



Petitioners Robert Bates and B&H Construction Services Inc., submit three additional authorities on the definition of a “prevailing party”:

1. P.T. v. Seattle School Distr. No. 1, 474 F.3d 1165 (9<sup>th</sup> Cir. 2007).

The suggestion that we have declined to accept the definition of “prevailing party” as requiring some judicial *imprimatur* is foreclosed by our decision in Carbonell, 429 F.3d 894. In Carbonell, the plaintiff appealed from the district court's denial of attorneys' fees under the Equal Access to Justice Act, contending that he qualified as a prevailing party because he had obtained a court order incorporating a voluntary stipulation which awarded him a substantial portion of the relief he sought. *Id.* at 895. The district court denied attorneys' fees, citing Buckhannon. *Id.* at 898.

We vacated and remanded. We held that under Buckhannon, for a litigant to be a “prevailing party” for the purpose of awarding attorneys' fees, he must meet two criteria: “he must achieve a ‘material alteration of the legal relationship of the parties,’ ” and “that alteration must be ‘judicially sanctioned.’ ” *Id.* at 898 (quoting Buckhannon, 532 U.S. at 604-05, 121 S.Ct. 1835). We rejected any overly narrow interpretation of “judicial action sufficient to convey prevailing party status,” *id.*, but concluded:

[I]n recognizing that a litigant can “prevail” for the purpose of awarding attorney's fees as a result of judicial action other than a judgment on the merits or a consent decree (*provided that such action has sufficient “judicial imprimatur”*), this court is in agreement

with the vast majority of other circuits that have considered this issue since Buckhannon.

Id. at 899 (emphasis added)...

Thus, although there may remain some uncertainty as to what might constitute a “judicial *imprimatur*,” the existence of some judicial sanction is a prerequisite in this circuit for a determination that a plaintiff is a “prevailing party” and entitled to an award of attorneys' fees as part of costs under the IDEA.

P.N. v. Seattle School Dist. No. 1, 474 F.3d 1165, 1172 -1173 (9<sup>th</sup> Cir 2007).

2. Aronov v. Napolitano, 562 F.3d 84 (1<sup>st</sup> Cir. 2009).

The Supreme Court has described what it meant by a “court-ordered consent decree.” It distinguished such consent decrees from “private settlements” (as to which fees may not be awarded), saying “[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees.” [Buckhannon v. West Virginia DHHR, 532 U.S. 598,] 604 n. 7, 121 S.Ct. 1835. Buckhannon contrasted final judgments on the merits and court-ordered consent decrees with situations which failed to meet the judicial imprimatur test: for example, securing the reversal of a directed verdict, acquiring a judicial pronouncement that a defendant has violated the Constitution unaccompanied by “judicial relief,” or obtaining a non-judicial “alteration of actual circumstances.” Id. at 605-06, 121 S.Ct. 1835.

The Court emphasized three related factors. The first was that the change in legal relationship must be “court-ordered.” See id. at 604, 121 S.Ct. 1835. Second, there must be judicial approval of the relief vis-à-vis the merits of the case. Buckhannon cited

Kokkonen v. Guardian Life Insurance Co. of America, 511 U.S. 375, 381, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), which held a “judge’s mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order.” Third, there must be judicial oversight and ability to enforce the obligations imposed on the parties. See Buckhannon, 532 U.S. at 604 n. 7, 121 S.Ct. 1835 (noting that judicial oversight is inherent in consent decrees but not in private settlements).

Aronov v. Napolitano 562 F.3d 84, 90 (1<sup>st</sup> Cir. 2009).

3. Tenney, Matthew B., “When Does a Party Prevail?: A Proposed “Third-Circuit-Plus” Test for Judicial Imprimatur”, 2005 B.Y.U Law Rev. 429 (2005).

A close reading of Buckhannon reveals that a satisfactory judicial imprimatur test needs approval and well as oversight. The Court in Buckhannon was concerned that the catalyst theory “allow[ed] an award where there is no judicially sanctioned change in the legal relationship of the parties. The Court reasoned that prevailing party status required that there be at least some participation by a judge – a judicial finger in the pot – so as to justify the notion that the party has “prevailed” in the actual suit in some way. The Court’s reasoning suggests that the form of the resolution is important, but that it is not the only requirement. Significantly, the Court declined to “abrogate the ‘merit’ requirement of [its] prior cases” by reaffirming its declaration in Hewitt that “[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.” Respect for the Court’s “merit requirement” urges that a judge may not simply incorporate the terms of the settlement and add his signature without any review of the merits of the original complaint. Furthermore, in Buckhannon, the

Court referred to "judicial *approval and oversight*" as the distinguishing factors between consent decrees and private settlements. It follows that a party may only "prevail" when a judge has been sufficiently involved in the resolution of the case in both the areas of oversight and approval.

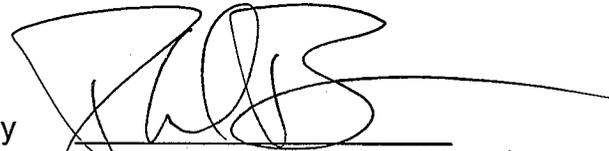
Tenney, 2005 B.Y.U. Law Rev., 429, 463-64 (2005) (footnotes omitted).

Copies of these authorities are attached for the Court's convenience.

DATED this <sup>26<sup>th</sup></sup> day of January, 2010.

BURI FUNSTON MUMFORD, PLLC

By



Philip Buri, WSBA #17637  
Attorney for Petitioners

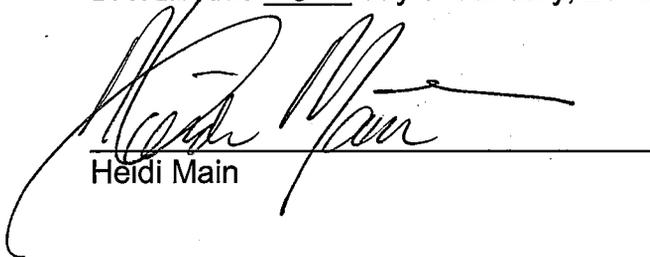
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of Statement of Additional Authorities to:

James S. Hoogestraat  
Pemberton & Hoogestraat, P.S.  
120 Prospect Street, Ste. 1  
Bellingham, WA 98225

Rolf Beckhusen  
2014 Iron Street  
Bellingham, WA 98225

DATED this 26<sup>th</sup> day of January, 2010.

  
Heidi Main

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# ATTACHMENT 1

Westlaw

474 F.3d 1165  
 474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008  
 (Cite as: 474 F.3d 1165)

Page 1

**H**

United States Court of Appeals,  
 Ninth Circuit.  
 P.N., parent of T.N., a minor, Plaintiff-Appellant,  
 v.  
 SEATTLE SCHOOL DISTRICT, NO. 1, Defendant-Appellee.  
 No. 04-36141.

Argued and Submitted June 9, 2006.  
 Filed Jan. 29, 2007.  
 Amended Jan. 29, 2007.

**Background:** Student's parent filed action under Individuals with Disabilities Education Act (IDEA) to recover attorney fees incurred in resolving a conflict with school district over student's education. The United States District Court for the Western District of Washington, John C. Coughenour, Chief Judge, determined that parent was not a prevailing party entitled to fee award. Parent appealed.

**Holding:** The Court of Appeals, Callahan, Circuit Judge, held that parent, who resolved her differences through a settlement agreement, which did not receive any judicial imprimatur, was not a prevailing party entitled to recover attorney fees under IDEA.  
 Affirmed.

## West Headnotes

**[1] Schools**  **148(2.1)**

345k148(2.1) Most Cited Cases

To implement the Individuals with Disabilities Education Act (IDEA), schools must prepare a written Individualized Education Program (IEP) for each disabled child. Individuals with Disabilities Education Act, § 614(d), 20 U.S.C.A. § 1414(d).

**[2] Schools**  **148(2.1)**

345k148(2.1) Most Cited Cases

An Individualized Education Program (IEP) sets out the child's present educational performance, es-

tablishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable each child to meet these objectives. Individuals with Disabilities Education Act, § 614(d), 20 U.S.C.A. § 1414(d).

**[3] Schools**  **155.5(5)**

345k155.5(5) Most Cited Cases

Student's parent, as an alleged prevailing party, was entitled to file an action for attorney fees under Individuals with Disabilities Education Act (IDEA). Individuals with Disabilities Education Act, § 615(i)(3)(B), 20 U.S.C.A. § 1415(i)(3)(B).

**[4] Schools**  **155.5(5)**

345k155.5(5) Most Cited Cases

Individuals with Disabilities Education Act (IDEA) authorizes an action solely to recover attorney fees and costs, even if there has been no administrative or judicial proceeding to enforce a student's rights under the IDEA. Individuals with Disabilities Education Act, § 615(i)(3)(B), 20 U.S.C.A. § 1415(i)(3)(B).

**[5] Schools**  **155.5(5)**

345k155.5(5) Most Cited Cases

The existence of some judicial sanction is a prerequisite for a determination that a plaintiff is a "prevailing party" and entitled to an award of attorney fees as part of costs under the Individuals with Disabilities Education Act (IDEA). Individuals with Disabilities Education Act, § 615(i)(3)(B), 20 U.S.C.A. § 1415(i)(3)(B).

**[6] Schools**  **155.5(5)**

345k155.5(5) Most Cited Cases

Student's parent was not a prevailing party under Individuals with Disabilities Education Act (IDEA) entitled to recover attorney fees incurred in resolving a conflict with school district over student's education; although parent secured some special education benefits for student from district, she re-

474 F.3d 1165  
 474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008  
 (Cite as: 474 F.3d 1165)

Page 2

solved her differences through a settlement agreement, which did not receive any judicial imprimatur. Individuals with Disabilities Education Act, § 615(i)(3)(B), 20 U.S.C.A. § 1415(i)(3)(B).

\*1166 Charlotte Cassady, Seattle, WA, for the plaintiff-appellant.

Lawrence B. Ransom and Tracy M. Miller, Karr Tuttle Campbell, Seattle, WA, for the defendant-appellee.

Appeal from the United States District Court for the Western District of Washington; John C. Coughenour, Chief Judge, Presiding. D.C. No. CV-04-00258-JCC.

Before DAVID R. THOMPSON, A. WALLACE TASHIMA, and CONSUELO M. CALLAHAN, Circuit Judges.

ORDER AMENDING OPINION AND AMENDED  
 OPINION  
 CALLAHAN, Circuit Judge.

#### ORDER

Our opinion filed August 15, 2006, is amended to include the following at the end of footnote 7.

We further note that 20 U.S.C. § 1415 was amended subsequent to the underlying events in this case. We have no occasion to consider whether these amendments alter the statutory requirements for an award of attorneys' fees under the IDEA.

\*1167 With the filing of the amended opinion, Judges Thompson, Tashima, and Callahan vote to deny the petition for rehearing, and the petition for rehearing is denied.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on rehearing en banc, the petition for rehearing en banc is denied. Fed. R. App. P. 35.

