No. _____

In the Supreme Court of the United States

STEVEN LEFEMINE, d/b/a Columbia Christians for Life,

Petitioner,

v.

DAN WIDEMAN, individually and in his official capacity; MIKE FREDERICK, individually and in his official capacity; LONNIE SMITH, individually and in his official capacity; BRANDON STRICKLAND, individually and in his official capacity; TONY DAVIS, Sheriff, in his official capacity,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1976, Congress enacted the Civil Rights Attorney's Fee Act of 1976 (now codified as part 42 U.S.C. § 1988) with the express intent of allowing awards of attorney's fees to prevailing plaintiffs in actions brought under, *inter alia*, 42 U.S.C. § 1983. This Court then labored for over twenty years—from *Maher v. Gagne*, 448 U.S. 122 (1980) to *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001)—to craft its "prevailing plaintiff" jurisprudence. Under that jurisprudence, prevailing plaintiffs are those who obtain "enforceable judgments on the merits [or] court-ordered consent decrees [which] create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Buckhannon*, 532 U.S. at 604 (quotation marks and citation omitted).

The Fourth Circuit, in the instant § 1983 case, rejected this Court's test, the view of every other court of appeals, and its own prior practice, when it refused to recognize the Petitioner, Mr. Lefemine—who obtained permanent injunctive relief and declaratory relief on the merits of his case—as a prevailing plaintiff, opting instead to employ a test that examines the *nature* of the alteration in the legal relationship. In so doing, the Fourth Circuit also abandoned its own prior view and the view of every other court of appeals that the question of whether a plaintiff has prevailed is a question of law, subject to *de novo* review. The Questions Presented are these:

1. Did the Fourth Circuit err when it rejected this

Court's *Buckhannon* rule by holding that a plaintiff who has obtained a permanent injunction and declaratory relief on the merits of his claim has nonetheless not prevailed?

2. Did the Fourth Circuit err when it promulgated its new rule that the determination of whether a plaintiff has prevailed will now be subject to abuse of discretion review?

PARTIES TO THE PROCEEDING

All Parties to this proceeding are listed in full on the cover of this Petition.

STATEMENT IN LIEU OF CORPORATE DISCLOSURE STATEMENT

Petitioner Steven Lefemine sometimes conducts business as Columbia Christians for Life. However, Columbia Christians for Life has no independent existence and is not a corporation. Thus, no Corporate Disclosure Statement is required.

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The opinion of the United States District Court for the District of South Carolina is reported at 732 F.Supp.2d 614 (under the name *Lefemine v. Davis*) and reprinted at App. 26. The opinion of the United States court of Appeals for the Fourth Circuit is published at 672 F.3d 292 and reprinted at App. 4. The Fourth Circuit's Order denying Mr. Lefemine's motion for rehearing (panel or en banc) is reprinted at App. 2.

STATEMENT OF JURISDICTION

The Fourth Circuit filed its opinion on March 5, 2012. It denied Mr. Lefemine's Petition for Rehearing on April 2, 2012. On July 9, 2012, Chief Justice Roberts extended the time for filing the instant Petition for a Writ of Certiorari through and including July 31, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Civil Rights Attorney's Fees Award Act of 1976, which has been codified as part of 42 U.S.C. § 1988, states in pertinent part as follows:

> (b) Attorney's fees
>
> In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . 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 . . . .

STATEMENT OF THE CASE

On September 24, 2008, Mr. Lefemine filed suit under 42 U.S.C. § 1983 in the United States District Court for the District of South Carolina to vindicate his First Amendment rights.[1] Mr. Lefemine alleged and the District Court held that employee's of the Greenwood County, South Carolina, Sheriff's Office violated Mr. Lefemine's free exercise of religion, free speech, and free assembly rights, when they twice threatened him with arrest. App. 43-44. The District Court awarded Mr. Lefemine an enforceable judgment on the merits, yet refused to award him attorney's fees under 42 U.S.C. § 1988. App. 50. Mr. Lefemine appealed to the Fourth Circuit, which also refused to award attorney's fees. App. 23. The Questions Present by this Petition deal with that decision and the standard of review that the Fourth Circuit used in reaching that decision. However, the following broader factual and procedural information sets the context for the legal questions now before this Court.

