No. 08- 08-853 JAN 5 - 2009



IN THE

# Supreme Court of the United States

BRUCE ZESSAR,

*Petitioner,*

*v.*

JOHN R. KEITH, *ET AL.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a plaintiff's achievement of summary judgment on the merits is a sufficient "alteration of legal relationship" under this Court's decision in *Buckhannon Board and Care Home Inc. v. West Virginia Dept. of Health*, 532 U.S. 598 (2001) to entitle the plaintiff to "prevailing party" status, and attorneys fees, under the Civil Rights Attorneys Fees Awards Act of 1976, codified as 42 U.S.C. § 1988, despite the defendants' subsequently mooting the case by enacting corrective legislation explicitly attributed to the litigation, prior to the entry of a Fed. R. Civ. P. 58 final judgment?

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## PETITION FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The opinion and order of the district court (per Coar, D.J.) (Appendix ("Pet. App. __"), Pet. App. A) entering final judgment against Respondent. The opinion of the court of appeals (per Manion, joined by Flaum and Tinder) reversing the district court's decision (Pet. App. B) and is reported at 536 F.3d 788. The court of appeals' order denying rehearing en banc (Pet. App. C) is not reported.

## JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331. The judgment of the court of appeals was entered on August 8, 2008. A timely petition for rehearing en banc was denied on October 7, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

42 U.S.C. § 1988

"(b) Attorney's fees

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000

> [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction."

## STATEMENT OF THE CASE

### 1. *Nature of the Case*

Petitioner's 2004 general election absentee ballot was rejected by the Lake County, IL election judges on election night, yet he was not notified of the rejection until 2 1/2 months later. At that time, Illinois law neither required timely notice nor provided any opportunity to be heard to defend one's ballot even though the official count would never occur for at least two weeks.

Zessar brought this Civil Rights action in the United States District Court (N.D. Ill.) to challenge Illinois' lack of timely notice and any provision for a hearing to defend the voter's ballot. After certifying the case to proceed as a class action, the District Court granted summary judgment to Petitioner on the merits, holding that Illinois' lack of timely notice and opportunity for a hearing to defend one's ballot prior to the final ballot

count ("canvass") did constitute a deprivation of his constitutional right to vote without due process, and ordered the parties to present proposed procedures to protect absentee voters' due process rights.

Instead, but before the court ruled on ultimate relief and judgment, the Illinois legislature enacted legislation requiring notice within 48 hours and the opportunity to appear in person to defend one's ballot[1] and defendants moved to dismiss the case as moot. Although the District Court ruled that the defendants' actions had mooted the case, it nonetheless held that the Petitioner's achieving summary judgment on the merits constituted sufficient alteration of the parties' legal relationship, entitling him to attorneys' fees under the Civil Rights Attorneys Fees Act of 1976, 42 U.S.C. § 1988.

On the appeal by the State and County election officials, the Seventh Circuit, interpreting this Court's *Buckhannon*[2] decision, held that the mooting of the case prior to entry of final judgment deprived the plaintiff of "prevailing party" status, and reversed the order of entitlement to attorneys' fees.

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[1] The number of affected voters, historically about one per precinct, is a significant number; and the result since then has been that virtually every rejected voter who has chosen to defend their ballot has succeeded in having their ballot counted. While petitioner did not seek money damages, the only manner in which his complaint was not addressed, was that persons in military service or similarly incapable of appearing in person should be afforded a way to defend their ballot, by facsimile, mail or internet.

[2] *Buckhannon Board and Care Home Inc. v. West Virginia Dep't of Health*, 532 U.S. 598 (2001).

## REASONS FOR GRANTING THE PETITION

There is an irreconcilable split among the Circuits that this Court needs to resolve.

The Seventh Circuit's holding that Petitioner's achievement of summary judgment on the merits is insufficient for "prevailing party" status, clashes with holdings of the First, Second, Third, Fifth, Sixth, Eighth, Ninth, Eleventh and D.C. Circuits that a merits-based decision *at any stage* can confer prevailing party status to a plaintiff where a defendant thereafter mooted the case by either amending the challenged statute or permanently changing the policies prior to entry of final Rule 58 judgment.

The Seventh Circuit's "final judgment" standard also wrongly provides the perverse incentive for defendants to litigate all cases, regardless of merit, to wear down plaintiffs, right up to the instant before final judgment, diminishes an important incentive that Congress intended to provide in order to ensure that important cases such as this one are litigated, by and conversely deters plaintiffs from asserting such claims (in fact deters lawyers from accepting such representation) because any defendant will always be able to evade paying fees by mooting the case at any time prior to entry of final judgment.