No further petition for rehearing will be entertained.

#### OPINION

P.N., plaintiff-appellant, filed an action under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, to recover attorneys' fees incurred in resolving a conflict with the Seattle School District ("SSD") over her child's education. The conflict was resolved by a settlement agreement signed only by the parties. The district court held that P.N. was not a prevailing party, and thus, not entitled to attorneys' fees under the IDEA because the settlement agreement lacked any judicial *imprimatur*. We affirm. We hold, consistent with our own precedent and decisions by our sister circuits, that (a) the definition of "prevailing party" set forth by the Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), applies to the IDEA's attorneys' fees provision, (b) the determination that a parent is a prevailing party requires that there be some judicial sanction of the settlement agreement, and (c) there is no judicial *imprimatur* of the settlement agreement in this case.

#### I

[1][2] The IDEA seeks "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A). To implement the IDEA, schools must prepare a written Individualized Education Program ("IEP") for each disabled child. 20 U.S.C. § 1414(d); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir.1993). "[T]he IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable each child to meet these objectives." *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). The statute guarantees parents of disabled children an opportunity to participate in the identification, evaluation, and placement pro-

474 F.3d 1165  
 474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008  
 (Cite as: 474 F.3d 1165)

Page 3

cess. 20 U.S.C. §§ 1414(d)(1)(B)(i), 1415(b)(1). Parents who object to their child's "identification, evaluation, or educational placement," or have a complaint regarding the provision of a free appropriate public education for their child, can file an administrative complaint and are entitled to an impartial due process hearing. *Id.* §§ 1415(b)(6), (f)(1); *Ojai*, 4 F.3d at 1469. At the due process hearing, parents have a right to be accompanied and advised by counsel, present evidence, and confront, cross-examine, and compel the attendance of witnesses. 20 U.S.C. § 1414(h). Parents aggrieved by a hearing officer's findings and decision can file a civil action in either federal or state court. *Id.* § 1415(i)(2); *Ojai*, 4 F.3d at 1469.

The IDEA also provides that the parents of a child with a disability who is the "prevailing party" may be awarded reasonable attorneys' fees. 20 U.S.C. § 1415(i)(3)(B). Here, we are called upon to determine the legal definition of "prevailing party" as used in 20 U.S.C. § 1415(i)(3)(B), and whether P.N. meets this legal definition.

#### \*1168 II

For many years, P.N.'s child, T.N., experienced difficulty in school, and P.N. repeatedly asked the SSD to evaluate T.N. for learning disabilities and to provide appropriate special education. When SSD failed to do so, P.N. obtained a psychological evaluation and enrolled T.N. in a private school. In March 2003, P.N. hired an attorney to represent her in attempting to obtain special education for T.N. from SSD and reimbursement for the costs of psychological evaluation and private schooling.

Over the next seven months P.N. and her attorney corresponded and met with SSD personnel. By the end of September 2003, SSD had agreed to fund T.N.'s placement in the private school for the summer of 2003 and for the 2003-2004 school year on a part-time basis, but had not agreed to reimburse P.N. for the expenses associated with T.N.'s private evaluation and his enrollment in the private school from March through June 2004.

In November 2003, P.N., through counsel, requested a due process hearing under the IDEA. In early January 2004, the parties entered into a settlement agreement whereby SSD agreed to reimburse P.N. for the costs associated with T.N.'s psychological evaluation and attendance at the private school. The settlement agreement expressly reserved "any issue of attorneys' fees and costs." On January 23, 2004, the administrative law judge, at P.N.'s request, dismissed the due process hearing proceeding.

On February 4, 2004, P.N. filed in this action for the recovery of attorneys' fees and costs under the IDEA. She sought \$13,653.00 in attorneys' fees incurred in the due process proceedings and attorneys' fees and costs incurred in the federal action to recover fees. In October 2004, the district court denied P.N.'s summary judgment motion for attorneys' fees and subsequently dismissed P.N.'s claims with prejudice. P.N. filed a timely notice of appeal.

#### III

Although we review a district court's denial of attorneys' fees and costs for an abuse of discretion, any elements of legal analysis and statutory interpretation underlying the district court's attorneys' fees decision are reviewed de novo, and factual findings underlying the district court's decision are reviewed for clear error. *Carbonell v. I.N.S.*, 429 F.3d 894, 897 (9th Cir.2005); *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1133 (9th Cir.2003).

#### IV

A. *P.N., as an alleged prevailing party, was entitled to file an action for attorneys' fees under the IDEA*

[3] P.N.'s complaint specifically sought only attorneys' fees and costs under the IDEA. [FN1] Although it was revised in 2004, 20 U.S.C. § 1415(i)(3)(B) continues to provide that the court may, in its discretion, award reasonable attorneys' fees as part of costs to a prevailing party who is a parent of a child with a disability. [FN2]

FN1. 20 U.S.C. § 1415(i)(2)(A) provides:

474 F.3d 1165  
 474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008  
 (Cite as: 474 F.3d 1165)

Page 4

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

FN2. In February 2004, when P.N. filed her action, 20 U.S.C. § 1415(i)(3)(B) provided that:

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

The statute was revised in 2004. Pub.L. 91-230, Title VI, § 615, as added Pub.L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2715. Section 1415(i)(3) now reads, in relevant part:

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--

(I) to a prevailing party who is the parent of a child with a disability;....

\*1169 [4] We have held that the phrase "action or proceeding brought under this section" in 20 U.S.C. § 1415(i)(3)(B) authorizes the filing of a complaint

by a prevailing party seeking only attorneys' fees and costs. In *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1025 (9th Cir.2000), parents of an autistic son complained to the school district that their son was not receiving the special education benefits to which he was entitled under the IDEA. *Id.* After the parents filed a complaint with the state Department of Education pursuant to the state's Complaint Review Procedure, the parents prevailed upon the school district to complete a revised IEP for their son. The parents then filed an action in a district court seeking to recover attorneys' fees. *Id.* The district court granted the parents' request for attorneys' fees and the school district appealed. *Id.* On appeal we addressed whether 20 U.S.C. § 1415(i)(3)(B) authorized an action solely for attorneys' fees, and concluded:

Although we have not expressly so held before today, our prior cases imply that the district court has jurisdiction over a case in which fees are sought although liability is established outside the district court proceeding itself. See *Barlow-Gresham Union High Sch. Dist. No. 2 v. Mitchell*, 940 F.2d 1280, 1285 (9th Cir.1991) (allowing "the prevailing parents to recover attorneys' fees when settlement is reached prior to the due process hearing"); *McSomebodies v. Burlingame Elementary Sch. Dist.*, 897 F.2d 974 (9th Cir.1989) (awarding the parents of a disabled child attorney fees incurred in an administrative due process hearing under the Handicapped Children's Protection Act [the predecessor of the IDEA]).

*Id.* at 1026. Accordingly, we hold that the IDEA authorizes an action solely to recover attorneys' fees and costs, even if there has been no administrative or judicial proceeding to enforce a student's rights under the IDEA. See *Barlow-Gresham*, 940 F.2d at 1285 ("We ... conclude that [the predecessor of § 1415(i)(3)(B)] allows the prevailing parents to recover attorneys' fees when settlement is reached prior to the due process hearing."). We turn next to defining "prevailing party."

B. The Supreme Court has defined "prevailing

474 F.3d 1165  
 474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008  
 (Cite as: 474 F.3d 1165)

Page 5

*party" to require a judicial imprimatur of the material alteration of the parties' legal relationship*

The critical question is whether P.N. is a "prevailing party" and thus eligible for an award of attorneys' fees as part of costs under the IDEA. The term was addressed by the Supreme Court in *Buckhannon*. 532 U.S. at 600, 121 S.Ct. 1835. There, the plaintiffs challenged a West Virginia law requiring all residents of residential board and care homes to be capable of moving themselves away from imminent danger, such as a fire. *Id.* at 600-01, 121 S.Ct. 1835. The plaintiffs sought declaratory and injunctive relief under the Fair Housing Amendments Act ("FHAA") and the Americans with Disabilities Act ("ADA"). *Id.* While the case was pending, \*1170 the West Virginia state legislature eliminated the self-preservation requirement, thus rendering plaintiffs' action moot. *Id.* at 601. Plaintiffs, nonetheless, sought attorneys' fees as the "prevailing party" under the FHAA and the ADA. They argued that they "were entitled to attorney's fees under the 'catalyst theory,' which posited that a plaintiff was a 'prevailing party' if he or she achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* Although most of the circuits had recognized the "catalyst theory," the Fourth Circuit rejected it. The Supreme Court granted certiorari and affirmed the Fourth Circuit. *Id.* at 602., 121 S.Ct. 1835

The Court's opinion commenced by noting that under the American Rule, parties are ordinarily required to bear their own attorneys' fees, but that Congress has authorized the award of attorneys' fees to prevailing parties under numerous statutes. *Id.* Referring to Black's Law Dictionary, the Court commented that a "prevailing party" is "one who has been awarded some relief by the court" and that this view "can be distilled from our prior cases." *Id.* at 603, 121 S.Ct. 1835.

The Court recognized that in addition to judgments on the merits, "settlement agreements enforced through a consent decree may serve as the basis for

an award of attorney's fees." *Id.* at 604, 121 S.Ct. 1835. This is because although a consent decree does not always include an admission of liability, it nonetheless is a court-ordered change in the legal relationship between the parties. *Id.* The Court observed that several of its prior decisions "establish that 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." [FN3] *Id.* (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)).

FN3. The Court further commented:

We have subsequently characterized the *Maier* [*v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980) ] opinion as also allowing for an award of attorney's fees for private settlements. See *Farrar v. Hobby*, [506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494,] at 111, ... [1992]; *Hewitt v. Helms*, [482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654,] at 760, ... [1987]. But this dictum ignores that *Maier* only "held that fees may be assessed ... after a case has been settled by the entry of a consent decree." *Evans v. Jeff D.*, 475 U.S. 717, 720, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986). Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). 532 U.S. at 604, 121 S.Ct. 1835.

The Court held that the "catalyst theory" was too broad because it "allows an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605, 121 S.Ct. 1835. It reasoned that a "defendant's voluntary change in

474 F.3d 1165

474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008

(Cite as: 474 F.3d 1165)

Page 6

conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* The Court reinforced the need for a judicial *imprimatur* by noting:

We have only awarded attorney's fees where the plaintiff has received a judgment on the merits, see, e.g., *Farrar, supra*, at 112, 113 S.Ct. 566, ... or obtained a court-ordered consent decree, *Maher, supra*, at 129-130[100 S.Ct. 2570, 65 L.Ed.2d 653], ...--we have not awarded attorney's fees where the plaintiff has secured the reversal of a directed verdict, see *Hanrahan*, 446 U.S. [754,] at 759, 100 S.Ct. 1987, 64 L.Ed.2d \*1171 670, ... [1980], or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by "judicial relief," *Hewitt, supra*, at 760[107 S.Ct. 2672, 96 L.Ed.2d 654], ... (emphasis added). Never have we awarded attorney's fees for a nonjudicial "alteration of actual circumstances." Post, at 1856 (dissenting opinion).... We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" without obtaining any judicial relief. Post, at 1856 (internal quotation marks and citation omitted).

