments and, accordingly, reversed the district court's decision. The plaintiffs petitioned for certiorari, but the Supreme Court declined to disturb the Court's decision. 537 U.S. 825 (2002).

3. *Smyth* dictates the outcome of this case.

Smyth has remained the law in this circuit ever since, and it applies fully here.

Notably, Plaintiffs do not identify any factual or procedural distinction between this case and *Smyth*. Nor could they. What occurred in *Smyth* likewise occurred here:

1) the district court found that Plaintiffs were likely to succeed on a single claim challenging the constitutionality of a Virginia governmental policy, and therefore granted a preliminary injunction;[27]

2) the case was later dismissed as moot, with no further relief having been granted;[28]

3) the plaintiffs sought fees by insisting that the preliminary injunction was a judgment "on the merits";[29] and

4) the plaintiffs claimed that obtaining a preliminary injunction conferred prevailing-party status.[30]

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[27] *Compare Smyth*, 168 F.R.D. at 31 ("plaintiffs will likely succeed on the merits"), *with Stinnie*, 355 F. Supp. 3d at 520 [JA820] ("Plaintiffs are likely to succeed on the merits of their procedural due process claim . . . .").

[28] *Compare Smyth*, 88 F. Supp. 567, *with* JA1017.

[29] *Compare Smyth*, 282 F.3d at 275 ("The preliminary injunction entered by the district court is sufficient, they assert, to constitute an enforceable judgment on the merits.") (citation omitted and punctuation altered), *with* Pls.' Br. at 12 (emphasizing that the Court's determination was "on the merits"), 27 ("It was a merits-based preliminary injunction . . . .")

[30] *Compare Smyth*, 2000 WL 1567168, at *5 (preliminary injunction "materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefitted the plaintiff"), *with* Pls.' Br. at 27 (arguing that "Plaintiffs are prevailing parties entitled to attorneys' fees"

The Court's conclusive settlement of this issue in *Smyth* is dispositive here.[31]

B. Intervening Supreme Court precedent does not call *Smyth* into question.

Despite *Smyth*'s controlling authority, Plaintiffs assert that the Court can ignore it because it "has been nullified by more recent Supreme Court cases"—namely *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), and *Lefemine v. Wideman*, 568 U.S. 1 (2012) (per curiam). Pls.' Br. at 43; *see also id.* (*Smyth* "no longer holds any weight"); ACLU Br. at 3 (contending *Smyth* has been "superseded"). They also place significance on the fact that the Supreme Court recently denied review of a Sixth Circuit decision reaching a result contrary to *Smyth*. Pls.' Br. at 36–39. They are wrong on all three scores.

To begin, the Supreme Court has *expressly* left open "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, the success in gaining a preliminary injunction may sometimes warrant an award of

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because "this Court's preliminary injunction materially altered Defendant's behavior").

[31] The magistrate judge's glancing criticism of *Smyth*'s applicability is misplaced. He remarked that the district court's "evaluation of Plaintiffs' likelihood of success was anything but 'abbreviated,'" given the analysis in its opinion. JA1149. But this Court's likelihood-of-success analysis in *Smyth* spanned several pages too, *see Smyth*, 168 F.R.D. at 31–32, and the Court had no trouble finding that insufficient and the product of a "necessarily abbreviated" inquiry, *Smyth*, 282 F.3d at 274. The length of a court's analysis is not the applicable measure—rather, whether a full examination of the merits occurred. It did not.

counsel fees," *Sole*, 551 U.S. at 86. Therefore, it is a bold claim indeed that *other* Supreme Court cases have *implicitly* settled that issue. *Cf. Agostini v. Felton*, 521 U.S. 203, 230–31 (1997) (explaining that lower courts should not conclude that the Supreme Court's "more recent cases have, by implication, overruled [its] earlier precedent").[32] Yet that is precisely what Plaintiffs assert—that *Winter* and *Lefemine* "compel[] the conclusion that Plaintiffs are prevailing parties." Pls.' Br. at 27.

In any event, none of the Supreme Court precedent cited by Plaintiffs calls *Smyth* into doubt. *Smyth* closed the door on Plaintiffs' argument, and that door remains firmly shut.

1. *Winter* did not undermine *Smyth* because *Smyth* expressly accounted for the different standard that *Winter* later adopted.

