

THE CATALYST THEORY MEETS THE SUPREME COURT—COMMON SENSE TAKES A VACATION

Abstract: In 2001, in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Supreme Court of the United States eliminated the catalyst theory from the definition of prevailing party in relation to two federal statutes. In doing so, the Court severely restricted the opportunities for plaintiffs to collect attorney's fees from defendants who change their behavior to meet the plaintiffs' claims without fully adjudicating those claims. This Note examines the history of the catalyst theory and prevailing party decisions, as well as the impact of *Buckhannon* on fee-shifting, and argues that a permanent rejection of the catalyst theory would dramatically chill the vindication of civil and environmental rights by plaintiffs facing costly litigation. This Note concludes that Congress should enact legislation that preserves the catalyst theory and that, in the meantime, courts should distinguish the fee-shifting provisions at issue in *Buckhannon* and thus preserve the catalyst theory in other statutory contexts.

INTRODUCTION

On May 29, 2001, in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Supreme Court of the United States excised the catalyst theory from the definition of prevailing party.¹ The Court specifically invalidated the theory as a basis for attorney fee recovery in the context of the Fair Housing Authority Act (FHAA) and the Americans with Disabilities Act (ADA).² Prior to this ruling, plaintiffs could rely on the catalyst theory to prove their "prevailing" status if their lawsuits caused defendants voluntarily to alter their behavior to benefit the plaintiffs.³

¹ 532 U.S. 598, 610 (2001).

² *Id.*

³ See *Kasza v. Browner*, 133 F.3d 1159, 1175 (9th Cir. 1998) (noting that a party "need not obtain formal judicial relief" to constitute a prevailing party, but may receive attorney's fees by satisfying the criteria of the catalyst theory); *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1299 (1st Cir. 1997); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 549-50 (3d Cir. 1994); *Little Rock*

Although the Supreme Court had foreshadowed the catalyst theory's demise in dicta in its 1992 holding in *Farrar v. Hobby*, the *Buckhannon* ruling was nevertheless surprising because it overruled several decades of established attorney fee theory and contradicted congressional intent.⁴ Until *Farrar*, every United States court of appeals had embraced the catalyst theory.⁵ After *Farrar*, however, the United States Court of Appeals for the Fourth Circuit broke away and explicitly abandoned the catalyst theory.⁶ Thus, by the time *Buckhannon* came before the Court, the Justices were poised to resolve a disagreement among the courts of appeals.⁷

A permanent rejection of the catalyst theory would dramatically chill potential vindication of civil and environmental rights.⁸ The *Buckhannon* decision has already forced lawyers to refuse representation of worthy claimants who have few financial resources.⁹ Until the catalyst theory is reinstated, or an adequate substitute created, public and private actors will continue to violate the rights of those citizens least able to defend themselves.¹⁰ In turn, this lack of protection will decrease the potency of civil and environmental rights.¹¹

This Note critically examines *Buckhannon* and its aftermath.¹² Section I describes the prevailing party origins of the catalyst theory and key fee-shifting statutes that provide the authority for the theory's validity.¹³ Section II discusses the Supreme Court's prevailing party decisions leading up to *Buckhannon* and the abolition of the catalyst theory.¹⁴ Section III examines *Buckhannon* and deciphers the reasoning by both the majority and the dissent.¹⁵ Section IV focuses on the growing *Buckhannon* legacy, through which plaintiffs have tested the

Sch. Dist. v. Pulaski County Special Sch. Dist., No. 1, 17 F.3d 260, 262-63 & n.2 (8th Cir. 1994).

⁴ *Buckhannon*, 532 U.S. at 622 (Ginsburg, J., dissenting).

⁵ See *id.* at 602 (stating that most courts of appeals endorse the catalyst theory).

⁶ S-1 & S-2 By and Through P-1 & P-2 v. State Bd. of Educ., 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (holding that a party could prevail only by enforceable judgment, consent decree, or settlement), *rev'd* 6 F.3d 160 (4th Cir. 1993).

⁷ See *Buckhannon*, 532 U.S. at 601-02.

⁸ See, e.g., *infra* notes 201-223 and accompanying text.

⁹ See *Buckhannon*, 532 U.S. at 636 (Ginsburg, J., dissenting) (noting that Congress enacted Section 1988, and other fee-shifting statutes, with the intent of alleviating the severe hardship experienced by nonaffluent plaintiffs with civil rights claims).

¹⁰ See *id.*

¹¹ See *id.*

¹² See *infra* Parts I-V.

¹³ See *infra* notes 20-67 and accompanying text.

¹⁴ See *infra* notes 68-128 and accompanying text.

¹⁵ See *infra* notes 129-197 and accompanying text.

extent of any remaining catalyst theory validity.¹⁶ Finally, Section V discusses the Court's defiance of both common sense and congressional intent in its elimination of the catalyst theory.¹⁷ Section V also distinguishes other fee-shifting statutes from those in question in *Buckhannon* in order to preserve their viability for catalyst plaintiffs.¹⁸ In conclusion, this Note argues that, just as the harsh consequences of the American Rule, by which parties bear their own fees, earlier inspired passage of the Civil Rights Attorney's Fees Act of 1976 (Fees Act or Section 1988) to award fees to prevailing parties, the Court's mistaken decision begs a congressional response.¹⁹

I. BACKGROUND

Although most fee-shifting statutes clearly require that a party prevail on the merits of a claim to be eligible for fees, they do not define "prevailing party."²⁰ To overcome this omission, courts have looked to legislative history.²¹ For example, the legislative history of the Fees Act indicates an inclusive definition of prevailing party.²² In the absence of explicit congressional guidance, however, courts continued to struggle with prevailing party boundaries, which led to the disagreement among the courts of appeals and, therefore, to the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.²³

The statutory prevailing party doctrine evolved from the common law "private attorney general" doctrine, by which courts awarded fees to prevailing parties in suits that would both vindicate an individual's rights and benefit all other similarly situated plaintiffs.²⁴ For example, in 1975, in *Souza v. Travisono*, the United States Court of Appeals for the First Circuit granted prisoners a right to legal aid and

¹⁶ See *infra* notes 198–244 and accompanying text.

¹⁷ See *infra* notes 245–283 and accompanying text.

¹⁸ See *infra* notes 284–313 and accompanying text.

¹⁹ See *infra* notes 314–327 and accompanying text; see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 267–68 (1975) (requiring legislative basis for fee-shifting).

²⁰ See, e.g., Equal Access to Justice Act, 28 U.S.C. § 2412 (d) (1) (A) (2000).

²¹ See, e.g., *Bonner v. Guccione*, 178 F.3d 581, 594 (2d Cir. 1999) (holding catalyst theory consistent with the legislative history of the Fees Act, H.R. REP. NO. 94-1558, at 7 (1976), which requires courts to award fees even if the defendant voluntarily ceases unlawful conduct).

²² See Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988 (2000).

²³ See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

²⁴ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 267 n.42 (1975).

also awarded them attorney's fees to compensate "those who by helping protect basic rights were thought to have served the public interest."²⁵ Courts would thus award fees to those individuals who had acted in the attorney general's stead by litigating a claim in the public interest.²⁶

Prior to the development of the private attorney general doctrine, United States courts were guided by the traditional American Rule, which required individual parties to carry the burden of their litigation costs and attorney's fees, unless explicit statutory authority provided otherwise.²⁷ The American Rule was originally created as a progressive policy to enable plaintiffs to litigate without fear of fee liability to defendants.²⁸ The rule evolved, however, into a barrier between poorer clients and attorneys who were unwilling to accept the financial risk of a suit, even if faced with likely success.²⁹ As courts began to appreciate the unequal legal opportunities created by the American Rule, they developed the common law private attorney general doctrine to compensate a prevailing party's fees and to encourage vindication of individual and societal rights.³⁰ Unlike under the American Rule, a plaintiff could recover fees by validating the merits of a claim—thus prevailing.³¹

In 1975, in *Alyeska Pipeline Service Co. v. Wilderness Society*, the Supreme Court rejected the private attorney general doctrine.³² The Court held that the judiciary was not authorized to allocate the pecuniary burden of litigation, so fee-shifting was valid only when pursuant to explicit legislation.³³ Accordingly, the environmentalist plaintiffs could not recover their fees even though they vindicated the public interest by obtaining an injunction against the construction of the Alaska pipeline.³⁴

²⁵ 512 F.2d 1137, 1139 (1st Cir. 1975).

²⁶ See *id.*

²⁷ See, e.g., *Alyeska*, 421 U.S. at 270-71 (applying American Rule because of its deep common law roots and congressional policy).

²⁸ See Martin Patrick Averill, "Specters" and "Litigious Fog": The Fourth Circuit Abandons Catalyst Theory in S-1 & S-2 By and Through P-1 & P-2 v. State Board of Education of North Carolina, 73 N.C. L. REV. 2245, 2252 (1995).

²⁹ See *id.*

³⁰ See *Associated Indus. v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943); Joel H. Trotter, *The Catalyst Theory of Civil Right Fee Shifting After Farrar v. Hobby*, 80 VA. L. REV. 1429, 1431 (1994).

³¹ See *Ickes*, 134 F.2d at 704.

³² See 421 U.S. at 241.

³³ See *id.* at 267-68.

³⁴ See *id.*

Congress quickly responded to the Court's implied request for statutory authority to award fees to a prevailing party by enacting the Fees Act in 1976.³⁵ In the Fees Act, Congress explicitly stated its intention to provide reasonable fees to prevailing parties who brought suit pursuant to civil rights statutes lacking fee-shifting provisions.³⁶ As commentators have noted, this incentive is necessary to avoid the free rider issue inherent in civil rights litigation—that a citizen naturally lacks incentive to sue to vindicate the citizen's own civil rights because those interests will be protected for free if someone else files suit.³⁷ Thus, to avoid underenforcement of civil rights, Congress codified the private attorney general doctrine to provide attorney's fees for any plaintiff who prevailed in a civil rights action.³⁸

Congress has now promulgated over fifty statutes with fee-shifting provisions that allow the prevailing party to recover reasonable attorney's fees and costs.³⁹ The Fees Act itself provides, "In any action to enforce a provision of . . . this title . . . 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."⁴⁰ In fact, the Equal Access to Justice Act (EAJA) was enacted specifically to shift fees to those parties who, even absent adequate funding, filed socially responsible suits.⁴¹ The EAJA provides, "Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses"⁴² Similarly, the Clean Water Act states, "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any *prevailing or substantively prevailing party*, whenever the court deems such award is appropriate."⁴³ Hence, Congress has recognized the need for adequate counsel for underrepresented segments of society in many fields of the law, and

³⁵ 42 U.S.C. § 1988 (2000); see Trotter, *supra* note 30, at 1431.

³⁶ See Averill, *supra* note 28, at 2254–55 (citing S. REP. NO. 94-1011, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5911).

³⁷ See Trotter, *supra* note 30, at 1433.

³⁸ See 42 U.S.C. § 1988.