*Id.* at 605-06, 121 S.Ct. 1835.

The Court was not impressed with the argument that legislative history supported a broad reading of "prevailing party." *Id.* at 607, 121 S.Ct. 1835. It doubted "that legislative history could overcome what we think is the rather clear meaning of 'prevailing party'--the term actually used in the statute." *Id.* Indeed, the Court observed that the legislative history cited by petitioners was "at best ambiguous," and that in view of the American Rule, attorney's fees would not be awarded absent "explicit statutory authority." *Id.* The opinion concluded with the Court reiterating that a "request for attorneys' fees should not result in a second major litigation," and noting that it had "avoided an interpretation of

the fee-shifting statutes that would have spawn[ed] a second litigation of significant dimension." *Id.* at 609, 121 S.Ct. 1835 (internal quotation marks and citations omitted).

C. We have adopted Buckhannon's definition of "prevailing party" for IDEA cases

Any questions as to whether we would apply *Buckhannon's* definition of "prevailing party" to actions brought under the IDEA have been dispelled by our decisions in *Shapiro v. Paradise Valley Unified Sch. Dist.*, 374 F.3d 857, 865 (9th Cir.2004), and *Carbonell v. INS*, 429 F.3d 894, 899 (9th Cir.2005).

In *Shapiro*, plaintiffs filed an action in a district court under the IDEA. The district court eventually granted plaintiffs some of the attorneys' fees they requested, and plaintiffs appealed. 374 F.3d at 861. In affirming the district court's award of attorneys' fees, we followed a "consistent line of precedent from our own and other circuits" and concluded that "*Buckhannon's* definition of 'prevailing party' applies to the IDEA's attorneys' fees provision. 20 U.S.C. § 1415(i)(3)(B)." *Id.* at 865. We held that "[e]ssentially, in order to be considered a prevailing party after *Buckhannon*, a plaintiff must not only achieve some material alteration of the legal relationship of the parties, but *that change must also be judicially sanctioned.*" *Shapiro*, 374 F.3d at 865 (quoting *Roberson v. Giuliani*, 346 F.3d 75, 79 (2d Cir.2003))(internal quotation marks omitted, emphasis added). Our determination that *Buckhannon's* definition of "prevailing party" applies to the attorneys' fees provision of the IDEA is in accord with decisions of other circuit courts. [FN4]

FN4. See *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 30 (1st Cir.2004) (holding that *Buckhannon* applies to the IDEA and that IDEA plaintiffs who achieve their desired result via private settlement may not, in the absence of a judicial *imprimatur*, be considered "prevailing parties"); *J.C. v. Reg'l Sch. Dist. 10*, 278 F.3d 119, 125 (2d Cir.2002) (holding that *Buckhannon* gov-

474 F.3d 1165  
 474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008  
 (Cite as: 474 F.3d 1165)

Page 7

erns plaintiff's claims pursuant to the IDEA); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 555 (3d Cir.2003) (holding that *Buckhannon* applies to the IDEA's fee-shifting provision); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir.2003) (holding that *Buckhannon* is applicable to the IDEA); and *Alegria v. Dist. of Columbia*, 391 F.3d 262, 263 (D.C.Cir.2004) (holding *Buckhannon* applies to the IDEA's fee-shifting provisions).

\*1172 P.N. attempts to distinguish *Shapiro* by noting that in *Barrios*, 277 F.3d at 1134, we commented that a plaintiff who had entered into a private settlement was a prevailing party in his action under the ADA. P.N. points out that in *Barrios* we characterized as dictum the judicial sanction component of *Buckhannon's* definition of prevailing party. [FN5] This characterization, however, was itself dictum as the settlement in *Barrios* was clearly judicially enforceable. [FN6] *Id.* ("Given that *Barrios* can enforce the terms of the settlement agreement against the [defendants], the district court correctly concluded that *Barrios* was the 'prevailing party' in his civil rights litigation.").

FN5. In a footnote, after observing that following *Buckhannon* we had rejected the catalyst theory, we wrote:

While dictum in *Buckhannon* suggests that a plaintiff "prevails" only when he or she receives a favorable judgment on the merits or enters into a court supervised consent decree, 121 S.Ct. at 1840 n. 7, we are not bound by that dictum, particularly when it runs contrary to this court's holding in *Fischer [ v. SJB-P.D., Inc., 214 F.3d 1115 (9th Cir.2000) ]*, by which we are bound. Moreover, the parties, in their settlement, agreed that the district court would retain jurisdiction over the issue of attorneys' fees, thus providing sufficient judicial oversight to justify an award of attorneys'

fees and costs.

*Barrios*, 277 F.3d at 1134 n. 5.

FN6. The thrust of our opinion in *Barrios* was that the district court had erred in concluding that the benefits *Barrios* obtained in the settlement agreement were *de minimis*. *Id.* at 1137.

The suggestion that we have declined to accept the definition of "prevailing party" as requiring some judicial *imprimatur* is foreclosed by our decision in *Carbonell*, 429 F.3d 894. In *Carbonell*, the plaintiff appealed from the district court's denial of attorneys' fees under the Equal Access to Justice Act, contending that he qualified as a prevailing party because he had obtained a court order incorporating a voluntary stipulation which awarded him a substantial portion of the relief he sought. *Id.* at 895. The district court denied attorneys' fees, citing *Buckhannon*. *Id.* at 898.

We vacated and remanded. We held that under *Buckhannon*, for a litigant to be a "prevailing party" for the purpose of awarding attorneys' fees, he must meet two criteria: "he must achieve a 'material alteration of the legal relationship of the parties,' " and "that alteration must be 'judicially sanctioned.'" *Id.* at 898 (quoting *Buckhannon*, 532 U.S. at 604-05, 121 S.Ct. 1835). We rejected any overly narrow interpretation of "judicial action sufficient to convey prevailing party status," *id.*, but concluded:

[I]n recognizing that a litigant can "prevail" for the purpose of awarding attorney's fees as a result of judicial action other than a judgment on the merits or a consent decree (*provided that such action has sufficient "judicial imprimatur"*), this court is in agreement with the vast majority of other circuits that have considered this issue since *Buckhannon*.

*Id.* at 899 (emphasis added).

In support of our conclusion we cited *Pres. Coal. v. Fed. Transit Admin.*, 356 F.3d 444, 452 (2d Cir.2004) ("*Buckhannon* does not limit fee awards

474 F.3d 1165  
 474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008  
 (Cite as: 474 F.3d 1165)

Page 8

to enforceable judgments on the merits or to consent decrees."), *LaGrange*, 349 F.3d at 478 ("*Buckhannon* held that to be a 'prevailing party' a litigant must have obtained a judgment on the merits, a consent decree, or some similar form of judicially sanctioned relief."), *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir.2002) \*1173 ("We do not agree with the District Court's conclusion that the parties' settlement was an inappropriate basis for an award of attorney's fees." (emphasis in original)), *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1319 (11th Cir.2002) ("[T]he district court [s interpretation of] *Buckhannon* to stand for the proposition that a plaintiff could be a 'prevailing party' only if it achieved one of those two results ... is overly narrow."), and *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir.2002) ("We doubt that the Supreme Court's guidance in *Buckhannon* was intended to be interpreted so restrictively as to require that the words 'consent decree' be used explicitly.").

[5] Thus, although there may remain some uncertainty as to what might constitute a "judicial imprimatur," the existence of some judicial sanction is a prerequisite in this circuit for a determination that a plaintiff is a "prevailing party" and entitled to an award of attorneys' fees as part of costs under the IDEA.

Again, our position is in accord with the position taken by our sister circuits. The First Circuit noted that at the core of the Supreme Court's reasoning was the concept of judicial imprimatur without which "a federal court may be unable to retain jurisdiction so it can oversee execution of the settlement." *Doe*, 358 F.3d at 24. The Third Circuit observed that the *Buckhannon* court "concluded that in order to be a 'prevailing party,' a party must be 'successful' in the sense that it has been awarded some relief by a court." *John T.*, 318 F.3d at 556 (emphasis in original). The Seventh Circuit has held that central to *Buckhannon's* conclusion "was its finding that the term 'prevailing party' was 'a legal term of art' which signified that the party had been granted relief by a court." *LaGrange*, 349 F.3d

at 474.

*D. There is no judicial imprimatur of the settlement agreement*

[6] Although P.N. can show the material alteration necessary to meet the first prong of the prevailing party test, the settlement agreement did not receive any judicial imprimatur. The document is entitled "Settlement Agreement and Waiver and Release of Claims," and does not appear to contemplate any judicial enforcement. The agreement does reserve "any issue of attorneys' fees and costs." This matter, however, was not referred to any court, but was "left for resolution by methods other than by this Agreement and Release." Thus, when P.N. filed this action two weeks after the administrative law judge dismissed the due process proceeding, there was nothing that could be construed as a "judicial sanction" of the agreement and nothing to suggest that any judicial imprimatur was contemplated. [FN7]

FN7. There is language in *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848 (3d Cir.2006), indicating that a consent decree entered by an administrative law judge may meet the judicial imprimatur prong of "prevailing party," at least where the consent order is "enforceable through an action under 42 U.S.C. § 1983 and under state law." *Id.* at 854-55. We need not consider the Third Circuit's approach as here the settlement agreement was only signed by the parties and no consent decree was entered by any administrative law judge or hearing officer. We further note that 20 U.S.C. § 1415 was amended subsequent to the underlying events in this case. We have no occasion to consider whether these amendments alter the statutory requirements for an award of attorneys' fees under the IDEA.

V

Through the IDEA, P.N. secured some special education benefits for her child from SSD. Accord-

474 F.3d 1165  
474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008  
(Cite as: 474 F.3d 1165)

ingly, P.N. meets the first prong of the test for prevailing party; P.N. achieved a material alteration of the \*1174 legal relationship of the parties. However, P.N. resolved her differences with SSD through a settlement agreement and there is nothing in the record that we can construe as a judicial sanction of that agreement. Accordingly, we are constrained by the Supreme Court's opinion in *Buckhannon*, and our decisions in *Carbonell* and *Shapiro*, to hold that P.N. is not a "prevailing party" as that term is used in 20 U.S.C. § 1415(i)(3)(B), and thus not entitled under that statute to attorneys' fees as part of costs. The district court's dismissal of P.N.'s action is

**AFFIRMED.**

474 F.3d 1165, 215 Ed. Law Rep. 637, 07 Cal. Daily Op. Serv. 1008

END OF DOCUMENT

Westlaw

537 F.3d 1122

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

Page 1

**C**

United States Court of Appeals,  
Ninth Circuit.  
Les JANKEY, Plaintiff-Appellant,  
v.