Steven Lefemine, doing business as Columbia Christian for Life—with the aid of like-minded citizens—frequently engages in pro-life protests. During these protests, Mr. Lefemine and others carry pictures of aborted babies "to raise public

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[1] 28 U.S.C. §§ 1343(a)(3) and (4), provide original jurisdiction in the district courts for all suits brought pursuant to 42 U.S.C. § 1983. Jurisdiction was also conferred by 28 U.S.C. § 1331 because the cause of action arose under the Constitution and laws of the United States.

awareness of the horrors of abortion throughout the State of South Carolina." App. 27. On November 3, 2005, Mr. Lefemine was conducting such a protest in Greenwood County, South Carolina. App. 7. Several employees of the Sheriff's Office, Respondents here, were dispatched to the scene of the protest where they threatened Mr. Lefemine with being ticketed for breach of peace. App. 26-31. Mr. Lefemine instructed those assisting him to remove the signs. App. 28-30.

When Mr. Lefemine desired to return to the same general location again in 2006, he retained legal counsel who wrote letters to the sheriffs of both Greenwood County and Greenwood City, expressing concerns about the prior year's events, putting them on notice that Mr. Lefemine intended to return, and explaining that if Mr. Lefimine's rights were violated he would file suit on Mr. Lefemine's behalf. App. 30-31. The city sheriff replied via letter and informed Mr. Lefemine's counsel that Mr. Lefemen and his group would be welcome to protest. The county chief deputy (Respondent Frederick), however, answered via letter that if Mr. Lefemine returned and used the signs he would be ordered to "stop or face criminal sanctions." *Id.* This response prompted Mr. Lefemine's lawsuit.

Mr. Lefemine's complaint contained three causes of action and, as noted, he prevailed on all of them. The District Court held that the actions of the Sherrif's Office employees violated Mr. Lefemine's rights. Specifically, the Court held that the employees imposed a content-based restriction on Mr. Lefemine's speech which occurred in a public forum. It further held that that restriction violated not only Mr. Lefemine's free speech rights, but also

his free assembly and free exercise rights. App. 34-44. However, the Court also held that those rights were not clearly established at the time (due to the graphic nature of the signs), and thus held the employees were entitled to qualified immunity. App. 49. However, the Court did award Mr. Lefemine a permanent injunction, which prohibited the employees from engaging in the same behavior they had previously engaged in, namely imposing "content-based restrictions on Plaintiff's display of graphic signs without narrowly tailoring its restriction to serve a compelling state interest." App. 50. The Court failed to rule on Mr. Lefemine's request for declaratory relief App. 19 (but see immediately below pp. 9-10). Finally, while treating Mr. Lefemine as a prevailing party, the Court failed to award him attorney's fees under 42 U.S.C. § 1988.[2]

Cross appeals followed. Mr. Lefemine appealed the District Court's ruling that the employees were entitled to qualified immunity, and one of the employees who no longer works for the Sheriff's Office appealed the Court's ruling that the injunction covered him. The Fourth Circuit affirmed the District Court on both points. App. 19, 25. These aspects of the Fourth Circuit's judgment, however, are not implicated by the Questions Presented in this Petition. Importantly, however, none of the employees appealed the District Court's holdings regarding any of the constitutional violations. App.

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[2] The Court's attorneys' fee analysis reads in its entirety as follows: "Pursuant to 42 U.S.C. § 1988(b), a prevailing party in a § 1983 action may, in the court's discretion, receive attorney's fees. Under the totality of the facts in this case the award of attorney's fees is not warranted."

15, n.5.

Mr. Lefemine also appealed the District Court's failure to award attorneys' fees and its failure to rule on his request for declaratory relief. App. 10-11. The Fourth Circuit held that the District Court's opinion must be read as having implicitly granted Mr. Lefemine the declaratory relief he requested. App. 20. Thus, when the Fourth Circuit turned to the question of attorneys' fees, it had already determined that Mr. Lefemine had been awarded a permanent injunction and declaratory relief on the merits of his claims.[3]

In appealing the District Court's refusal to award attorneys' fees, Mr. Lefemine argued that under this Court's decision in *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989), the District Court was *required* to award him fees, absent unusual circumstances; and that the District Court did not find special circumstances; and that it could not, as none existed. Thus, Mr. Lefemine argued, the District Court abused its discretion. App. 21. However, instead of addressing this argument, the Fourth Circuit opined that Mr. Lefemine was not entitled to a fee award *because he was not a prevailing plaintiff*. App. 22-23.