## I. The Seventh Circuit's Decision Conflicts with All Reported Decisions of the United States Courts of Appeals for Other Circuits Holding that a Defendant's Mooting the Case by Capitulating to Plaintiff's Position After Even a Nonfinal Adjudication of the Merits May Satisfy Prevailing Party Status

The Seventh Circuit's "final judgment on the merits" requirement[3] for "prevailing party" status conflicts with all other reported majority of Circuits' holdings that achievement of any decision on the merits of the claim is generally sufficient for "prevailing party" status, even where the defendant thereafter "moots" the claim by subsequently amending the statute or permanently changing its policies prior to entry of a final Rule 58 judgment.

### A. The Third, Fifth and Ninth Circuits hold that a Preliminary Ruling on the Merits may satisfy *Buckhannon*, Even Without Entry of Final Judgment.

The Third, Fifth and Ninth Circuits all hold that a favorable ruling on the merits may be sufficient to satisfy "prevailing party" status over the defendants'

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[3] The Seventh Circuit also ignored its own prior case law recognizing a final judgment is not required for Petitioner to be a prevailing party. *See, Palmetto Props., Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004) (conferring prevailing party status on plaintiff that succeeded on a preliminary injunction despite defendant amending the statute and mooting the case prior to final judgment).

subsequent mooting of the claim. See: *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 232 (3d Cir. 2008); *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008) and *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002).

The Third Circuit, in *People Against Police Violence v. City of Pittsburgh*, 520 F.3d at 235, held that plaintiffs were prevailing parties where the district court granted plaintiffs' motion [for interim injunctive relief] and issued a preliminary injunction which prohibited the City from enforcing the challenged ordinance and imposed temporary procedures . . . "until the City passed a new ordinance." *Id.* Like here, the district court also ordered the city to submit its proposed revisions to the ordinance to the court and held that the plaintiff was a prevailing party.

The Third Circuit affirmed the district court's holding that plaintiffs were a prevailing party and rejected the defendants' argument that the voluntary amendment to the statute – after it was deemed unconstitutional – lacked the judicial imprimatur to confer prevailing party status, articulating that "[a]t the end of the proceedings, plaintiffs had achieved precisely what they sought on an enduring basis, and that success was a result of plaintiffs' efforts and court-enforced victories rather than defendant's voluntary actions." *Id.* at 236.

Similarly, the Fifth Circuit, in *Dearmore v. City of Garland,* 519 F.3d at 522, found that a plaintiff was a prevailing party under § 1988 when plaintiff obtained a preliminary injunction enjoining enforcement of an

ordinance even where subsequent amendment of that ordinance mooted the plaintiff's claim.

More specifically, in *Dearmore*, the district court held that insofar as the challenged ordinance allowed inspections and searches of unoccupied property, it violated a property owner's Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* at 519. As a result, the district court issued a preliminary injunction enjoining the City from enforcing section 32.09(F) of the Ordinance, which required a property owner who rents or leases a single-family dwelling to allow an inspection of the rental property as a condition of issuing a permit, or penalizes the lessor for refusing to allow an inspection. *Id.*

Later, the Garland City Council amended the ordinance, removing the provisions related to a nonresident owner's consent to the inspection of single-family rental properties and clarifying the circumstances under which the City may seek a warrant to inspect such properties when consent has been refused or could not be obtained. *Id.* at 520.

The district court dismissed the case, entered final judgment dismissing the case as moot and with prejudice, but nonetheless granted Petitioner's motion for attorneys' fees finding that Dearmore was a "prevailing party" under 42 U.S.C. § 1988(b). *Id.* Defendant appealed.

The Fifth Circuit affirmed, holding that final judgment and consent decrees are not the exclusive remedies that have sufficient judicial imprimatur under

*Buckhannon. Id., citing, Buckhannon,* 532 U.S. at 605 (referencing the judgment on the merits and consent decree as mere "examples").