POOP DECK; Quentin L. Thelen; and The Poop  
Deck Inc., a California  
corporation; Defendants-Appellees.  
No. 06-55957.

Argued and Submitted Feb. 7, 2008.  
Filed Aug. 12, 2008.

**Background:** Patron with a physical disability sued bar and its owners under the Americans with Disabilities Act (ADA). The parties entered into a settlement agreement, which the district court approved, that required defendants to remedy the problems. Patron then sought attorney fees as a prevailing party under the ADA. The United States District Court for the Central District of California, Ronald S.W. Lew, denied request. Appeal was taken.

**Holdings:** The Court of Appeals, Graber, Circuit Judge, held that:

(1) patron was a "prevailing party" under the ADA, for purposes of attorneys' fees, and  
(2) prevailing party's lack of prelitigation notice and protraction of the litigation did not justify outright denial of fees, but rather should be considered in calculating fees.

Reversed and remanded.

West Headnotes

**[1] Civil Rights** ↪ 1482

78k1482 Most Cited Cases

For a litigant to be a prevailing party for the purpose of awarding attorneys' fees under the ADA, he must meet two criteria: he must achieve a material alteration of the legal relationship of the parties, and that alteration must be judicially sanctioned. Americans with Disabilities Act of 1990, § 505, 42 U.S.C.A. § 12205.

**[2] Civil Rights** ↪ 1482

78k1482 Most Cited Cases

Settlement agreement and the district court's order dismissing the case, which provided that the district court would retain jurisdiction to enforce the agreement, was sufficient to render bar patron a "prevailing party" under the Americans with Disabilities Act (ADA), for purposes of attorneys' fees; the settlement agreement both authorized judicial enforcement of its terms and expressly referred resolution of the issue of attorney fees to the district court. Americans with Disabilities Act of 1990, § 505, 42 U.S.C.A. § 12205.

**[3] Federal Civil Procedure** ↪ 2737.1

170Ak2737.1 Most Cited Cases

Settlement agreement meaningfully alters legal relationship between parties, as would support award of attorney fees to prevailing party, if it allows one party to require other party to do something it otherwise would not be required to do.

**[4] Civil Rights** ↪ 1482

78k1482 Most Cited Cases

A prevailing plaintiff under the ADA should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust. Americans with Disabilities Act of 1990, § 505, 42 U.S.C.A. § 12205.

**[5] Civil Rights** ↪ 1479

78k1479 Most Cited Cases

A district court may not use a lack of prelitigation notice as a factor in determining whether to deny as unjust a request for attorney fees under the ADA. Americans with Disabilities Act of 1990, § 505, 42 U.S.C.A. § 12205.

**[6] Civil Rights** ↪ 1482

78k1482 Most Cited Cases

Prevailing party's lack of prelitigation notice and protraction of litigation did not justify outright denial of fees under the Americans with Disabilities Act (ADA). Americans with Disabilities Act of

537 F.3d 1122

Page 2

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

1990, § 505, 42 U.S.C.A. § 12205.

**[7] Civil Rights ↪ 1487**

78k1487 Most Cited Cases

Although the district court erred in considering ADA plaintiff's protraction of the litigation in deciding whether to deny attorneys' fees, the court could consider whether the plaintiff protracted the litigation in deciding whether to reduce fees. Americans with Disabilities Act of 1990, § 505, 42 U.S.C.A. § 12205.

\*1123 Thomas E. Frankovich and Julia M. Adams, Thomas E. Frankovich, PLC, San Francisco, CA, for the plaintiff-appellant.

E. Thomas Moroney, Redondo Beach, CA, for the defendants-appellees.

Appeal from the United States District Court for the Central District of California; Ronald S.W. Lew, District Judge, Presiding. D.C. No. CV-04-09741-RSWL.

Before: SUSAN P. GRABER and MARSHA S. BERZON, Circuit Judges, and CLAUDIA WILKEN, [FN\*] District Judge.

FN\* The Honorable Claudia Wilken, United States District Judge for the Northern District of California, sitting by designation.

GRABER, Circuit Judge:

Plaintiff Les Jankey, an individual with a physical disability, sued Defendant Poop Deck, a beer and wine bar, and its owners, Defendants Quentin L. Thelen and The Poop Deck Inc., under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213. Plaintiff alleged that Defendants failed to remove architectural barriers at a place of public accommodation, in violation of the ADA. The parties entered into a settlement agreement, which the district court approved, that required Defendants to remedy the problems. Plaintiff then sought attorney fees as a prevailing party under the ADA. The district court denied the request,

ruling that "an award of attorney's fees and costs under the circumstances would be unjust." We reverse and remand.

**FACTUAL AND PROCEDURAL HISTORY**

Plaintiff has a congenital deformity of his lower extremities, requiring that he use a wheelchair. Plaintiff alleges the following facts. On September 23, 2004, he visited the Mermaid, a restaurant in Hermosa Beach, California, to have a snack. After being unable to use the restroom at the Mermaid, he visited the Poop Deck, a beer and wine bar adjacent to the Mermaid, to have a drink and use the restroom. When he attempted to visit the Poop Deck, he encountered architectural barriers that denied him legally required access to the bar and restrooms. He "found that there was no lowered bar area from which to order a drink or to sit at the bar," that he "had difficulty wheeling through the narrow door of the restroom, as it only had a 27 inch clearance," and that, when he "attempted to transfer to and from the toilet without the use of a grab bar," he "stressed and strained himself in the transfer process."

On November 30, 2004, Plaintiff and the organization Disability Rights Enforcement, Education, Services: Helping You Help Others ("DREES") filed suit against Defendants in the Central District of California. [FN1] They alleged violations of the ADA, 42 U.S.C. §§ 12101-12213; the California Disabled Persons Act, Cal. Civ.Code \*1124 §§ 54-55.2; California Health & Safety Code § 19955; the Unruh Civil Rights Act, Cal. Civ.Code § 51; and the California Unfair Competition Act, Cal. Bus. & Prof.Code §§ 17200-17210. Under the ADA, they sought injunctive relief to compel Defendants to make the Poop Deck accessible to individuals with disabilities, and they requested attorney fees and costs. On the California state law claims, they sought injunctive relief, attorney fees and costs, general and compensatory damages, punitive damages, statutory damages, special and consequential damages, and prejudgment interest.

FN1. Plaintiff earlier had filed suit against

537 F.3d 1122

Page 3

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

the Mermaid. Defendant Thelen owns the building that houses both the Poop Deck and the Mermaid.

Neither Plaintiff personally nor his lawyers provided Defendants with any form of prelitigation notice, whether formal or informal. In other words, they did not notify Defendants in any way of the alleged accessibility violations before they filed suit. [FN2]

FN2. Instead, Plaintiff's counsel, the Frankovich Group, sent Defendants a letter with a copy of the complaint. The letter stated, in part:

Once defense attorneys respond to or answer the Complaint, the vast majority, rather than attempt to settle the action, embark on a "billing" exercise. Simply put, the defense attorneys want to sufficiently "bill it" before they get realistic about the settlement. This may cost The Poop Deck Inc. a significant amount of money that could be better spent on the remedial work and settlement of the action. Keep in mind, the more work the defendant's attorneys force on us, the more work we must do. The more work we do is just that much more money The Poop Deck Inc. may be responsible for paying.

We do not believe you have any bona fide defense to your continuing obligation to identify and remove architectural barriers pursuant to the ADA, which was passed over a decade ago (15 years).

*See Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1063-64 (9th Cir.2007) (per curiam) (describing a strikingly similar letter from the same lawyers as potentially "intimidating to unrepresented defendants [and], at best, a questionable exercise of professional judgment").

On July 25, 2005, the district court dismissed DREES for lack of standing and declined to exercise supplemental jurisdiction over Plaintiff's state

law claims, ruling that the claims predominated over the federal ADA claim. Those rulings are not at issue on appeal.

On July 26, 2005, Defendants' counsel, E. Thomas Moroney, sent Plaintiff's counsel, Julia Adams at the Frankovich Group, a letter as a follow-up to a telephone conversation that had taken place one month earlier. The letter expressed Defendants' belief that they were not violating the ADA because the Poop Deck had accessible seating and because of the age and size of the facility. [FN3] The letter proposed a compromise:

FN3. For certain facilities, the ADA requires only that the owners "remove architectural barriers ... *where such removal is readily achievable.*" 42 U.S.C. § 12182(b)(2)(A)(iv) (emphasis added).

The Poop Deck and The Mermaid Restaurant are located side-by-side in a common building with a dividing wall. The property is owned by Mr. Thelen. The Mermaid is a defendant in a separate lawsuit brought by your client. The Poop Deck and Mermaid are willing to build a third unisex ADA compliant restroom in the Mermaid and have that restroom available to Poop Deck and Mermaid customers. The Poop Deck would post appropriate signage. The Poop Deck and Mermaid front The Strand, which is the beach bike, skate, and pedestrian walk way. A disabled customer from the Poop Deck can get to the Mermaid on The Strand without crossing streets or the Mermaid parking lot.

The Poop Deck is also willing to address accessible seating by trying to \*1125 lower and widen a portion of the shelf/rail that runs along the northern wall.

I believe a shared facility is a reasonable and appropriate response. Given the age of the building and its common ownership it is unreasonable to expect the parties to incur the expense of completely remodeling several existing restrooms, all of which are undersized and likely could not meet new construction ADA requirements in any

537 F.3d 1122

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

Page 4

event.

Last month I asked whether these modifications would satisfy your client's demands and allow us to settle the litigation. My clients would like to proceed with these modifications knowing that it will bring the lawsuits to an end. We do not want to be in a position of spending money on these modifications only to later learn that your client disapproves of them or demands something else. If your client does not respond or if we cannot reach agreement on the modifications, we will do what we believe is reasonably required under the circumstances and defend the litigation. But our first preference is to try and reach some agreement.

On August 23, 2005, Moroney sent Adams a second letter: "I would greatly appreciate some response to the proposal that has been on the table since June."

On October 7, 2005, Moroney again sent Adams a letter. The district court had appointed a mediator to the case, and Moroney proposed a mediation date. Moroney also wrote:

In June, I proposed a resolution that addressed the site issues as alleged in your complaint against the Poop Deck (as tenant) and Mr. Thelen (as landlord). I confirmed that proposal in writing. I followed-up with phone calls. To date, I have heard nothing from your office. My understanding is that the same is true with regard to the separate case alleging site issues specific to the Mermaid Restaurant (owned by Mr. Thelen), which is being defended by different counsel.

It may be utterly unnecessary for you to travel to Los Angeles for a mediation in this case, but we will not know that unless and until we get a response to, or at least a discussion about, the proposal on the table. If you have some fondness for downtown Los Angeles, then I suppose we will have the discussion during the mediation. But the trip and expense may be unnecessary.