Plaintiffs correctly note that the Supreme Court in *Winter* altered the test for determining when a preliminary injunction should be granted, but they draw the

[32] The statements cited by Plaintiffs and amici regarding this Court's authority to ignore precedent were made in cases where the Supreme Court had *specifically* or *clearly* called this Court's conclusions into doubt—not where, as here, an issue has expressly been left open. Pls.' Br. at 44–45; ACLU Br. at 5. *See Faust v. S.C. State Highway Dep't*, 721 F.2d 934, 940–41 (4th Cir. 1983) (declining to follow the language of a decision that became "untenable" because the Supreme Court had "sharply curtailed" the "sweep of the language . . . on which we relied"); *Payne v. Taslimi*, 998 F.3d 648, 655 n.4 (4th Cir. 2021) (Supreme Court decisions "clearly undermine[d]" panel precedent); *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090–91 (4th Cir. 1993) (later Supreme Court decision "*specifically* rejected the reasoning on which [the Court's] decision was based") (emphasis added).

wrong conclusion from it. Under *Winter*'s four-part test, a moving party must establish "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." 555 U.S. at 20. But *Winter*'s refinement of the preliminary-injunction standard hardly "nullified" *Smyth*'s prevailing-party analysis.

First, Plaintiffs are wrong that *Smyth* is no longer good law on the ground that it "was decided under a different, and since discarded, standard for granting a preliminary injunction," Pls.' Br. at 43—*i.e.*, the Fourth Circuit's then-prevailing test in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977). What Plaintiffs persist in overlooking is that the *Smyth* court acknowledged those criticisms but ***expressly noted that they did not matter to the prevailing-party determination***:

> Our Circuit's current framework for the preliminary injunction inquiry, specifically the establishment of the "analytical order, hierarchy of importance, . . . comparative weights," and the intertwining of consideration of the factors in our prior cases has been criticized as a departure (in form if not necessarily in practice) from Supreme Court precedent. *Safety–Kleen, Inc. [v. Wyche],* 274 F.3d [846,] 868–70 [(4th Cir. 2001)] (Luttig, J., concurring). ***Whatever the merits of this argument, it does not alter our conclusion here.***

Smyth, 282 F.3d at 277 n.8 (emphasis added). *See also* JA1263 n.2 (district court's acknowledgement of the impact of the bolded language). This Court explained that

its conclusion was based instead on the inherently "preliminary" nature of the merits inquiry: the "preliminary injunction inquiry, because of the preliminary, incomplete examination of the merits involved and the incorporation (if not the predominance) of equitable factors, is ill-suited to guide the prevailing party determination ***regardless of how it is formulated***." *Id.* (emphasis added). As the district court recognized, "[t]his statement is just as true of the *Winter* inquiry as it is of the *Blackwelder* one." JA1263. As footnote 8 of the *Smyth* decision shows, Plaintiffs' focus on the *Blackwelder/Winter* distinction is misplaced.

Second, Plaintiffs read too much significance into *Winter*'s requirement that a plaintiff demonstrate "that he is likely to succeed on the merits," 555 U.S. at 20. *See* Pls.' Br. at 25, 43 (emphasizing that a plaintiff must "*likely succeed*"). Plaintiffs characterize this as a "stark contrast to the prior standard, which permitted a plaintiff to obtain a preliminary injunction based only on establishing that the 'case presents a substantial question' on the merits." *Id.* at 25 (punctuation omitted). But *Smyth*'s holding did not turn on the applicability of the "substantial question" standard. While this Court recognized that in ***some*** circumstances "a plaintiff may . . . need only establish that his case presents a 'substantial question' to obtain a preliminary injunctive relief," *Smyth*, 282 F.3d at 276, it expressly acknowledged the ***higher*** standard that *Winter* later adopted:

> At the most, a party seeking a preliminary injunction may have to demonstrate ***a strong showing of likelihood of***

> ***success or a substantial likelihood of success by clear and convincing evidence*** in order to obtain relief. A district court's determination that ***such a showing*** has been made is best understood as a prediction of a probable, but necessarily uncertain, outcome.

Id. (internal citation and punctuation omitted) (emphasis added). Thus, contrary to Plaintiffs' belief, *Smyth* was not undermined by *Winter*'s "more stringent" standard, Pls.' Br. at 27, because the Fourth Circuit specifically took it into account. *See* JA1262 (noting that *Smyth* "acknowledged that some preliminary injunctions involved a showing on the merits nearly identical to—or even stronger than—the one the Supreme Court later articulated in *Winter*").

The district court was "not persuaded" by Plaintiffs' argument, JA1262, and neither should this Court be. *Winter* did not "pull[] the chair out from under *Smyth*," Pls.' Br. at 44; *Smyth* sits comfortably and undisturbed, *see Ge*, 2021 WL 5774725, at *4 (citing *Smyth*).