³⁹ See *id.*; see also SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 94TH CONG. 2D SESS., CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976, PUB. L. NO. 94-559, § 1988, S. 2278, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS app. A, at 220–21 (1976) (listing fee-shifting statutes).

⁴⁰ 42 U.S.C. § 1988(b).

⁴¹ 28 U.S.C. § 2412 (d)(1)(A) (2000).

⁴² *Id.*

⁴³ 33 U.S.C. § 1365(d) (2000) (emphasis added).

has responded actively with fee-shifting statutes to encourage vindication of citizens' rights.⁴⁴

Once courts began to award attorney's fees to prevailing parties, they had to determine which plaintiffs could be said to have prevailed.⁴⁵ Courts naturally extended the prevailing party definition to include plaintiffs whose claims had forced defendants to alter their unlawful behavior.⁴⁶ In 1970, in *Parham v. Southwestern Bell Telephone Co.*, the first judicial articulation of the catalyst theory, the United States Court of Appeals for the Eighth Circuit held that the defendant had violated Title VII of the Civil Rights Act of 1964 but refused to issue an injunction because the defendant had already ceased the unlawful racial discrimination at issue.⁴⁷ Even though the defendant corporation had conformed to the law and established affirmative action policies without judicial compulsion, attorney's fees were granted to the plaintiff because his lawsuit had catalyzed the implementation of such policies.⁴⁸ Consequently, the plaintiff was eligible for fees because the defendant had corrected its action in direct response to the plaintiff's lawsuit.⁴⁹

Since this landmark case, courts have included the catalyst theory—in addition to the traditional judgment on the merits, consent decree, and settlement agreement—within the definition of prevailing party.⁵⁰ Under the catalyst theory, plaintiffs prevail if their lawsuits cause defendants voluntarily to alter their behavior to comply with the demands of the plaintiffs' original claim.⁵¹ For example, a plaintiff could prevail under the catalyst theory by filing a claim with an administrative body that caused the body to revise or repeal the chal-

⁴⁴ See *id.*

⁴⁵ See *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429–30 (8th Cir. 1970); Trotter, *supra* note 30, at 1434.

⁴⁶ See *Parham*, 433 F.2d at 429–30.

⁴⁷ *Id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *Kasza v. Browner*, 133 F.3d 1159, 1175 (9th Cir. 1998) (noting that a party "need not obtain formal judicial relief" to constitute a prevailing party, but may receive attorney's fees by satisfying the criteria of the catalyst theory); *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1299 (1st Cir. 1997); *Beard v. Teska*, 31 F.3d 942, 951–52 (10th Cir. 1994); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 549–50 (3d Cir. 1994); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, No. 1, 17 F.3d 260, 262–63 & n.2 (8th Cir. 1994).

⁵¹ See *S-1 & S-2 By and Through P-1 & P-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (defining and rejecting the catalyst theory), *rev'd* 6 F.3d 160 (4th Cir. 1993).

lenged policy, rendering the plaintiff's claim moot.⁵² Without the catalyst theory, however, the plaintiff could not recover attorney's fees because the case would be dismissed for mootness, and thus never would reach a traditional resolution.⁵³

Under the catalyst theory, courts have generally required both that the plaintiff's claim cause the defendant to change a position and that the claim be legally colorable, rather than a nuisance suit.⁵⁴ The first requirement ensures that the plaintiff is not rewarded for serendipitously filing a lawsuit at the same time that the defendant is considering a policy change.⁵⁵ The second requirement prevents a windfall to a plaintiff if a defendant changes a position in the face of a frivolous suit merely to avoid the stigma of a lawsuit.⁵⁶

In the absence of a specific statutory definition for prevailing party, legislative history indicates that Congress intended the inclusion of such a catalyst doctrine.⁵⁷ In fashioning the Fees Act, both houses of Congress relied on *Parham*. The House report stated that "after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed."⁵⁸ In turn, the Senate report noted that "parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief."⁵⁹ As a result, every federal court of appeals soon embraced the catalyst theory in matters in which, even in the absence of final judgment, defendants changed their behavior towards plaintiffs to comply with the plaintiffs' meritorious claims.⁶⁰

Plaintiffs invoked the catalyst theory most often after administrative or statutory challenges.⁶¹ In this setting, either the plaintiff would dismiss the suit, or the court would determine it moot when the governmental body in question revised or repealed the challenged policy

⁵² Trotter, *supra* note 30, at 1435.

⁵³ *See id.*

⁵⁴ Averill, *supra* note 28, at 2256 (referring to *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978)).

⁵⁵ *See Nadeau*, 581 F.2d at 280–81.

⁵⁶ *See id.* at 281.

⁵⁷ *See* H.R. REP. NO. 94-1558, at 5, 7 (1976); S. REP. NO. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912.

⁵⁸ H.R. REP. NO. 94-1558, at 5, 7 (1976).

⁵⁹ S. REP. NO. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912.

⁶⁰ H.R. REP. NO. 94-1558, at 5, 7 (1976).

⁶¹ Trotter, *supra* note 30, at 1435.

⁶² *See id.*

to comply with the plaintiff's claim.⁶² The plaintiff would then justify a fee award by noting the defendant's voluntary change in position that resulted from the claim.⁶³ If the court found that the plaintiff had catalyzed the defendant's alteration of unlawful actions, then the court would award fees to the plaintiff.⁶⁴

After three decades of development, the catalyst theory came squarely before the Supreme Court in *Buckhannon*, forcing the Court to determine whether a plaintiff could constitute a prevailing party by causing a defendant's change in behavior that benefited the plaintiff.⁶⁵ The Court had only hinted at the matter in its earlier dicta definition of prevailing party in *Farrar v. Hobby* that excluded the catalyst theory.⁶⁶ The Supreme Court's earlier prevailing party decisions, however, did not conflict with the catalyst theory and so had led lower courts to continue the doctrine's application.⁶⁷

II. BUCKHANNON'S FOREBEARS

As the definition of prevailing party continued to evolve in lower courts to include the catalyst theory, the Supreme Court delivered several opinions that narrowed this definition.⁶⁸ In 1983, in *Hensley v. Eckerhart*, one of its earliest decisions on the subject, the Court affirmed that a prevailing party was one who succeeded on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit."⁶⁹ In *Hensley*, the plaintiffs challenged the constitutionality of the treatment and conditions in the forensic unit of a mental hospital, the lack of due process in the placement of patients in this very restrictive unit, and the lack of compensation for institution-maintaining labor.⁷⁰ Even though a consent decree resolved the due process claim, and congressional adoption of the Fair Labor Standards Act mooted the wage claim, the

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.* at 1436 (quoting *Smith v. Univ. of N.C.*, 632 F.2d 316, 347 (4th Cir. 1980)).

⁶⁵ See *Buckhannon*, 532 U.S. at 605.

⁶⁶ See 506 U.S. 103, 111 (1992) (holding that a civil rights plaintiff could qualify as a prevailing party by obtaining an enforceable judgment or comparable relief through a consent decree—however, the catalyst theory was not before the Court).

⁶⁷ See, e.g., *Rhodes v. Stewart*, 488 U.S. 1, 2, 4 (1988) (holding that to prevail a plaintiff must benefit from defendant's altered policy, and therefore, prisoners who had died or left custody could not receive benefit from policy allowing magazine subscriptions).

⁶⁸ See, e.g., *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

⁶⁹ 461 U.S. 424, 433 (1983).

⁷⁰ *Id.* at 426.

plaintiffs' success on the treatment and conditions claim earned them prevailing party status.⁷¹ Hence, the Court "generously" deemed that a party prevails if it succeeds on a significant issue in its litigation.⁷²

In 1987, in *Hewitt v. Helms*, the Court continued to award attorney's fees based on the defendant's behavior, rather than the legal imprimatur resulting from adjudication.⁷³ In his opinion for the Court, Justice Scalia commented that a plaintiff could prevail without receiving a formal judgment if the defendant adopted a change in behavior to redress the plaintiff's grievances.⁷⁴ If the plaintiff had received only an interlocutory ruling, however, it was "not the stuff of which legal victories are made," so the plaintiff could not be said to prevail.⁷⁵ Justice Scalia stopped short, though, of requiring a judicially sanctioned result for prevailing party status.⁷⁶ In fact, he stated that the judicial decree was merely the means to an end, not the desired end itself, and that the prevailing party inquiry should focus on the judgment's effect on the defendant, "the payment of damages, or some specific performance, or the termination of some conduct."⁷⁷ He concluded:

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.⁷⁸

Accordingly, the catalyst theory's focus on the defendant's actions toward the plaintiff appeared to bring the doctrine squarely within the purview of the Court's definition of prevailing party.⁷⁹

In 1988, in *Rhodes v. Stewart*, its next attempt to define prevailing party, the Court noted that the defendant's behavior, even if intended to benefit the plaintiff, could create a prevailing party only if the

⁷¹ *Id.* at 428.

⁷² *Id.* at 433.

⁷³ 482 U.S. at 761.

⁷⁴ *Id.*

⁷⁵ *Id.* at 760.

⁷⁶ *Id.* at 761.

⁷⁷ *Id.* at 761.

⁷⁸ *Hewitt*, 482 U.S. at 760–61.

⁷⁹ *Id.*

plaintiff actually benefited from the defendant's action.⁸⁰ The Court denied the sufficiency of a declaratory judgment to create a prevailing party by stating that *Hewitt* did not require that a plaintiff who received such judgment be automatically considered prevailing under Section 1988.⁸¹ Instead, a party could prevail only if the defendant's change in behavior directly benefited the plaintiff.⁸² Thus, if two prisoners won the right to magazine subscriptions, but then one died and one was released, they could not benefit directly from the prison's new policy allowing subscriptions.⁸³ As in *Hewitt*, the focus on the defendant's behavior for determining prevailing status comported perfectly with the catalyst theory.⁸⁴

In 1989, in *Texas State Teachers Association v. Garland Independent School District*, the Court claimed to synthesize the earlier cases.⁸⁵ Instead, the Court appeared to establish a new standard that focused not on the defendant's behavior, but on the legal relationship between the parties.⁸⁶ The primary question before the Court was whether a plaintiff needed to succeed on its central claim, or merely a significant claim, to prevail.⁸⁷ The Court held that success on any significant issue would suffice to constitute a prevailing party, and therefore granted attorney's fees to the plaintiff teachers' association that vindicated the First Amendment rights of public employees in the workplace and materially altered the defendant school district's limitations on the teachers' rights to communicate with each other about union issues.⁸⁸ Furthermore, the Court continued in dicta by reviewing *Hewitt* and *Rhodes* and suggested that they stood for the proposition that prevailing party status depended on a change in the legal relationship between the parties, not the defendant's behavior.⁸⁹ Therefore, the appropriate prevailing party test asked whether there was a change in the legal relationship between the opposing parties, and if so, whether it benefited the plaintiff.⁹⁰

⁸⁰ 488 U.S. 1, 4 (1988).

⁸¹ *Id.* at 3.

⁸² *Id.* at 4.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ 489 U.S. 782, 793 (1989).

⁸⁶ *See id.* at 792-93.

