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Manufactured Mootness: How the Supreme Court's Decision in New York State Rifle & Pistol Association Highlights the Need for Congress to Define the Term "Prevailing Party"

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ABSTRACT

The constitutional limits of state and local firearm regulation became an inevitable contest following the Supreme Court's recognition of an individual's right to keep and bear arms in District of Columbia v. Heller. After granting certiorari in *New York State Rifle & Pistol Association v. City of New York* (NYSR&PA), the Supreme Court was prepared to weigh in on the contest by examining the constitutionality of a local New York City gun regulation. However, after two post certiorari changes to New York law, New York City's brief strove to have the case dismissed as moot. A controversial amicus brief went even further, asserting that if the Court did not dismiss the case as moot, the decision would justify congressional efforts to restructure the Court. Consequently, the Court shifted its focus onto the jurisdictional bar of mootness. And, as a result, the central issue in NYSR&PA was no longer whether New York City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits was consistent with the Second Amendment, but whether the first Second Amendment case to reach the Supreme Court in over a decade was justiciable.

Ultimately, the Court held that the petitioners' appeal in NYSR&PA no longer presented a justiciable case or controversy and, therefore, dismissed the appeal on grounds of mootness. Specifically, the Court reasoned that the two post certiorari changes in law effectively awarded the petitioners the precise relief requested—to transport firearms to a second home or shooting range outside the city—therefore, the petitioners' claim for declaratory and injunctive relief no longer presented a justiciable case or controversy. While there remains an intriguing scholarly debate over whether the two post

certiorari changes in law in NYSR&PA truly rendered the petitioners' appeal moot, this Note does not weigh in on that debate. Rather, this Note focuses on: (1) a government defendant's incentive to manufacture mootness, and (2) the current contradiction under Supreme Court precedent, which considers the petitioners in NYSR&PA as receiving the precise relief requested but does not consider the petitioners to be a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988—a critical civil rights enforcement statute.

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NOTE

MANUFACTURED MOOTNESS: HOW THE SUPREME COURT'S DECISION IN *NEW YORK STATE RIFLE & PISTOL ASSOCIATION* HIGHLIGHTS THE NEED FOR CONGRESS TO DEFINE THE TERM "PREVAILING PARTY"

Austin Deramo †

I. INTRODUCTION

The practice of awarding reasonable attorney's fees[1] to the "prevailing party" of a lawsuit is colloquially known as fee-shifting.[2] In the English legal system, the prevailing party of a lawsuit is generally entitled to fee-shifting by collecting his attorney's fees from his unsuccessful opponent.[3] This practice has become known as the "English Rule."[4] In the American legal system, the prevailing party of a lawsuit must generally pay his own attorney's fees absent a statutory authorization or a contractual basis.[5] This practice has become known as the "American Rule."[6]

Historically, Congress authorized statutory fee-shifting as a particularly appropriate remedy in civil rights legislation.[7] In fact, every major civil rights

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[1] Articles dealing with attorney's fees must first decide as "a matter of style and usage [whether to] refer to 'attorney fees,' 'attorneys fees,' 'attorney's fees,' or 'attorneys' fees?'" Stallworth v. Greater Cleveland Reg'l Transit Auth., 105 F.3d 252, 253 n.1 (6th Cir. 1997). Judge Danny Boggs, writing for the Sixth Circuit, observed that "[i]n federal statutes, rules and cases, we find these forms used interchangeably, nay, promiscuously." *Id.* However, because the Supreme Court Style Manual expressly advises opinion writers to use the phrase "attorney's fees;" and in light of the use of "attorney's fees" in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, "attorney's fees" will be used throughout this Note.

[2] Maureen S. Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021, 1022 (2020).

[3] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 & n.18 (1975); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

[4] Vargo, *supra* note 3, at 1569.

[5] *Alyeska Pipeline*, 421 U.S. at 257; Vargo, *supra* note 3, at 1567, 1569, 1578, 1587.

[6] Vargo, *supra* note 3, at 1569.

[7] S. REP. NO. 94-1011, at 3 (1976) (noting that the very first fee-shifting statute, the Enforcement Act of 1870, was a civil rights statute that provided for attorney's fees in three separate provisions protecting voting rights); *see* Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968) (per curiam).

statute that passed through Congress since 1964 included, or has been amended to include, one or more fee-shifting provisions.[8] Generally, Congress enacts statutory fee-shifting provisions to encourage the enforcement of laws deemed to promote the public interest.[9] In addition, members of Congress have argued that not authorizing fee-shifting as a remedy in a civil rights statute would be a legislative omission tantamount to repealing the statute itself because not awarding fee-shifting would frustrate the very purpose of the civil rights statute, which is to promote the enforcement of civil rights.[10]

Despite Congress's historical reliance on the efficacy of statutory fee-shifting provisions to promote the enforcement of civil rights, the Supreme Court rendered a decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*[11] that dramatically altered the utility of many fee-shifting provisions in civil rights statutes enacted by Congress. Stated generally, the issue in *Buckhannon* was whether the plaintiff properly qualified as a "prevailing party," and was therefore entitled to attorney's fees under the fee-shifting provisions of two major civil rights statutes.[12] Stated more specifically, the issue in *Buckhannon* was whether the institutional plaintiff, who achieved the desired results of its lawsuit because the government defendant voluntarily ceased to engage in the conduct challenged by the plaintiff, qualified as a "prevailing party."[13] As a result of the issue presented in *Buckhannon*, the Court was required to interpret the phrase "prevailing party," a phrase commonly used in the statutory fee-shifting provisions of civil rights statutes.

At the time the Court granted certiorari in *Buckhannon*, nearly every federal circuit court in the nation adopted the catalyst theory when interpreting the phrase "prevailing party."[14] Generally, the catalyst theory qualified a plaintiff as a "prevailing party," when that plaintiff achieved the

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[8] Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 205 (2003) ("Every significant contemporary civil rights statute contains some provision for attorney's fees . . . ."); *see, e.g.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(p); Emergency School Aid Act of 1972, 20 U.S.C. § 1617; Equal Employment Amendments of 1972, 42 U.S.C. § 2000e-16(b).

[9] Carroll, *supra* note 2, at 1022.

[10] S. REP. NO. 94-1011, at 2 (1976); *see* Hall v. Cole, 412 U.S. 1, 13 (1973).

[11] Buckhannon Bd & Care Home, Inc. v. W. Va. Dept. of Health & Hum. Res., 532 U.S. 598 (2001).

[12] *Id.* at 600.

[13] *Id.* at 603.

[14] SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 2015).

desired results of its lawsuit because the defendant voluntarily ceased to engage in the conduct challenged by the plaintiff.[15] Despite this widespread circuit court precedent, the Court in *Buckhannon* expressly rejected the catalyst theory.[16] Specifically, the Court held that a defendant's voluntary cessation of the challenged conduct alone, is not sufficient to qualify a plaintiff as a prevailing party; but rather, to qualify as a prevailing party, the plaintiff must obtain a "material alteration of the legal relationship of the parties," such as a judgment on the merits or a court-ordered consent decree.[17] Notably, the Court acknowledged the fear that, without the catalyst theory and the accompanying threat of fee-shifting, defendants would be incentivized to manufacture mootness or strategically capitulate just enough to collectively thwart an unfavorable judgment and avoid paying attorney's fees to civil rights litigants.[18] However, the Court reasoned that removing the catalyst theory did not pose a serious risk of manufactured mootness because a plaintiff could assert that the defendant's voluntary change in conduct did not render her case moot by reason of the voluntary cessation doctrine, which is an exception to mootness.[19]

In the years following *Buckhannon*, modern data has called into question the Court's assumption that, without the catalyst theory, the voluntary cessation doctrine would suffice as a deterrent to manufactured mootness.[20] First, modern data since *Buckhannon* establishes that the voluntary cessation doctrine is not applied in a consistent manner, which has diminished the doctrine's ability to deter manufactured mootness.[21] Second, modern data establishes that, when the voluntary cessation doctrine is applied to government defendants, the doctrine is severely stripped of its utility because courts often defer to a government defendant's claim of sincerity.[22] Finally, research has established that civil rights plaintiffs often seek nonmonetary

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[15] *See infra* Section II.A.

[16] *Buckannon*, 532 U.S. at 604.

[17] *Id.*

[18] *Id.* at 608.

[19] *Id.* at 608–09.

[20] *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007) (presenting empirical evidence that *Buckhannon* increased occurrences of "strategic capitulation," i.e., manufactured mootness).

[21] Joseph C. Davis & Nicholas R. Reaves, Note, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J. 325, 325 (2019).

[22] *Id.*

relief, such as institutional reform or a change in policy.[23] Therefore, the prospect of being awarded attorney's fees under the fee-shifting provisions of civil rights statutes incentivizes attorneys to bring civil rights cases on behalf of indigent plaintiffs.[24] However, without the catalyst theory, a civil rights plaintiff may "receive the precise relief [they] requested," yet fail to qualify as a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988—a critical civil rights statute.[25] As a result, the Court's decision in *Buckhannon* not only altered the ability for civil rights litigants to bring successful claims against a government defendant, but has the potential to produce a chilling effect on civil rights litigation by placing a formidable barrier to an award of attorney's fees.[26]

In light of these developments, critics urge the Court to reverse *Buckhannon*; however, considering the unlikely event that the Court would grant certiorari on a case to overturn *Buckhannon*, combined with the force of statutory stare decisis[27] and widespread reliance[28] on *Buckhannon*, judicially overturning *Buckhannon* is highly unlikely. However, this Note explains why a congressional response to *Buckhannon* is a hopeful alternative. Specifically, Part II of this Note addresses the development of the catalyst theory and the Court's decisions to dissolve the theory in *Buckhannon*. Part III of this Note addresses the voluntary cessation doctrine's inability to fill the void created by the Court's decision to dissolve the catalyst theory. Finally, Part IV proposes a shift in focus from the Court to Congress by proposing a new statute defining the phrase prevailing party in statutory fee-shifting provisions.