As noted, the Fourth Circuit had already acknowledged that Mr. Lefemine had obtained a permanent injunction and declaratory relief as to all claims. Furthermore, the Fourth Circuit acknowledged this Court's rule from *Texas State*

[3] The Fourth Circuit refers to Mr. Lefemine's "rights"—plural—which most naturally refers to all three of his claims.

Teachers Association v. Garland Independent School District, 489 U.S. 782, 789 (1989) that "[a]t a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." Nonetheless, the Fourth Circuit held that Mr. Lefemine was not a prevailing party because the injunction he won merely "ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future." *Id.* Further, in recasting the question in terms of whether Mr. Lefemine was a prevailing party, the Fourth Circuit continued to apply an abuse of discretion standard. App. 21.

Believing that both the standard of review and the test applied to determine whether he was a prevailing party were incorrect, Mr. Lefemine filed a motion for rehearing (panel or en banc). The Fourth Circuit denied that motion. App. 2-3.

REASON FOR GRANTING THE WRIT

There are three reasons for granting the Writ. First, the Fourth Circuit's judgment thwarts Congress's intent in a way that will impact untold numbers of civil rights litigants. Second, the Fourth Circuit's judgment variously misunderstands and refuses to be bound by this Court's long-standing jurisprudence. Third, the judgment creates a circuit split on two issues: 1) the test to be applied to determine whether a plaintiff has prevailed and 2) the standard of review to be applied to this question. This Petition will examine each in turn.

I. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S JUDGMENT WILL STRIP UNTOLD NUMBERS OF CIVIL RIGHTS PLAINTIFFS OF ATTORNEY'S FEES AWARDS THAT CONGRESS INTENDED THEM TO HAVE.

As noted in the Question Presented, Congress passed the Civil Rights Attorney's Fees Act of 1976 (now codified as part 42 U.S.C. § 1988) with the express intent of allowing awards of attorneys' fees to prevailing plaintiffs in actions brought under, *inter alia*, 42 U.S.C. § 1983. Congress passed the Act in direct response to this Court's decision in *Alyeska Pipeline Service Corp. v. Wilderness Society*, 421 U.S. 240 (1975). Senator John V. Tunney, as Chairman of the Senate Judiciary Subcommittee on Constitutional Rights, noted when he introduced the original version of the bill that became the Act that

> [t]he purpose and effect of this bill is simple—it is to allow the courts to provide the traditional remedy of reasonable counsel fee awards to private citizens who must go to court to vindicate their rights under our civil rights statutes. The Supreme Court's recent *Alyeska* decision has required specific statutory authorization if Federal courts continue previous policies of awarding fees under all

> Federal civil rights statutes. This bill simply applies the type of "fee-shifting" provision already contained in titles II and VII of the 1964 Civil Rights Act to the other civil rights statutes which do not already specifically authorize fee awards.

121 Cong. Rec. 26,806 (1975).

Senator Tunney went on to emphasize that in *Alyeska* this Court had before it "an environmental case not a civil rights case." 121 Cong. Rec. 26,806 (1975). Indeed, *Alyeska* withdrew the availability of attorney's fees in all cases—not just civil rights—for which Congress had not specifically authorized such fees. 421 U.S. at 269. However, as Senator Tunney's remarks quoted above indicate, his purpose in introducing his bill was to restore attorney's fees in *only* civil rights cases, not in all cases. Mr. Lefemine's case is a quintessential civil rights case—his free speech, free exercise, and free assembly rights were all violated. It is exactly these cases in which attorney's fees awards as so crucial.

Significantly, Senator Tunney noted that civil rights litigants often have no funds with which to hire an attorney and that often no damages are awarded from which the attorneys could draw a fee. 121 Cong. Rec. 26,806 (1975).

Furthermore, this Court put a finer point on matters in *Pulliam v. Allen*, 466 U.S. 522, 527 (1984). This Court—over the arguments of the Attorneys General of 49 states and the Conference of Chief

Justices, among others[4]—explicitly held that even where damages are unavailable due to immunity defenses, attorneys' fees should still be awarded to prevailing plaintiffs: "The legislative history of § 1988 clearly indicates that Congress intended to provide for attorney's fees in cases where relief properly is granted against officials who are immune from damages awards." In support of this assertion, this Court quoted the House Report:

> "[W]hile damages are theoretically available under the statutes covered by H.R.15460 [which became the Attorney's Fees Awards Act], it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R.15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees."

Id. at 527, n.4 (quoting H.R. Rep. No. 94–1558, p.