⁸⁷ *Id.* at 784.

⁸⁸ *Id.* at 793.

⁸⁹ *Id.* at 792-93.

⁹⁰ *Garland*, 489 U.S. at 792-93.

Finally, in 1992, in *Farrar v. Hobby*, the Court held that “a plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”⁹¹ In *Farrar*, the plaintiff brought a civil rights action seeking damages in the amount of seventeen million dollars.⁹² Because the jury found that the defendants were not the proximate cause of any injury to Farrar, the United States District Court for the Southern District of Texas dismissed the action on the merits.⁹³ The Court of Appeals for the Fifth Circuit, however, reversed the district court’s decision with regard to a single defendant, Hobby, and awarded damages of one dollar to the plaintiff.⁹⁴ With this final judgment, and his concurrent belief that he was a prevailing party, Farrar applied under the Fees Act for \$300,000 in attorney’s fees and costs.⁹⁵ The district court then awarded him these expenses.⁹⁶

In reviewing the district court’s decision, a divided Fifth Circuit declared Farrar’s nominal damages at best a technical victory, and consequently found him not a prevailing party and unworthy of a fee award.⁹⁷ Farrar did not prevail because he did not truly benefit from the one-dollar judgment.⁹⁸ The dissent relied on *Hewitt*, *Rhodes*, and *Garland* in its opinion that a party deprived of constitutional rights could still be a prevailing party, despite recovery of only nominal damages.⁹⁹

The Supreme Court, in a 5–4 decision, affirmed the Fifth Circuit’s denial of attorney’s fees and then, after summarizing its holdings in *Hewitt*, *Rhodes*, and *Garland*, announced a new test to determine the status of a prevailing party.¹⁰⁰ That test required that “the plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement.”¹⁰¹ The Court reasoned, as it had in *Rhodes*, that the civil rights litigation must result in a “material alteration of the

⁹¹ 506 U.S. 103, 111–12 (1992).

⁹² *Id.* at 106.

⁹³ *Id.* at 106–07.

⁹⁴ *Id.* at 107.

⁹⁵ *Id.*

⁹⁶ *Farrar*, 506 U.S. at 107.

⁹⁷ *Id.* at 107–08.

⁹⁸ *Id.*

⁹⁹ *Id.* at 108–09.

¹⁰⁰ *Id.* at 105, 109–11.

¹⁰¹ *Farrar*, 506 U.S. at 111.

legal relationship of the parties."¹⁰² Thus, there could be no material alteration of the parties' legal relationship until the plaintiff received a favorable final judgment, consent decree, or settlement.¹⁰³

For the case at hand, Farrar was deemed a prevailing party because the nominal damages judgment was legally enforceable and thus constituted a material alteration of the legal relationship between the plaintiff and defendant.¹⁰⁴ Unlike earlier cases in which attorney's fees depended solely on a party's technical status, however, fees after *Farrar* would reflect the magnitude of relief as well.¹⁰⁵ Thus, a plaintiff would first have to cross the threshold of material legal alteration and then prove sufficient success to merit fees.¹⁰⁶ Because Farrar had received a judgment in his favor for one dollar, he obtained prevailing party status, but this nominal sum was deemed unworthy of attorney fee recovery.¹⁰⁷

As a result of the Supreme Court's decision in *Farrar*, the focus of the prevailing party inquiry shifted from the defendant's behavior toward the plaintiff to their legal relationship.¹⁰⁸ The substance of the legal relationship, however, was still undetermined. The Court did not explicitly limit prevailing party status only to those suits in which the plaintiff obtained a final judgment or consent decree.¹⁰⁹ Thus, most courts of appeals held that this dicta provided merely an inexhaustive list of possible prevailing party postures and continued to interpret the definition of prevailing party to include the catalyst theory.¹¹⁰

The United States Court of Appeals for the Fourth Circuit, unlike the other courts of appeals, discarded the catalyst theory in response to the *Farrar* decision.¹¹¹ In *S-1 & S-2 By and Through P-1 & P-2 v. State Board of Education of North Carolina*, the parents of two special needs children demanded private school expenses from the Asheboro City Board of Education (City Board) after the inadequacy of the school's special programs forced them to send their children to private

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 115.

¹⁰⁶ *See Farrar*, 506 U.S. at 115.

¹⁰⁷ *See id.* at 116.

¹⁰⁸ *See id.*

¹⁰⁹ *See id.* at 111.

¹¹⁰ *See, e.g., Little Rock Sch. Dist. v. Pulaski Special Sch. Dist., No. 1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994).

¹¹¹ *S-1 & S-2 By and Through P-1 & P-2 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (per curiam), *rev'g* 6 F.3d 160 (4th Cir. 1993), *cert. denied*, 513 U.S. 876 (1994).

schools.¹¹² The parents demanded these expenses pursuant to the Education of the Handicapped Act (EHA), which requires "free appropriate public education."¹¹³ After denial by the City Board and its subsequent refusal to hold a due process hearing, the parents petitioned the North Carolina State Board of Education (State Board) either to compel the City Board to hear their claim or to enact regulations to force a hearing.¹¹⁴ Upon denial of this petition, the parents filed suit against the City Board, State Board, and the State Board chair and added a claim for recovery of attorney's fees under the Fees Act.¹¹⁵

After the district court granted summary judgment for the parents, and while the appeal was pending, the City Board agreed to reimburse the parents for their tuition expenses in exchange for the parents' dismissal of all claims.¹¹⁶ Although the State Board was not a party to this agreement, it altered its position and authorized the City Board's hearing officers to entertain the parents' demand.¹¹⁷ The Fourth Circuit then vacated the district court's order as moot and remanded to the district court.¹¹⁸ The district court, in turn, awarded attorney's fees on the basis that the suit had forced North Carolina to amend its legislation to comply with federal law.¹¹⁹ The Fourth Circuit originally affirmed the district court's holding, stating that a sufficient causal nexus existed between the plaintiffs' claim and the state's subsequent legislative about-face.¹²⁰ Rehearing the case en banc, however, the Fourth Circuit rejected the plaintiffs' catalyst theory and held that they could not qualify as prevailing parties on the basis of postdismissal events.¹²¹ Thus, the Fourth Circuit split off from the other courts of appeals as the first and only court of appeals to refute the catalyst theory.¹²²

By 2001, the Supreme Court had narrowed the definition of prevailing party but had not expressly refuted the catalyst theory.¹²³ In

¹¹² *Id.*

¹¹³ *See id.* at 161.

¹¹⁴ *See id.* at 162.

¹¹⁵ *Id.*

¹¹⁶ *See S-1 & S-2*, 6 F.3d at 163.

¹¹⁷ *Id.*

¹¹⁸ *See id.* at 163.

¹¹⁹ *See id.*

¹²⁰ *See id.* at 168.

¹²¹ *See S-1 & S-2*, 21 F.3d at 49.

¹²² *See id.*

¹²³ *See Farrar*, 506 U.S. at 111 (summarizing requirements for prevailing party, but not rejecting catalyst theory).

the absence of an explicit mandate from the Court, nearly every lower court continued to employ the well-established catalyst theory.¹²⁴ The Fourth Circuit's rejection of the catalyst theory, however, prompted the Supreme Court to revisit its fee-shifting jurisprudence in *Buckhannon* and abolish the catalyst theory for fee recovery under the FHAA or ADA.¹²⁵

The prevailing party inquiry initially focused on a change in the relationship between the plaintiff and the defendant, such that a party could prevail under the Fees Act without receiving judicially decreed relief.¹²⁶ Within five years, however, the plaintiff could meet the prevailing party standard only through an enforceable judgment against the defendant.¹²⁷ Therefore, the catalyst theory's focus on the nature of the defendant's behavior toward the plaintiff became less consistent with the case law as the Supreme Court began to place more importance on the judicial imprimatur stamped on the claim.¹²⁸

III. BUCKHANNON

In May of 2001, *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources* brought the catalyst theory's validity squarely before the Supreme Court of the United States.¹²⁹ As some had anticipated after *Farrar v. Hobby*, a split Court abolished the catalyst theory, at least in the context of the ADA and FHAA.¹³⁰ Thus, to the detriment of the environmental and civil rights movements, the Court proved many pessimistic commentators correct.¹³¹

¹²⁴ See *Buckhannon*, 532 U.S. at 601–02.

¹²⁵ See *id.* at 601, 610.

¹²⁶ See, e.g., *Hewitt*, 482 U.S. at 760–61 (holding that the critical factor in the prevailing party determination was whether the lawsuit provided relief from the defendant to the plaintiff).

¹²⁷ *Id.* at 760–61 (decided five years before *Farrar*); *Farrar*, 506 U.S. at 111.

¹²⁸ See *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

¹²⁹ 532 U.S. 598, 605 (2001).

¹³⁰ *Id.* at 610; see Trotter, *supra* note 30, at 1440.

¹³¹ See *Buckhannon*, 532 U.S. at 610; P.G. Szczepanski, *For a Few Dollars Less: Equity Rides Again in the Denial of Section 1988 Attorney's Fees to a Prevailing Plaintiff* in *Farrar v. Hobby*, 5 TEMP. POL. & CIV. RTS. L. REV. 219, 242 (1996) (stating that *Farrar* had already led to rejection of catalyst theory in one court of appeals, and had survived in other courts only through "judicial legerdemain"); Trotter, *supra* note 30, at 1440 (arguing that the catalyst theory's inconsistency with *Farrar*'s holding that a party must obtain an enforceable judgment or comparable relief through a consent decree or settlement will kill the catalyst theory).

The dispute began in 1997, when the West Virginia Office of the State Fire Marshall (Fire Marshall) delivered to Buckhannon Board and Care Home, Inc. (Buckhannon) an order to cease and desist operating its assisted living homes.¹³² The Fire Marshall delivered this order because Buckhannon had failed the self-preservation portion of an inspection when its residents had proven incapable of escaping dangerous situations, such as a fire, unassisted.¹³³ Hence, the Fire Marshall imposed the cease and desist order to compel Buckhannon to comply with state law.¹³⁴

In response to the Fire Marshall's order, Buckhannon filed suit on behalf of its residents, claiming that the self-preservation requirement violated both the FHAA and the ADA.¹³⁵ While Buckhannon's claim was pending, the West Virginia Legislature passed two bills that eliminated the self-preservation requirement.¹³⁶ The Fire Marshall then moved to dismiss the case on the grounds that the underlying claim was moot.¹³⁷ Because West Virginia had permanently and effectively removed the offending provision, the United States District Court for the District of West Virginia agreed with the Fire Marshall and dismissed the claim.¹³⁸ Thus, it seemed that Buckhannon's claim had forced the state legislature to alter its position and that of the Fire Marshall by amending the underlying law.¹³⁹

With this apparent victory in hand, Buckhannon filed for attorney's fees pursuant to the prevailing party provisions in both the FHAA and ADA.¹⁴⁰ Buckhannon based the fee petition on the catalyst theory, arguing that it had achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct.¹⁴¹ Because the United States Court of Appeals for the Fourth Circuit had earlier repudiated the catalyst theory in *S-1 & S-2 By and Through P-1 & P-2 v. State Board of Education of North Carolina*, it rejected Buckhannon's petition in light of Buckhannon's failure to obtain "an enforceable judgment, consent decree or settlement giving

¹³² *Buckhannon*, 532 U.S. at 600.