II. BACKGROUND

Despite the general American Rule, and outside of express congressional authorization to engage in fee-shifting, federal courts historically relied upon their broad equitable powers to award reasonable attorney's fees to the

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[23] H.R. REP. NO. 94-1558, at 3 (1976) (noting that the prototypical case arising under a civil rights statute involves an indigent plaintiff with no damage claims from which an attorney could draw its fee). Hudson v. Michigan, 547 U.S. 586, 597 (2006) ("Since some civil-rights violations would yield damages too small to justify the expenses of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs.").

[24] *See* Albiston & Nielsen, *supra* note 20, at 1088.

[25] N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1539 (2020).

[26] *See* Albiston & Nielsen, *supra* note 20, at 1087 (presenting empirical evidence that *Buckhannon* increased occurrences of "strategic capitulation").

[27] *See infra* Section IV.A.

[28] *See infra* Section IV.A.

prevailing party of a lawsuit when "the interests of justice so required."[29] To that end, federal courts often concluded that the interests of justice required fee-shifting when a plaintiff, who filed a successful lawsuit, acted as a "'private attorney general,' vindicating a policy that Congress considered of the highest priority."[30] This practice of equitable fee-shifting later became known as the "private attorney general doctrine" because it encouraged the private enforcement of public rights, as opposed to the public enforcement of public rights by the Attorney General.[31]

For years, the private attorney general doctrine served as a widely used and prudential exception to the general American Rule.[32] However, in 1975, the Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society* brought the practice of fee-shifting under the private attorney general doctrine to an abrupt end.[33] In *Alyeska Pipeline*, the Court noted that it was "inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation."[34] While the Court recognized several exceptions to the general American Rule, which would confer upon judges the power to shift fees,[35] the Court's decision explicitly limited the federal judiciary's power to enforce the private attorney general doctrine.[36] As a result, federal courts could no longer invoke their equitable powers to award reasonable attorney's fees to litigants under the theory that the litigant vindicated a policy that Congress considered of the highest priority—absent express congressional authorization.[37]

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[29] Wilderness Soc'y v. Morton, 495 F.2d 1026, 1029 (D.C. Cir. 1974).

[30] *Id.* (quoting Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968) (per curiam)) (collecting cases).

[31] *See generally* William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2153 (2004).

[32] *See* Carroll, *supra* note 2, at 1022; Carl Cheng, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929, 1929 (1985).

[33] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975).

[34] *Id.* at 247.

[35] *See id.* at 257–63 (affirming exceptions in four instances: (1) when allowed by statute; (2) when a losing party willfully disobeys a court order; (3) when a losing party acts in bad faith; and (4) when the "historic power of equity" would allow the recovery of attorney's fees).

[36] *Id.* at 263 ("[C]ongressional use of the private attorney general concept,] can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.").

[37] *Id.* at 271.

In response to the *Alyeska Pipeline* decision, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976[38] (Fees Award Act), which significantly amended 42 U.S.C. § 1988.[39] Notably, the Fees Award Act expressly authorized federal courts to award attorney's fees to the prevailing party in any action or proceeding to enforce a number of civil rights laws.[40] In addition, the Fees Award Act stated that its purpose was to restore the federal courts' authority to provide attorney's fees to private citizens who relied on those courts to vindicate their civil rights.[41] Finally, if it was not explicit enough that the Fees Award Act was a direct response to the Court's *Alyeska Pipeline* decision, Congress noted that the Fees Award Act would mend the "anomalous gaps" in civil rights law whereby awards of fees, "according to *Alyeska*, [were] suddenly unavailable in the most fundamental civil rights cases."[42]

Although the Fees Awards Act simply provided the prospect of attorney's fees in civil rights litigation, this congressional response to the Court's *Alyeska Pipeline* decision proved to be an integral part of Congress's overall civil rights enforcement scheme. Indeed, the congressional reports on the Fees Award Act illustrate that civil rights laws vindicate public policies "of the highest priority,"[43] yet "depend heavily on private enforcement."[44] However, the prototypical case arising under a civil rights statute involves an indigent plaintiff with no damage claims from which an attorney could draw its fee.[45] Thus, to enable citizens to vindicate their rights under various civil rights laws, they must have the opportunity to recover the cost of vindication.[46] Indeed, the congressional reports illustrate an overarching effort to ensure that indigent civil rights plaintiffs have "effective access" to federal courts to enforce civil rights laws, which makes fee-shifting "an integral part of the remedies necessary to obtain . . . compliance" with civil

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[38] Pub. L. No. 94-559, 90 Stat. 2461 (codified as amended at 42 U.S.C. § 1988 (2003)).

[39] 42 U.S.C. § 1988 (1976).

[40] 42 U.S.C. § 1988(b) (1976) ("In any action or proceeding to enforce a provision of [numerous civil rights laws], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

[41] H.R. REP. NO. 94-1558, at 3 (1976).

[42] S. REP. NO. 94-1011, at 4 (1976).

[43] *Id.* at 3 (quoting Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968) (per curiam)).

[44] *Id.* at 2.

[45] H.R. REP. NO. 94-1558, at 3 (1976).

[46] *Id.*

rights laws.[47] However, after the Fees Award Act re-leveled the playing field, courts were then tasked with interpreting the newly amended "prevailing party" provision of 42 U.S.C. § 1988.

A. *Prevailing Under the Catalyst Theory*

When courts began to interpret the phrase "prevailing party" in 42 U.S.C. § 1988, it appeared to be a relatively evident conclusion that a plaintiff was the prevailing party of a lawsuit if she secured a favorable ruling on the merits of her lawsuit. However, a more difficult issue of statutory interpretation arose when courts began considering whether a plaintiff was a prevailing party of a lawsuit absent a formal ruling on the merits of a lawsuit. For example, courts now had to consider whether, in a prospective relief case, a plaintiff would be considered the "prevailing party" when the defendant voluntarily ceased to engage in the challenged conduct after litigation commenced. Until the Supreme Court's decision in *Buckhannon*, the general rule in nearly every circuit was that a plaintiff could be considered a "prevailing party" of a lawsuit, and thus entitled to attorney's fees, even absent a formal ruling on the merits of a lawsuit.[48]

The First Circuit's holding in *Nadeau v. Helgemoe* presents a clear example of lower courts interpreting the phrase "prevailing party" in 42 U.S.C. § 1988 to encompass plaintiffs who receive favorable results absent a formal ruling on the merits of a lawsuit.[49] In *Nadeau*, the First Circuit held that "the legislative history [of the Civil Rights Attorney's Fees Awards Act of 1976] strongly suggests that a plaintiff who is partially successful in achieving the relief sought may still receive an award."[50] The court reasoned that the Senate Report of the Fees Award Act made it abundantly clear that "in general 'parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.'"[51] As an example, the court noted that a plaintiff would prevail "when [the] plaintiff's lawsuit acts as a 'catalyst' in prompting defendants to take action to meet [the] plaintiff's claims," and that "attorney's fees are justified despite the lack of judicial involvement in the result."[52]

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[47] S. REP. NO. 94-1011, at 5 (1976); H.R. REP. NO. 94-1558, at 1 (1976); Buckhannon Bd. & Care Home Inc. v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 639 (2001) (Ginsburg, J., dissenting).

[48] NAHMOD, *supra* note 14, § 10.10.

[49] *See* Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978).

[50] *Nadeau*, 581 F.2d at 278; *see also Buckhannon*, 532 U.S. at 625–26 (Ginsburg, J., dissenting).

[51] *Nadeau*, 581 F.2d at 279.

[52] *Id.*

This catalyst theory of prevailing party status gained considerable traction after the First Circuit's decision in *Nadeau*. In fact, with the exception of the Second Circuit, every Circuit Court of Appeals followed the First Circuit's holding in *Nadeau*.[53] In each circuit that followed the newly formed catalyst theory, there were generally three conditions necessary to a party's qualification as a prevailing party, however, they all fell short of a favorable ruling on the merits such as a final judgment or consent decree.[54]

Despite this long standing tradition in the federal circuit courts, in 1994, the Fourth Circuit broke ranks and declared that a plaintiff could not be a "prevailing party" without "an enforceable judgment, consent decree, or settlement."[55] However, after the Fourth Circuit's ruling, nine other circuits reaffirmed their interpretation of prevailing party under the catalyst theory.[56] In 2001, the Supreme Court sought to resolve this split among the circuits.[57]

While the Court did not directly address the propriety of the catalyst theory before *Buckhannon*, Justice Scalia's opinion in *Hewitt v. Helms*[58]

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[53] Marbley v. Bane, 57 F.3d 224, 233–35 (2d Cir. 1995); Ross v. Horn, 598 F.2d 1312, 1322 (3d Cir. 1979); DeMier v. Gondles, 676 F.2d 92, 93 (4th Cir. 1982); Hennigan v. Ouachita Par. Sch. Bd., 749 F.2d 1148, 1151 (5th Cir. 1985); Johnston v. Jago, 691 F.2d 283, 286 (6th Cir. 1982); Harrington v. DeVito, 656 F.2d 264 (7th Cir. 1981); *see* Miller v. Staats, 706 F.2d 336, 341 (D.C. Cir. 1983); Ortiz De Arroyo v. Barcelo, 765 F.2d 275 (1st Cir. 1985) (*Nadeau* reaffirmed); Garcia v. Guerra, 744 F.2d 1159, 1162 (5th Cir. 1984); Williams v. Miller, 620 F.2d 199, 202 (8th Cir. 1980); Sablan v. Dep't of Fin. of Com. of Northern Mariana Islands, 856 F.2d 1317, 1325–27 (9th Cir. 1988); Supre v. Ricketts, 792 F.2d 958, 962 (10th Cir. 1986); Fields v. City of Tarpon Springs, 721 F.2d 318, 321 (11th Cir. 1983).