2. *Lefemine* did not introduce a new standard that undercuts *Smyth*.

Plaintiffs are likewise unjustified in claiming support from *Lefemine.* There the Supreme Court reversed a decision that "a plaintiff who secured a ***permanent*** injunction but no monetary damages was not a 'prevailing party' under 42 U.S.C. § 1988, and so could not receive fees." 568 U.S. at 2 (emphasis added). The case does not undermine *Smyth* for two reasons.

First, there is nothing remarkable about *Lefemine*'s conclusion that monetary damages are not required to confer prevailing-party status when the plaintiff wins permanent declaratory or injunctive relief. *See id.* (calling that principle "established" and noting "we have repeatedly held that an injunction or declaratory judgment, like a damages award, will usually satisfy" the test). The Supreme Court's holding that ***permanent*** injunctive relief is sufficient to confer prevailing-party status does not undermine *Smyth*'s holding that ***preliminary*** injunctive relief is insufficient due to the "preliminary, incomplete nature of the merits examination . . . in the preliminary injunction inquiry." *Smyth*, 282 F.3d at 277. *See also id.* at 276 ("The fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately . . . ."). Indeed, *Lefemine* "was a brief per curiam opinion, and it made no explicit mention of or holding regarding preliminary injunctions." JA1145.

Second, Plaintiffs are wrong to conclude that *Lefemine* "clarified when a plaintiff is a prevailing party." Pls.' Br. at 25 (emphasis omitted). Now because of *Lefemine*, they argue, "the focal point of the analysis on a fee petition is the before-and-after situation of the parties." *Id.* at 26. But *Lefemine* introduced no new standard in this regard. In *Lefemine*, the Supreme Court merely recited its previous holding that a "plaintiff 'prevails,' . . . 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the

defendant's behavior in a way that directly benefits the plaintiff.'" *Lefemine*, 568 U.S. at 4 (quoting *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992)). Contrary to Plaintiffs' suggestion, that standard was well established long before *Lefemine*. *See* JA1263 (referring to *Lefemine* as a "straightforward application of precedent . . . decided [two] decade[s] before"). Indeed, it was precisely the standard applied by the district court in *Smyth*:

> [P]rior to dismissal of the case as moot, the plaintiff obtained a judgment against the defendant (the preliminary injunction), . . . which materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefitted the plaintiff.

Smyth, 2000 WL 1567168, at *5. *See also Smyth*, 282 F.3d at 273–74 (explaining the district court's decision). In *Smyth*, this Court reversed the district court not because it disagreed with the recited standard, but because a preliminary injunction did not constitute actual relief "on the merits." *Lefemine* is not to the contrary.

Plaintiffs and their amici can point to only a single case across the country finding *Lefemine* relevant in the preliminary-injunction context: *Veasey v. Wilkins*, 158 F. Supp. 3d 466 (E.D.N.C. 2016). Even if that case had any controlling authority, which it does not, it is easily distinguished. In *Veasey*, plaintiffs sued a North Carolina sheriff, challenging the constitutionality of a citizenship requirement for obtaining a concealed carry permit. At a hearing on the plaintiffs' motion for preliminary injunction, the defendant "conceded that plaintiffs were likely to

succeed," 158 F. Supp. 3d at 470, and "admitted that the law at issue in th[e] case was unconstitutional," *Veasey v. Wilkins*, No. 5:14-CV-369-BO, 2015 WL 4622694, at *3 (E.D.N.C. July 31, 2015), and the plaintiffs got their permits. Unlike here, the preliminary injunctive relief in *Veasey* was tantamount to the permanent injunctive relief addressed by *Lefemine*—making *Veasey* an unusual case even in the *Veasey* court's estimation. *Compare* 158 F. Supp. at 470 (finding *Smyth* inapplicable partly "in light of . . . the facts of this case"), *with* Pls.' Br. at 46 (characterizing *Veasey* as "on all fours with this case").[33]

In sum, and as the district court correctly concluded, "nothing in *Lefemine* alters the *Smyth* court's reasoning." JA1263.

3. The Supreme Court's denial of certiorari in *Planned Parenthood* is irrelevant.

Plaintiffs also place unwarranted reliance on the fact that the Supreme Court denied review of the Sixth Circuit's decision in *Planned Parenthood v. Dewine*, 931 F.3d 530 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 189 (2020), which, while not citing *Smyth*, reached a contrary result. *See generally* Pls.' Br. at 36–39. Whatever credibility Plaintiffs gain by conceding that denials of certiorari have no precedential

[33] Although *Veasey* was wrongly decided under *Smyth*, this Court was not given the opportunity to correct the error.

value, *id.* at 37 ("technically . . ."), they then lose by pronouncing the denial of certiorari in *Planned Parenthood* "noteworthy," *id.*

As the Supreme Court has "often stated, the 'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

> We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.