¹³³ *Id.*

¹³⁴ *Id.* (citing W. Va. Code §§ 16-5H-1, 16-5H-2 (1998)).

¹³⁵ *Id.* at 601 (citing 42 U.S.C. §§ 3601 (FHAA), 12101 (ADA) (2000)).

¹³⁶ *Id.*

¹³⁷ *Buckhannon*, 532 U.S. at 601.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *Id.*

¹⁴¹ *See id.*

some of the legal relief requested."¹⁴² The Supreme Court then granted certiorari to resolve the catalyst theory's validity.¹⁴³

The Supreme Court held in *Buckhannon* that a party that relied solely on the catalyst theory to recover fees could not establish itself as a prevailing party because it could not show an enforceable alteration of the legal relationship between the parties.¹⁴⁴ In reaching this conclusion, the Court first looked to Black's Law Dictionary, which defines a prevailing party as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>."¹⁴⁵ Hence, a plaintiff could not constitute a prevailing party without obtaining the judicial imprimatur embodied in a judgment.¹⁴⁶ The Court then declared this result consistent with its past prevailing party interpretations, which had required judicially-sanctioned relief.¹⁴⁷

Synthesizing the prevailing party precedent, Chief Justice Rehnquist stated that previous cases stood for the proposition that enforceable judgments and court-ordered consent decrees materially alter the legal relationship between the parties, as is necessary to award attorney's fees.¹⁴⁸ Chief Justice Rehnquist then reasoned that the catalyst theory did not satisfy these criteria because it "lacks the necessary judicial *imprimatur*."¹⁴⁹ In a sharp retort to the dissent, Chief Justice Rehnquist stated that the Court had never awarded attorney's fees in the absence of a judicial alteration of actual circumstances.¹⁵⁰ Accordingly, any language from earlier cases that recognized the catalyst theory's validity was dicta.¹⁵¹

The Court next analyzed the context in which the statutory authority was enacted and declared that against this background the legislative history was ambiguous.¹⁵² Even though the House report on Section 1988 stated that a prevailing party should not be limited only to plaintiffs who had obtained a "final judgment following a full trial

¹⁴² See *Buckhannon*, 532 U.S. at 602-03 (quoting *S-1 & S-2*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc)).

¹⁴³ *Id.* at 602.

¹⁴⁴ *Id.* at 604.

¹⁴⁵ *Id.* at 603.

¹⁴⁶ See *id.*

¹⁴⁷ *Buckhannon*, 532 U.S. at 603.

¹⁴⁸ *Id.* at 603-04.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 605-06.

¹⁵¹ *Id.*

¹⁵² *Buckhannon*, 532 U.S. at 605-06.

on the merits," and the Senate report allowed a party to prevail by "vindicat[ing] rights through a consent judgment or without formally obtaining relief," the Court found this legislative history ambiguous in light of the American Rule.¹⁵³ Instead, the Court stated that a legal vindication of the parties' substantial rights, a goal expressed by the same House report, could only take the form of a judgment on the merits.¹⁵⁴

The Court then dismissed Buckhannon's assertions as to the adverse impact of the abolition of the catalyst theory.¹⁵⁵ First, Chief Justice Rehnquist discarded the petitioner's fear that catalyst theory rejection would deter plaintiffs from filing potentially expensive suits.¹⁵⁶ Because Buckhannon had not proffered any empirical evidence that the Fourth Circuit had hosted fewer civil rights cases since its rejection of the catalyst theory, the Court discarded the petitioner's concern as unfounded.¹⁵⁷

Chief Justice Rehnquist then jettisoned Buckhannon's fear that defendants would moot claims by altering their behavior in mid-trial and reassured the petitioner that an action for damages would continue to lie even after a defendant had changed behavior.¹⁵⁸ The Court recognized, however, that equitable relief would be foreclosed in those cases (i.e. any civil rights or environmental disputes) in which a defendant mooted the claim by behaving differently to comply with the plaintiff's demands.¹⁵⁹ Even claims for equitable relief, the Court suggested, would rarely meet the stringent mootness requirement that it be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."¹⁶⁰ Finally, the ultimate possibility of hefty attorney's fees would practically pressure many defendants into settlement agreements through which plaintiffs could secure attorney's fees.¹⁶¹

Throughout its opinion, the Court expressed policy concerns to bolster its holding.¹⁶² First, the Court implied that a non-frivolous yet

¹⁵³ *Id.* at 607 (quoting S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912; H.R. REP. NO. 94-1558, at 5, 7 (1976)).

¹⁵⁴ *Id.* at 608 (quoting H.R. REP. NO. 94-1558, at 8 (1976)).

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ *Buckhannon*, 532 U.S. at 608.

¹⁵⁸ *Id.* at 608-09.

¹⁵⁹ *See id.* at 609.

¹⁶⁰ *Id.* at 608-09.

¹⁶¹ *Id.* at 609.

¹⁶² *Buckhannon*, 532 U.S. at 606-10.

meritless lawsuit would compel the defendant to alter a position merely to avoid the suit's nuisance value.¹⁶³ Therefore, requiring full adjudication would allow courts to determine the merits of a claim before awarding a final judgment and its accompanying fees.¹⁶⁴ The Court similarly suggested that defendants who might otherwise voluntarily alter their conduct would refrain from doing so in the face of a catalyst theory that would hold them financially liable for such a change.¹⁶⁵ Hence, in rejecting the catalyst theory, the majority seemed to believe it had removed a barrier, and actually encouraged defendants to voluntarily change their conduct to meet the plaintiff's demands.¹⁶⁶

In her dissenting opinion, Justice Ginsburg examined the majority opinion's logic and its preference for a judicial signature rather than the successful resolution of the immediate controversy.¹⁶⁷ The dissent utilized notions of access to courts, history, precedent, and plain English to describe the catalyst theory as an integral aspect of fee-shifting jurisprudence.¹⁶⁸ Justice Ginsburg concluded that the catalyst theory was necessary to encourage private enforcement of civil rights and thus further the purpose of fee-shifting provisions.¹⁶⁹

Justice Ginsburg first claimed that Black's Law Dictionary definition for prevailing party should not be read preclusively.¹⁷⁰ She relied on other instances in which the Court had defined terms more broadly than Black's.¹⁷¹ For example, in 1980, in *Maher v. Gagne*, the Court had included a consent decree within the definition of prevailing party, rather than confining it to a final judgment.¹⁷² Thus, the Court could have actively employed a broader definition for prevailing party to include the catalyst theory.¹⁷³

¹⁶³ See *id.* at 606.

¹⁶⁴ See *id.*

¹⁶⁵ See *id.* at 608.

¹⁶⁶ See *id.*

¹⁶⁷ See *Buckhannon*, 532 U.S. at 622-23 (Ginsburg, J., dissenting). Justices Stevens, Souter, and Breyer joined Justice Ginsburg's dissent. See *id.* at 622 (Ginsburg, J., dissenting).

¹⁶⁸ See *id.* at 622-23 (Ginsburg, J., dissenting).

¹⁶⁹ See *id.* at 644 (Ginsburg, J., dissenting).

¹⁷⁰ See *id.* at 628-29 (Ginsburg, J., dissenting).

¹⁷¹ *Buckhannon*, 532 U.S. at 628-39 (Ginsburg, J., dissenting).

¹⁷² *Id.* (Ginsburg, J., dissenting) (noting that in *Maher*, 448 U.S. 122, 129 (1980), the Court stated that the Fees Act did not require full litigation of the issues or a judicial determination of plaintiff's rights).

¹⁷³ See *id.* (Ginsburg, J., dissenting).

Justice Ginsburg then referred to instances in which the Court had awarded fees in the absence of a legitimate final judgment on the merits.¹⁷⁴ For instance, in 1884, in *Mansfield, C. & L.M.R. Co. v. Swan*, the plaintiffs had prevailed on the merits all the way to the Supreme Court, where they were stripped of their judgment for lack of subject matter jurisdiction.¹⁷⁵ Although the plaintiffs no longer possessed a judgment on the merits, the Court awarded them costs because they had prevailed in a "formal and nominal sense."¹⁷⁶ Consequently, the Court had ruled in at least one instance that a party could obtain costs without obtaining a valid final judgment.¹⁷⁷

Justice Ginsburg next interpreted the purpose of a lawsuit to be the substantive attainment of actual relief from the defendant, not the procedural stamp of judicial imprimatur.¹⁷⁸ According to this view, a plaintiff succeeded by obtaining actual relief—reasoning that comported clearly with the catalyst theory.¹⁷⁹ In fact, Justice Scalia had noted in *Hewitt v. Helms* that the goal of the judicial process was the relief, not the judicial decree that merely provided the means for accomplishing this goal.¹⁸⁰ Therefore, because Buckhannon secured continued operation for the assisted living centers, it obtained actual relief.¹⁸¹

The dissent continued with an analysis of the congressional history surrounding the civil rights legislation.¹⁸² The House report on Section 1988 declared that Congress intended to secure "effective access" necessary to protect civil rights for all, especially those incapable of bearing the financial burden of litigation.¹⁸³ Additionally, the House report acknowledged that a defendant could voluntarily cease an unlawful practice, but that fees should still be granted to a plaintiff even in the absence of the need for formal relief.¹⁸⁴ Justice Ginsburg

¹⁷⁴ See *id.* at 630 (Ginsburg, J., dissenting).

¹⁷⁵ See *id.* (Ginsburg, J., dissenting) (referring to *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379 (1884)).

¹⁷⁶ See *Buckhannon*, 532 U.S. at 630 (Ginsburg, J., dissenting) (quoting *Mansfield*, 111 U.S. at 388).

¹⁷⁷ See *id.* (Ginsburg, J., dissenting).

¹⁷⁸ See *id.* (Ginsburg, J., dissenting).

¹⁷⁹ See *id.* at 634 (Ginsburg, J., dissenting).

¹⁸⁰ See *id.* (Ginsburg, J., dissenting) (referring to *Hewitt*, 482 U.S. 755, 761 (1987)).

¹⁸¹ See *Buckhannon*, 532 U.S. at 630 (Ginsburg, J., dissenting).

¹⁸² See *id.* at 635–36 (Ginsburg, J., dissenting).

¹⁸³ See *id.* (Ginsburg, J., dissenting) (quoting H.R. REP. NO. 94–1558, at 1 (1976)).