[54] The three conditions that were generally necessary were:

> A plaintiff first had to show that the defendant provided 'some of the benefit sought' by the lawsuit. Wheeler v. Towanda Area School Dist., 950 F.2d 128, 131 (3d Cir. 1991). Under most Circuits' precedents, a plaintiff had to demonstrate as well that the suit stated a genuine claim, i.e., one that was at least 'colorable,' not 'frivolous, unreasonable, or groundless.' *Grano*, 783 F.2d at 1110 (D.C. Cir. 1986) (internal quotation marks and citation omitted). Plaintiff finally had to establish that her suit was a 'substantial' or 'significant' cause of defendant's action providing relief. Williams v. Leatherbury, 672 F.2d 549, 551 (5th Cir. 1982).

Buckhannon Bd. & Care Home, Inc., v. W. Va. Dep't of Health & Hum. Res., 532 U.S. 598, 627–28 (2001) (Ginsburg, J., dissenting).

[55] S-1 by & Through P-1 v. State Bd. of Educ. of North Carolina, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (per curiam).

[56] *Buckhannon*, 532 U.S. at 627.

[57] *Id.* at 602 ("To resolve the disagreement amongst the Courts of Appeals, we granted certiorari . . . .").

[58] *See* Hewitt v. Helms, 482 U.S. 755 (1987).

suggested that the Fourth Circuit's position would be overruled. In *Hewitt*, Justice Scalia famously claimed:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.[59]

However, fourteen years later, Justice Scalia abandoned this broad approach and concurred with the strictly formalistic majority in *Buckhannon*.[60]

B. *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*

The *Buckhannon* decision significantly altered an integral part of the post-*Alyeska Pipeline* civil rights enforcement system. The issue in *Buckhannon* was the correct interpretation of the phrase "prevailing party."[61] The plaintiff, Buckhannon Board and Care Home, Inc., sought declaratory and injunctive relief from a West Virginia law that required elderly residents to be capable of "self-preservation."[62] The law required that all residents of homes like Buckhannon's be capable of "self-preservation," which meant, in part, that residents could make their way to fire exits without assistance.[63] The plaintiffs

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[59] *Id.* at 760–61; *see also* Maher v. Gagne, 448 U.S. 122, 129 (1980) ("Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated."); Hanrahan v. Hampton, 446 U.S. 754, 757 (1980) (per curiam) (noting language in legislative history that "parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief"). *But see Buckhannon,* 532 U.S. at 603–04 n.5 ("[The Court explained that the language in *Hewitt* was merely dictum which] alluded to the possibility of attorney's fees where 'voluntary action by the defendant . . . affords the plaintiff all or some of the relief . . . sought,' but [the Court] expressly reserved the question, *see* [*Hewitt*, 482 U.S. at 763].").

[60] *Buckhannon*, 532 U.S. at 610 (Scalia, J., concurring).

[61] *Id.* at 600.

[62] *Id.* at 600-01.

[63] *Id.* at 600.

alleged that the requirement violated the Fair Housing Amendments Act of 1988[64] (FHAA) and the Americans with Disabilities Act of 1990[65] (ADA).[66]

After commencing litigation, the plaintiffs were faced with the state defendants' sovereign immunity pleas and, as a result, the plaintiffs "stipulated to the dismissal of their claim for monetary damages."[67] Later, in response to the defendants' motion to dispose of the remainder of the case summarily, the district court determined that the plaintiffs presented triable claims under the FHAA and the ADA.[68] However, less than a month after the district court held that the plaintiffs presented triable claims, the West Virginia legislature enacted two bills eliminating the self-preservation requirement and moved to dismiss the case as moot.[69] The district court found that it was unlikely that the West Virginia legislature would reenact the self-preservation rule, and agreed that the legislatures repeal of the self-preservation rule rendered the case moot.[70] As a result of the legislature's repeal of the self-preservation requirement, the plaintiffs subsequently moved for an award of attorney's fees as the "prevailing party" under the fee-shifting provisions of the FHAA and the ADA.[71] Although the district court dismissed the case as moot, the plaintiffs assumed, based on long-standing federal circuit court precedent, that they were entitled to recover attorney's fees under the catalyst theory.

Because the plaintiffs brought suit in the Fourth Circuit—the only circuit at that time to outright reject the catalyst theory[72]—the district court rejected the plaintiffs' catalyst theory claim and denied their motion for attorney's fees.[73] On appeal, the Fourth Circuit declined to reexamine its interpretation of prevailing party en banc, and summarily affirmed the judgment of the district court.[74] The Supreme Court granted certiorari, and held that even

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[64] Fair Housing Act, 42 U.S.C. § 3613(c)(2) (2003).

[65] Americans with Disabilities Act, 42 U.S.C. § 12205 (2003).

[66] *Buckhannon,* 532 U.S. at 600–01 (majority opinion).

[67] *Id.* at 624 (Ginsburg, J., dissenting).

[68] *Id.* (Ginsburg, J., dissenting).

[69] *Id.* at 624–25 (Ginsburg, J., dissenting).

[70] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 19 F. Supp. 2d 567, 577 (N.D.W. Va. 1998); *see also Buckhannon*, 532 U.S. at 601.

[71] *Buckhannon*, 532 U.S. at 601.

[72] NAHMOD, *supra* note 14, § 10.10 ("[T]he Fourth Circuit stood alone in holding that the catalyst theory was not a proper basis for an award of fees to a prevailing party; every other circuit addressing the matter had taken the contrary position.").

[73] *Buckhannon*, 19 F. Supp. 2d at 577.

[74] Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res., 203 F.3d 819 (4th Cir. 2000).

though the plaintiffs obtained the relief they sought, for purposes of the FHAA and the ADA, they were not prevailing parties.[75]

1. The Majority

The majority, led by Chief Justice Rehnquist, relied primarily on Black's Law Dictionary to deduce that the "clear meaning" of "prevailing party" was a party who has been awarded some relief by the adjudicating court.[76] Although the lawsuit brought about the desired result by way of voluntary cessation, there was no alteration in the legal relationship of the parties in the absence of a judgment on the merits or a court-ordered consent decree.[77] Therefore, because there was no alteration in the legal relationship of the parties, the plaintiffs were not entitled to an award of attorney's fees under the FHAA or the ADA as prevailing parties.[78] The Court made clear, however, that its opinion was not narrowed to the FHAA or the ADA, but applied to the prevailing party language embedded in various statutes, such as the newly amended 42 U.S.C. § 1988.[79]

In dissolving the catalyst theory, the Court rejected the plaintiffs' argument that the theory was "necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees,"[80] and that "the rejection of the 'catalyst theory' w[ould] deter plaintiffs with meritorious but expensive cases from bringing suit,"[81]

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[75] *Buckhannon*, 532 U.S. at 610.

[76] *Id.* at 603, 607.

[77] *Id.* at 604.

[78] *Id.*

[79] *Id.* at 603 n.4 ("We have interpreted these fee-shifting provisions consistently, . . . and so approach the nearly identical provisions at issue here."); NAHMOD, *supra* note 14, § 10.10 ("First, although *Buckhannon* was not a § 1988 case, the FHAA and ADA fees language interpreted by the Court is virtually identical to that of § 1988, and therefore, as the Court itself indicated, the catalyst theory is no longer available under § 1988."); *Compare* 42 U.S.C. § 12205 ("In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual."), *and* 42 U.S.C. § 3613(c)(2) ("In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person."), *with* 42 U.S.C. § 1988(b) ("[T]he court, in its discretion, may also allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

[80] *Buckhannon*, 532 U.S. at 608.

[81] *Id.*

because it was unsupported by empirical evidence.[82] In addition, the Court reasoned that "the fear of mischievous defendants only materializes in claims for equitable relief."[83] And that even in a claim for injunctive relief, the voluntary cessation doctrine would likely stop a defendant's claim of mootness from successfully ridding the case, unless it was absolutely clear that the allegedly unlawful conduct would not recur.[84] In addition, the Court claimed that "[a] request for attorney's fees should not result in a second major litigation,"[85] which drove the Court to avoid an interpretation of fee-shifting statutes that would "spawn[] a second litigation of significant dimension."[86] Similarly, the Court was wary of litigation surrounding the catalyst theory because it would require analysis of the defendant's subjective motivations in changing its conduct and "likely depend on a highly fact-bound inquiry."[87]

2. The Dissent

Justice Ginsburg, writing for the dissent, emphasized the long-prevailing federal circuit court precedent, as well as the legislative history behind the federal fee-shifting statutes. [88] According to Justice Ginsburg, the catalyst theory was a key component of the fee-shifting statutes that Congress adopted to advance the enforcement of civil rights. [89] In fact, congressional records indicated that the catalyst theory was embedded in the provisions of § 1988.[90] Therefore, eliminating the catalyst theory was unjustified by legislative history.[91] Moreover, eliminating the catalyst theory would permit a defendant to avoid paying fees where the merits of the suit led the defendant to manufacture mootness, which would impede access to the court for the less affluent, and reduce the incentive for private suits to enforce civil rights.[92] Therefore, eliminating the catalyst theory was an act contrary to Congress's

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[82] *Id.*

[83] *Id.*

[84] *Id.* at 608–09.

[85] *Id.* at 609 (quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)).

[86] *Buckhannon*, 532 U.S. at 609 (quoting Tex. State Tchrs. Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 791 (1989)).

[87] *Id.* at 609–10 (quoting Brief for United States as Amicus Curiae at 28).

[88] *Id.* at 622, 629 (Ginsburg, J., dissenting).

[89] *Id.* at 623 (Ginsburg, J., dissenting).

[90] *Id.* at 638 (Ginsburg, J., dissenting); *see also* S. REP. NO. 94-1011, at 5 ("[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.").

[91] *Buckhannon,* 532 U.S. at 623 (Ginsburg, J., dissenting).