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[4] See 80 L. Ed.2d 911-12 for the list of briefs. The Attorney General of Virginia argued the cause. The other 48 Attorneys General filed an Amicus Brief, as did the Conference of Chief Justices. *Pulliam* involved the issue of judicial immunity, not qualified immunity. However, the points made in this Court's opinion apply equally to qualified immunity.

9 (1976).

The Fourth Circuit's answer to all of this was that the district court "ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future. No other damages were awarded" App. 22. The Fourth Circuit therefore believed that the injunction and declaratory judgment had "not altered the relative positions of the parties." App. 23 (internal quotation and citation omitted).

Ironically, the court whose judgment was affirmed in *Pulliam* was the Fourth Circuit. In its opinion, the Fourth Circuit correctly recognized that where "[t]he district court declared unconstitutional the practice [at issue] . . . and granted injunctive relief," *Allen v. Burke*, 690 F.2d 376, 377 (4th Cir. 1982), that is, where the district court "ordered Defendants to comply with the law and safeguard Plaintiff's constitutional rights in the future," App. 22, attorney's fees were appropriate. This makes sense since it is only unlawful (here unconstitutional) behavior that can be enjoined. The Sherriff's Office's employees made it clear before Mr. Lefemine's lawsuit that they intended to continue with their unlawful conduct. But the relief Mr. Lefemine won altered their behavior.

As the above comparison shows, Mr. Lefemine is not the only plaintiff who will be affected by the new rule promulgated by the Fourth Circuit. Any and every civil rights plaintiff who sues a defendant who is entitled to an immunity defense *or* who is erroneously found to be entitled to such a defense—despite being among those Congress intended to be

eligible for attorney's fees awards—will no longer be able to obtain those awards. The number and variety of plaintiffs who will be impacted is almost without limit. Congress's explicit intent will be thwarted.

That would be reason enough to grant the Writ. However, as noted, the Fourth Circuit's judgment ignores this Court's carefully-worked-out and long-standing jurisprudence.

II. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S JUDGMENT MISUNDERSTANDS AND IGNORES THIS COURT'S "PREVAILING PLAINTIFF" JURISPRUDENCE.

In support of its conclusion that Mr. Lefemine is not a prevailing party, the Fourth Circuit relied on a single erroneously decided opinion that it had not ever before cited for this point, *People Helpers Foundation, Inc. v. City of Richmond*, 12 F.3d 1321 (4th Cir. 1993). App. 21-22. The Fourth Circuit also quoted this Court's opinion in *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792 (1989): "'a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status.'" (elipses in Fourth Circuit's opinion). App. 22. Finally, the Courth circuit noted that in *Hewitt v. Helms*, 482 U.S. 755, 763 (1987), this Court "found that a judicial determination that a plaintiff's civil rights had been violated, without more, was insufficient to render the plaintiff a 'prevailing party' and thereby entitle him to an award of attorney's fees." *Id.*

The fact that *People Helpers* was wrongly decided and that the Fourth Circuit misunderstood

Garland and *Hewitt*—both in *People Helpers* and in the instant case—can be demonstrated by the following quotation from *People Helpers*:

> Th[e] injunction [awarded in that case] prevents the City from coercing, harassing, intimidating, or interfering with People Helpers or its clients. The injunction does not, however, restrict legitimate conduct of the City, namely the enacting of city ordinances and other policies designed to effectively administer the City. People Helpers has the satisfaction of knowing that the City cannot harass it with discriminate maneuvers, but People Helpers is not immune from traditional governmental regulation. The distinction between valid regulation and discriminatory conduct is an important one because the Supreme Court has required us to examine the relative positions of the parties before and after the completion of litigation. According to *Texas State Teachers* [i.e., *Garland*] People Helpers must be able to point to a resolution of the dispute "which changes the legal relationship between itself and the defendant." Following the jury verdict and the entry of the permanent injunction, People Helpers is still under the direct authority of the City, which has the power to tax and regulate all nonprofit organizations, like People Helpers, in its jurisdiction. While People Helpers did obtain some form of relief,

> such relief has not altered the relative positions of the parties.
>
> . . . . Looking at the jury's verdict and the permanent injunction, we are not convinced that the final outcome has altered the relative positions of the parties as contemplated by the Supreme Court for purposes of determining a prevailing party.