¹⁸⁴ See *id.* at 638 (Ginsburg, J., dissenting) (quoting H.R. REP. NO. 94–1558, at 7 (1976)) (emphasis added by Court).

concluded that in drafting its civil rights legislation, Congress intended to protect citizens' civil, not legal, rights.¹⁸⁵

Justice Ginsburg next refuted the majority's fears that the catalyst theory had acted as both a deterrent to rehabilitative behavior and a form of extortion for clever civil rights attorneys.¹⁸⁶ As to the first concern, Justice Ginsburg noted that potential defendants should reform their conduct before litigation commences or is even threatened.¹⁸⁷ The threat of attorney's fees would achieve this goal by deterring violations of civil or environmental rights in the first place.¹⁸⁸ In addition, courts could avoid the extortion issue by including it as a factor in their discretionary "reasonable" fee determination.¹⁸⁹ By removing this decision from the discretion of other courts, the majority's opinion impugned their abilities accurately to screen out meritless claims filed for nuisance value.¹⁹⁰

Finally, the dissent interpreted the majority's judicial imprimatur holding as a shift from precedents that focused on the practical impact of the lawsuits.¹⁹¹ In particular, Justice Ginsburg relied on the *Hewitt* language that defined a prevailing party as a plaintiff who benefited from a defendant's altered conduct.¹⁹² Therefore, in *Hewitt*, the lawsuit's practical effect on the parties' relationship established a prevailing party, a test that could be fulfilled by the catalyst theory.¹⁹³ By the time of the *Buckhannon* holding, however, the crucial requirement had become the mere stamp of legal process.¹⁹⁴

When the smoke had cleared in *Buckhannon*, Chief Justice Rehnquist had carried the majority in rejecting the catalyst theory for the FHAA and the ADA.¹⁹⁵ As a result, a plaintiff could achieve prevailing party status only by obtaining a final judgment on the merits or a consent decree.¹⁹⁶ Many questions, however, remained unan-

¹⁸⁵ See *id.* (Ginsburg, J., dissenting).

¹⁸⁶ See *Buckhannon*, 532 U.S. at 640 (Ginsburg, J., dissenting).

¹⁸⁷ *Id.* (Ginsburg, J., dissenting).

¹⁸⁸ See *id.* (Ginsburg, J., dissenting).

¹⁸⁹ See *id.* (Ginsburg, J., dissenting).

¹⁹⁰ See *id.* (Ginsburg, J., dissenting).

¹⁹¹ *Buckhannon*, 532 U.S. at 641 (Ginsburg, J., dissenting).

¹⁹² *Id.* (Ginsburg, J., dissenting).

¹⁹³ *Id.* (Ginsburg, J., dissenting).

¹⁹⁴ See *id.* at 641-42 (Ginsburg, J., dissenting); *Homier Distrib. Co., Inc. v. City of New Bedford*, No. 00-12410-GAO, 2002 U.S. Dist. LEXIS 2372, at *8 (Mass. Dist. Ct. Feb. 13, 2002) (noting that *Buckhannon* prohibited award under catalyst theory due to lack of judicially sanctioned change in parties' legal relationship).

¹⁹⁵ See *Buckhannon*, 532 U.S. at 610.

¹⁹⁶ See *id.*

swered, especially concerning the outer limits of any remaining catalyst theory validity.¹⁹⁷

IV. THE AFTERMATH OF *BUCKHANNON*

Since the Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, nearly every court that has required a prevailing party as a prerequisite to fee recovery has applied *Buckhannon's* judicial imprimatur test to reject catalyst claims.¹⁹⁸ Those courts that have awarded fees pursuant to the catalyst theory have distinguished their language from the FHAA or ADA versions of prevailing party language.¹⁹⁹ While acknowledging that the catalyst theory might not establish a prevailing party, they continue to grant fees where the statute gives them discretion to do so, regardless of prevailing party status.²⁰⁰

Although *Buckhannon* explicitly rejected the catalyst theory only in the FHAA and ADA contexts, courts have extrapolated its holding to nearly every other fee-shifting statute that refers to a prevailing

¹⁹⁷ See *infra* Part IV.

¹⁹⁸ See *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (holding that *Buckhannon* applies to Social Security Act, and thus denying fees requested under Fees Act); *Richardson v. City of Boston*, 279 F.3d 1, 4 (1st Cir. 2002) (holding that the catalyst theory may no longer be used to award attorney's fees under the Fees Act); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir. 2002) (holding catalyst theory invalid for Individuals with Disabilities in Education Act plaintiffs); *Chambers v. Ohio Dep't of Human Servs.*, 273 F.3d 690, 692–93 (6th Cir. 2001) (applying *Buckhannon* to reject catalyst theory under Fees Act); *County of Morris v. Nationalist Movement*, 273 F.3d 527, 536 (3d Cir. 2001) (noting that party prevails according to *Buckhannon* only after receiving some relief by the court); *Johnson v. ITT Ind., Inc.*, 272 F.3d 498, 500 (7th Cir. 2001) (applying Supreme Court's catalyst rejection to all fee-shifting provisions, including Title VII of Civil Rights Act of 1964); *N.Y. State Fed. of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154, 157 (2d Cir. 2001); *Griffin v. Steeltek, Inc.*, 261 F.3d 1026, 1029 (10th Cir. 2001) (holding catalyst theory invalid in ADA setting as a result of recent *Buckhannon* decision); *Bennett v. Yoshina*, 259 F.3d 1097, 100–01 (9th Cir. 2001); *Reiner v. Champion Health Care Corp.*, 258 F.3d 720, 727 (8th Cir. 2001) (reversing district court's fee award under Fair Labor Standards Act due to *Buckhannon* decision coming down before appeal decided); *J.S. & M.S. v. Ramapo Cent. Sch. Dist.*, 165 F. Supp. 2d 570, 577 (S.D.N.Y. 2001); *Alcocer v. INS*, No. 3:00–CV–2015–H, 2001 U.S. Dist. LEXIS 20543, at *8–9 (N.D. Tex. Aug. 28, 2001) (applying *Buckhannon* in EAJA setting to deny attorney's fees under catalyst theory); *Nat'l Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272, 1277 (N.D. Fla. 2001) (recognizing the catalyst theory's invalidity after *Buckhannon*).

¹⁹⁹ See, e.g., *Ctr. for Biological Diversity v. Norton*, 262 F.3d 1077, 1080 (10th Cir. 2001) (retaining validity of catalyst theory for Endangered Species Act because language allows fee awards where appropriate); *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 738, 745 (2001) (distinguishing EAJA mandate that courts "shall" award attorney's fees from FHAA and ADA discretionary "may" award attorney's fees).

²⁰⁰ See *Brickwood*, 49 Fed. Cl. at 747.

party.²⁰¹ Courts have relied on several statements from *Buckhannon* in order to do so.²⁰² In 2001, in *Miley v. Principi*, the United States Court of Appeals for Veterans Claims referred to the Supreme Court's statement that "Congress . . . has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes in addition to those at issue here."²⁰³ Similarly, in 2001, in *Bennett v. Yoshina*, the United States Court of Appeals for the Ninth Circuit noted that the *Buckhannon* Court had grouped the Fees Act with the FHAA and the ADA and stated that the Court had interpreted Congress's fee-shifting statutes consistently.²⁰⁴ Hence, even though the Court spoke explicitly only to the FHAA and ADA, the dicta that discussed the Fees Act and the general reference to other fee-shifting statutes have been interpreted to authorize courts to reject the catalyst theory in other contexts.²⁰⁵

In *Bennett*, the Ninth Circuit explicitly stated that *Buckhannon* overturned its earlier catalyst theory precedent under the Fees Act.²⁰⁶ There, the plaintiffs filed suit against several state officials in Hawaii after a referendum failed because the Hawaii Supreme Court tallied all the blank ballots and over-votes as "no" votes, rather than non-votes.²⁰⁷ The State of Hawaii later mooted this claim by passing a bill

²⁰¹ See *Smyth*, 282 F.3d at 277 (holding that *Buckhannon* applies to Social Security Act, and thus denying fees requested under Fees Act); *Richardson*, 279 F.3d at 4 (holding that the catalyst theory may no longer be used to award attorney's fees under the Fees Act); *J.C.*, 278 F.3d at 125 (holding catalyst theory invalid for Individuals with Disabilities in Education Act plaintiffs); *Chambers*, 273 F.3d at 692-93 (applying *Buckhannon* to reject catalyst theory under Fees Act); *County of Morris*, 273 F.3d at 536 (noting that party prevails according to *Buckhannon* only after receiving some relief by the court); *Johnson*, 272 F.3d at 500 (applying Supreme Court's catalyst rejection to all fee-shifting provisions, including Title VII of Civil Rights Act of 1964); *N.Y. State Fed. of Taxi Drivers, Inc.*, 272 F.3d at 157; *Griffin*, 261 F.3d at 1029 (holding catalyst theory invalid in Americans with Disabilities Act setting as a result of recent *Buckhannon* decision); *Bennett*, 259 F.3d at 100-01; *Reimer*, 258 F.3d at 727 (reversing district court's fee award under Fair Labor Standards Act due to *Buckhannon* decision coming down before appeal decided); *J.S. & M.S.*, 165 F. Supp. 2d at 577; *Alcoer*, 2001 U.S. Dist. LEXIS 20543, at *8-9 (applying *Buckhannon* in EAJA setting to deny attorney's fees under catalyst theory); *Nat'l Coalition for Students with Disabilities*, 173 F. Supp. 2d at 1277 (recognizing the catalyst theory's invalidity after *Buckhannon*); *Sileikis v. Perryman*, No. 01-C-944, 2001 WL 965503, at *2 (N.D. Ill. Aug. 21, 2001). But see *Brickwood*, 49 Fed. Cl. at 746 (distinguishing EAJA prevailing party language from that of the FHAA and ADA).

²⁰² See, e.g., *Miley v. Principi*, 15 Vet. App. 97, 98 (2001) (holding that *Buckhannon* reasoning should be applied in EAJA setting).

²⁰³ *Id.* at 98 (citing *Buckhannon*, 532 U.S. at 602).

²⁰⁴ See *Bennett*, 259 F.3d at 1100-01 (referring to *Buckhannon*, 532 U.S. at 602).

²⁰⁵ See *Buckhannon*, 532 U.S. at 610; *Bennett*, 259 F.3d at 1100-01; *Miley*, 15 Vet. App. at 98.

²⁰⁶ *Bennett*, 259 F.3d at 1100.