[92] *Id.* at 622–23 (Ginsburg, J., dissenting).

intent because Congress enacted civil rights statutes to incentivize private attorneys to bring civil rights cases on behalf of indigent plaintiffs.[93]

In response to the majority's assertion that the voluntary cessation doctrine, as an exception to mootness, mitigated the decision to dissolve the catalyst theory, the dissent was skeptical of the doctrine preventing manufactured mootness when the "recurrence of the controversy is under the defendant's control."[94] In response to the majority's wishes to avoid a request for attorney's fees resulting in a second major litigation, the dissent questioned the value of the Court's fee-shifting ruling, which would drive a plaintiff prepared to accept adequate relief to litigate on and on in an attempt to reach a ruling on the merits.[95] Moreover, the dissent noted that, under the catalyst theory, "[p]ersons with limited resources were not impelled to 'wage total law' in order to assure that their counsel fees would be paid."[96]

Finally, the dissent claimed that "Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'"[97] The dissent reasoned that "prevail," in everyday use, means "gain victory by virtue of strength or superiority: win mastery: triumph."[98] Under this definition, the dissent reasoned that there are undoubtedly situations in which an individual's goal is to obtain the approval of a judge, and in those situations, one cannot "prevail" short of a judge's formal declaration.[99] However, where the ultimate goal is not an arbiter's approval, but a favorable alteration of actual circumstances, a formal declaration is not essential.[100] The dissent reasoned further that a lawsuit's ultimate purpose is to achieve actual relief from an opponent. While a favorable judgment may be instrumental in gaining that relief, generally, "the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant . . . ."[101] Therefore, "[o]n this common understanding, if a party reaches the 'sought-after destination,' then the party 'prevails' regardless of the 'route taken.'"[102] "Western democracies, for instance, 'prevailed' in the Cold War even though the Soviet Union never

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[93] *See* Albiston & Nielsen, *supra* note 20, at 1088.

[94] *Buckhannon*, 532 U.S at 639 (Ginsburg, J., dissenting).

[95] *Id.*

[96] *Id.* at 636 (Ginsburg, J., dissenting).

[97] *Id.* at 633 (Ginsburg, J., dissenting).

[98] *Id.* (Ginsburg, J., dissenting).

[99] *Id.*

[100] *Buckhannon*, 532 U.S. at 633 (Ginsburg, J., dissenting).

[101] *Id.* at 634 (Ginsburg, J., dissenting) (quoting Hewitt v. Helms, 482 U.S. 755, 761 (1987)).

[102] *Id.* (quoting Hennigan v. Ouachita Par. Sch. Bd., 749 F.2d 1148, 1153 (5th Cir. 1985)).

formally surrendered."[103] "Among television viewers, John F. Kennedy 'prevailed' in the first debate with Richard M. Nixon during the 1960 Presidential contest, even though moderator Howard K. Smith never declared a winner."[104] Therefore, the dissent urged that under a fair reading of the fee-shifting provisions enacted by Congress, "a party 'prevails' in 'a true and proper sense,' when she achieves, by instituting litigation, the practical relief sought in her complaint."[105]

III. PROBLEM

There are several issues with the Supreme Court dismantling the catalyst theory in *Buckhannon*. First, and foremost, although the statutes at issue in *Buckhannon* were specifically the FHA and the ADA, the fees language interpreted by the Court was virtually identical to that of many other federal fee-shifting statutes, including 42 U.S.C. § 1988—a vital civil rights enforcement statute.[106] Therefore, as the Court indicated, the catalyst theory is no longer available under § 1988 post-*Buckhannon*.[107] The second, and possibly the most detrimental effect, is that it is now possible for a defendant sued for prospective relief to manufacture mootness by voluntarily ceasing to engage in any challenged conduct before a likely adverse decision. As a result, defendants may not only render a plaintiff's case moot but have the potential

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[103] *Id.* at 633 (Ginsburg, J., dissenting).

[104] *Id.* at 633–34 (Ginsburg, J., dissenting).

[105] *Id.* at 634 (Ginsburg, J., dissenting) (quoting Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 388 (1884)).

[106] NAHMOD, *supra* note 14, § 10.10; *Compare* 42 U.S.C. § 12205 ("In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual."), *and* 42 U.S.C. § 3613(c)(2) ("In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person."), *with* 42 U.S.C. § 1988(b) ("[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . .").

[107] *Buckhannon*, 532 U.S. at 603 n.4 ("We have interpreted these fee-shifting provisions consistently, . . . and so approach the nearly identical provisions at issue here."); NAHMOD, *supra* note 14, § 10.10. The Second Circuit applied *Buckhannon* to § 1988 because "it is clear that the Supreme Court intends the reasoning of [*Buckhannon*] to apply to § 1988 as well." N.Y. State Fed'n of Taxi Drivers, Inc. v. Westchester Cnty. Taxi & Limousine Comm'n, 272 F.3d 154, 158 (2d Cir. 2001). *See also* Chambers v. Ohio Dep't. of Hum. Servs., 273 F.3d 690, 693 (6th Cir. 2001), a § 1988 case overruling Johnston v. Jago, 691 F.2d 283 (6th Cir. 1982), which adopted the catalyst theory. Bennett v. Yoshina, 259 F.3d 1097, 1101 (9th Cir. 2001) applied *Buckhannon* where the Hawaii legislature enacted legislation that gave the plaintiffs what they sought but there was no "judicial *imprimatur*."

to bring important public litigation to frustratingly anticlimactic conclusions.[108]

To combat these issues posed by the Court's holding in *Buckhannon*, a plaintiff faced with a defendant who voluntarily ceases challenged conduct is left only with the possibility of raising the defense of the voluntary cessation exception to mootness. However, modern data indicates that the voluntary cessation doctrine is not applied in a consistent manner, which diminishes the doctrine's ability to deter manufactured mootness.[109] Moreover, modern data has established that, when the voluntary cessation doctrine is against government defendants, the doctrine is severely stripped of its utility because courts often defer a government defendant's claim of sincerity.[110] Therefore, scholars have indicated that the Court's decision in *Buckhannon*, which leaves the voluntary cessation doctrine as a last defense, "encourages 'strategic capitulation,' makes settlement more difficult, and discourages attorneys from representing civil rights plaintiffs," which "herald[s] a shift away from private rights enforcement toward more government power both to resist rights claims and to control the meaning of civil rights."[111]

Finally, research has established that the prototypical case arising under a civil rights statute involves an indigent plaintiff with no damage claims from which an attorney could draw its fee.[112] While some civil rights plaintiffs may seek monetary damages that are significant to them, these damages are far less than the cost of litigating their claims.[113] Further, the doctrine of sovereign immunity has made recovering damages particularly difficult in civil rights claims against state actors and government defendants.[114] Therefore, the prospect of being awarded attorney's fees under the fee-shifting provisions of civil rights statutes is thought to incentivize attorneys to bring civil rights cases on behalf of indigent plaintiffs.[115] However, without the catalyst theory, a civil rights plaintiff may receive the "precise relief" requested, yet fail to qualify as a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988—a critical civil rights statute.[116] As a result, the

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[108] NAHMOD, *supra* note 14, § 10.10.

[109] Davis & Reaves, *supra* note 21, at 335.

[110] *Id.* at 334; NAHMOD, *supra* note 14, § 10.10.

[111] *See* Albiston & Nielsen, *supra* note 20, at 1087.

[112] H.R. REP. NO. 94-1558, at 3 (1976).

[113] Hudson v. Michigan, 547 U.S. 586, 597 (2006) ("Since some civil-rights violations would yield damages too small to justify the expenses of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs.").

[114] *See* Albiston & Nielsen, *supra* note 20, at 1102–03.

[115] *Id.* at 1090.

[116] N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020).

Court's decision in *Buckhannon* has not only altered the ability for civil rights litigants to bring successful claims against a government defendant, but also has the potential to produce a chilling effect on civil rights litigation by placing a formidable barrier to an award of attorney's fees.[117]

A. *Why The Post-*Buckhannon *Shift in Focus From the Catalyst Theory to the Voluntary Cessation Doctrine Has a Particularly Detrimental Effect in Civil Rights Litigation*

The Court's decision in *Buckhannon* has drawn considerable criticism.[118] However, with the exception of the OPEN Government Act of 2007,[119] which abrogated the Court's holding in *Buckhannon* with respect to Freedom of Information Act claims,[120] Congress has yet to formally and systematically address the Supreme Court's interpretation of the phrase prevailing party.[121] To be clear; however, not all statutory fee-shifting provisions were undercut by the Court's decision in *Buckhannon*. Rather, federal courts have held that the catalyst theory still applies to environmental statutes that authorize attorney's fees awards "whenever the court determines such award is appropriate."[122] Federal courts draw this conclusion because the statutory

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[117] *See* Albiston & Nielsen, *supra* note 20, at 1124, 1127 (presenting empirical evidence that *Buckhannon* increased occurrences of "strategic capitulation").

[118] *Id.*; Landyn Wm. Rookard, *Don't Let the Facts Get in the Way of the Truth: Revisiting How* Buckhannon *and* Alyeska Pipeline *Messed up the American Rule*, 92 IND. L.J. 1247, 1248 (2017).

[119] OPEN Government Act of 2007, Pub. L. No. 110-175, § 4(a), 121 Stat. 2524 (2007).

[120] *Id.* (abrogating the *Buckhannon* proscription on the catalyst theory by reimplementing the theory in the narrow context of Freedom of Information Act claims); *see* First Amendment Coal. v. U.S. Dep't of Just., 869 F.3d 868, 875 (9th Cir. 2017); Brayton v. Off. of U.S. Trade Representative, 641 F.3d 521, 525 (D.C. Cir. 2011); Warren v. Colvin, 744 F.3d 841, 845 (2d Cir. 2014); Havemann v. Colvin, 537 F. App'x 142, 148–49 (4th Cir. 2013); Batton v. I.R.S., 718 F.3d 522, 526 n.2 (5th Cir. 2013); Cornucopia Inst. v. U.S. Dep't of Agric., 560 F.3d 673, 677 (7th Cir. 2009); Zarcon, Inc. v. N.L.R.B., 578 F.3d 892, 894 (8th Cir. 2009).