Daniels v. Allen, 344 U.S. 443, 492 (1953), *overruled in part on other grounds by Townsend v. Sain*, 372 U.S. 293 (1963). Indeed, while Plaintiffs attempt to foist on the Court the conclusion that the Supreme Court's denial of certiorari means that it agreed with the Sixth Circuit's decision, it is equally reasonable to draw the opposite conclusion—that if the Supreme Court were troubled by the variation in rules among the circuit courts (including this Court's approach in *Smyth*), it would have stepped in to establish a uniform rule and abrogate all others.

Finally, if Plaintiffs wish to read significance into denials of certiorari, they again must account for *Smyth* itself. When the unsuccessful plaintiff there sought certiorari from this Court's decision, the Supreme Court denied review—letting stand the outcome that Plaintiffs now attack. 537 U.S. 825 (2002).

II. The approach embodied in *Smyth* is the correct one.

A. This case exemplifies why *Smyth* was right: the preliminary injunction inquiry, by merely predicting likelihood of success, is of limited help in the prevailing-party determination.

This case demonstrates the wisdom of the *Smyth* approach. Predicting the likelihood of success based on an incomplete and untested record is an unreliable basis for a prevailing-party determination.

First, the facts. Plaintiffs made assertions at the preliminary injunction hearing regarding courts' lack of involvement in suspending licenses—assertions on which the district court grounded its injunction opinion—that did not hold up to scrutiny in the discovery process. *See generally* Def.'s Mem. of Law in Supp. of Mot. for Summ. J. at 8–11, *Stinnie v. Holcomb*, No. 3:16-cv-44 (W.D. Va. June 3, 2019), Dkt. 196 ["Def.'s Summ. J. Br."]. At that hearing, Plaintiffs offered the testimony of two court clerks from only one of Virginia's 31 judicial circuits (Charlottesville) to support the conclusion that DMV, not courts, actually suspends licenses for failure to pay court debt.[34] *See* JA824–26 ¶¶ 22–31, 36–37 (citing transcript of the preliminary injunction hearing). Based on Plaintiffs'

[34] Def.'s Summ. J. Br. at 6 (Statement of Undisputed Material Facts ("SUMF") ¶ 10) (Charlottesville Circuit Court Clerk Llezelle Dugger testified that a due date for court costs and fines is set as part of the sentencing order, and that no separate order regarding license suspension is entered at the time of default); *id.* at 7 (SUMF ¶ 11) (former Charlottesville General District Court Deputy Clerk Julie Moats testified that the court enters neither a suspension order nor a separate order upon default on fines and costs owed).

representations, the district court apparently understood the Charlottesville clerks' testimony to be representative of court processes across the Commonwealth, and relied on their broad representations when it resolved the *Rooker-Feldman* issue in Plaintiffs' favor:

> There is no judicial proceeding surrounding license suspension under § 46.2-395. The court's only action is the assessment of fines and costs associated with an underlying conviction. Forty days after payment of those costs is due, without notification to affected individuals and without entrance of a court order, data is automatically, administratively, and electronically transmitted to DMV. DMV, in turn, enters a suspension on the debtor's driving record. The suspension is an administrative action, and state administrative decisions, even those that are subject to judicial review by state courts, are beyond doubt subject to challenge in an independent federal action.

JA827 (punctuation and citation omitted). On that basis, the Court was persuaded to reverse its earlier decision and conclude that it had jurisdiction over this suit. *Id.*

But discovery conducted after the hearing[35] made clear that these witnesses' testimony was ***not*** representative and therefore could not support injunctive relief in this case (much less relief that would extend to all 31 of Virginia's judicial circuits). For instance, clerk Dugger conceded at deposition that her testimony was limited to the operations of the Charlottesville Circuit Court and that, notwithstanding her

[35] No discovery in the case occurred until ***after*** the preliminary injunction hearing.

previous testimony, she was not able to testify about the practices of other courts. Def.'s Summ. J. Br. at 6 (SUMF ¶ 10).[36] Moreover, documentary evidence demonstrated that, contrary to Plaintiffs' suggestion at the preliminary injunction stage (which relied on broad implications from the clerks' hearing testimony), the named Plaintiffs ***did*** receive notices of suspension ***from the courts*** on the kinds of forms appended to Plaintiffs' original Complaint as Exhibits 3 and 4 [JA165, JA168]. *See id.* at 5 (SUMF ¶¶ 7–8).[37] And discovery showed that Plaintiffs either entered into deferred payment arrangements, installment payment plans, or had costs and fines converted to community service, belying any claim that they had no opportunity to be heard. Def.'s Summ. J. Br. at 5 (SUMF ¶ 8). These facts, and others, refute the assertions at the preliminary injunction hearing that led the district court to grant the preliminary injunction.