Identically, the Ninth Circuit, in *Watson v. County of Riverside,* 300 F.3d 1092 (9th Cir. 2002) held that a preliminary injunction was sufficient under *Buckhannon* to confer prevailing party status on Plaintiff because of change in legal relationship even though the underlying case became moot. *Id.* at 1095. The Ninth Circuit specifically concluded that: "by obtaining the preliminary injunction, appellees 'prevailed on the merits of at least some of (their) claims.'" *Id.* at 1096. Additionally, the *Watson* court articulated that the plaintiff succeeded on a "significant issue in litigation, which achieve(d) . . . the benefit the parties sought in bringing suit" *id.*, and "the Ninth Circuit's previous dismissal of the appeal as moot and vacation of the district court judgment did not affect the fact that for the pertinent time period appellees obtained the desired relief." *Id.*

Petitioner's entitlement to "prevailing party" status is even stronger herein, since the Defendants' mooting actions followed the District Court's definitive summary judgment ruling on the merits, which was explicitly referred to in the legislators' explanations of the Bill being presented on the floor of the legislature.[4]

[4] The legislative history of SB 1445 shows not only that the absentee amendments were made only *after* the District Court ruled that the Election Code's absentee voting provisions were not constitutional, but that they were explicitly enacted *because* of it. When debate was held on SB1445, the sponsor clearly (Cont'd)

Indeed, the summary judgment entered here was much more compelling than any preliminary order found sufficient by other circuits. And, the relief changed the legal relationship between the parties because following the entry of summary judgment, Illinois no longer had constitutional absentee balloting procedures. The only reason that Defendants were able to "moot" the case is that the District Court mandated that new, constitutional procedures be implemented ahead of the final order. Simply amending the statute without court approval however, does not change the fact that Petitioner succeeded on the main tenet of the litigation – to have the law declared unconstitutional and to require Illinois election authorities to provide timely notice to absentee balloters and the opportunity to challenge any rejection of his or her ballot.[5]

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(Cont'd)

mentioned that "this measure comes from [county] clerks across the state." (App. A to Appellee's Br. at p. 89). The Senate Transcript similarly shows the attribution, stating: "this comes from a court case in Lake County." (App. B to Appellee's Br. at p. 31)

[5] Indeed, the fundamental value of Plaintiff's efforts is shown in the record below that since the change, all voters – every one of them – who have received notice and chosen to contest their absentee ballot's disqualification have had their vote counted.

### B. The First, Second, Sixth, Eleventh and D.C. Circuits Have Similarly Conferred Prevailing Party Status on Parties Even at Preliminary Order Stages.

The First, Second, Sixth, Eleventh and D.C. Circuits have also conferred prevailing party status to parties that have prevailed in obtaining preliminary injunctive relief.

In *Maine School Administrative Dist. No. 35 v. Mr. R.*, 321 F.3d 9, 17 (1st Cir. 2003) (analogizing the Individuals with Disabilities Education Act fee shifting provisions to 42 U.S.C. § 1988), the First Circuit conferred prevailing party status to a party in an IDEA lawsuit where the party simply prevailed at the preliminary injunction stage where the opposing party capitulated, reasoning that a party may be considered "prevailing" even without obtaining a favorable final judgment on all (or even the most crucial) of her claims.

Similarly, in *Preservation Coalition of Erie County v. Federal Transit Admin.*, 356 F.3d 444, 451-452 (2d Cir. 2004) (analyzing *Buckhannon* in the context of an interlocutory order requiring a Supplemental Environmental Impact Statement ("SEIS")), the Second Circuit upheld prevailing party status where the plaintiff succeeded in compelling a SEIS report under threat of continuing injunctive relief and articulated that "[w]hile these orders were cited by the Court as examples of the types of actions that would convey the judicial

imprimatur necessary to a fee award, broader language in *Buckhannon* indicates that these examples are not an exclusive list." *Id.*

Also, in *Sandusky County v. Blackwell*, 191 Fed. Appx. 397 (6th Cir. 2006) (conferring prevailing party status on a plaintiff where the plaintiff succeeded in obtaining a preliminary injunction, following which the defendant submitted to a permanent injunction), the plaintiff was held to entry of prevail on the merits when his lawsuit forced the county to ensure that provisional voting in Ohio met the requirements and objectives in future elections for federal office in Ohio and where, like here it was "accomplished . . . solely as a result of [the] suit and [ the] Court's orders." *Id.* at 399-400.

Similarly, the Eleventh Circuit, in *United States v. Flowers*, 281 Fed. Appx. 960,963 (11th Cir.) (in suit brought to hold that race-based hiring rule was unconstitutional), and Defendant supported the requested preliminary relief, held that even where the defendant agrees and supports the relief sought by the plaintiff from the very beginning, the plaintiff is considered a prevailing party. *Id.* (where defendants supported the change in law advocated by plaintiff and district court found that plaintiff made a separate contribution to the litigation and that contribution was a substantial force in the court's decision to suspend the statute).