[121] *See infra* Section IV.B.

[122] *See, e.g.*, Ass'n of Cal. Water Agencies v. Evans, 386 F.3d 879, 885 (9th Cir. 2004) (allowing recovery of fees under the catalyst theory for an action brought under the Endangered Species Act of 1973); Loggerhead Turtle v. Cnty. Council of Volusia, 307 F.3d 1318, 1327 (11th Cir. 2002) (allowing recovery of fees under the catalyst theory for an action brought under the Endangered Species Act of 1973); Sierra Club v. EPA, 322 F.3d 718, 728 (D.C. Cir. 2003) (allowing recovery of fees under the catalyst theory in an action brought under the Clean Air Act). For a discussion of *Buckhannon* in the context of environmental litigation, *see* Marisa L. Ugalde, *The Future of Environmental Citizen Suits After* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, 8 ENVTL. LAW. 589, 597 (2002).

language differs from the prevailing party provision interpreted in *Buckhannon*.[123]

Despite the exception to the rule for various environmental statutes, the Court's decision in *Buckhannon* has unequivocally removed the catalyst theory as a potential avenue to an attorney's fees award under many crucial civil rights statutes like 42 U.S.C. § 1988.[124] Without the catalyst theory, defendants faced with a strong claim of injunctive relief, backed by the bite of paying attorney's fees, are now able to moot a plaintiff's claim and avoid paying attorney's fees, by providing the requested relief before a ruling on the merits. [125] This litigation maneuver poses a severe risk to civil rights enforcement by imposing a substantial obstacle to obtaining attorney's fees. Indeed, without the prospect of attorney's fees, many civil rights claims lack the financial incentives sufficient to interest private attorneys.[126] For example, civil rights plaintiffs often seek nonmonetary relief, such as institutional reform or a change in policy. While some civil rights plaintiffs may seek monetary damages that are significant to them, these damages are far less than the cost of litigating their claims.[127] In addition, given the doctrine of sovereign immunity, damages are frequently unavailable in civil rights claims against state actors.[128] Thus, federal fee-shifting statutes provide the prospect of attorney's fees recovery, and therefore create an enforcement mechanism for the nation's civil rights laws by incentivizing attorneys to bring civil rights cases on behalf of indigent plaintiffs. However, without the catalyst theory, a civil rights plaintiff may receive the "precise relief" requested, yet fail to qualify as a prevailing party entitled to attorney's fees under 42 U.S.C. § 1988.[129] Therefore, the Court's decision in *Buckhannon* carries the potential to produce a chilling effect on civil rights litigation, by placing a formidable barrier to an award of attorney's fees.[130]

As a result of *Buckhannon*, plaintiff-lawyers seeking attorney's fees must invoke certain exceptions to the mootness doctrine to avoid the negative

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[123] *See* NAHMOD, *supra* note 14, § 10.10.

[124] *Id.*

[125] *See* Albiston & Nielsen, *supra* note 20, at 1124, 1127 (presenting empirical evidence that *Buckhannon* increased occurrences of "strategic capitulation").

[126] *Id.* at 1090.

[127] Hudson v. Michigan, 547 U.S. 586, 597 (2006) ("Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs.").

[128] *See* Albiston & Nielsen, *supra* note 20, at 1102.

[129] N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020).

[130] *See* Albiston & Nielsen, *supra* note 20, at 1124, 1127 (presenting empirical evidence that *Buckhannon* increased occurrences of "strategic capitulation").

effects of a defendant's strategic capitulation.[131] Consequently, the debate in this category of cases, which once centered over the catalyst theory of prevailing party status, now centers around the voluntary cessation doctrine and various exceptions to the jurisdictional bar of mootness.[132]

B. *The Voluntary Cessation Doctrine and Civil Rights Litigation: Government Defendants*

The *Buckhannon* majority claimed that empirical evidence had yet to show that strategic capitulation posed a serious risk of manufactured mootness in light of the voluntary cessation doctrine.[133] However, empirical evidence that has developed since the *Buckhannon* decision called the Court's empirical assumptions into question.[134] In fact, modern data indicates that the voluntary cessation doctrine is not applied in a consistent manner, which has diminished the doctrine's ability to deter manufactured mootness.[135] In addition, modern data establishes that, when the voluntary cessation doctrine is against government defendants, the doctrine is severely stripped of its utility because courts often defer a government defendant's claim of sincerity.[136] As a result, modern data undercuts the majority's assumption in *Buckhannon* that strategic capitulation did not pose a serious risk of manufactured mootness in light of the voluntary cessation doctrine.[137]

Even worse, the *Buckhannon* decision may have a more chilling effect on public interest and civil rights litigation because plaintiffs that seek injunctive relief against government defendants appear to be the most vulnerable to strategic capitulation. For example, government defendants often seek to avoid creating adverse precedent that will preclude desired policy ends. Thus, even if that means losing a few battles to still win the war, government defendants will frequently seek to avoid creating an adverse precedent.[138] One

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[131] *See* Buckhannon Bd. & Care Home, Inc. v. W. Va Dep't of Health & Hum. Res., 532 U.S. 598, 607–08 (2001); Michael Ashton, Note, *Recovering Attorneys' Fees with the Voluntary Cessation Exception to Mootness Doctrine after* Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2002 WIS. L. REV. 965, 972 (2002).

[132] Ashton, *supra* note 131, at 981.

[133] *Buckhannon*, 532 U.S. at 608.

[134] *See id.* at 608; Ashton, *supra* note 131, at 967–68.

[135] Davis & Reaves, *supra* note 21, at 333.

[136] *Id.*

[137] *Buckhannon*, 532 U.S. at 608.

[138] *See* Guzzi v. Thompson, 470 F. Supp. 2d 17, 19–20 (D. Mass. 2007) (discussing that a prisoner filed a civil-rights action challenging the denial of a kosher diet, however, Massachusetts succeeded in mooting the case by giving only the plaintiff kosher meals and avoided the prospect of a systemic change in policy).

tool in their arsenal is a mid-litigation change in the law specifically designed to moot a concerning case. Evidence shows that government defendants employ this tool with some frequency, especially after *Buckhannon*, because federal courts have consistently entitled government defendants to a presumption of good faith[139] and special solicitude when reviewing a government defendant's strategic capitulation under the voluntary cessation doctrine.[140]

For example, under the voluntary cessation doctrine, "a defendant's voluntary cessation of a challenged practice" ordinarily "'does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'"[141] While the Supreme Court described this standard as a "heavy burden" placed onto the party asserting mootness,[142] when the defendant has been a government entity whose voluntary cessation consists of changing a challenged law or policy, some lower federal courts have required the plaintiff to show that it is "virtually certain" that the old law or policy "will be reenacted."[143] As voluntary cessation precedent shows, civil rights litigants who bring suit against government defendants are forced to undertake an unpredictable debate of mootness, which costs plaintiffs a substantial amount of attorney's fees, therefore acting as an ever-larger financial disincentive to litigating important but expensive civil rights claims. As a result, when the voluntary cessation doctrine is applied against government defendants, the doctrine is severely stripped of its utility, and a recent example of this is *New York State Rifle & Pistol Association v. City of New York*.

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[139] Sossamon v. Lone Star State of Tex., 560 F.3d 316, 325 (5th Cir. 2009); Amawi v. Paxton, 956 F.3d 816, 821 (5th Cir. 2020); Speech First, Inc. v. Killeen, 968 F.3d 628, 646 (7th Cir. 2020); Texas v. Azar, 476 F. Supp. 3d 570, 575 (S.D. Tex. 2020).

[140] Albiston & Nielsen, *supra* note 20, at 1112 n.140 (collecting cases); *see, e.g.*, Steven B. Dow, *Navigating Through the Problem of Mootness in Corrections Litigation*, 43 CAP. U. L. REV. 651, 675 & n.238–46 (2015) (collecting cases); Ashton, *supra* note 131, at 969 ("[T]he voluntary cessation exception most likely will not be applied to government defendants . . . ."). Davis & Reaves, *supra* note 21, at 333.

[141] *Buckhannon*, 532 U.S. at 609 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)); *see also* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982).

[142] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 719 (2007).

[143] Teague v. Cooper, 720 F.3d 973, 977 (8th Cir. 2013) (quoting Native Vill. of Noatak v. Blatchford, 38 F.3d 1505, 1510 (9th Cir. 1994)).

C. New York State Rifle & Pistol Association v. City of New York

Following *Heller*,[144] the Court had not addressed a major gun rights case for almost ten years; however, the Court was prepared to address a restrictive gun regulation in *New York State Rifle & Pistol Association v. City of New York*[145] (*NYSR&PA*). Before reaching the Supreme Court, lower courts examined the former version of the gun regulation at the center of *NYSR&PA*.[146] The former version heavily restricted licensed gun owners from transporting their licensed handguns throughout the City of New York (City) for the purpose of taking them to shooting ranges or shooting competitions outside of the City's limits.[147] In addition, the former version did not include any provision allowing licensed holders to transport licensed handguns to a second home outside of the City's limits.[148] Due to these restrictions, three individuals, along with the New York State Rifle & Pistol Association (Petitioners), brought suit against the City and the New York Police Department License Division (NYPD).[149] The Petitioners collectively sought an injunction against the enforcement of the statute, along with a request for attorney's fees pursuant to 42 U.S.C. § 1988.[150] However, the City vigorously defended the constitutionality of this ordinance through five years of litigation, winning in both the Southern District of New York[151] and the Second Circuit[152] on all substantive grounds.

When the Supreme Court granted certiorari to review *New York State Rifle & Pistol Ass'n*,[153] the Court set out to determine specifically "[w]hether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits [wa]s consistent with the Second

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[144] District of Columbia v. Heller, 554 U.S. 570 (2008).

[145] N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020).

[146] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 86 F. Supp. 3d 249, 268 (S.D.N.Y. 2015); N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 68 (2d Cir. 2018).

[147] Brief of Respondents at 22–23, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280).