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[36] Indeed, it became clear that none of the Plaintiffs owed any unpaid fines to the testifying clerks' courts, *id.* at 2–4 (SUMF ¶¶ 1–6), rendering the clerks' testimony even less relevant to the preliminary injunction in the first place.

[37] The district court correctly relied on these forms in its first conclusion that the case should be dismissed. *See, e.g.*, JA190 ("That the court issues the suspension order . . . is further substantiated by . . . the Suspension Forms . . . .") (citing Dkt. 1-3 [JA165], 1-4 [JA168]). At least one Virginia court agreed, finding that DMV's involvement was limited to responding to "a court order or a court ruling or court notification." Ex. 3, Def.'s Resp. to Pls.' Objs. to the R&R Regarding Pls.' Pet. for Attorneys' Fees & Litig. Expenses, *Stinnie v. Holcomb*, No. 3:16-cv-44 (W.D. Va. Mar. 15, 2021), Dkt. 248-3 [Tr. of Hr'g (Nov. 20, 2017) at 51:13–14, *Commonwealth v. Nicholson*, CR17000058-00 (Va. Cir. Ct. (Albemarle))].

Second, in the months after the district court granted the preliminary injunction, the case law developed decisively against Plaintiffs' position. In predicting Plaintiffs' success on the merits, the only analogous case the district court could look to was *Fowler v. Johnson*, No. CV 17-11441, 2017 WL 6379676 (E.D. Mich. Dec. 14, 2017), involving a due process challenge to Michigan's similar license-suspension statute. As in this case, the *Fowler* plaintiffs' "central argument" was that state law "mandates suspensions for failure to pay court debt ***with no exception for indigence or non-willfulness***." *Fowler v. Benson*, 924 F.3d 247, 258 (6th Cir. 2019) (emphasis added). The district court there predicted that the plaintiff's challenge was likely to succeed and granted a preliminary injunction. *See Stinnie*, 355 F. Supp. 3d at 531–32 n.9, 532 [JA840–41 n.9]. But six months after the district court entered its own preliminary injunction, the Sixth Circuit ***reversed*** the injunction in *Fowler*. 924 F.3d at 264. The Sixth Circuit reasoned that if the plaintiffs' "indigency is not relevant to the state's underlying decision to suspend their licenses, then giving them a hearing—or any other procedural opportunity—where they can raise their indigency would be pointless. Such a procedure would do nothing to prevent . . . 'the risk of erroneous deprivation.'" *Id.* at 259 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Sixth Circuit therefore found the plaintiffs had "***not*** shown that their procedural due process claim is likely to succeed on the merits." *Id.* at 260 (emphasis added).

Here, Defendant was pressing the same argument—and the same conclusion—when this case was dismissed. *See* Def.'s Summ. J. Br. at 11–16. Among other things, *Fowler* shows why the district court was mistaken in granting a preliminary injunction on the basis that "the procedures in place are not sufficient to protect against the erroneous deprivation of the property interest involved." *See Stinnie*, 355 F. Supp. 3d at 530 [JA837]. Along with the existing case law that supported Defendant's arguments, intervening decisions demonstrate that, contrary to the district court's initial prediction, Plaintiffs are ***unlikely*** to have prevailed on the merits of their claims had the matter proceeded to final adjudication.[38]