12 F.3d at 1328-29.

The problem with this approach is that the Fourth Circuit failed to understand that *Garland's* statement of the prevailing party test ("the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant") was shorthand for a more fully stated test. Instead of finding that more fully stated test, the *People Helpers* court—and the *Lefemine* court—believed it was free to examine the *nature* of the change accomplished by the plaintiff's legal victory. If the plaintiff was still subject to *legitimate* control by the defendant, the Fourth Circuit believed the plaintiffs had not prevailed. But as already noted, lawful conduct will never be enjoined or declared unlawful.

The *People Helpers* court somehow missed multiple articulations of the prevailing party test.[5] First, this Court had already stated in *Hewitt v.*

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[5] Some of these quotations address only declaratory judgments, but their principles apply equally to suits in which declaratory judgments, injunctions, or both are awarded.

Helms, 482 U.S. 755, 761 (1987) (first emphasis added), that

> [i]n all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the *termination of some conduct*. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement—what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion—is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*

Second, this Court had already stated in *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) that "[a] declaratory judgment . . . is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff."

Third, this Court had already stated in *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992), 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*.

In both *People Helpers* and *Lefemine* the

defendants' behavior had changed. In *People Helpers*, the unlawful "coercing, harassing, intimidating, [and] interfering" was enjoined, 12 F.3d at 1328. Here, the Sherriff's Office's employees can no longer subject Mr. Lefemine to criminal sanctions if he uses his graphic signs. App. 50.

Even if the Fourth Circuit's confusion is somehow understandable in *People Helpers*,[6] its revival of that confusion in the instant case is harder to understand. After *People Helpers* but before *Lefemine*, this Court decided *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001), and connected the dots in unmistakable fashion: "*enforceable judgments on the merits* and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Id.* at 604 (*quoting Garland*, 489 U.S. at 792-93). As the preceding parenthetical shows, the internal quotation in this passage from *Buckhannon* is the very *Garland* language that the *People Helpers* and *Lefemine* courts relied upon to deny attorney's fees. This Court's binding test informed the Fourth Circuit that Mr. Lefemine is a prevailing party. Yet the Fourth Circuit has created a new test that will deprive untold numbers of plaintiffs of their rightful fee awards, thus effectively repealing a portion of the Civil Right Attorney's Fees Award Act.

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[6] The *People Helpers* court's analysis of *Hewitt* is especially flawed and seems to be at the heart of its confusion. *See*, 12 F.3d at 1327-28.

This Court has always aggressively protected the definition of "prevailing plaintiff," both by refusing to include those who should not be included *and* by refusing to exclude those who should not be excluded. This has been true even where complete or near complete consensus existed. For example, in *Pulliam v. Allen*, where the Fourth Circuit and this Court both held that plaintiffs were entitled to an attorney's fee award, neither court ever addressed any authority holding the opposite, *i.e.*, that judicial immunity bars an award of attorney's fees. Further, this Court *explicitly* addressed the complete *unanimity* of the courts of Appeals on the underlying question of whether judges' conduct could be enjoined. See *Allen v. Burke*, 690 F.2d 376, 378-79 (4th Cir. 1982), *affirmed sub nom. Pulliam v. Allen*, 466 U.S. 522, 527-28 & n.7 (1984). Yet, this Court granted certiorari, not requiring a circuit split to exist at all prior to protecting the rights of prevailing plaintiffs.

On the other side of the coin, when this Court needed to exclude putative prevailing plaintiffs, it did not wait for a circuit split to percolate. Rather it granted certiorari in *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598 (2001), when only a single circuit disagreed with a nine-circuit consensus. *See*, *id.* at 627 (Ginsburg, J., dissenting).

The Fourth Circuit's judgment in the instant case—which so clearly misunderstands and ignores this Court's prevailing plaintiff rule—also creates a single-circuit circuit split and also so threatens the very ability of civil rights plaintiffs to proceed with

litigation that this Court should grant the instant Writ and not wait for the split to percolate.

Nonetheless, the existing split will be examined in the next Section.

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE FOURTH CIRCUIT'S HOLDING CREATES A CIRCUIT SPLIT ON THE PREVAILING PLAINTIFF TEST AND ON THE STANDARD OF REVIEW TO BE APPLIED TO THAT QUESTION.

Because, as documented in the prior Section, the Fourth Circuit's opinion misunderstands and ignores this Court's binding prevailing plaintiff jurisprudence, it is not surprising that the Fourth Circuit has created a circuit split with every other circuit regarding the proper test. It has also created a split with every other circuit regarding the standard of review. This Petition will examine each in turn.