[148] *Id.*

[149] *See generally* Amended Complaint at 1, N.Y. State Rifle & Pistol Ass'n v. City of New York, 86 F. Supp. 3d 249 (S.D.N.Y. 2013) (No. 13 Civ. 2115).

[150] *See generally id.* at 19.

[151] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 86 F. Supp. 3d 249, 268 (S.D.N.Y. 2015).

[152] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 68 (2d Cir. 2018).

[153] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

Amendment, the Commerce Clause, and the constitutional right to travel."[154] However, after granting certiorari, the Court shifted its focus onto the jurisdictional bar of mootness stemming from two post certiorari changes in the law.[155] In fact, a controversial amicus brief asserted that if the Court did not dismiss the case as moot, that decision would justify congressional efforts to restructure the Court.[156] Consequently, the central issue in *NYSR&PA* was no longer whether New York City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits was consistent with the Second Amendment. Instead, the Court was forced to consider whether the first major Second Amendment case to reach the Supreme Court in over a decade was justiciable.[157]

Scholars have indicated that the City's efforts to moot the case were not the product of a change of heart, but rather of a carefully calculated effort to frustrate the Court's review.[158] The City never admitted that it changed its regulation because of any newfound recognition that the old rule was wrong or unlawful rather, the City continued to defend the old ordinance on the merits.[159] Nonetheless, the City urged the Court to find the case moot due to its post-certiorari changes in law and the supposed presumption that a government defendants' mid-litigation changes to the law were undertaken in good faith and intended to be permanent.[160] The City further argued that

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[154] Petition for Writ of Certiorari at 6, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280).

[155] N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020) ("After we granted certiorari, the State of New York amended its firearm licensing statute, and the City amended the rule so that petitioners may now transport firearms to a second home or shooting range outside of the city."). *See generally* N.Y. PENAL LAW § 400.00(6) (Consol. 2022); N.Y. COMP. CODES R. & REGS. tit. 38, § 5-23(a)(3) (2022).

[156] *See* Brief of Senators Sheldon Whitehouse et al. as Amici Curiae in Support of Respondents at 17, 23, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280) (asserting that if the Court did not dismiss the case as moot, it would reveal itself as merely a tool of "the big funders, corporate influencers, and political base of the Republican Party" and justify congressional efforts to "restructure" the Court).

[157] The last major Second Amendment case to reach the Supreme Court, prior to NYSR&PA, was decided by the Court in 2010. *See* McDonald v. Chicago, 561 U. S. 742 (2010). The Court's per curium opinion in NYSR&PA, the first major Second Amendment case to reach the Court after *McDonald*, focused solely on whether the petitioners' claim was moot. *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020).

[158] Davis & Reaves, *supra* note 21, at 327–28 n.16.

[159] *See* Brief of Respondents, *supra* note 147, at 7 (defending what the City now calls the "former rule" on all substantive grounds).

[160] Response to Suggestion of Mootness at 17–20, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280). *See also* Brief of Senators Sheldon

the "Court has long treated a governmental defendant's change in law as falling *beyond the reach of the voluntary cessation doctrine*."[161] And that "'[a]ll the circuits to address the issue' also have agreed that a change in law 'moots a plaintiff's injunction request' because governmental entities are presumed to make such changes without any intent to revert to prior law."[162] In response, scholars pointed the Court to the voluntary cessation doctrine as an exception to mootness,[163] and urged the Court to reaffirm the doctrine's important procedural protection; however, the Court's opinion wholly dodged the doctrine's application.[164]

IV. SOLUTION

The solution to the inability of the voluntary cessation doctrine deterring a government defendant's strategic capitulation, is reimplementing the catalyst theory. Without the catalyst theory, there is little to no financial risk of paying attorney's fees—a penalty that deters litigants from engaging in strategic capitulation. As a result, potentially important public litigation may come to frustratingly anticlimactic conclusions as evinced in *NYSR&PA*. Alternatively, under the catalyst theory a defendant is deterred from strategic capitulation by the prospect of paying attorney's fees despite engaging in a voluntary and potentially unnecessary change in conduct. Scholars have called the Supreme Court to reimplement the catalyst theory by overruling, or reexamining *Buckhannon*.[165] However, the "special force" attached to statutory stare decisis combined with widespread reliance on *Buckhannon* makes reversal highly unlikely.[166] Congressional response to *Buckhannon*,

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Whitehouse et al., *supra* note 156, at 17, 23 (asserting that if the Court did not dismiss the case as moot, it would reveal itself as merely a tool of "the big funders, corporate influencers, and political base of the Republican Party" and justify congressional efforts to "restructure" the Court).

[161] Suggestion of Mootness at 24, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280) (emphasis added).

[162] *Id.*

[163] *See* City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 & n.10 (1982); Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 661–62 (1993).

[164] Davis & Reaves, *supra* note 21, at 325.

[165] *Id.*

[166] In a case involving a suit by a prisoner and his fiancé alleging a violation of their constitutional right to marry, the Sixth Circuit applied *Buckhannon* retroactively to the case before it and held that the plaintiffs were not entitled to attorney's fees. Toms v. Taft, 338 F.3d 519, 528–30 (6th Cir. 2003). They obtained only a voluntary change in defendants' conduct but not a judgment on the merits or a court-ordered consent decree. *See id.* In another case, the plaintiff sued a state highway patrolman, among others, alleging violations

however, is a hopeful alternative that would potentially reimplement the catalyst theory. Instead of forcing prospective civil rights plaintiffs to fight a taxing and unpredictable battle of mootness, without the deterrent of the catalyst theory, a new statute defining prevailing party would deter strategic capitulation, circumvent the unpredictable mootness debate, and altogether promote civil rights enforcement.

A. *The "Special Force" of Statutory Stare Decisis*

Due to the "special force" attached to statutory stare decisis, a solution to the overall issue of strategic capitulation, post-*Buckhannon*, will more than likely need to derive from congressional action rather than judicial reinterpretation. While the Court is relatively willing to overrule constitutional precedent, because in that context the Court considers "correction through legislative action [as] practically impossible,"[167] several Justices on the Court have given cases "interpreting statutes special protection from overruling."[168] Rather, in the context of statutory precedent, the Supreme Court insists that a party advocating the abandonment of a statutory interpretation bears a greater burden.[169] The Court claims that stare decisis has "special force" in statutory precedent,[170] which it gains "from the principle of legislative supremacy—the belief that Congress, rather than the Supreme Court, bears primary responsibility for shaping policy through statutory law."[171]

The Supreme Court's cases and the literature discussing the "special force" of statutory stare decisis offer two explanations for the Supreme Court's statutory stare decisis practice. One explanation for the Court's special force behind statutory stare decisis is that the doctrine reflects deference to Congress's wishes.[172] This deference typically occurs through an

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of her constitutional rights in connection with an investigation of alleged child neglect by the plaintiff. Coates v. Powell, 639 F.3d 471, 474–75 (8th Cir. 2011). The plaintiff entered into a private settlement with the patrolman and then sought attorney's fees, which the district court denied on the ground that she was not a prevailing party under *Buckhannon*. *Id.* Affirming, the Eighth Circuit observed that the district court had taken no action that judicially sanctioned or materially altered the relationship of the parties. *See id.* at 474–75.

[167] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

[168] Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005).

[169] Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) ("[T]he burden borne by the party advocating abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction.").

[170] *Id.*

[171] Barrett, *supra* note 168, at 317.

[172] *Id.*

interpretation of congressional silence following the Supreme Court's interpretation of a statute as acquiesence or approval of the Court's interpretation.[173] The argument is, "[i]f Congress had disagreed with the Supreme Court's interpretation . . . Congress would have amended the statute to reflect its disagreement. By failing to amend the statute, Congress signals its acquiescence in the Supreme Court's approach."[174] A second explanation for the heightened stare decisis in statutory cases is a means of honoring legislative supremacy, or the separation of powers.[175] The argument is, "in our Constitution's separation of powers, policymaking is an aspect of legislative, rather than judicial, power. Because statutory interpretation inevitably involves policymaking, it risks infringing upon legislative power, and consequently, the Supreme Court should approach the task with caution."[176] While the Court cannot avoid interpreting a statute the first time a statutory ambiguity is presented to the Court, "the Supreme Court's refusal to revisit a statutory interpretation is a means of shifting policymaking responsibility back to Congress, where it belongs."[177]

Here, both explanations for a heightened stare decisis apply to the Court's precedent in *Buckhannon*, and therefore effectively requires congressional action rather than judicial reinterpretation. In fact, outside of the OPEN Government Act of 2007,[178] the Court's 2001 interpretation of the phrase "prevailing party" in the Fair Housing Act[179] and the Americans with

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[173] *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 792 (1998); Burlington Indus. v. Ellerth, 524 U.S. 742, 763–64 (1998); Ankenbrandt v. Richards, 504 U.S. 689, 700–01 (1992); Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 202 (1991); United States v. Johnson, 481 U.S. 681, 686–87 n.6 (1987); Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987); Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 421–24 (1986); S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 55 n.18 (1985); Flood v. Kuhn, 407 U.S. 258, 281–84 (1972); Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 n. 7 (1940). *See generally* John Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737, 741–54 (1985); Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 IND. L.J. 515 (1982).

[174] Barrett, *supra* note 168, at 317.

[175] *See* Neal v. United States, 516 U.S. 284, 295–96 (1996); Boys Mkts., Inc. v. Retail Clerks Union, 398 U.S. 235, 255–61 (1970) (Black, J., dissenting); Francis v. S. Pac. Co., 333 U.S. 445, 450 (1948); Douglass v. Cnty. of Pike, 101 U.S. 677, 687 (1880).

[176] Barrett, *supra* note 168, at 317.

[177] *Id.*

[178] OPEN Government Act of 2007, Pub. L. No. 110-175, § 4(a), 121 Stat. 2524 (2007).

[179] 42 U.S.C. § 3613(c)(2) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . .").

