No. 16-30929

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LISA ROMAIN; STACEY GIBSON; JOANIKA DAVIS; SCHEVELLI ROBERTSON; JERICHO MACKLIN; DAMEION WILLIAMS; BRIAN TRINCHARD,

Plaintiffs-Appellants,

v.

MARKETA GARNER WALTERS, in her official capacity as Secretary of Louisiana Department of Children and Family Services,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
No. 2:15-cv-06942-KDE-SS

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC.; IMPACT FUND; LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER; DISABILITY RIGHTS CALIFORNIA; IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

Michael T. Kirkpatrick
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

October 17, 2016

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT AND SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 29(c)(1), the undersigned counsel certifies that Amici Curiae Public Citizen, Inc.; Impact Fund; Legal Aid Society – Employment Law Center; and Disability Rights California; are nonprofit, non-stock corporations. They have no parent corporations, and no publicly traded corporations have an ownership interest in them.

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those already listed in Appellants' brief, have an interest in the outcome of this case.

Public Citizen, Inc. – Amicus Curiae

Public Citizen Litigation Group – law firm for Public Citizen, Inc.

Public Citizen Foundation, Inc. – nonprofit organization of which Public Citizen Litigation Group is a part

Michael T. Kirkpatrick – counsel for Amici Curiae

Allison M. Zieve – counsel for Amici Curiae

Impact Fund – Amicus Curiae

Legal Aid Society – Employment Law Center – Amicus Curiae

Disability Rights California – Amicus Curiae

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick
Attorney for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Amici Curiae submit this brief in support of Plaintiffs-Appellants, indigent food stamp recipients who brought this case to prevent unconstitutional deprivations of their benefits. Although Appellants were successful in obtaining an enforceable order requiring Defendant-Appellee to take steps to halt the threatened termination of their food stamps, the district court rejected outright their application for attorneys' fees under 42 U.S.C. § 1988, even though Appellants are prevailing parties and no special circumstances make them ineligible for fees. Amici are public interest organizations that support fee-shifting as a means of promoting access to justice. Amici are concerned that the district court's decision, if affirmed, would impede the use of fee-shifting statutes, particularly by the poor in cases seeking equitable relief, and undermine the incentive Congress created for the enforcement of federal civil rights law by private attorneys general.

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[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

Public Citizen is a non-profit, consumer advocacy organization with members and supporters nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the enforcement of a wide range of health, safety, environmental, and consumer legislation. Public Citizen has represented plaintiffs in litigation over federal fee-shifting statutes in a wide variety of cases. Public Citizen and its attorneys have filed amicus briefs or represented parties on attorneys' fee issues in cases including *Perdue v. Kenny A.*, 559 U.S. 542 (2010); *Richlin Security Service Co. v. Chertoff, Secretary of Homeland Security*, 553 U.S. 571 (2008); *Sole v. Wyner*, 551 U.S. 74 (2007); *Scarborough v. Principi*, 541 U.S. 401 (2004); and *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001).

Impact Fund is a non-profit legal foundation that provides strategic leadership and support for litigation to achieve economic and social justice. It provides funding, training, and co-counsel services to public interest lawyers across the country. The Impact Fund has served as counsel in a number of major civil rights class actions, including cases challenging lack of access for those with disabilities, wage-and-

hour violations, employment discrimination, and violations of fair housing laws.

Legal Aid Society – Employment Law Center (LAS-ELC) is a public interest legal organization that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, LAS-ELC has represented low-wage clients individually and in class actions involving a broad range of employment-related issues, including discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. The LAS-ELC's interest in preserving the protections afforded employees by antidiscrimination laws is longstanding. The LAS-ELC has appeared before the United States Supreme Court in cases involving federal fee shifting statutes, both as counsel for plaintiffs, as well as in an amicus curiae capacity. LAS-ELC has consistently recognized the importance of attorneys' fees awards to encourage and allow for the vindication of important civil rights.

Disability Rights California (formerly known as Protection and Advocacy, Inc.) is a non-profit agency established under federal law to

protect, advocate for, and advance the human, legal, and service rights of Californians with disabilities. Disability Rights California works in partnership with people with disabilities, striving towards a society that values all people and supports their rights to dignity, freedom, choice, and quality of life. Since 1978, Disability Rights California has provided essential legal services to people with disabilities. In the last year, Disability Rights California provided legal assistance on nearly 26,000 matters to individuals with disabilities, including impact litigation and direct representation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici agree with the arguments set forth by Appellants. The Stipulated Order creates the material alteration of a legal relationship necessary to establish prevailing party status for purposes of fee-shifting. App. Br. 15 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.,* 532 U.S. 598, 604 (2001)). Thus, the district court erred when it denied fees based on its determination that "no relief provided to Plaintiffs . . . is fairly attributable, to any extent, to the instant lawsuit and the efforts of Plaintiffs' counsel, rather than merely the voluntary action of the Defendant based on the announced

policy of Louisiana's (then) Governor-Elect John Bel Edwards." ROA 411. As Appellants explained, the district court erred as a matter of law by failing to apply the *Buckhannon* standard, and as a matter of fact because the Stipulated Order imposed deadlines, notice obligations, and means of enforcement that the plaintiff class would not have enjoyed absent the lawsuit and its negotiated resolution. App. Br. 15-19. The district court's determination that Appellants are not prevailing parties should therefore be reversed.