* * *

[38] Consistent with Defendant's arguments, Plaintiffs' ***other*** constitutional claims—based on equal protection, fundamental fairness, and other elements of due process—also have been roundly rejected by other courts, including those within the Fourth Circuit. *See, e.g.*, *Fowler*, 924 F.3d 247 (rejecting challenge to Michigan license-suspension statute based on due process, fundamental fairness, and equal protection); *Robinson v. Long*, 814 F. App'x 991, 995 (6th Cir. 2020) (applying *Fowler* because the "rationale for upholding the Michigan scheme applies with equal force to the Tennessee one"); *White v. Shwedo*, No. 2:19-CV-3083-RMG, 2020 WL 2315800, at *5 (D.S.C. May 11, 2020) (finding no likelihood of success on the merits of a fundamental fairness claim); *Motley v. Taylor*, No. 2:19-CV-478-WKW, 2020 WL 1540391, at *28 (M.D. Ala. Mar. 31, 2020) (dismissing due process and equal protection claims), *appeal pending*, No. 20-11688 (11th Cir. filed May 1, 2020); *Johnson v. Jessup*, 381 F. Supp. 3d 619, 631 (M.D.N.C. 2019) (granting defendant judgment on the pleadings on plaintiffs' equal protection and substantive due process claim), *appeal pending*, No. 19-1421 (4th Cir. filed Apr. 19, 2019); *Mendoza v. Garrett*, No. 3:18-CV-01634-HZ, 2019 WL 2251290 (D. Or. May 16, 2019) (dismissing equal protection, due process, and fundamental fairness claims), *appeal pending*, No. 19-35506 (9th Cir. filed June 11, 2019).

Accordingly, this case underscores the wisdom of the rule in *Smyth*. That approach properly recognizes that, in light of the "necessarily abbreviated" nature of the preliminary injunction determination, *Smyth*, 282 F.3d at 274, and the limited record available at the early stage of litigation, courts may not correctly predict a plaintiff's probability of success (as in this case). Consequently, it makes little sense to double-down on an initial prediction—a possibly mistaken one—by finding that the plaintiff "prevailed."

B. Sound policy reasons support *Smyth*'s bright-line rule.

In addition to *Smyth*'s central justification—that a preliminary injunction is not sufficiently merits-based to confer prevailing-party status—other policy grounds support the *Smyth* approach.

To begin with, a key advantage of this Court's bright-line approach—including over the "fact-specific standards" of other circuits, *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008)—is the clarity it offers to courts and litigants. This is consistent with the Supreme Court's longstanding concern for the "judicial administration of § 1988" with respect to "defining the term 'prevailing party.'" *Tex. State Teachers Ass'n,* 489 U.S. at 791. Although Plaintiffs denigrate this concern, Pls.' Br. at 50–51, the same concern was at issue in *Buckhannon*. *Compare Buckhannon*, 532 U.S. at 610 (criticizing the "nuanced 'three thresholds' test required by the 'catalyst theory'" as "clearly not a formula for 'ready

administrability'"), *with id.* at 639–40 (Ginsburg, J., dissenting). Clarity promotes worthy policy objectives, especially where, as here, government actors and resources are involved.

Fixing plaintiffs' fee eligibility (and defendants' exposure to fee liability) according to *Smyth*'s bright-line rule has numerous salutary effects. First, it helps government defendants make informed decisions about how to respond when laws and policies come under legal challenge—including how to balance their obligations to defend government policies while at the same time preserving public funds that a court may (or may not) award to plaintiffs' attorneys depending on the government's response. Plaintiffs contend it is "not a legitimate consideration for the government to want additional clarity concerning how to respond regarding its *unconstitutional* laws," Pls.' Br. at 52—but that offers little value in a situation like this one, where the law was never declared unconstitutional, and the government is confident of the law's constitutionality.

Unlike *Smyth*, an unpredictable, context-specific rule would hinder defendants in evaluating the costs and benefits of amending a law or changing a policy—such as where, as here, a policy may be unpopular but not unconstitutional. As the Supreme Court recognized in *Buckhannon*, "defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits," 532 U.S. at 608 (quoting

Evans v. Jeff D., 475 U.S. 717, 734 (1986)); understandably, that could affect "a defendant's decision to voluntarily change its conduct, conduct that may not be illegal," *id.* Meanwhile, a clear rule the other way—that always locked in a fee award for plaintiffs who obtain a preliminary injunction—would disincentivize defendants from revising challenged laws or ending litigation. *See id.* (recognizing that "the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct").

Adhering to *Smyth*'s sensible rule also avoids unnecessary proceedings, such as this one, regarding whether and in what circumstances a plaintiff who obtains only a preliminary injunction yet may be considered a prevailing party. As the Supreme Court warned, "[c]reating 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." *Garland*, 489 U.S. at 791. *See also Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

III. Plaintiffs' out-of-circuit precedents are irrelevant, inconsistent, and preclusive of relief for Plaintiffs.

Stymied by *Smyth*, Plaintiffs urge the Court to turn its back on that binding precedent in favor of decisions by *other* courts of appeal. *See* Pls.' Br. at 32–42. This Court is "not, of course, bound by decisions of other circuits." *United States v.*

Johnson, 915 F.3d 223, 231 n.4 (4th Cir.), *cert. denied*, 140 S. Ct. 268 (2019). Any reason to trade *Smyth*'s bright-line rule for a context-specific one would need to be persuasive—and Plaintiffs have failed to meet that threshold.