On November 1, 2005, Moroney sent Adams an e-mail: "Any word on your end re the proposal on the

table?" Three days later, Moroney followed up the e-mail with another letter:

As you know, we have a mediation scheduled for November 16. In June, I put a proposal on the table involving structural modifications to the Poop Deck and Mermaid that addressed your client's concerns. I have followed-up on that proposal with phone calls and letters to you asking for a response. To date, your client still has not responded.

I am concerned that the mediation will be quite unproductive if you do not provide a response to or at least engage in some dialogue about the proposed modifications before we meet on the 16th. If you take the position at the mediation that our existing proposal is inadequate in some way and have some other modifications in mind, we will not be able to agree or disagree with any counter proposal without first having input from an architect and contractor and an understanding of what the City, County, and Alcohol Beverage Control Board might say about different modifications. So if, at the mediation, you come in and say we want "x," the very best response we could give you is: "we have to run that by all sorts of other folks before we can \*1126 give you a response." The mediation will end. Our clients and the mediator's time will have been wasted, and you will have flown to Los Angeles for nothing.

We will have the same problem if you respond before the mediation but wait until the last minute before doing so. Please give us a response to the proposal by next Wednesday. Hopefully that will give us enough lead time to be able to productively discuss resolution on the 16th. Thank you.

The following Wednesday, November 8, 2005, Thomas E. Frankovich, the Frankovich Group's namesake, finally responded to Moroney's entreaties with a letter that he jointly wrote with Adams. The letter accepted Defendants' proposal of a single, unisex, ADA-accessible restroom located in the Mermaid Restaurant. Frankovich also requested that the restaurant add "signage of significant size

537 F.3d 1122

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

Page 5

... indicating the location and path of travel to the accessible restroom," "that an accessible area in the bar ... be created," and that "a sign bearing the International Symbol of Accessibility ... be posted adjacent to the front door," all of which Moroney had proposed in varying levels of detail. Frankovich then "ma[d]e a monetary demand contingent on an agreement being reached as to the requested injunctive relief." He stated:

[I]f this case were to go to trial, defendants' potential exposure for statutory damages [under state law] alone is potentially \$48,000.00.

Of course, we are cognizant that settlement value is less than what could be expected at time of trial and have, therefore, taken this into consideration. Based upon the facts of this case and the methods by which damages may be calculated, plaintiff's demand to settle the compensatory damage claim for Les Jankey is \$20,000. Additionally, our attorneys fees, costs and litigation expenses to date are \$21,500 which includes expert fees in the sum of \$4,700. Thus, plaintiffs' global demand to settle all monetary claims would be \$41,500.00.

Moroney called Adams to confirm the content of the letter, and he responded the next day with a letter that reconfirmed the modification plans to which Frankovich had agreed in writing and to which Adams had agreed over the telephone--namely, the shared restroom in the Mermaid and the addition of signage and an accessible seating area in the Poop Deck. The letter noted that Defendants had submitted the restroom construction plans to the city for approval months earlier and that the construction plans also included widening the entrance to the Poop Deck, an accessibility modification that Plaintiff had not requested. The letter concluded: "I believe these plans address the ADA concerns. If your client believes that these plans are inadequate or something else is required please advise me by the end of the week [November 11]. I will call you in response to your letter of November 8 early next week." Plaintiff did not object to the plans that week.

On November 14, 2005, two days before the scheduled mediation session, Moroney called Adams and told her that Defendants would settle all monetary claims for \$2,500. In response, Frankovich faxed to Moroney a letter that rejected Defendants' counter-offer: "[P]laintiff's demand remains at \$41,500. Plaintiff will be happy to entertain a reasonable counter-offer that takes both damages and attorneys' fees and costs into consideration." In addition, the letter objected, for the first time, to the fact that Poop Deck customers would have "to go outside and around the building to reach the [ADA-compliant] restroom." Frankovich stated that "[t]he shared restroom [with the Mermaid Restaurant] will only work if interior access is provided. If \*1127 not, ... two fully accessible restrooms are required."

Moroney immediately sent a letter to the court-appointed mediator requesting that the mediation session be postponed in light of Frankovich's letter. He wrote:

Mr. Frankovich just faxed me a letter ... that places us exactly in the situation I expressed concerns about last week and one I have been trying to avoid since June.... I will refrain in this letter from characterizing Mr. Frankovich's last minute response as either a withdrawal of their prior agreement or a misunderstanding. I will, however, say that I called Ms. Adams after receiving her office's November 8 letter and before writing my confirming November 9 letter ... to make sure we were on the same page.

In either case, it is certain that we will not be in any position to discuss opening walls between two separate businesses with different owners and different type ABC licenses on Wednesday. We will need input from an architect, contractor, Department of Alcohol Beverage Control and City of Hermosa Beach....

Since the monetary award plaintiff seeks in the pending action is driven entirely by a possibility that he might recover attorneys' fees, I am frustrated that we will be participating in a mediation that cannot possibly resolve the matter. I am par-

537 F.3d 1122

Page 6

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

ticularly disturbed that plaintiff's lawyers will be incurring and seeking recovery of fees for participating in a mediation rendered unproductive by their failure to communicate about these issues months ago, or at the very latest last week when we had experts on location to evaluate the issues.

I suggest we delay mediation until my clients and I can confirm one way or the other the feasibility, legality and expense of what Mr. Frankovich now proposes.... [I]t makes little sense for us to chat about them without having had an opportunity to evaluate the situation.

The mediator rescheduled the mediation for December 5, 2005.

On November 23, 2005, Moroney sent Adams and Frankovich a letter asking that, before the scheduled mediation, "our two contractors ... have a discussion via phone, without lawyers, to see whether they can reach common ground on what is readily achievable with respect to the Poop Deck restroom issue." Adams and Frankovich declined Moroney's offer.

On December 2, 2005, Frankovich called Moroney to discuss a possible settlement to obviate the need for mediation. Although the record is unclear whether the parties met for mediation on December 5, 2005, the next day Moroney sent Adams and Frankovich a letter that memorialized their December 2 discussion:

You again agreed to our proposal to construct a unisex accessible restroom in the Mermaid adjacent to the existing Mermaid restrooms with that restroom also being available to Poop Deck customers, and the path of travel being outside along the Strand and into the south facing entrance of the Mermaid (the main entrance). Appropriate signage will be posted.

You had previously agreed that our proposal to increase accessible seating in the Poop Deck is adequate. As of Friday, no other access issues had been raised in our discussions or correspondence.

Although the parties appeared to agree on the ne-

cessary modifications, they did not have an agreement in writing, nor did they have an agreement on Plaintiff's claim for monetary damages. Consequently, on December 23, 2005, Moroney sent Adams and Frankovich another letter:

\*1128 So far as I know, we have agreed on modifications that adequately address the access issues at the Poop Deck. The Poop Deck is proceeding with those modifications.

The court dismissed all plaintiff's damage claims. With agreement on the access issues, the appropriate response would be for you to dismiss the complaint, or alternatively, confirm in a document we can present to the court that the access issues have been resolved. At that point, you can file a motion seeking your attorneys' fees, which we will oppose.

If you proceed with the lawsuit seeking unnecessary or moot injunctive relief, we will file a motion for summary judgment. Given our agreement on access, such a motion should be unnecessary and one of the options we will consider is a request that the court order that plaintiff pay defendants' fees in having to file the motion.

Please immediately dismiss the lawsuit or prepare a document for filing with the court confirming that the access issues have been resolved.

On December 29, 2005, Adams and Frankovich responded by faxing Moroney a proposed settlement. After minor revisions, the parties finally entered into a settlement agreement. Under the terms of the settlement, Defendants agreed to the following modifications:

- a) Post a sign bearing the International Symbol of Accessibility ("ISA") adjacent to the front door;
- b) Widen entrance doorway to a width of 32" when the door is open to 90 degrees (The parties agree and acknowledge that this modification has been completed.);
- c) Lower and bevel the front entrance threshold to a maximum of 1/2 in. above the floor (The parties agree and acknowledge that this modification has been completed.);
- d) Provide an [ADA Accessibility Guidelines]

537 F.3d 1122

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

Page 7

(Cite as: 537 F.3d 1122)

compliant accessible seating area for service to persons with disabilities (The parties agree and acknowledge that this modification has been completed.); and

e) Provide a fully accessible restroom facility, per plans of architect Steve Jones, ... located within the Mermaid Restaurant to be shared by patrons of both the Mermaid and the Poop Deck. Provide signage at each restroom door indicating location of accessible restroom.

The agreement required Defendants to complete all modifications by June 30, 2006. In addition, the agreement provided that "[t]he issues of attorneys' fees, costs and litigation expenses remain before the court" and that the district court retained jurisdiction to enforce the terms of the agreement.

On April 21, 2006, the district court accepted the settlement agreement:

Plaintiff LES JANKEY, by and through his counsel, and defendants QUENTIN L. THELEN and THE POOP DECK INC., by and through their counsel, stipulate to dismissal of this action in its entirety with prejudice pursuant to Fed.R.Civ.P. 41(a)(1). The issue of plaintiff's attorneys' fees, costs and litigation expenses shall be resolved by plaintiff filing a motion for reasonable attorneys' fees, costs and litigation expenses with the court. The parties further consent to and request that the Court retain jurisdiction over enforcement of the parties' Equitable Settlement Agreement and Release.

....

IT IS HEREBY ORDERED that matter is dismissed with prejudice pursuant to Fed.R.Civ.P. 41(a)(1). IT IS \*1129 FURTHER ORDERED that the Court shall retain jurisdiction for the purpose of enforcing the parties' Settlement Agreement and General Release should such enforcement be necessary.

(Citation omitted.)

On May 5, 2006, Plaintiff filed a Notice of Motion and Motion for Award of Reasonable Attorneys' Fees, Including Litigation Expenses and Costs. In a

memorandum in support of his motion, Plaintiff argued that he was entitled to attorney fees as a prevailing party because the settlement agreement "legally obligates defendants to provide fully accessible accommodations and/or facilities at The Poop Deck" and, "[a]s a term of the parties' settlement is for the federal court to retain full jurisdiction over enforcement of the agreement, the settlement agreement has the necessary judicial *imprimatur*."

Defendants opposed Plaintiff's fee request. They argued that the district court should exercise its discretion to deny Plaintiff's request because he did not provide prelitigation notice and because Defendants proposed a prompt resolution of the access issues. Alternatively, Defendants argued that Plaintiff was not a prevailing party under Supreme Court and Ninth Circuit precedent and that Plaintiff's request for fees was unreasonable because Defendants proposed the final modifications six months before Plaintiff accepted them.

The district court denied Plaintiff's Motion for Award of Reasonable Attorneys' Fees, Including Litigation Expenses and Costs. The court ruled:

In A.D.A. cases the Court may decline to award attorney's fees and costs to the prevailing plaintiff when such an award would be unjust.