Amici also agree with Appellants' conclusion that this case presents no special circumstances that would justify a denial of fees to the prevailing parties. *See Sanchez v. City of Austin*, 774 F.3d 873, 880 (5th Cir. 2014) (explaining that a fee award is mandatory in the absence of "an extremely strong showing of special circumstances") (internal quotation marks and citation omitted). As Appellants explained in their opening brief, the record does not support application of the "did not contribute" special circumstance, because the Stipulated Order required action beyond what was pledged by the Governor-Elect. App. Br. 24-26.

Amici submit this brief to add two additional points. First, the district court's outright denial of attorneys' fees is counter to the policies

underlying fee-shifting in general, and 42 U.S.C. § 1988 in particular, especially in a case brought by indigent litigants seeking only injunctive relief. Second, the "did not contribute" special circumstance was abrogated by the Supreme Court's rejection of the catalyst theory in *Buckhannon*.

ARGUMENT

I. Fee Shifting Encourages Private Enforcement Of Civil Rights Statutes And Is Of Particular Importance Where Indigent Plaintiffs Seek Equitable Relief.

Under the generally applicable "American Rule," each party to a lawsuit pays its own legal fees. A number of statutes, however, include fee-shifting provisions to open the legal process to individuals who would not otherwise be able to afford counsel, to encourage plaintiffs to serve as private attorneys general to enforce important public policies, and to deter misconduct. Such statutes promote public interest litigation by allowing a court to order a losing party to pay the prevailing party's legal fees.

The importance of fee-shifting to encourage socially beneficial litigation was recognized by the Supreme Court in, among other cases, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Piggie*

Park was an action brought under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination by a restaurant chain. Title II, which prohibits discrimination in public accommodations, has a fee-shifting provision authorizing an award of reasonable attorneys' fees to the prevailing party, but the Fourth Circuit had instructed the district court to award fees only to the extent that the defendant's defenses had been advanced in bad faith or for improper purposes. *Id.* at 401 (citing 377 F.2d 433, 437 (4th Cir. 1967)). The Supreme Court rejected that standard, finding instead that "one who succeeds in obtaining an injunction under [Title II] should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Id.* at 402. The Court recognized that Congress included a fee-shifting provision in the statute "not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Id.* Such plaintiffs, the Court explained, act as private attorneys general to enforce the law and vindicate important public policy. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be

in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Id.*

Following the Supreme Court's endorsement of the "private attorney general" theory in *Piggie Park*, lower federal courts began to apply it as an exception to the American Rule even in the absence of a statutory provision for fee shifting. Judicial development of the doctrine was short-lived, however, because the Supreme Court held in *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 254-62 (1975), that federal courts may not award attorneys' fees under the private attorney general theory in the absence of express statutory authorization. Although *Alyeska* halted judicial development of the doctrine, the decision affirmed the authority of Congress to provide for fee-shifting when private enforcement of specific statutes furthers public policy.

Congress responded to the *Alyeska* decision by enacting the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. § 1988, observing that, without fee shifting, many individuals with meritorious civil rights claims would be unable to afford a lawyer, and civil rights laws, which rely heavily on private enforcement, would become "mere hollow

pronouncements." S. Rep. 94-1011, at 6 (1976). This concern is especially salient in cases brought against state officials to vindicate constitutional rights where, as here, damages are unavailable and the plaintiffs are indigent. *See* Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 Hastings L.J. 197 (1997) (describing the reluctance of attorneys to take cases seeking only injunctive relief, and where the clients were not capable of paying a fee in the event statutory fees were unavailable). In such cases, fee-shifting provides the only path by which the plaintiffs' attorneys can be paid for their efforts, and the need to incentivize the provision of legal services is at its apex.

Here, the district court's outright denial of attorneys' fees, if affirmed, would strip indigent litigants of the means to vindicate their rights and subvert the essential purpose of § 1988. The court's suggestion that the fruits of this litigation might have been available through the political process should have no bearing on Appellants' entitlement to fees. First, the Stipulated Order imposed obligations on the Defendant above and beyond what the Governor-Elect pledged to do once in office. App. Br. 24. Second, the Stipulated Order added means of

enforcement that the plaintiff class would not have enjoyed had it merely relied on the Governor-Elect's promises. App. Br. 25.

Further, as Appellants explained in their opening brief, they did not seek the same relief through the judicial and political processes. From the Governor-Elect, Appellants sought a request to the U.S. Department of Agriculture for reinstatement of a waiver from having to implement the Able-Bodied Adult Without Dependents (ABAWD) program. From the Defendant, Appellants sought provision of food stamps and notice within specific timeframes if the waiver was granted, or reinstatement of their due process challenge to the manner in which the ABAWD program was being administered if the waiver was denied. App. Br. 6-9, 15-17.