²⁰⁷ *Id.* at 1099.

that called for another election.²⁰⁸ The Ninth Circuit held that because the Supreme Court of the United States in *Buckhannon* had cited the prevailing party provision of the Fees Act as nearly identical to the corresponding FHAA and ADA provisions, there could be “no doubt” that Chief Justice Rehnquist’s analysis in *Buckhannon* applied to the Fees Act and, therefore, that the plaintiff in *Bennett* could not recover fees under the catalyst theory.²⁰⁹ Thus, the Ninth Circuit held that the catalyst theory no longer applied to the Fees Act and acknowledged that its precedents to the contrary had been overturned.²¹⁰

In addition to interpreting *Buckhannon*’s legal assessments to reject catalyst claims, some courts have applied the policy rationale behind the Court’s decision.²¹¹ In 2001, in *Sileikis v. Perryman*, the United States District Court for the Northern District of Illinois faced a claim demanding that the Immigration and Naturalization Service (INS) adjudicate the two applications for admission to the country that the plaintiff had submitted a year earlier.²¹² Midway through the case, the INS delivered a decision denying the plaintiff permission to reapply for admission, mooting the claim.²¹³ Because the plaintiff had compelled the INS to resolve the status of his applications, he applied for attorney’s fees on the basis of the catalyst theory.²¹⁴ The court, however, declined to grant fees because doing so might provide the INS with a disincentive to issue its decisions.²¹⁵ In addition, the court would be forced to speculate on the subjective motivations behind the INS’s conduct change, which would make the court’s job much more cumbersome.²¹⁶ Thus, the plaintiff could not recover fees even though he had motivated the INS to fulfill its duties.²¹⁷ The Supreme Court’s policy rationale has therefore borne fruit in courts that fear increasing workloads, allowing them to evade difficult issues as beyond their jurisdiction.²¹⁸

²⁰⁸ *Id.* at 1100.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See, e.g., Sileikis*, 2001 WL 965503, at *3.

²¹² *Id.* at *1.

²¹³ *Id.*

²¹⁴ *See id.*

²¹⁵ *Id.* at *3.

²¹⁶ *Sileikis*, 2001 WL 965503, at *3.

²¹⁷ *See id.*

²¹⁸ *See id.*

One court has even gone so far as to determine that a private settlement agreement does not confer prevailing party status upon the plaintiff.²¹⁹ Borrowing from *Buckhannon's* requirement for a judgment on the merits, in 2001, in *J.S. & M.S. v. Ramapo Central School District*, the United States District Court for the Southern District of New York concluded that settlements did not include the judicial imprimatur necessary to create a prevailing party.²²⁰ The plaintiff in *Ramapo* was forced to send her son to a special state school that could adequately administer to his learning disabilities.²²¹ Afterward, she settled with her son's former school district for the cost of attendance at the boarding school, and then applied for reimbursement of "consultant services."²²² The court responded by holding that a plaintiff would need to incorporate a private settlement into a consent decree to prevail.²²³

Several cases have distinguished *Buckhannon* and awarded fees on the basis of the catalyst theory.²²⁴ In *Center for Biological Diversity v. Norton*, the United States Court of Appeals for the Tenth Circuit granted the plaintiff attorney's fees pursuant to the catalyst theory and the Endangered Species Act (ESA).²²⁵ The ESA provides that a court may award costs and fees in citizen suits "whenever the court determines such award is appropriate."²²⁶ The court distinguished this "appropriate" language from the "prevailing party" definition in *Buckhannon* that excluded the catalyst theory.²²⁷ Because the ESA permits a court to grant fees where appropriate, the plaintiff could receive fees if it had catalyzed the defendant's change in position.²²⁸ Thus, if the center could prove that its request to list the Arkansas River shiner as endangered caused the secretary to do just that, the catalyst theory applied and the plaintiff could recover attorney's fees.²²⁹

Fees have also been awarded to a catalytic plaintiff based upon a defendant's change in position and a trial court, at a temporary re-

²¹⁹ *J.S. & M.S.*, 165 F. Supp. 2d at 575.

²²⁰ *See id.*

²²¹ *Id.* at 572.

²²² *Id.* at 573.

²²³ *See id.* at 575.

²²⁴ *See, e.g., Ctr. for Biological Diversity*, 262 F.3d at 1080 n.2.

²²⁵ *Id.* at 1081.

²²⁶ *Id.* at 1080 (citing The Endangered Species Act, 16 U.S.C. § 1540(g)(4) (2000)).

²²⁷ *See id.* at 1080 n.2.

²²⁸ *Id.* at 1081.

²²⁹ *See Ctr. for Biological Diversity*, 262 F.3d at 1081.

straining order (TRO) hearing, finding unlawful activity.²³⁰ In 2001, in *Brickwood Contractors v. United States*, the United States Court of Federal Claims granted the petitioner's request for fees by distinguishing the EAJA from the statutes in question in *Buckhannon*.²³¹ The EAJA allows plaintiffs to file claims against governmental actors who are not fulfilling a statutory mandate.²³² The court first distinguished *Buckhannon*'s FHAA and ADA context, suggesting that any reference to other statutory authority could be only dictum.²³³ Second, the *Brickwood* court interpreted Chief Justice Rehnquist's list of similar prevailing party statutes as exhaustive, noting it did not refer to the EAJA.²³⁴ Third, the court had already decided that the plaintiff in *Brickwood* had forced the defendant's change in behavior, whereas the *Buckhannon* Court never made such a finding.²³⁵ Additionally, the EAJA language mandating that a state "shall" award fees to the prevailing party distinguished it from the FHAA and ADA language cited in *Buckhannon* stating that the court "may" award fees.²³⁶

In rejecting one of *Buckhannon*'s policy concerns, the *Brickwood* court determined that the EAJA's inherent safeguards would avoid compensation for meritless claims.²³⁷ Specifically, the EAJA requires the plaintiff to prove that the government's position was not "justified to a degree that could satisfy a reasonable person."²³⁸ Even if the government had changed its position to accommodate the plaintiff's claim, a court could only award fees if the government's original position was not substantially justifiable.²³⁹ The court would accordingly avoid awarding fees for a meritless claim by evaluating the government's position to determine whether it was substantially justified.²⁴⁰

New cases continue to apply *Buckhannon* to catalyst claims on a daily basis.²⁴¹ At present, these cases are holdovers whose merits were decided before *Buckhannon* was handed down, but which are now in

²³⁰ See, e.g., *Brickwood*, 49 Fed. Cl. at 743, 749.

²³¹ See *id.* at 745.

²³² See 28 U.S.C. § 2412 (2000).

²³³ See *Brickwood*, 49 Fed. Cl. at 744.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 745–46.

²³⁷ *Id.* at 746.

²³⁸ See *Brickwood*, 49 Fed. Cl. at 746.

²³⁹ See *id.* (referring to 28 U.S.C. § 2412(d)(2)(D) (2000)).

²⁴⁰ *Id.* at 746–47.

²⁴¹ See, e.g., *N.Y. State Fed'n of Taxi Drivers, Inc.*, 272 F.3d at 157 (holding that *Buckhannon*'s reasoning required a judicially sanctioned change in the legal relationship under Section 1988).

the stage of attorney's fees requests.²⁴² It will be impossible to assess the effect of *Buckhannon* on overall litigation rates until these cases have concluded.²⁴³ The most profound effects, however, will arise with new claims as plaintiffs become overly discerning in litigating these claims in light of *Buckhannon*, and lawyers in turn carefully choose those plaintiffs.²⁴⁴

V. BUCKHANNON UNLEASHED

In *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, the Supreme Court erroneously overturned thirty years of fee-shifting jurisprudence by eliminating the catalyst theory for recovery under the FHAA and ADA.²⁴⁵ First, the majority misinterpreted the legislative history of the Fees Act by deeming it ambiguous on the availability of catalyst claims.²⁴⁶ Second, Chief Justice Rehnquist underestimated the chilling effect of the abolition of the catalyst theory on future litigation because of the lack of evidence proffered to prove such an effect.²⁴⁷ Third, the majority ignored the fact that most environmental and civil rights claimants request primarily equitable relief in its unreasonable suggestion that a claim for damages would serve as a proxy for otherwise mooted equitable claims.²⁴⁸ Fourth, the majority underestimated the number of defendants who could meet the absolutely clear standard to moot claims.²⁴⁹ Fifth, the Court overstated the threat of nuisance suits being

²⁴² See *id.* at 155.

²⁴³ See *id.*

²⁴⁴ See, e.g., *supra* note 9 and accompanying text.

²⁴⁵ See 532 U.S. 598, 610 (2001).

²⁴⁶ See *id.* at 608 (stating that Congress would have to endorse the catalyst theory explicitly to overcome the American Rule's presumption against awarding attorney's fees).

²⁴⁷ See *id.*; Laura E. Flenniken, *No More Plain Meaning*: *Farrar v. Hobby*, 71 DENV. U. L. REV. 477, 505 (1994) (stating that the "most obvious objection to the *Farrar* decision is its potential chilling effect on civil rights litigation"); Daniel L. Lowery, "Prevailing Party" Status for Civil Rights Plaintiffs: *Fee-Shifting's Shifting Threshold*, 61 U. CIN. L. REV. 1441, 1475-76 (1993) (stating that the Supreme Court is achieving success at eliminating classes of civil rights cases).

²⁴⁸ See *Buckhannon*, 532 U.S. at 609-10; *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 785 (1989) (plaintiffs challenged constitutionality of communications prohibition between teachers and unions during schoolday); *Hewitt v. Helms*, 482 U.S. 755, 757-58 (1987) (filing suit to vindicate due process rights); *Hensley v. Eckerhart*, 461 U.S. 424, 426 (1983) (bringing lawsuit challenging constitutionality of treatment at state mental health hospital).

²⁴⁹ See *Buckhannon*, 532 U.S. at 608-10.

brought in the guise of catalyst theory cases.²⁵⁰ Finally, Chief Justice Rehnquist incorrectly concluded that defendants would be more likely to alter their positions in the absence of the catalyst theory.²⁵¹

Regardless of these criticisms, the *Buckhannon* decision has been accepted by nearly every federal court of appeals and utilized to eliminate the catalyst theory from prevailing party discussions.²⁵² Understanding that the *Buckhannon* holding will likely remain valid case law, it should be distinguished from other catalyst theory cases to promote vindication of civil or environmental rights by those parties who cannot afford litigation fees.²⁵³ In addition, Congress should preempt the possibility of further *Buckhannon* expansion by adopting a prevailing party definition that explicitly includes the catalyst theory.²⁵⁴ Until the courts or Congress remedy *Buckhannon*'s strict prevailing party requirements, the vindication of critical civil and environmental rights will continue to be lethargic.²⁵⁵

In *Buckhannon*, the Court exceeded its authority by substituting its own definition of prevailing party for that stated in the legislative history of the Fees Act.²⁵⁶ Instead of adopting the Senate report's assertion that a party could prevail without obtaining formal relief, Chief Justice Rehnquist required a party to procure a material alteration in its legal relationship with the opposing party.²⁵⁷ In shaping this definition, he deemed statements that a prevailing party need not be limited to plaintiffs who received a "final judgment following a full trial on the merits" ambiguous in light of the American Rule.²⁵⁸ The majority evaded the fact that the legislative history of the Fees Act expressly refuted the American Rule in such circumstances.²⁵⁹ In fact,

²⁵⁰ See *id.* at 610 (stating that the elimination of the catalyst theory would avoid district court analysis of the defendant's subjective motivations in changing conduct).

²⁵¹ See *id.*

²⁵² See *supra* notes 198–202 and accompanying text.

²⁵³ See, e.g., *Brickwood Contractors v. United States*, 49 Fed. Cl. 743, 745 (2001) (distinguishing *Buckhannon*).