Here plaintiff has failed to provide prelitigation notice and has unreasonably protracted litigation by waiting nearly five months to reply to defendants' proposal remedy of the A.D.A. violation. Mr. Frankovich and his firm's abusive litigation tactics have been well documented. The purpose of the A.D.A. is to ensure accessibility to public accommodations for disabled individuals, not to enrich attorneys.

Because an award of attorney's fees and costs under the circumstances would be unjust, the plaintiff's motion is denied.

Plaintiff timely appealed the district court's denial of his motion for attorney fees.

#### STANDARDS OF REVIEW

We review de novo the legal standard applied by a district court to rule on a request for attorney fees.

537 F.3d 1122

Page 8

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

*Thomas v. City of Tacoma*, 410 F.3d 644, 647 (9th Cir.2005). We also review de novo questions of law underlying that decision. *Id.* We review for clear error questions of fact resolved by the district court. *Id.* If the district court applied the correct legal standard and if its findings of fact were not clearly erroneous, then we review for abuse of discretion the district court's decision on the award of attorney fees. *Id.*

## DISCUSSION

### A. Plaintiff was a prevailing party.

As a threshold matter, Defendants argue that we should affirm the denial of fees because Plaintiff was not a "prevailing party" under the ADA. We disagree.

[1] In a case pursued under the ADA, a court, "in its discretion, may allow the prevailing party ... a reasonable attorney's fee." 42 U.S.C. § 12205. "[F]or a litigant to be a 'prevailing party' for the purpose of awarding attorneys' fees, he must meet two criteria: he must achieve a material alteration of the legal relationship of the parties, and that alteration must be \*1130 judicially sanctioned." *P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1172 (9th Cir.2007) (internal quotation marks omitted). In other words, the alteration must have a "judicial imprimatur." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

[2] Here, the district court dismissed Plaintiff's case pursuant to a settlement agreement between the parties under which the court retained jurisdiction to enforce the settlement. Defendants argue that those actions by the district court do not constitute a sufficient judicial *imprimatur*. That argument is foreclosed by *Skaff v. Meridien North America Beverly Hills, LLC*, 506 F.3d 832 (9th Cir.2007) (per curiam). There, we held that a "settlement agreement and the district court's order dismissing the case [, which] provided that the district court would retain jurisdiction to enforce the agreement," satisfied the requirements of *Buckhannon* to render

the plaintiff a prevailing party under the ADA. *Id.* at 844 & n. 12. The settlement agreement in this case both authorized judicial enforcement of its terms and expressly referred resolution of the issue of attorney fees to the district court.

Alternatively, Defendants argue that the settlement agreement did not meaningfully alter the legal relationship between the parties because, by the time the parties signed the settlement agreement, the only modifications that Defendants had not completed were construction of the accessible restroom in the Mermaid Restaurant and signage about that restroom in the Poop Deck. Defendants reason that Defendant Thelen already was bound to construct the restroom by a settlement agreement in Plaintiff's action against the Mermaid Restaurant and, therefore, that the settlement agreement in this case obligated Defendants to do nothing that they had not previously completed or were obligated to complete.

[3] Defendants are mistaken. A settlement agreement meaningfully alters the legal relationship between parties if it allows one party to require the other party "to do something it otherwise would not be required to do." *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir.2000). Defendants' argument, on its face, acknowledges that the Mermaid settlement agreement did not bind Defendants Poop Deck and The Poop Deck Inc. to construct an accessible restroom. Plaintiff had the authority to require them to do so--and to do so by June 30, 2006--under, and only because of, the settlement agreement at issue here. In addition, the instant settlement agreement, and only that agreement, bound Defendants to install the appropriate signage in the Poop Deck informing patrons about the accessible restroom located in the Mermaid Restaurant and to inform Frankovich when all of the agreed modifications were completed. Thus, Plaintiff was the prevailing party on his ADA claim.

B. The district court erred in denying Plaintiff attorney fees.

537 F.3d 1122

Page 9

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

[4] "The Supreme Court has explained that[,] in civil rights cases, the district court's discretion is limited." *Fischer*, 214 F.3d at 1119 n. 2. A prevailing plaintiff under the ADA "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir.2002) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

"Congress passed the ADA in 1990 to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 730 \*1131 (9th Cir.2007) (citation and internal quotation marks omitted). And Congress enacted the fee-shifting provisions of civil rights statutes "to ensure effective access to the judicial process for persons with civil rights grievances." *Hensley*, 461 U.S. at 429, 103 S.Ct. 1933 (internal quotation marks omitted). "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (per curiam). Consequently, recovery is "the rule rather than the exception." *Herrington v. County of Sonoma*, 883 F.2d 739, 743 (9th Cir.1989) (order) (internal quotation marks omitted).

The district court applied the correct legal standard to Plaintiff's request for attorney fees under the ADA, asking whether an award of fees to Plaintiff would be unjust. However, Plaintiff argues that the district court erred by considering the lack of prelitigation notice in making that decision.

In *Skaff*, 506 F.3d at 844, we reviewed a district court's denial of an award of attorney fees where the court "did not explicitly indicate the significance of the fact that [the plaintiff] did not give pre-suit notice ... [but] apparently viewed pre-suit notice as a prerequisite to recovering attorneys' fees

under the ADA." (Emphasis added.) We "h[e]ld that the ADA contains no such notice requirement, and ... decline[d] to imply one." *Id.* We reasoned:

The text of the ADA contains no pre-suit notice requirement. If Congress believes it is preferable as a matter of policy to require plaintiffs to give notice to defendants before filing an ADA suit, it is free to amend the Act.... Unless and until Congress sees fit to engraft a notice requirement onto the ADA, we apply the ADA as written without a pre-filing notice requirement.

*Id.* at 844-45. We vacated the district court's order denying an award of attorney fees and remanded for "the district court [to] consider the merits of [the plaintiff]'s motion." *Id.* at 846.

Unlike in *Skaff*, the district court here did not purport to require prelitigation notice. Instead, this case presents a question of law left open by *Skaff*-whether the ADA allows a district court to consider lack of prelitigation notice as a factor in its special-circumstances analysis in determining whether a request for attorney fees under the ADA would be unjust.

Denying attorney fees altogether as "unjust" because of a lack of prelitigation notice would constitute, in essence, a sanction for failing to provide notice. But as we held in *Skaff*, the ADA does not require prelitigation notice. Litigants and their lawyers should not be penalized for failing to meet a purported technical requirement that does not exist. And failing to provide prelitigation notice cannot, by itself, be considered harassing or improper because the ADA permits the conduct. Nor does it matter whether the district court considers the lack of notice in conjunction with other adverse considerations. If the other conduct is sufficient to render a fee award unjust, then the lack of prelitigation notice need not be considered; if the other conduct is not sufficient, then the lack of prelitigation notice would be, in the end, what justifies denying fees, in contravention of *Skaff*.

[5] We therefore hold that a district court may not use a lack of prelitigation notice as a factor in de-

537 F.3d 1122

Page 10

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

termining whether to deny as unjust a request for attorney fees under the ADA. Here, the district court erred when it used Plaintiff's failure to provide prelitigation notice as a factor \*1132 to deny him attorney fees as a prevailing plaintiff.

[6] The district court also denied fees because it found that Plaintiff unreasonably *protracted* the litigation, but unreasonably prolonging a legitimate suit is a reason to reduce fees, not to deny them altogether. That successful litigation took longer than necessary does not render "unjust" an award of fees in some amount. *See Hensley*, 461 U.S. at 434, 103 S.Ct. 1933 ("The district court ... should exclude from th[e] initial fee calculation hours that were not reasonably expended." (internal quotation marks omitted)). In addition, here, the court below stated that the "abusive litigation tactics [of Plaintiff's counsel] have been well documented." To the extent that the court was referring to Plaintiff's lack of prelitigation notice and his protraction of the litigation, we already have explained that neither reason justifies an outright denial of fees. To the extent that the court was referring to Plaintiff's counsel's numerous *other* lawsuits in the Central District of California, those cases are not a part of the record here.

Consequently, the district court proffered no legitimate factor that would constitute a special circumstance to render an award of attorney fees unjust. We therefore reverse the district court's denial of Plaintiff's request for fees and remand for a calculation of reasonable attorney fees.

C. *The district court has discretion to reduce Plaintiff's fee award.*

On remand,

the district court has discretion in determining the amount of [the] fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters. It remains important, however, for the district court to provide a concise but

clear explanation of its reasons for the fee award. *Hensley*, 461 U.S. at 437, 103 S.Ct. 1933.

[7] "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 433, 103 S.Ct. 1933. But "[t]he district court ... should exclude from th[e] initial fee calculation hours that were not reasonably expended." *Id.* at 434, 103 S.Ct. 1933 (internal quotation marks omitted). In other words, the court should exclude "hours that [we]re excessive, redundant, or otherwise unnecessary." *Id.* Consequently, although the district court erred in considering Plaintiff's protraction of the litigation in deciding whether to *deny* fees, the court may consider whether Plaintiff protracted the litigation in deciding whether to *reduce* fees.

In addition, we clarify that a district court may, in its protraction analysis, consider whether a plaintiff provided prelitigation notice. Prelitigation notice is not required, and failing to provide notice is not unjust, but district courts have discretion to consider all kinds of non-required conduct in deciding whether litigants have protracted litigation. For example, there is no legal requirement that a lawyer respond to telephone calls, but it would not unduly penalize a lawyer to consider such conduct in finding that the lawyer unreasonably protracted litigation. Similarly, while a district court may not reduce fees on the premise that the suit should not have been filed at all before providing notice, it does have discretion to determine whether failing to provide prelitigation notice resulted in unnecessary fees during the course of the litigation--that is, fees that would have been lower had there been notice before filing. *Accord Ass'n of Disabled Ams. v. Neptune Designs, Inc.*, 469 \*1133 F.3d 1357, 1360 (11th Cir.2006) (per curiam).

Of course, a determination that the lack of prelitigation notice resulted in unnecessary fees during the litigation must be explained, and the excessive fees identified. *See Hensley*, 461 U.S. at 437, 103 S.Ct. 1933 ("[T]he district court [should] provide a con-

537 F.3d 1122

Page 11

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

cise but clear explanation of its reasons for the fee award."). As we recently noted, in reviewing a fee reduction for duplicative work,

if the court believes the overall award is too high, it needs to say so and explain why, rather than making summary cuts in various components of the award. While we accord deference to the district court's explanation of why a requested fee is excessive, we can only do so if the district court provides an explanation that we can meaningfully review. Findings of duplicative work should not become a shortcut for reducing an award without identifying just why the requested fee was excessive and by how much. As the reduction passes well beyond the safety zone of a haircut, which plaintiff's counsel seems to have given herself already, the district court's justification for the cuts must be weightier and more specific.

*Moreno v. City of Sacramento*, 534 F.3d 1106, 1113 (9th Cir.2008). Similarly, the lack of prelitigation notice "should not become a shortcut for reducing an award," *id.* at 1113, and is a permissible consideration only if it is specifically connected to a reason why the lawsuit, once filed, would have been resolved more cheaply.