A. The Fourth Circuit's Holding Creates a Circuit Split on the Prevailing Plaintiff Test.

At the outset, it is worth noting that the Fourth Circuit's opinion in the instant case is in conflict with five of its own prior published cases, which all employed the test as articulated in *Buckhannon*:

- *J.D. ex rel. Davis v. Kanawha County Bd. of Educ.*, 571 F.3d 381, 386 (4th Cir. 2009);

- *Grissom v. The Mills Corp.*, 549 F.3d 313, 319 (4th Cir. 2008);

- *Goldstein v. Moatz*, 445 F.3d 747, 751 (4th Cir. 2006);
- *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 274-75 (4th Cir. 2002); and

- *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 414 (4th Cir. 2001).[7]

However, because *People Helpers* was decided first, it controls the intra-circuit conflict: "When published panel opinions are in direct conflict on a given issue, the earliest opinion controls, unless the prior opinion has been overruled by an intervening opinion from this court sitting *en banc* or the Supreme Court." McMellon v. United States, 387 F.3d 329, 333 (4th Cir. 2004) (*en banc*). Moverover, because this instant case was decided after *Buckhannon*, it represents the Fourth Circuit's view that *Buckhannon* does not serve as an intervening decision that in any way overrules *People Helpers*. Thus, in effect, the instant case transformed People Helpers from a wrongly decided, but five-times-ignored anomaly into a strongly re-affirmed flouting of this Court's binding precedent which creates a clear circuit split, as the following illustrative cases,

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[7] These cases involved various fee-shifting provisions but all used the Buckhannon test, on the authority of *Buckhannon* itself since this Court explained there that fee-shifting statutes should be interpreted consistently. 532 U.S. at 603 n.4. Other cases in the remainder of this Petition will also involve various fee-shifting provisions.

all of which employ the proper *Buckhannon* test demonstrate:

- First Circuit: *Smith v. Fitchburg Public Schools*, 401 F.3d 16, 23 (1st Cir. 2005);

- Second Circuit: *A.R. ex rel. R.V. v. New York City Dept. of Educ.*, 407 F.3d 65, 74-76 (2d 2005);

- Third Circuit: *Singer Management Consultants, Inc. v. Milgram*, 650 F.3d 223, 231 (3d Cir. 2011);

- Fifth Circuit: *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008);

- Sixth Circuit: *Sierra Club v. Hamilton County Bd. of County Com'rs*, 504 F.3d 634, 653 n.8 (6th Cir. 2007);

- Seventh Circuit: *Bingham v. New Berlin School Dist.*, 550 F.3d 601, 602-04 (7th Cir. 2008);

- Eighth Circuit: *Rogers Group, Inc. v. City of Fayetteville, Ark.*, 683 F.3d 903, 909 (8th Cir. 2012);

- Ninth Circuit: *United States v. Milner*, 583 F.3d 1174, 1196 (9th Cir. 2009);

- Tenth Circuit: *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226, 1229 (10th Cir. 2008);

- Eleventh Circuit: *Cook v. Randolph County, Ga.*, 573 F.3d 1143, 1155 (11th Cir. 2009);

- District of Columbia Circuit: *Davis v. Department*

of Justice, 460 F.3d 92, 105-06 (D.C. Cir. 2006); and

- Federal Circuit: *Ward v. U.S. Postal Service*, 672 F.3d 1294, 1297 (Fed. Cir.2012).

In sum, no other court of appeals engages in the Fourth Circuit's lawful/legitimate test; they all simply apply *Buckhannon*.

As noted previously, this Court has always aggressively protected the definition of "prevailing plaintiff," and there is no reason to wait to see whether another court of appeal will be attracted to the Fourth Circuit's gloss. Nor is there any reason, in cases where immunity defenses may be available, to uniquely force civil rights plaintiffs in the Fourth Circuit to try to attract competent counsel without being able to offer the prospect of attorney's fee awards. This split is reason enough to grant the Writ.

B. The Fourth Circuit's Holding Also Creates a Circuit Split on the Applicable Standard of Review.

The Fourth Circuit also created a circuit split concerning the standard of review to apply when examining whether a plaintiff has prevailed. The Fourth Circuit has previously applied a *de novo* standard to this question. *See*, *e.g.*, *Goldstein v. Moatz,* 445 F.3d 747, 751 (4th Cir. 2006) ("Ordinarily, we review an award of attorney's fees for abuse of discretion. The designation of a party as a prevailing party, however, is a legal determination which we review *de novo*") (citations omitted).