Disabilities Act[180] has not been addressed directly by Congress. This long period of congressional silence confirms the "special force" of statutory stare decisis surrounding the Court's decision in *Buckhannon*. Moreover, an argument for honoring legislative supremacy would direct the Court to avoid revisiting and reinterpreting the phrase "prevailing party" as a means of shifting the policymaking responsibility back to Congress, "where it belongs."[181] As a result, statutory stare decisis effectively requires congressional action rather than judicial reinterpretation.

B. *Congress Reestablishing the Catalyst Theory*

Congressional response to reimplement the pre-*Buckhannon* catalyst theory is a relatively easy task. In *First Amendment Coalition v. United States DOJ*,[182] the Ninth Circuit joined several other Circuit Courts of Appeals in determining that the OPEN Government Act of 2007[183] reinstated the pre-*Buckhannon* catalyst theory of recovery with regards to Freedom of Information Act (FOIA) claims.[184] Prior to the 2007 amendment, the FOIA, specifically Section 552(a)(4)(E) of Title 5 of the United States Code, stated that "the court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."[185] The 2007 amendment added the following: "(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either[:]" (1) "a judicial order, or an enforceable written agreement or consent decree; or" (2) "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."[186]

While many lower federal courts have interpreted the 2007 Amendment to the FOIA as reimplementing the pre-*Buckhannon* catalyst theory, the Amendment still only reaches as far as FOIA claims. Outside of the OPEN

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[180] 42 U.S.C. § 12205 ("[T]he court or agency, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses . . . .").

[181] Barrett, *supra* note 168, at 317.

[182] *See* First Amendment Coal. v. U.S. Dep't of Just., 869 F.3d 868 (9th Cir. 2017).

[183] OPEN Government Act of 2007, Pub. L. No. 110-175, § 4(a), 121 Stat. 2524 (2007).

[184] The Ninth Circuit joined the Second, Fourth, Fifth, Seventh, Eighth, and the D.C. Circuits. *See* Brayton v. Off. of U.S. Trade Representative, 641 F.3d 521 (D.C. Cir. 2011); Warren v. Colvin, 744 F.3d 841 (2d Cir. 2014); Havemann v. Colvin, 537 F. App'x 142 (4th Cir. 2013); Batton v. I.R.S., 718 F.3d 522 (5th Cir. 2013); Cornucopia Inst. v. U.S. Dep't of Agric., 560 F.3d 673 (7th Cir. 2009); Zarcon, Inc. v. N.L.R.B., 578 F.3d 892 (8th Cir. 2009).

[185] 5 U.S.C. § 552(a)(4)(E).

[186] *Id.*

Government Act of 2007,[187] Congress has not systematically and formally addressed the Court's overall interpretation of a prevailing party in *Buckhannon*, which has not been cabined in to the statutory provisions at issue in *Buckhannon*.[188] To be clear, however, not all statutory fee-shifting provisions have been undercut by the Court's proscription in *Buckhannon*. Rather, federal courts have held that the catalyst theory still applies to environmental statutes that authorize attorney's fees awards "whenever the court determines such award is appropriate."[189] Federal courts have drawn this conclusion because the statutory language differs from the prevailing party provision interpreted in *Buckhannon*.[190]

The common factor between each maneuver around the Court's proscription in *Buckhannon* is a distinction in statutory language, or an amendment to an existing fee-shifting provision by Congress. Considering the special force of statutory stare decisis, and the principle of legislative supremacy—the belief that Congress, rather than the Supreme Court, bears primary responsibility for shaping policy through statutory law—it is not surprising that the Court has refrained from reshaping the interpretation of federal fee-shifting statutes laid out in *Buckhannon*, but have accepted a reinterpretation prompted by a congressional amendment. This Note therefore proposes congressional action to reach a preferred judicial reinterpretation of the term prevailing party as used in federal fee-shifting statutes.

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[187] *See* OPEN Government Act of 2007, Pub. L. No. 110-175, § 4(a), 121 Stat. 2524 (2007).

[188] Scholars have noted that the Court's decision in *Buckhannon* applies to nearly every federal fee-shifting statute. Richard L. Gibson, *Redefining the Civil Rights Attorney's Fees Award Act:* Buckhannon Board and Care Homes *and the End of the Catalyst Theory*, 52 CATH. U. L. REV. 207 (2003). Senator Russ Feingold has twice proposed legislation to change the definition of "prevailing party" in all federal legislation, but both bills died in committee. *See* Settlement Encouragement and Fairness Act, S. 3161, 107th Cong. (2002) (died in the judiciary committee); Settlement Encouragement and Fairness Act, S. 1117, 108th Cong. (2003) (incorporating into the Civil Rights Act of 2004, S. 2088, 108th Cong. (2004), which died in the Committee on Health, Education, Labor, and Pensions).

[189] *See, e.g.*, Ass'n of Cal. Water Agencies v. Evans, 386 F.3d 879, 881 (9th Cir. 2004) (allowing recovery of fees under the catalyst theory for an action brought under the Endangered Species Act of 1973); Loggerhead Turtle v. Cnty. Council of Volusia, 307 F.3d 1318, 1327 (11th Cir. 2002) (allowing recovery of fees under the catalyst theory for an action brought under the Endangered Species Act of 1973); Sierra Club v. EPA, 322 F.3d 718, 728 (D.C. Cir. 2003) (allowing recovery of fees under the catalyst theory in an action brought under the Clean Air Act). For a discussion of *Buckhannon* in the context of environmental litigation, *see,* Marisa L. Ugalde, *The Future of Environmental Citizen Suits After* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources, 8 ENVTL. LAW. 589 (2002).

[190] *See* NAHMOD, *supra* note 14, § 10.10.

C. *Proposed Statute to Resestablish the Catalyst Theory*

The OPEN Government Act of 2007 has already laid considerable groundwork in reversing the effects of *Buckhannon* as the statute has been interpreted by lower courts as reimplementing the pre-*Buckhannon* catalyst theory.[191] As a result, ensuring that new congressional statutes secure a catalyst interpretation appears to be a relatively easy task. In fact, the easiest way to secure widespread reinterpretation and ensure the use of the catalyst theory for civil rights litigation is to amend 42 U.S.C. § 1988 against the backdrop of the OPEN Government Act of 2007. For example, an effective amendment to 42 U.S.C. § 1988, which draws upon the language of the OPEN Government Act of 2007,[192] as well as Justice Ginsburg's dissent in *Buckhannon*[193] would be to add in the language:

> For purposes of this section, a 'prevailing party' is: (1) a party who has obtained relief through either a judicial order, or an enforceable written agreement or consent decree; or (2) a party whose pursuit of a nonfrivolous claim was the catalyst for a voluntary or unilateral change in position by the opposing party that provides the practical relief sought.

This language not only incorporates the successful OPEN Government Act of 2007 language, but forecloses the possibility for a court to require a showing of the complainant being provided the primary relief sought, as opposed to the practical relief sought.[194]

1. The Catalyst Theory: Primary Relief Sought v. Practical Relief Sought

The Supreme Court has indicated that under the pre-*Buckhannon* catalyst theory, the degree of the plaintiff's success, in relation to the other goals of the lawsuit, is a factor critical to determining the *amount* of a reasonable fee, not the *eligibility* for a fee award.[195] Instead, the Court reiterated the rule that it previously enunciated in *Hensley v. Eckerhart*—the plaintiff does not need to achieve the primary relief sought.[196] Despite this, some federal and state

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[191] *See supra* Section IV.B.

[192] OPEN Government Act of 2007, Pub. L. No. 110-175, § 4(a), 121 Stat. 2524 (2007).

[193] Buckhannon Bd. & Care Home, Inc. v. W. Va Dep't of Health & Hum. Res., 532 U.S. 604, 622, 629 (2001) (Ginsburg, J., dissenting).

[194] *See* Taylor v. Ft. Lauderdale, 810 F.2d 1551 (11th Cir. 1987); Sullivan v. Pa. Dep't of Lab. & Indus., 663 F.2d 443 (3d Cir. 1981); Robinson v. Kimbrough, 652 F.2d 458 (5th Cir. 1981); Waterman v. Farmer, 84 F. Supp. 2d 579 (D.N.J. 2000).

[195] Hensley v. Eckerhart, 461 U.S. 424, 432 (1983).

[196] *Id.* at 440.

courts incorporated a test into the analysis of the catalyst theory which requires that the plaintiff receive the primary relief sought.[197]

For example, California courts use the "primary relief sought" rule, after retaining the catalyst theory post *Buckhannon*. California Code of Civil Procedure § 1021.5 allows fees to a successful party "in any action which has resulted in the enforcement of an important right affecting the public interest."[198] To be eligible for fees under this statute, California law does not require a "judicially recognized change in the legal relationship between the parties."[199] Instead, California allows attorney's fees to be granted under the "catalyst theory."[200] Under California law, the catalyst theory requires a plaintiff to establish various elements, including that "the lawsuit was a catalyst motivating the defendants to provide the primary relief sought."[201] To meet this element, "a plaintiff must establish the precise factual/legal condition that [she] sought to change or affect."[202] The issue here is that reimplementing the catalyst theory and requiring the *primary* factual or legal condition sought, as California has, does not fully foreclose the potential of selective mooting or strategic capitulation. However, by requiring the *practical* relief sought under the catalyst theory, selective mooting poses a relatively low risk for plaintiffs' attorneys; even if plaintiffs do not win or settle, the attorneys may recover their fees if the defendants make some substantial or practical change based on the requested relief.[203]

One case in particular, *Gordon v. Tootsie Roll Industries, Inc.*,[204] is a clear indication of the issue in requiring the primary relief sought to be shown, rather than allowing a showing of practical relief. In *Gordon*, the Ninth Circuit held that the first element of California's catalyst theory test[205] was not satisfied because the change in conduct by the defendant, Tootsie Roll,

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[197] *Taylor*, 810 F.2d at 1555–56; *Sullivan*, 663 F.2d at 449; *Robinson*, 652 F.2d at 465; *Waterman*, 84 F. Supp. 2d at 583–84.