Here, it is evident on the current record that the lack of prelitigation notice did not result in the incurring of any unnecessary fees during the litigation. Defendant did not initiate settlement discussions until seven months after the lawsuit was filed, and there is no reason to believe Defendant would have responded any more quickly once the complaint was filed had there been notice first. Nor is there a showing that the lack of notice caused Plaintiff's attorney unnecessarily to incur any fees once the case was filed. Where, as here, the lack of prelitigation notice neither caused nor contributed to the accumulation of unnecessary fees once the case was filed, it cannot be the basis for reducing a fee award. See *Hensley*, 461 U.S. at 434, 103 S.Ct. 1933 ("The district court ... should exclude from th[e] initial fee calculation hours that were not reasonably expended." (internal quotation marks omitted)).

The record does support a possible different basis for reducing the fee award: the district court's finding that Plaintiff's conduct after the lawsuit was filed unreasonably protracted the litigation, a finding that Plaintiff challenges on appeal. We "must accept the district court's factual findings absent a definite and firm conviction that a mistake has been committed." *Alcala v. Woodford*, 334 F.3d 862, 868 (9th Cir.2003) (internal quotation marks omitted). No mistake occurred here.

In the questionable letter that Frankovich sent Defendants with the complaint, he expressed: "We do not want to see The Poop Deck Inc. waste its money on needless litigation. We want access agreed to now, not later." And yet, after Moroney proposed access modifications in June 2005--modifications in some respects more expansive than those requested by Plaintiff--the uncontroverted record demonstrates that Frankovich and Adams waited more than four months to respond to the proposal.

In his initial proposal, Moroney explained why feedback on the modifications was both important and time-sensitive and expressed his clients' motivation to settle. But Moroney's July 26, 2005, letter went unanswered. His August 23, 2005, letter \*1134 went unanswered. His October 7, 2005, letter went unanswered, even though Moroney expressed a desire and willingness to settle the access issues in advance of the scheduled mediation session. His November 1, 2005, e-mail went unanswered. His November 4, 2005, letter finally received a response, after emphasizing the importance of receiving feedback before the mediation, so that the effort would be productive.

On November 8, 2005, Frankovich and Adams responded to, and accepted, Moroney's proposed access modifications. But two days before the scheduled mediation session, Frankovich withdrew his acceptance because Poop Deck customers would have to go outside to reach the accessible restroom located in the Mermaid Restaurant--a fact that had been a part of Moroney's proposal from the very be-

537 F.3d 1122

Page 12

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

(Cite as: 537 F.3d 1122)

ginning. Frankovich's withdrawal forced Moroney to reschedule the mediation, as Moroney's letters had stated would be necessary if Frankovich objected to the proposed modifications on the eve of mediation. Moroney once again struck a conciliatory and practical tone, requesting that the parties' contractors "have a discussion via phone, without lawyers, to see whether they can reach common ground on what is readily achievable to the Poop Deck restroom issue"--a request that Frankovich denied.

On December 2, 2005, Frankovich again agreed to Moroney's proposed modifications but would not put anything in writing to that effect. Only after Moroney raised the specter of a motion for summary judgment and attorney fees for requiring the filing of such a motion did Frankovich and Adams propose a settlement agreement. The agreement consisted of five access modifications, three of which Defendants already had completed, and all five of which Defendants had proposed six months earlier.

In summary, Plaintiff requested access, and Defendants proposed modifications to provide it. After four months of silence by Plaintiff, and two months in which Plaintiff accepted and then unaccepted the proposal, Plaintiff finally proposed a settlement agreement that essentially restated the modifications that Defendants had placed on the table six months earlier. In the face of those facts, the district court did not clearly err in determining that Plaintiff unreasonably protracted the litigation in this case. Plaintiff argues that the delay was reasonable because he "was attempting to resolve not only this underlying action, but also another action in which [Defendant] Quentin Thelen was named as a defendant, *Jankey v. Mermaid Restaurant*." But Plaintiff does not explain why those efforts resulted in four months of silence, particularly because Defendants' proposed restroom would have resolved both cases simultaneously--it was located in the Mermaid Restaurant--nor does he create a "definite and firm conviction that a mistake has been committed." *Alcala*, 334 F.3d at 868.

We leave to the district court's discretion--applying the standards enunciated in *Hensley* and *Moreno*, as discussed above--whether, and to what extent, Plaintiff's protraction of the litigation should affect his award of attorney fees.

REVERSED and REMANDED.

537 F.3d 1122, 20 A.D. Cases 1611, 37 NDLR P 164, 08 Cal. Daily Op. Serv. 10,489, 2008 Daily Journal D.A.R. 12,588

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# ATTACHMENT 2

Westlaw

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 1

▷

United States Court of Appeals,  
 First Circuit.  
 Alexandre ARONOV, Plaintiff, Appellee,  
 v.  
 Janet NAPOLITANO, [FN\*] et al., Defendants,  
 Appellants.  
 FN\* Pursuant to Fed. R.App. P. 43(c)(2),  
 Janet Napolitano, Secretary of the U.S. De-  
 partment of Homeland Security, has been  
 substituted for former Secretary Michael  
 Chertoff.

No. 07-1588.

Heard Jan. 7, 2009.  
 Decided April 13, 2009.

**Background:** Russian applicant for citizenship sued the United States Citizenship and Immigration Service (USCIS), which immediately entered into a voluntary settlement and never filed a responsive pleading. Citizen then filed an application for fees and costs under the Equal Access to Justice Act (EAJA), which the United States District Court for the District of Massachusetts, Nancy Gertner, J., granted, and USCIS appealed.

**Holdings:** On rehearing of en banc, the Court of Appeals, Lynch, Chief Judge, held that:

(1) order remanding applicant's suit did not constitute a consent decree so as to entitle applicant to prevailing party status for purposes of EAJA; and  
 (2) decision of USCIS not to grant applicant citizenship until his FBI background check was completed, even if that exceeded 120 days, was "substantially justified".  
 Reversed.

Torruella, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] **United States** ⚡ 147(6)  
 393k147(6) Most Cited Cases

Equal Access to Justice Act (EAJA) applications may not be filed until there is a final judgment. 28 U.S.C.A. § 2412(d)(1)(B, D), (d)(2)(G).

[2] **Federal Courts** ⚡ 830

170Bk830 Most Cited Cases

District court's determinations of fees award under the Equal Access to Justice Act (EAJA) are reviewed for abuse of discretion. 28 U.S.C.A. § 2412(d)(1)(A).

[3] **United States** ⚡ 147(2)

393k147(2) Most Cited Cases

[3] **United States** ⚡ 147(5)

393k147(5) Most Cited Cases

Equal Access to Justice Act (EAJA) is a waiver by the government of its sovereign immunity and so must be construed strictly in favor of the government. 28 U.S.C.A. § 2412(d)(1)(A).

[4] **Federal Civil Procedure** ⚡ 2397.3

170Ak2397.3 Most Cited Cases

[4] **Federal Courts** ⚡ 25

170Bk25 Most Cited Cases

Consent decree, because it is entered as an order of the court, receives court approval and is subject to the oversight attendant to the court's authority to enforce its orders, characteristics not typical of settlement agreements; court entering a consent decree must examine its terms to be sure they are fair and not unlawful.

[5] **United States** ⚡ 147(11.1)

393k147(11.1) Most Cited Cases

Order remanding applicant's suit for citizenship against United States Citizenship and Immigration Service (USCIS), which immediately entered into a voluntary settlement and never filed a responsive pleading, did not constitute a consent decree so as to entitle applicant to prevailing party status for purposes of Equal Access to Justice Act (EAJA); court did not order USCIS to do anything, and made no evaluation at all of the merits of the con-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 2

trover, but merely returned jurisdiction to the agency to allow the parties to carry out their agreement. 28 U.S.C.A. § 2412(d)(1)(A).

[6] **United States** ↪ 147(9)

393k147(9) Most Cited Cases

A plaintiff does not become a prevailing party for purposes of Equal Access to Justice Act (EAJA) if the court merely recognizes what the government has voluntarily agreed to and only requires government to follow through with what it had already voluntarily promised to do. 28 U.S.C.A. § 2412(d)(1)(A).

[7] **United States** ↪ 147(10)

393k147(10) Most Cited Cases

An action is "substantially justified" within meaning of Equal Access to Justice Act (EAJA) if it has a reasonable basis in law and fact; government's conduct must be justified to a degree that could satisfy a reasonable person. 28 U.S.C.A. § 2412(d)(1)(A).

[8] **United States** ↪ 147(10)

393k147(10) Most Cited Cases

Position of a government agency can be substantially justified for Equal Access to Justice Act (EAJA) purposes, even if a court ultimately determines the agency's reading of the law was not correct. 28 U.S.C.A. § 2412(d)(1)(A).

[9] **United States** ↪ 147(11.1)

393k147(11.1) Most Cited Cases

Decision of United States Citizenship and Immigration Service (USCIS) not to grant applicant citizenship until his FBI background check was completed, even if that exceeded 120 days, was "substantially justified" within meaning of Equal Access to Justice Act (EAJA). Immigration and Nationality Act, §§ 335(a), 336(b), 8 U.S.C.A. §§ 1446(a), 1447(b); 28 U.S.C.A. § 2412(d)(1)(A).

\*85 Thomas H. Dupree, Jr., Principal Deputy Assistant Attorney General, Civil Division, with whom Gregory G. Katsas, Assistant Attorney General, Civil Division, and Donald E. Keener, Deputy Director, were on brief for appellants.

Gregory Romanovsky with whom Law Offices of Gregory Romanovsky was on brief for appellee.

Anthony Drago, Jr., Anthony Drago, Jr., P.C., Marisa A. DeFranco, Devine Millimet & Branch, Howard Silverman, Ross, Silverman & Levy LLP, Jeanette Kain, Ilana Etkin Greenstein, Harvey Kaplan, Kaplan, O'Sullivan & Friedman, Paul Glickman, Ellen Sullivan, Glickman Turley, LLP, Vard Johnson, William Graves, Kerry Doyle, and Graves & Doyle on brief for American Immigration Lawyers Association, amicus curiae.

Before LYNCH, Chief Judge, TORRUELLA, BOUDIN, LIPEZ, and HOWARD, Circuit Judges.

OPINION EN BANC

LYNCH, Chief Judge.

This case concerns the standards for an award of attorneys' fees against an agency \*86 of the United States under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). The Act requires such an award for a successful litigant who meets the particularized standards for being a "prevailing party," when the government's position, either before or after suit was filed, was not substantially justified, and provided that the award of fees would not otherwise be unjust. *Id.*; see also generally *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16 (1st Cir.2005).