However, in the instant case, the Fourth Circuit conflated the question of abuse of discretion in failing to award fees with the question of whether Mr. Lefemine is, in fact, a prevailing plaintiff, and declared that this conflated question is subject to abuse of discretion review:

> [I]n light of the lack of findings that Plaintiff was a prevailing party within the meaning of § 1988 as well as the absence of any other damages award, this ruling is consistent with the conclusion that the outcome of this litigation "has not altered the relative positions of the parties." *People Helpers*, 12 F.3d at 1329.
>
> Accordingly, we see no abuse of discretion in this ruling and thus affirm the district court's denial of attorney's fees to Plaintiff.

App. 23.

No other court of appeals has similarly conflated the analysis (which makes sense since no other court of appeals has deviated from the *Buckhannon* test). Thus, every other court of appeals applies the *de novo* standard of review to the question of whether a plaintiff has prevailed, as the following illustrative cases demonstrate[8]:

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[8] The cases for the Second, Third, Seventh, Eighth, Ninth, and Eleventh Circuits come from *Bailey v. Mississippi*, 407 F.3d 684, 687, (5th Cir. 2005), which is the case listed for the Fifth Circuit and in which that court compiled

- First Circuit: *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 8 (1st Cir. 2011);

- Second Circuit: *Preserv. Coal. v. Fed. Transit Admin.,* 356 F.3d 444, 450 (2d Cir.2004);
- Third Circuit: *Truesdell v. Philadelphia Hous. Auth.*, 290 F.3d 159, 163 (3d Cir.2002);

- Fifth Circuit: *Bailey v. Mississippi*, 407 F.3d 684, 687, (5th Cir. 2005);

- Sixth Circuit: *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007);

- Seventh Circuit: *Palmetto Props., Inc. v. County of DuPage,* 375 F.3d 542, 547 (7th Cir.2004);

- Eighth Circuit: *Christina A. ex rel. Jennifer A. v. Bloomberg,* 315 F.3d 990, 992 (8th Cir.2003);

- Ninth Circuit: *Richard S. v. Dep't of Developmental Servs.,* 317 F.3d 1080, 1085-86 (9th Cir.2003);

- Tenth Circuit: *Kansas Judicial Watch v. Stout*,

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cases for those courts of appeals that had already explicitly adopted the *de novo* standard by 2005 and in which it adopted that standard for itself: "Post-*Buckhannon,* every Circuit to address the issue has determined that the characterization of prevailing-party status for awards under fee-shifting statutes such as § 1988 is a legal question subject to *de novo* review. This Court agrees that, post-*Buckhannon,* we will review such question *de novo.*" *Id.* (footnote omitted).

653 F.3d 1230, 1235 (10th Cir. 2011);

- Eleventh Circuit: *Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., Ltd.,* 254 F.3d 987, 1012 (11th Cir.2001);

- District of Columbia Circuit: *Turner v. National Transp. Safety Bd.*, 608 F.3d 12, 14 (D.C. Cir. 2010); and

- Federal Circuit: *Shum v. Intel Corp.*, 629 F.3d 1360, 1366 (Fed. Cir. 2010).

While this circuit split may seem (or may actually be) less significant than the Fourth Circuit's confusion over of this Court's binding prevailing plaintiff precedent, this split still represents an important reason to grant the Writ. Should any other court of appeals seek to follow the Fourth Circuit in its test, the abuse of discretion standard will allow it to do so. Similarly, should another court of appeal decide to deviate from *Buckhannon* in any other way, the idea that its approach is subject to the abuse of discretion standard may erroneously facilitate that deviation. Finally, the standard of review question and the creation of the Fourth Circuit's new prevailing plaintiff test really go hand-in-hand; this Court should address them together.

CONCLUSION

Because the Fourth Circuit variously misapplied or ignored this Court's carefully-worked-out and long-standing jurisprudence, because the Fourth Circuit conflated the issues before it,

because these mistakes created two circuit splits, because these mistakes will make it harder for civil rights plaintiffs in the Fourth Circuit to obtain competent counsel, and because this Court has always aggressively protected the definition of "prevailing plaintiff"; Mr. Lefemine respectfully requests that this Court grant the Writ.

Respectfully Submitted,
this 31st day July, 2012

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