Finally, it is common for public interest groups to pursue their goals in multiple fora simultaneously, including before each branch of government. The potential availability of relief through efforts other than litigation has not been recognized as an exception to the general rule that a prevailing civil rights plaintiff is entitled to recover a reasonable attorneys' fee under § 1988. To the contrary, it is well-established that injunctive relief alone, even where the injunction

merely orders defendants to comply with the law, will support a fee award. *Lefemine v. Wideman*, 133 S. Ct. 9, 11 (2012); *Sanchez*, 774 F.3d at 879. This Court should reject the notion that courts, in deciding whether to award a fee, should evaluate whether plaintiffs could have achieved their victory through means other than litigation.

II. *Buckhannon*, In Which the Supreme Court Rejected The Catalyst Theory For Determining Prevailing Party Status, Abrogated The "Did Not Contribute" Special Circumstance As A Basis For Denying Fees.

Under the catalyst theory, a plaintiff is considered a prevailing party for purposes of fee-shifting if it achieved its desired result "because the lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon*, 532 U.S. at 601. The Supreme Court rejected the theory as a basis for fee-shifting under 42 U.S.C. § 1988, and held that a party is a "prevailing party" for purposes of the statute's fee-shifting provision only where a party has obtained judicial relief, either by judgment or consent decree, because prevailing party status requires an alteration in the legal relationship between the parties. The Court reasoned that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.*

at 605. The Court focused the inquiry on whether the litigation achieved an alteration of the legal relationship between the parties, in large part, because an analysis of "the defendant's subjective motivations in changing its conduct" would "depend on a highly fact-bound inquiry," and threaten to "spawn a second litigation of significant dimension." *Id.* at 609 (internal quotation marks and citations omitted). In particular, the Court stated that it sought to avoid embroiling district courts in a determination of "whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's change in conduct," and "whether the defendant's change in conduct was motivated by the plaintiff's threat of victory." *Id.* at 610.

Although *Buckhannon* rejected a causation-based argument for *obtaining* a fee award, its reasoning applies with equal force to an argument for *denying* fees based on a determination that the same result would have ensued even without the litigation. Once a plaintiff has established that it is a prevailing party by virtue of having obtained an enforceable order altering the legal relationship between the parties, a district court need not and should not inquire further into whether the defendant might have voluntarily changed its position to that urged

by the plaintiff even without the litigation. To do so would embroil the court in a determination of whether the plaintiff's lawsuit was a sufficient (or insufficient) cause of the relief obtained. This inquiry is precisely that rejected by the Supreme Court in *Buckhannon.*

Buckhannon also implicitly rejected the "did not contribute" special circumstance, because inquiry into the cause of the relief obtained is also precisely the sort required to apply that special circumstance. Indeed, although this Court has on occasion, even after *Buckhannon*, included the "did not contribute" formulation when listing special circumstances that might justify a denial of fees, *see, e.g., Grisham v. City of Fort Worth, Texas*, --- F.3d. ---, No. 15-10960, 2016 WL 5075964, at *3 (5th Cir. Sept. 19, 2016) (repeating the "did not contribute" special circumstance identified in *Riddell v. National Democratic Party*, 624 F.2d 539, 543-44 (5th Cir. 1980)), such recitations are artifacts from the days before the Supreme Court's rejection of the catalyst theory in *Buckhannon*. Amici have found no post-*Buckhannon* case in any court that relied on the "did not contribute" special circumstance to deny fees. The dearth of cases is not surprising, because the "did not contribute" special circumstance cannot

be reconciled with *Buckhannon*'s standard for determining prevailing party status. Under *Buckhannon*, a plaintiff that has obtained judicial relief, either by judgment or consent decree, has demonstrated that it contributed to the outcome, sufficient to be deemed a prevailing party.

Here, although the district court did not state explicitly that it was applying the "did not contribute" special circumstance, its opinion suggests that it might have been doing so. The court wrote: "[N]o relief provided to Plaintiffs . . . is fairly attributable, to any extent, to the instant lawsuit and the efforts of Plaintiffs' counsel, rather than merely the voluntary action of the Defendant." ROA 411. Because application of the "did not contribute" special circumstance is inconsistent with *Buckhannon*, this Court should reverse and clarify that *Buckhannon* abrogated the "did not contribute" special circumstance, which is no longer a viable basis for denying fees to a prevailing civil rights plaintiff.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' opening brief, the Court should reverse the district court's order denying fees and remand for a determination of the reasonable amount

of fees and costs. The Court should also clarify that the "did not contribute" special circumstance has been abrogated as a basis for denying fees to a prevailing civil rights plaintiff.

Respectfully submitted,

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

October 17, 2016

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on October 17, 2016, I submitted this brief using the Court's ECF system, which will serve a copy of the document on all counsel of record.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 2,735 words, less than half the number of words permitted by the Court for the parties' briefs.

/s/ Michael T. Kirkpatrick
Michael T. Kirkpatrick