A. Other circuit courts are not uniformly aligned.

Plaintiffs' survey of the landscape in other circuits leaves the reader with the unwarranted impression that every other circuit has specifically rejected *Smyth*'s reasoning and uniformly chosen a different rule instead. *See* Pls.' Br. at 20 ("overwhelmingly in agreement"); *id.* at 32 ("remarkably unified and consistent"). Not so.

Contrary to Plaintiffs' suggestion, not only do the other decisions not engage with *Smyth*'s reasoning,[39] there is noticeable variation in the approaches they have taken. As the Fifth Circuit put it in *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008), "[w]ithout a Supreme Court decision on point, circuit courts considering this issue have announced fact-specific standards that are anything but uniform." *Id.* at 521. Even among the circuits cited by Plaintiffs, there is variation in the standards

[39] The D.C. Circuit did not refer to the *Smyth* rule as "unsupportable." *Compare* Pls.' Br. at 45, *with Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 946 (D.C. Cir. 2005) (merely citing *Smyth* with a "*but see*" signal). Nor did the Third Circuit "specifically" engage with *Smyth*'s analysis. *Compare* Pls.' Br. at 45, *with People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 233 n.4 (3d Cir. 2008) (in its survey of the law, citing *Smyth* as "one arguably dissenting Court of Appeals").

applied, both as to the quality of preliminary relief required, *compare*, *e.g.*, *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 718 (9th Cir. 2013) (relief was "enduring rather than ephemeral"), *with Select Milk Producers, Inc.*, 400 F.3d at 947 (relief was "concrete and irreversible"), and the analysis of likelihood of success on the merits, *compare*, *e.g.*, *Rogers Grp., Inc. v. City of Fayetteville, Ark.*, 683 F.3d 903 (8th Cir. 2012) (noting "thorough analysis of the probability that Rogers Group would succeed on the merits"), *with Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1235 (10th Cir. 2011) (requiring "unambiguous indication of probable success on the merits"). *Cf.* Wright & Miller, 11A Fed. Prac. & Proc. § 2948.3 (3d ed.) (noting that "courts use a bewildering variety of formulations of the need for showing some likelihood of success"). Plaintiffs offer no compelling reason to wade into this thicket and trade *Smyth*'s bright-line rule for any other circuit's "fact-specific" standard. *Dearmore*, 519 F.3d at 521. Even if the other circuits were unified in their approach, that would only make them irrelevant in the same way. *See supra* Argument Part I.

Nor, in the absence of *Smyth*'s bright-line rule, would Plaintiffs even qualify as prevailing parties under all the different standards adopted by other circuits. For instance, in the Third Circuit, a qualifying "merits-based" determination "may not be merely a finding of a likelihood of success on the merits." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 230 n.4 (3d Cir. 2011) (en banc). *See*

id. at 229 (explaining that "the 'merits' requirement is difficult to meet in the context of TROs and preliminary injunctions, as the plaintiff in those instances needs only to show a *likelihood* of success on the merits (that is, a reasonable chance, or probability, of winning) to be granted relief."). The Third Circuit explained that, because "this 'probability' ruling is usually the only merits-related legal determination made when courts grant TROs and preliminary injunctions, it follows that parties will not often 'prevail' based solely on those events."[40]

Plaintiffs also would fail the Fifth Circuit's test, which grants "prevailing party status only when the defendant moots the plaintiff's action in response to a court order." *Dearmore*, 519 F.3d at 524. So too in the Seven Circuit, where the rule is that a preliminary injunction only yields prevailing-party status if the plaintiff wins "substantive relief that is not defeasible by further proceedings," *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005) (citation and punctuation omitted), as when a particular event covered by the injunction has passed. Here, by contrast, "further proceedings on the merits of the plaintiffs' claims" were contemplated; Plaintiffs

[40] *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008) ("*PAPV*"), cited by Plaintiffs, Pls.' Br. at 33, is not typical of the Third Circuit's approach. In granting the preliminary injunction at issue there, the district court had ruled that the challenged ordinance "*was* facially unconstitutional." *Id.* at 234 (emphasis added). Pointing out that the *PAPV* court's ruling was not based in "probability," the en banc Third Circuit later characterized it as "an example of that rare situation where a merits-based determination is made at the injunction stage." *Singer Mgmt. Consultants*, 650 F.3d at 229.

received only a fraction of what they requested, and only on a temporary basis. *Id.* at 723.