[198] CAL. CIV. PROC. CODE § 1021.5 (West 1993).

[199] Tipton-Whittingham v. City of Los Angeles, 101 P.3d 174, 177 (Cal. 2004).

[200] *Id.*

[201] *Id.*

[202] Graham v. DaimlerChrysler Corp., 101 P.3d 140, 155 (Cal. 2004).

[203] Buckhannon Bd. & Care Home, Inc. v. W. Va Dep't of Health & Hum. Res., 532 U.S. 604, 634 (2001) (Ginsburg, J., dissenting).

[204] Gordon v. Tootsie Roll Indus., 810 F. App'x 495 (9th Cir. 2020).

[205] The test is: (1) "the lawsuit was a catalyst motivating the defendants to provide the primary relief sought"; (2) the lawsuit had merit; and (3) the plaintiff attempted to settle the claim prior to filing the lawsuit. *Id.* at 496 (quoting Tipton-Wittingham v. City of Los Angeles, 101 P.3d 174, 177 (Cal. 2004)); *accord Tipton-Wittingham*, 101 P.3d at 177.

did not give the plaintiff "the primary relief sought."[206] The plaintiff brought a consumer action challenging alleged slack-fill in boxes of Junior Mints and Sugar Babies.[207] The plaintiff alleged that Tootsie Roll's candy boxes were misleading because of the amount of candy inside the package was disproportionate to the size of the box.[208] The plaintiff's "theory of the case was that the size of the box itself was misleading and that Tootsie Roll should either 'fill the Products' box with more candy . . . or shrink the box to accurately represent the amount of candy product therein.'"[209] Additionally, the plaintiff "expressly disclaimed" throughout the litigation that a change in product labeling would remedy her grievances.[210] Statements from the plaintiff indicated that "net weight and serving disclosures [were] simply irrelevant to the issue" and that adding additional information on the label was a "red herring."[211] However, during litigation, Tootsie Roll did just that. Tootsie Roll added the words "ACTUAL SIZE" to the front panel of the boxes under the depiction of the candy contained inside, stated on the panel the number of pieces inside, and moved several words from the back to the front of the box.[212] The court noted that these changes were sufficient to moot the plaintiff's claim without triggering a catalyst award because the plaintiff did not seek relief in the form of a label change, but rather a box size change.[213] Here, *Gordon* shows that under a primary relief sought test, it is still possible to easily undercut the plaintiff's claim without triggering a catalyst fees award. *Gordon* also illustrates that under a primary relief sought test, defendants faced with a claim for injunctive relief will explore changes that are not precisely the relief the plaintiff is seeking, but may still render the injunctive relief claim effectively moot.

D. *New Statute Applied to* NYSR&PA

If Congress passed the proposed amendment to § 1988, detailed in Section III.C of this Note, *NYSR&PA* would have reached a different outcome. The amendment would define prevailing party as:

> (1) a party who has obtained relief through either a judicial order, or an enforceable written agreement or consent

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206 *Gordon*, 810 F. App'x at 496.

207 *Id.*

208 *Id.* at 497.

209 *Id.*

210 *Id.*

211 *Id.*

212 *Gordon*, 810 F. App'x at 496–97.

213 *Id.*

> decree; or (2) a party whose pursuit of a nonfrivolous claim was the catalyst for a voluntary or unilateral change in position by the opposing party that provides the practical relief sought.

Under this amendment, the government litigants might have predicted that the petitioner would be considered a prevailing party as a result of their change in conduct, and would have been more hesitant to voluntarily cease the alleged unlawful conduct due to the threat of paying attorney's fees. Rather, the government litigants, who won at the trial level and on direct appeal, would have placed their bets on winning at the Supreme Court. However, without a definition of prevailing party, thus securing the use of the catalyst theory, there is little to no financial risk of paying attorney's fees. Therefore, litigants such as New York City in *NYSR&PA* will not be deterred from engaging in strategic capitulation. As a result, government defendants may rather strategically moot a case than face a potentially disruptive Supreme Court mandate. Therefore, potentially important public litigation may come to frustratingly anticlimactic conclusions, as evinced in *NYSR&PA*,[214] because government defendants may seek to avoid creating adverse precedent that will preclude desired policy ends. Thus, even if that means losing a few battles to win the war, government defendants will frequently seek to manufacture mootness to avoid creating an adverse precedent,[215] and evidence shows that government defendants have frequently manufactured mootness, especially after *Buckhannon* dissolved the catalyst theory. [216]

For example, in *NYSR&PA*, the City's gun law likely resembled a particular policy goal of the City.[217] Moreover, this policy goal in the form of a restrictive gun law previously won substantively on the merits at both the district and

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[214] N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1526 (2020).

[215] A prisoner filed a civil rights action challenging the denial of a kosher diet. *See* Guzzi v. Thompson, 470 F. Supp. 2d 17, 19–20 (D. Mass. 2007). Here, Massachusetts succeeded in mooting the case by giving only the plaintiff kosher meals and avoided the prospect of a systemic change in policy. *Id.*

[216] Albiston & Nielsen, *supra* note 20, at 1112 & n.140 (collecting cases); *see, e.g.*, Dow, *supra* note 140, at 675 & n.238–46 (collecting cases); Ashton, *supra* note 131, at 969 ("[T]he voluntary cessation exception most likely will not be applied to government defendants . . . .").

[217] The gun law refered to here is the original ordinance that prohibited law-abiding New Yorkers with a license to keep a handgun in the home (a "premises license") from taking that weapon to a firing range outside the City. N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525, 1530 (2020) (Alito, J., dissenting).

circuit level.[218] Thus, the City would have been more likely to litigate the merits of the issue on certiorari, rather than voluntarily change its desired policy ends without judicial direction to do so. Additionally, the City would have been more likely to litigate on the merits, not only to potentially avoid a required change in law, but to avoid paying attorney's fees if not required to do so. Rather, after *Buckhannon* and without the catalyst theory, it encouraged and incentivized the government defendant in *NYSR&PA* to voluntarily moot its opponent's claim.

Indeed, after a grant of certiorari, the City faced an inevitable ruling on the merits of its gun law and potential decree formally requiring the City to change its desired policy ends. If the Supreme Court, after ruling on the merits, found for the plaintiff, the City would have been required to change its law per the Court's direction and pay attorney's fees. However, if the City could mildly change its law at its own discretion without guidance from the Court, and avoid paying attorney's fees while doing so, it is clear which outcome the City would pick. Further, not only is there a financial incentive for the City to moot its opponent's case, and avoid paying attorney's fees, but also a policy incentive. That is, the City could change the law mildly enough to moot the case before the Court requires the City's desired policy-ends to change even further than the government defendant would have outside of a ruling on the merits. By choosing to selectively moot this concerning case, the City chose to willingly lose the battle to win the war.

It is not surprising, therefore, that the City chose to implement a mild change in the law rather than litigate the issue on the merits. What is surprising, however, is despite an indication that the voluntary cessation doctrine would be applied to stop the case from falling under the jurisdictional bar of mootness,[219] the Court wholly dodged the application of the doctrine. Thus, while the Court in *Buckhannon* concluded that the voluntary cessation doctrine would replace the catalyst theory and deter strategic capitulation, *NYSR&PA* stands as empirical evidence of: (1) the unpredictable use of the voluntary cessation doctrine as applied to government defendants, and (2) the doctrine's inability to truly deter strategic capitulation post *Buckhannon*.

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[218] *See* N.Y. State Rifle & Pistol Ass'n v. City of New York, 86 F. Supp. 3d 249, 268 (S.D.N.Y. 2015); N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 68 (2d Cir. 2018).

[219] Davis & Reaves, *supra* note 21, at 340 (discussing how the facts of *NYSR&PA* implicate application of the voluntary cessation doctrine).

V. CONCLUSION

The *Buckhannon* decision to dissolve the catalyst theory has drawn considerable criticism. In dissolving the catalyst theory, the Court dismissed concerns that the threat of strategic capitulation may disincentivize future plaintiffs from bringing suit with meritorious, but expensive, claims. Critics were right to fear that the Court's decision would pose a severe risk to civil rights enforcement by imposing a substantial obstacle to obtaining attorney's fees, and that without the prospect of attorney's fees, many civil rights claims would lack the financial incentives sufficient to interest private attorneys. However, finding these concerns to be speculative and unsupported by any empirical evidence, the Court dismantled the theory by concluding that a defendant's strategic capitulation lacks sufficient judicial imprimatur to render a litigant a prevailing party entitled to attorney's fees.

Although the Court provided various reasons for dismantling the catalyst theory, the Court not only noted that there was a lack of empirical evidence of strategic capitulation posing a risk to litigants without the catalyst theory, but that the voluntary cessation exception to the mootness doctrine would provide sufficient protection for plaintiffs from insincere changes in behavior. Since *Buckhannon*, however, empirical evidence has shown that public interest cases, such as injunctive relief against government actors (in which attorney's fees have been historically deemed an essential remedy), have been severely affected by the Court's decision in *Buckhannon*. Moreover, evidence shows that government defendants are frequently granted special solicitude in the voluntary cessation analysis, which indicates the exception's inability to truly dissuade a defendant's insincere change in behavior.

The solution to the inability of the voluntary cessation doctrine to deter strategic capitulation is to reimplement the catalyst theory. Scholars have called for the Supreme Court to reimplement the catalyst theory by overruling, or reexamining *Buckhannon*. With that said, the "special force" attached to statutory stare decisis, combined with widespread reliance on *Buckhannon*, makes reversing *Buckhannon* highly unlikely. Congressional response to *Buckhannon* is a hopeful alternative to reimplement the catalyst theory. Instead of forcing prospective civil rights plaintiffs to fight a taxing and unpredictable battle of mootness without the deterrent of the catalyst theory, a new statute defining "prevailing party" can deter strategic capitulation, circumvent the mootness debate, promote civil rights enforcement, and encourage judicial review of important issues, rather than settling for the review of mild, insincere issues of law.