²⁵⁴ See S. REP. NO. 94–1011, at 3–4 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

²⁵⁵ See Lowery, *supra* note 247, at 1475–77. The Court's reduction of the class of eligible plaintiffs to those who reach a final judgment, settlement, or consent decree will penalize plaintiffs who bring claims that are then mooted by defendants. See *id.* Clever defendants will avoid any fee-shifting liability at all by altering behavior before judgment, which places an unbearable financial burden on plaintiffs. See *id.*

²⁵⁶ See *Buckhannon*, 532 U.S. at 607.

²⁵⁷ See *id.*; see also S. REP. NO. 94–1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

²⁵⁸ See *Buckhannon*, 532 U.S. at 607–08.

²⁵⁹ See H.R. REP. NO. 94–1558, at 5, 7 (1976); S. REP. NO. 94–1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

the American Rule's adverse social impact in *Alyeska Pipeline Service Company v. Wilderness Society*, in which the plaintiff had succeeded in bringing about positive environmental change but then failed to obtain attorney's fees, led directly to the enactment of the Fees Act.²⁶⁰ Congress acknowledged its purpose by stating in the Fees Act that a party should receive fees for obtaining the requested relief even in the absence of a final judgment.²⁶¹ Consequently, the Supreme Court incorrectly overruled Congress's express desire to subordinate the American Rule to the emerging doctrine that a prevailing party could obtain attorney's fees even in the absence of a final judgment.²⁶²

The *Buckhannon* majority also minimized the chilling impact that the abolition of the catalyst theory would have on future rights vindication.²⁶³ Chief Justice Rehnquist improvidently stated that, in the absence of evidence to the contrary, he would assume that the Fourth Circuit's repudiation of the catalyst theory had not diminished the overall number of civil rights cases before the Fourth Circuit.²⁶⁴ Even allowing arguendo that this assumption is accurate, several of the following factors could explain the Fourth Circuit's continuing caseload.²⁶⁵

First, Chief Justice Rehnquist's reasoning does not take into account the lag time between the date a case is filed and its conclusion.²⁶⁶ Even though the Fourth Circuit decided *S-1 & S-2 By and Through P-1 & P-2 v. State Board of Education of North Carolina* in 1994, many of the court's current cases could have been in the docket since that date.²⁶⁷ Because civil rights and environmental cases are among the most complex types of litigation, they require even longer to conclude than cases in other genres.²⁶⁸ Thus, the cases in the Fourth Circuit's docket at the time of the *Buckhannon* deliberations likely repre-

²⁶⁰ See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 240 (1975); S. REP. NO. 94-1011, at 4 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

²⁶¹ See H.R. REP. NO. 94-1558, at 5, 7 (1976); S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

²⁶² See S. REP. NO. 94-1011, at 3-4 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

²⁶³ See Flenniken, *supra* note 247, at 505; Lowery, *supra* note 247, at 1475-77.

²⁶⁴ See Flenniken, *supra* note 247, at 505; Lowery, *supra* note 247, at 1475-77.

²⁶⁵ See *infra* notes 266-272 and accompanying text.

²⁶⁶ See Flenniken, *supra* note 247, at 505; Lowery, *supra* note 247, at 1475-77.

²⁶⁷ See Flenniken, *supra* note 247, at 505 (referring to extraordinary length of civil rights cases, including nineteen-year-long *Farrar v. Hobby*, 506 U.S. 103 (1992)).

²⁶⁸ See, e.g., *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1191 (9th Cir. 2000) ("Environmental litigation is tremendously complex, lengthy, and expensive.").

sented cases filed both before and after the *S-1* & *S-2* rejection of the catalyst theory, in unknown quantities.²⁶⁹

Second, Chief Justice Rehnquist's observation that there was no evidence of a Fourth Circuit decline in civil rights cases fails to consider those cases filed soon after *Buckhannon* to challenge the reach of its holding.²⁷⁰ When a potentially important holding is delivered, plaintiffs who may be affected often file a variation on the seminal case to determine the limits of their continuing rights.²⁷¹ In the case at hand, a plaintiff just like *Buckhannon* might choose to file a case in the aftermath of *S-1* & *S-2* because it purported to reject the catalyst theory.²⁷²

In addressing the mootness argument, Chief Justice Rehnquist conceded that an action for damages will continue to lie even if there is no longer any basis for equitable relief.²⁷³ This concession is unrealistic because the majority of catalyst plaintiffs file their lawsuits precisely to effect behavioral change, not to collect damages for the inappropriate behavior.²⁷⁴ For example, in *Buckhannon*, the plaintiff filed suit to enjoin the State of West Virginia from closing its business.²⁷⁵ Although *Buckhannon* would certainly have accepted damages for loss of earnings, its primary motive was to continue operating.²⁷⁶ Because the case was initially based in a claim for equitable relief, even if damages were granted, fee-shifting law might have determined that the plaintiff should have been compensated only for that portion of the fees deemed reasonable, or that attributed directly to the damages claim.²⁷⁷ Thus, *Buckhannon* would have recovered damages, its secondary concern, and the lawyer would have been

²⁶⁹ See Flenniken, *supra* note 247, at 505.

²⁷⁰ See *id.* (*Buckhannon* itself filed for attorney's fees even in the wake of *Farrar*, which appeared to eliminate the catalyst theory from the definition of prevailing party).

²⁷¹ See, e.g., *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 738, 745 (2001) (holding that *Buckhannon* did not apply in EAJA setting, though the EAJA language was similar to that of the ADA and FHAA, explicitly rejected in *Buckhannon*).

²⁷² See *id.*

²⁷³ See *id.*

²⁷⁴ See *Buckhannon*, 532 U.S. at 609–10; *Garland*, 489 U.S. at 785 (plaintiffs challenged constitutionality of communications prohibition between teachers and unions during schoolday); *Hewitt*, 482 U.S. at 757–58 (filing suit to vindicate due process rights); *Hensley*, 461 U.S. at 426 (bringing lawsuit challenging constitutionality of treatment at state mental health hospital).

²⁷⁵ See *Buckhannon*, 532 U.S. at 600–01.

²⁷⁶ See *id.*

²⁷⁷ See *Hensley*, 461 U.S. at 433–34 (calculating attorney's fees based on number of hours reasonably expended and reasonable hourly rate, and determining that claims that were unsuccessful should recover no fees).

poorly compensated for the total time put into the case.²⁷⁸ This result would have contributed further to hindering lawyers from accepting cases on a contingency basis.²⁷⁹

The majority also failed to distinguish between public and private defendants and underestimated the ability of public catalyst theory defendants to meet the strict mootness standard.²⁸⁰ A defendant can moot a claim only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."²⁸¹ Because a public statutory or regulatory response carries greater legal permanence than a private party's internal policy change, however, a public entity will more easily meet this absolute certainty standard.²⁸² Because many catalyst theory cases are filed against public parties that enact changes of this more permanent nature, plaintiffs in such cases may very likely find their cases to be moot.²⁸³

Just as the majority rashly dismissed the plaintiff's concerns, they overvalued the supposed dangers of the catalyst theory.²⁸⁴ Chief Justice Rehnquist discussed the hazard of awarding fees against a party that had changed its position merely to avoid the hassle of a nuisance suit.²⁸⁵ Although this fear of abuse of the legal system has merit, it underestimates both the energy that a plaintiff must expend in a case

²⁷⁸ See *id.*

²⁷⁹ See *id.*

²⁸⁰ See *Buckhannon*, 532 U.S. at 607-10.

²⁸¹ See *id.* (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

²⁸² See *id.* at 600-01 (finding that legislation enacted after suit was filed eliminated offensive provisions).

²⁸³ See *Smyth v. Rivero*, 282 F.3d 268, 271 (4th Cir. 2002) (claim against Virginia Department of Social Services for withholding welfare support in violation of Social Security Act and constitutional rights); *Richardson v. City of Boston*, 279 F.3d 1, 2 (1st Cir. 2002) (claim filed against city and police department); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 120 (2d Cir. 2002) (claim against school district's policies concerning Individuals with Disabilities in Education Act plaintiffs); *Chambers v. Ohio Dep't of Human Servs.*, 273 F.3d 690, 692-93 (6th Cir. 2001) (plaintiffs challenged defendant state agency's Medicaid eligibility rules); *County of Morris v. Nationalist Movement*, 273 F.3d 527, 529 (3d Cir. 2001) (claimed first amendment right to gather and rally on courthouse steps against county denial of permit for such activity); *N.Y. State Fed. of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n*, 272 F.3d 154, 156 (2d Cir. 2001) (plaintiffs sued Westchester County law requiring licensing of drivers picking up or dropping off passengers in County); *Bennett v. Yoshina*, 259 F.3d 1097, 1099 (9th Cir. 2001) (individuals and organizations filed claim against state officials and entities of federal court for constitutional violations of election procedures).

²⁸⁴ See *Buckhannon*, 532 U.S. at 605.

²⁸⁵ See *id.* at 606.

and the morals of a lawyer who would accept such a case.²⁸⁶ Because many plaintiffs do not have the time to file frivolous lawsuits, and most lawyers respect their ethical obligation to file non-frivolous claims, the incidence of a meritless claim would be low.²⁸⁷

In addition, Justice Ginsburg's dissent insightfully recommends that courts could value the merits of the underlying claim in doling out fees according to their discretion.²⁸⁸ Even if a plaintiff filed a meritless claim, a lawyer represented this plaintiff, and the defendant changed behavior to meet the plaintiff's frivolous demands, the ultimate authority for awarding fees would lie in the court.²⁸⁹ The court could then reduce the fees commensurate with its valuation of the underlying claim.²⁹⁰

The majority's similar concern that the possibility of catalyst fees would deter defendants from changing their positions is unfounded.²⁹¹ As Justice Ginsburg noted, such defendants could have avoided suits altogether by altering their behavior before a cause of action had arisen.²⁹² In addition, defendants faced with the possibility of exorbitant trial fees would surely rather expose themselves to the possibility of a much smaller catalyst theory liability by altering their behavior during the case.²⁹³ Thus, defendants who weighed the alternatives would discover that they would suffer less liability if they altered their behavior toward the plaintiff as early as possible.²⁹⁴

Although the *Buckhannon* Court's reasoning may have been flawed, lower courts must learn to apply or distinguish it.²⁹⁵ Hence, with the catalyst theory officially abolished for the FHAA and ADA, and effectively abolished under many other statutes with similar "prevailing party" language, courts can produce equitable results only by distinguishing those few statutes that are arguably outside the reach of *Buckhannon's* holding.²⁹⁶ In particular, because many catalyst cases are

²⁸⁶ See *id.*

²⁸⁷ See *id.*

²⁸⁸ See *id.* at 639–40 (Ginsburg, J., dissenting).

²⁸⁹ See *Buckhannon*, 532 U.S. at 639–40 (Ginsburg, J., dissenting).

²⁹⁰ See *id.* (Ginsburg, J., dissenting).

²⁹¹ See *id.* at 608.

²⁹² See *id.* at 639 (Ginsburg, J., dissenting).

²⁹³ See *id.* (Ginsburg, J., dissenting).

²⁹⁴ See *Buckhannon*, 532 U.S. at 639 (Ginsburg, J., dissenting).