In any event, this Court should feel no pressure to abandon well-reasoned precedent merely because it has staked out a minority position on a question the Supreme Court has expressly left open. *Sole*, 551 U.S. at 86. *Buckhannon* is instructive on this point. Before the Supreme Court's decision in that case, the Fourth Circuit was unique among the circuit courts in rejecting the catalyst theory of fee liability. "[M]ost Courts of Appeals recognize[d]" it.[41] But that lopsided line-up made no difference to the Supreme Court—it sided with this Court's decidedly outlier position.

B. The Fifth Circuit's approach—allowing prevailing-party status where a merits-based preliminary injunction causes the case to be mooted—resolves Plaintiffs' policy concern that governments will strategically moot cases to avoid paying fees.

Citing the importance of awarding fees in civil rights actions that ultimately prove meritorious—a general proposition with which Defendant agrees—Plaintiffs

[41] *See* 532 U.S. at 602 & n.3 (citing *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574, 577, n.2 (1st Cir. 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546–50 (3d Cir. 1994); *Payne v. Board of Ed.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski Cty. Sch. Dist., # 1*, 17 F.3d 260, 263, n.2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951–52 (10th Cir. 1994); *Morris v. W. Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999)).

hazard that, if the Court adheres to *Smyth* in this case, that would encourage governments "to employ litigation tactics to delay and keep unconstitutional laws on the books, mooting cases through legislative action at the last possible moment." Pls.' Br. at 50. To reiterate, that is not what happened here. *See supra* Background Parts B–C. Given the long-simmering political opposition to the license-suspension policy, it is both preposterous and presumptuous to suggest that the General Assembly repealed § 46.2-395 "to foil Plaintiffs' ability to recover their fees." Pls.' Br. at 50. The General Assembly had ample incentive to repeal § 46.2-395 irrespective of Plaintiffs' case and, in any event, Defendant would have prevailed if the case had continued. *See supra* Argument Part II.A.

But if this Court—sitting en banc—were to create an exception to *Smyth*'s bright-line rule for circumstances like these, where a case is rendered moot after entry of a preliminary injunction, the Court should strongly consider the Fifth Circuit's approach in *Dearmore*. As noted in the preceding section, the court there held that, for a plaintiff to be a prevailing party, a preliminary injunction must be merits-based and "cause[] the defendant to moot the action," thereby "prevent[ing] the plaintiff from obtaining final relief on the merits." *Dearmore*, 519 F.3d at 524. The Fifth Circuit reasoned that this formulation would be consistent with *Buckhannon*'s rejection of the catalyst theory because it would confer "prevailing

party status only when the defendant moots the plaintiff's action in response to a court order, not just in response to the filing of a lawsuit." *Id.*

If Plaintiffs' concern is the theoretical risk of gamesmanship by a state in strategically mooting cases to avoid fee liability, permitting recoveries in the limited circumstance where a merits-based preliminary injunction directly caused the case to be mooted would fully alleviate that concern.

CONCLUSION

In light of the controlling authority in this circuit that obtaining a preliminary injunction alone does not confer prevailing-party status, the Court should affirm the district court's denial of Plaintiffs' fee petition.

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Respectfully submitted,
Richard D. Holcomb

Mark R. Herring
Attorney General of Virginia

Donald D. Anderson
Deputy Attorney General

Julie M. Whitlock
Senior Assistant Attorney General & Transportation Section Chief

Janet W. Baugh (VSB #44649)
Senior Assistant Attorney General

Christian A. Parrish (VSB #44427)
Assistant Attorney General

/s/ *Maya M. Eckstein*
Maya M. Eckstein (VSB #41413)
Trevor S. Cox (VSB #78396)
David M. Parker (VSB #85619)
HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Ph: (804) 788-8200
Fax: (804) 788-8218
meckstein@HuntonAK.com
tcox@HuntonAK.com
dparker@HuntonAK.com

Counsel for Defendant

OFFICE OF THE ATTORNEY
GENERAL
202 North Ninth Street
Richmond, VA 23219
(804) 786-2071 – Telephone
(804) 786-4239 – Facsimile

STATEMENT REGARDING ORAL ARGUMENT

Because the Court may summarily affirm for the reasons stated by the district court in denying Plaintiff's fee petition, JA1265, oral argument is unnecessary. Counsel for Defendant will gladly participate in oral argument, however, if the Court believes that oral argument would aid the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Rule 32(a)(7)(B), because it contains 12,232 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ *Maya M. Eckstein*
Maya M. Eckstein

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2021, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Maya M. Eckstein*
Maya M. Eckstein