Finally, the D.C. Circuit, in *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005) (affirming order of the district court finding that plaintiffs were prevailing parties where they succeeded on a motion for a preliminary injunction and defendant mooted case) also noted that: "we are not alone in the view that *Buckhannon* does not reject the possibility that preliminary injunctions may be sufficient in some certain circumstances to render plaintiffs 'prevailing parties' under federal fee-shifting statutes." *Select Milk Producers,* 400 F.3d at 946.

### C. The Only Cases that Deny Prevailing Party Status to a Litigant Who Prevails at the Preliminary Injunction Stage Are Cases Where Preliminary Relief Does Not Bear on the Merits or Plaintiffs Ultimately Lost on the Merits.

Besides the Seventh Circuit, only the Fourth and Eighth Circuits arguably have not conferred prevailing party status on plaintiffs whose claim was mooted after a preliminary injunction. In *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002)(reversing the district court's finding of prevailing party status where defendant agreed not to seek reimbursement from plaintiff and subsequently changed the challenged policy), recipients of aid under the Aid to Families with Dependent Children (AFDC) program brought suit claiming that a new provision violated the Social Security Act, 42 U.S.C. §§ 601 *et seq. Id.* The Fourth Circuit refused to confer prevailing party status on the plaintiff because "[t]he proceedings below in this case present an example of the preliminary, incomplete nature of the merits examination and the inter-play between the 'likely

harms' and 'likelihood of success' factors in the preliminary injunction inquiry." *Id.* The Fourth Circuit found that the "likely harm" analysis weighed greatly in favor of the plaintiff such that the decision on the plaintiff's "likelihood of success" was diminished, making the preliminary injunction order in *Smyth* a harm-based rather than a merit-based decision. *Id.* Despite the Fourth Circuit's outlier decision, Zessar's case clearly prevailed on the merits.

Similarly, the Eighth Circuit refused to convey prevailing party status on a settling plaintiff, even where the district court approved a class settlement and retained jurisdiction to enforce the settlement. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) (finding that only a consent decree was the needed judicial imprimatur to confer prevailing party status because the enforcing the settlement would require a separate breach of contract action).

Distinguishable also are decisions where plaintiffs obtained preliminary relief but ultimately lost on the merits.[6] *See Sole v. Wyner*, 127 S.Ct. 2188, 2190 (2007) (rejecting prevailing party status where the preliminary injunction hearing was granted one day after the plaintiff's complaint was filed and Plaintiff lost on the merits); *see also, Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 480 F.3d 734 (5th Cir. 2007)(refusing to confer prevailing party status on a litigant that obtained a preliminary injunction that was eventually reversed and dissolved.)

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[6] In contrast, Petitioner here prevailed on the merits and ultimately obtained the review sought in his complaint; to be given notice of his ballot rejection and allowed an opportunity to contest.

## II. The Seventh Circuit's Rule Perversely Discourages Victimized Parties from Bringing Meritorious Claims to Enforce the Constitution, and Encourages Defendants to Strategically Litigate all Claims, Regardless of Merit, As Long As Possible just before the entry of Final Judgment.

The Seventh Circuit's "final judgment" rule subverts § 1988's intended purpose to attract counsel to pursue these cases to vindicate civil rights violations.

The purpose of "prevailing party" status is to encourage victims of constitutional abuses to bring meritorious claims where the monetary damage was less often, much less than the legal fees to prosecute such a suit. Indeed, if counsel's successful efforts to oust an unconstitutional election regimen can be left unpaid by the sheer tack of defendants to litigating all claims until lost, but not formally *final*, there is no incentive for a municipality to act constitutionally until the last instant before final judgment and no incentive for counsel to take and pursue these actions for individuals who have been wronged.

In this case, Petitioner litigated and succeeded on the merits at the summary judgment stage, but was stripped of prevailing party status because of a post-summary judgment alteration of the challenged statute. The Seventh Circuit's holding deters and prevents future plaintiffs from obtaining counsel to challenge and prosecute constitutional wrongs, simply because the wrongdoer may moot a plaintiff's claim at the eleventh hour to avoid paying attorneys fees that produced that

alteration. The Civil Rights Attorney Fees Act of 1976 was enacted by Congress to help remedy constitutional wrongs, and the Seventh Circuit's decision eviscerates the procedural protections afforded to those whose rights are violated.

## CONCLUSION

The Seventh Circuit's arbitrary bar to prevailing party status at any point prior to final judgment conflicts with the rule adopted in eight circuits that a party who achieves a favorable ruling on the merits may satisfy prevailing party status, even if the claim is subsequently mooted by defendant action.

This Court should grant the petition, hear the case and resolve the circuit conflict.

Respectfully submitted,

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