²⁹⁵ See *id.* at 644 (Ginsburg, J., dissenting).

²⁹⁶ See, e.g., *Brickwood*, 49 Fed. Cl. at 743.

filed in opposition to governmental action, distinguishing the EAJA would preserve the catalyst theory in many cases.²⁹⁷

In *Brickwood Contractors v. United States*, the United States Court of Federal Claims distinguished *Buckhannon* in its EAJA analysis on the basis of both different facts and EAJA's textual safeguards.²⁹⁸ First, Judge Horn stated that unlike the case before him, neither the plaintiffs nor the Court were responsible for the successful resolution of the *Buckhannon* dispute.²⁹⁹ Instead, the non-party West Virginia legislature satisfied *Buckhannon*'s claim by removing the statutory self-preservation requirement for nursing homes.³⁰⁰ Because the legislature was never a party to the case, Judge Horn posits that it would be difficult to prove a direct causation, so that even reliance on a valid catalyst theory would have failed.³⁰¹ The *Buckhannon* holding should therefore be applied only in those instances in which the plaintiff could not prove the requirements of the catalyst theory.³⁰²

Additionally, the *Brickwood* court distinguished the EAJA's language, which says that fees shall be awarded, from the fee-shifting provisions at issue in *Buckhannon*.³⁰³ In contrast to the FHAA or ADA, the EAJA requires that "a court *shall* award to a prevailing party other than the United States fees and other expenses . . . *unless* the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."³⁰⁴ The mandatory language indicates that a court can withhold fees only if the government can justify its position.³⁰⁵ This has two ramifications for EAJA litigation: courts have a nearly mandatory duty to award fees, and the statute itself provides a filter through which prevailing parties must demonstrate that they legitimately deserve attorney's fees.³⁰⁶ Thus, the EAJA inherently refutes the argument that the catalyst theory might reward nuisance plaintiffs because the government can avoid fee liability merely through proving that its position was "justified to a de-

²⁹⁷ See *id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 744.

³⁰⁰ See *Buckhannon*, 532 U.S. at 601.

³⁰¹ See *Brickwood*, 49 Fed. Cl. at 744.

³⁰² See *id.*

³⁰³ See *id.* at 745.

³⁰⁴ See *id.* at 746.

³⁰⁵ See *id.*

³⁰⁶ 28 U.S.C. § 2412(d)(1)(A) (2000).

gree that could satisfy a reasonable person."³⁰⁷ Even if the government altered its behavior to benefit the plaintiff, it would not be liable for fees unless its original position was unjustified.³⁰⁸

In addition to the EAJA, the catalyst theory should still be valid for fee-shifting statutes that do not require that a plaintiff be a prevailing party to receive fees.³⁰⁹ For example, the ESA provides for courts to award attorney's fees "whenever the court determines such award is appropriate."³¹⁰ In the context of the Clean Air Act, which has similar language, the Supreme Court has held that fees are appropriate only if the plaintiff has received "some degree of success on the merits."³¹¹ In the absence of adjudication on the merits to show some success, the United States Court of Appeals for the Tenth Circuit has found fees appropriate only if the plaintiff proves to be the catalyst behind the defendant's change in conduct.³¹² Thus, the catalyst theory should still be applied to plaintiffs who file suit under fee-shifting statutes that grant fees where appropriate.³¹³

Whether or not courts continue to read the catalyst theory out of the definition of prevailing party, Congress should amend its fee-shifting statutes to include the catalyst theory.³¹⁴ The *Buckhannon* decision, just like that in *Alyeska* twenty-five years ago, is an implied call to arms to Congress to codify a critical aspect of current common law, the catalyst theory.³¹⁵ In *Alyeska*, the Court would not defy the American Rule to grant fees to the prevailing party, so Congress responded by enacting fee-shifting statutes that expressly defied the American Rule.³¹⁶ Congress should take the same action and expressly defy the *Buckhannon* holding by inserting a definition of prevailing party that includes the catalyst theory within each fee-shifting statute.³¹⁷ The plain meaning of the prevailing party definition would then compel

³⁰⁷ See *Brickwood*, 49 Fed. Cl. at 746 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

³⁰⁸ See *id.* at 746-47.

³⁰⁹ See, e.g., Endangered Species Act, 16 U.S.C. § 1540(g)(4) (2000).

³¹⁰ See *id.*

³¹¹ See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983).

³¹² See *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1486 (10th Cir. 1995).

³¹³ See *Ctr. for Biological Diversity v. Norton*, 262 F.3d 1077 (10th Cir. 2001).

³¹⁴ See S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

³¹⁵ See *Alyeska*, 421 U.S. at 269.

³¹⁶ See H.R. REP. NO. 94-1558, at 5, 7 (1976); S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

³¹⁷ See H.R. REP. NO. 94-1558, at 5, 7 (1976); S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

courts to apply the catalyst theory to appropriate plaintiffs for attorney fee recovery.³¹⁸

Legislative codification of the catalyst theory would be completely consistent with the legislative history surrounding the early fee-shifting statute, the Fees Act.³¹⁹ The Senate report on the act asserted that final judgments could be unnecessary to obtain fees with statements such as, "[P]arties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief."³²⁰ Hence, Congress clearly intended "prevailing party" to have the broadest possible reach, a reach which would surely include the catalyst theory.³²¹

In addition, Congress could dispel much of the criticism concerning the catalyst theory's arbitrariness by enacting clearly defined standards for plaintiffs to use in applying the catalyst theory.³²² Congress could import aspects of prior case law to require that a catalyst plaintiff meet Justice Ginsburg's three-part threshold test: (1) that the plaintiff present a genuine, colorable claim, rather than a nuisance suit; (2) that the defendant provide some of the benefit sought by the plaintiff; and (3) that the plaintiff's suit be a substantial or significant cause of the defendant's change in behavior.³²³ The requirement of a genuine claim would allay concerns that the plaintiff filed a non-meritorious claim for its nuisance value.³²⁴ The fact that the plaintiff benefited from the change in behavior would prove that the plaintiff achieved some degree of success on the claim, and so could be said to have prevailed.³²⁵ Finally, a plaintiff would be forced to prove that the claim caused the defendant's action, so that the plaintiff would not be compensated for filing a claim after the defendant had decided to act.³²⁶ Thus, Congress could simply ensure the catalyst theory's viability by codifying the methods by which courts had evaluated catalyst claims prior to *Buckhannon*.³²⁷

³¹⁸ See *Buckhannon*, 532 U.S. at 607-08 (refusing to apply catalyst theory after finding congressional intent ambiguous).

³¹⁹ See H.R. REP. NO. 94-1558, at 5, 7 (1976); S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

³²⁰ See S. REP. NO. 94-1011, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5912.

³²¹ See *id.*

³²² See *Buckhannon*, 532 U.S. at 608, 610.

³²³ See *id.* at 626-28 (Ginsburg, J., dissenting).

³²⁴ See *id.* (Ginsburg, J., dissenting).

³²⁵ See *id.* (Ginsburg, J., dissenting).

³²⁶ See *id.* (Ginsburg, J., dissenting).

³²⁷ See *Buckhannon*, 532 U.S. at 608, 610 (Ginsburg, J., dissenting).

In the absence of a congressional response that would mitigate the civil and environmental rights violations that will occur without the catalyst theory, courts should fashion an efficient substitute.³²⁸ One scholar, Joel Trotter, has proposed the voluntary cessation doctrine as a valid alternative.³²⁹ The voluntary cessation doctrine provides a court with the continuing ability to render a final judgment if it feels that the defendant may have changed behavior only temporarily.³³⁰ Thus, as suggested by Chief Justice Rehnquist in his *Buckhannon* opinion, a defendant can moot a claim only by proving to a certainty a permanent discontinuance of the unlawful behavior at issue.³³¹ The voluntary cessation rule itself, however, is not without hazard.³³² For example, a cynical plaintiff who wishes a permanent resolution might continue to press for an injunction even after the defendant has ceased the unlawful activity.³³³ In such instances, a court will generally refrain from issuing such an injunction unless the future of the defendant's self-imposed ban is uncertain.³³⁴ Hence, this doctrine can be engaged with little difficulty by private parties who can show through writings that they have changed their policies, and even more easily by governmental bodies that can point to newly enacted statutory or regulatory authority.³³⁵ In addition, after *Farrar v. Hobby*, an enforceable judgment does not automatically establish eligibility for attorney's fees.³³⁶ The plaintiff must secure a substantial award that will indicate the monumental effort put into the case by the plaintiff and thus garner a large fee recovery.³³⁷ Therefore, the voluntary cessation doctrine will certainly prove helpful in obtaining final judgments, but only under very limited circumstances, and so cannot fully replace the catalyst theory.³³⁸

The catalyst theory's continuing vitality is crucial to maintaining the optimal level of civil rights and environmental defense.³³⁹ Without the risk of extra fee liability, a defendant may violate a plaintiff's rights

³²⁸ See Trotter, *supra* note 30, at 1450–53.

³²⁹ See *id.* at 1450.

³³⁰ See *id.* at 1450–51.

³³¹ See *id.* at 1451.

³³² See *id.* at 1453.

³³³ See Trotter, *supra* note 30, at 1453.

³³⁴ See *id.*

³³⁵ See *id.*

³³⁶ See *id.*

³³⁷ See *Farrar*, 506 U.S. 103, 115 (1992).

³³⁸ See Trotter, *supra* note 30, at 1453.

³³⁹ See *supra* notes 263–272 and accompanying text.

throughout the course of litigation before altering behavior to moot the claim.³⁴⁰ A plaintiff's attorney would evaluate this possibility and refuse to take the case at the risk of large pecuniary losses.³⁴¹ On the contrary, with a viable catalyst theory, a defendant would more quickly comply with the plaintiff's claim to avoid protracted litigation and the accompanying fees.³⁴²

CONCLUSION

The catalyst theory evolved as a method to award attorney's fees to citizens who had vindicated their legal rights without judicial decree. In drafting the Fees Act, Congress recognized that such plaintiffs were worthy of this reward and so implicitly included the theory in the language of the prevailing party legislative history. In 2001, however, the Supreme Court eviscerated Congress's statutory fee-shifting intent when it squarely abandoned the catalyst theory in the FHAA and ADA settings in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.

Regardless of the *Buckhannon* decision, the critical importance of a viable catalyst theory should compel lower courts and scholars to continue to search for ways to apply the catalyst theory in the civil rights and environmental contexts, distinguishing these areas of the law from either the FHAA or ADA. In addition, Congress should react to the Court's implied request for a clear prevailing party definition by promptly enacting catalyst theory legislation and setting guidelines by which it may be implemented. As the civil rights and environmental needs of this country continue to expand, the courts should allocate the fee burden appropriately by requiring defendants to pay for the litigation engendered by their unlawful actions.

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³⁴⁰ See *supra* notes 273-279 and accompanying text.

³⁴¹ See *supra* notes 273-279 and accompanying text.

³⁴² See *supra* notes 273-279 and accompanying text.