Alexandre Aronov, an applicant for citizenship, sued the U.S. Citizenship and Immigration Service ("USCIS"), which immediately entered into a voluntary settlement and never filed a responsive pleading. Instead the parties filed a joint motion to remand. The district court issued a one-line order granting the joint motion to remand and terminating the case. No hearing was ever held by the district court. The order remanded to the USCIS, which swore in Aronov as a citizen on November 8, 2006, as it had represented in the joint motion that it would do.

Aronov, newly a citizen, then filed an application

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 3

for fees and costs under the EAJA, which the district court granted in the sum of \$4,270.94, over the opposition of the USCIS. The USCIS appealed. The award was originally upheld by a panel, over a dissent.

The USCIS sought en banc review, arguing that the panel decision, if left standing, would have dangerous systemic consequences far beyond this case. The precedent would "create[ ] an enormous incentive for individuals frustrated with delays in the naturalization process to file mandamus lawsuits in this Circuit; [and would] create[ ] an enormous disincentive for the agency to settle these cases by agreeing to grant naturalization." It argued the panel decision was contrary to law and "undermine[d] the uniform judgment of both Congress and the agency that background checks are critical to insuring public safety and national security." While the sum awarded in this case might be small, it said, the potential economic consequences were quite large. This court granted en banc review. [FN1]

FN1. We acknowledge with appreciation the assistance provided by the amicus American Immigration Lawyers Association.

We now reverse the award of fees and order dismissal of Aronov's EAJA application with prejudice on the two separate and independent grounds that he was not a prevailing party and that, whether or not he met the prevailing party requirement, USCIS's position in requiring an FBI name check was substantially justified. The key question is not whether a court ultimately agrees with the agency's reading of its legal obligations but whether the agency's position was substantially justified.

#### I.

Aronov's suit, filed on August 28, 2006, was brought under 8 U.S.C. § 1447(b), which allows an applicant for citizenship to seek relief in federal district court if the USCIS does not act on the application within 120 days of his or her citizenship interview examination. Section 1447(b) provides in

full:

If there is a failure to make a determination under section 1446 of this title before the end of the 120-day period after the date on which the examination is conducted under such section, the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter. Such court has jurisdiction \*87 over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the [USCIS] to determine the matter.

8 U.S.C. § 1447(b).

There are no disputed facts. Aronov, a native of Russia and permanent U.S. resident since 2001, submitted an application for citizenship to the USCIS on May 22, 2004. On February 14, 2005, a USCIS officer examined Aronov before the agency received a full FBI background check for him, contrary to USCIS regulations. The officer informed him that his application could not be approved until additional security checks were completed.

The USCIS erred by examining Aronov prematurely. By regulation, the agency may not schedule an interview, which starts the 120-day clock for filing suit under § 1447(b), until a full FBI background check for the applicant is complete. *See* 8 C.F.R. § 335.2(b) (the USCIS will schedule interviews "only after [it] has received a definitive response from the [FBI] that a full criminal background check of an applicant has been completed"). Mistakes happen. Nevertheless, the error was harmless [FN2] and accrued to Aronov's benefit. The early interview meant he was immediately eligible for citizenship upon successful completion of the FBI background check and, under the literal terms of § 1447(b), was able to bring suit if the agency did not act on his application within 120 days.

FN2. *See generally Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 127 S.Ct. 2518, 2530, 168 L.Ed.2d 467 (2007) ("In administrative law ... there is a harmless error rule." (quoting *PDK*

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 4

*Labs., Inc. v. U.S. Drug Enforcement Admin.*, 362 F.3d 786, 799 (D.C.Cir.2004)).

On March 23, 2006, the USCIS sent Aronov written notice that additional review of his case was necessary and asked Aronov to contact the agency if he did not receive a notice of action within six months.

[1] Instead, Aronov sued. The USCIS did not file a responsive pleading. On October 6, 2006, Aronov and the government, having settled the case, filed a Joint Motion for Remand, stating that "USCIS ha[d] completed its review of plaintiff's application for naturalization and, if jurisdiction [were] returned to the agency, [USCIS] would grant the application and schedule plaintiff's oath ceremony for no later than November 8, 2006" and requesting that the court "remand the matter to USCIS so that it [could] grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006." Except on paper, the parties did not even appear before the court, there were no hearings and no representations were made about the parties' negotiations or the history of the matter. On October 12, 2006, the court entered an electronic order, [FN3] which stated in full:

FN3. The parties agree the order was a final judgment; EAJA applications may not be filed until there is a final judgment. See 28 U.S.C. § 2412(d)(1)(B), (d)(1)(D)(2)(G); see also *Melkonyan v. Sullivan*, 501 U.S. 89, 97, 111 S.Ct. 2157, 115 L.Ed.2d 78 (1991).

Electronic ORDER granting [Docket Number] 3 Joint Motion to Remand to U.S. Citizenship and Immigration Services.

That remand order forms the basis for the EAJA award at issue. By order dated January 30, 2007, the district court awarded fees on the basis that its order was a remand to the agency to do something and so met the judicial imprimatur requirement. The government, it found, unjustifiably delayed the petition, forced Aronov to file his action, and allowed for expedition only after mandamus was

filed.

**\*88 II.**

The EAJA provides in relevant part:

[A] court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

The purpose of the Act is "to ensure that certain individuals ... will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved." *Scarborough v. Principi*, 541 U.S. 401, 407, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004) (quoting H.R.Rep. No. 99-120(I), at 4 (1985), reprinted in 1985 U.S.C.C.A.N. 132, 132-33). The EAJA "reduces the disparity in resources between individuals ... and the federal government." H.R.Rep. No. 99-120(I), at 4, 1985 U.S.C.C.A.N. at p. 133.

Two issues are raised: (1) whether Aronov met the "judicial imprimatur" requirement of the "prevailing party" test; and (2) whether the USCIS has met its burden of showing that it did not act unreasonably.

[2] We review a district court's determinations under the EAJA for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558-59, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988); *Schock v. United States*, 254 F.3d 1, 4 (1st Cir.2001). An error of law is an abuse of discretion. *Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221 (1st Cir.2003); see also *Atl. Fish Spotters Ass'n v. Daley*, 205 F.3d 488, 491 n. 2 (1st Cir.2000). Whether a party is a prevailing party is itself a legal determination subject to de novo review. *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1021 (Fed.Cir.2005); *Smyth*

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 5

*ex rel. Smyth v. Rivero*, 282 F.3d 268, 274 (4th Cir.2002). The district court's award rests on errors of law.

[3] The EAJA is a departure from the traditional "American rule" that parties must ordinarily bear their own attorneys' fees. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Importantly, the EAJA is not simply a fee shifting statute. The EAJA is also a waiver by the government of its sovereign immunity and so must be construed strictly in favor of the government. *Ardestani v. INS*, 502 U.S. 129, 137, 112 S.Ct. 515, 116 L.Ed.2d 496 (1991). Whatever flexibility there may be in interpreting fee shifting statutes involving awards against parties other than the United States, such flexibility does not exist as to EAJA applications. See *Lehman v. Nakshian*, 453 U.S. 156, 161, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." (quoting *Soriano v. United States*, 352 U.S. 270, 276, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957))).

A. *The Judicial Imprimatur Standard Under the Prevailing Party Requirement of the EAJA*

We hold as a matter of law that Aronov is not a prevailing party under the order entered by the district court.

The Supreme Court set the general standards for defining the term "prevailing party" in federal attorneys' fees shifting statutes in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. \*89 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), a case concerned with fee statutes other than the EAJA. [FN4] *Buckhannon* sets the minimum standards for prevailing party status under the EAJA. "[T]he Supreme Court's reasoning in '*Buckhannon* is presumed to apply generally to all fee-shifting statutes that use the prevailing party terminology.'" *Smith*, 401 F.3d at 22 n. 8 (quoting *Doe v. Boston Pub.*

*Sch.*, 358 F.3d 20, 25 (1st Cir.2004)) (internal quotation marks omitted); *accord Ma v. Chertoff*, 547 F.3d 342, 344 (2d Cir.2008) (per curiam) (collecting cases).

FN4. *Buckhannon* involved provisions of the Federal Housing Amendments Act of 1988, 42 U.S.C. § 3613(c)(2) and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12205.

"[T]he term 'prevailing party' [is] a legal term of art." *Buckhannon*, 532 U.S. at 603, 121 S.Ct. 1835. To be a prevailing party, a party must show both a "material alteration of the legal relationship of the parties," *id.* at 604, 121 S.Ct. 1835 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989)), and a "judicial imprimatur on the change," *id.* at 605, 121 S.Ct. 1835.

Both terms are illuminated by the potential meanings *Buckhannon* rejected: the Supreme Court held that mere success in accomplishing a party's objectives is insufficient to be a prevailing party for a fee award. *Buckhannon*, 532 U.S. at 606, 121 S.Ct. 1835. The Court rejected the "catalyst" theory which had been accepted by many circuits, including this one. [FN5] The Court noted that use of the catalyst theory would have the adverse effect of discouraging the government from voluntarily settling cases (pre-suit or post-suit). See *id.* at 608, 121 S.Ct. 1835 (noting the "disincentive that the 'catalyst theory' may have upon a defendant's decision to voluntarily change its conduct"). The Court stated that its plain language approach served the purpose of providing a clear formula allowing for ready administrability and avoiding the result of a second major litigation over attorneys' fees. See *id.* at 609-11, 121 S.Ct. 1835.

FN5. *Buckhannon* thus overruled this circuit's prior acceptance of the catalyst theory in *Guglietti v. Secretary of Health & Human Services*, 900 F.2d 397 (1st Cir.1990) (applying EAJA), *followed in*

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 6

*Paris v. United States Department of Housing & Urban Development*, 988 F.2d 236 (1st Cir.1993) (same).

*Buckhannon* explicitly identified two and only two situations which meet the judicial imprimatur requirement: where plaintiff has "received a judgment on the merits," which does not apply here, or "obtained a court-ordered consent decree." *Id.* at 605, 121 S.Ct. 1835. The Court was clear that "settlement agreements enforced through a consent decree" may be the basis for fee awards and the resulting change in the legal relationship between the parties must be "court-ordered." *Id.* at 604, 121 S.Ct. 1835 (emphasis added). The change in the legal relationship must be a "judicially sanctioned change." *Id.* at 605, 121 S.Ct. 1835. [FN6] Notably, *Buckhannon*, which affirmed the judgment of the Fourth Circuit in denying fees, did not adopt that portion of the Fourth Circuit rule which permitted an award of fees for a "settlement giving some of the legal relief sought" in addition to fees for an "enforceable judgment [or] consent decree." *Id.* at 602, 121 S.Ct. 1835.

FN6. The Court said these requirements were imposed by the plain language of the statute and while there was no need to resort to legislative history, that history was consistent with these requirements. *Buckhannon*, 532 U.S. at 607-08, 121 S.Ct. 1835. We reject Aronov's arguments that the legislative history supports a broader approach.

\*90 The order here was plainly not a judgment on the merits, nor was it labeled a "court-ordered consent decree." That, however, does not end the matter. We agree with other circuits that the formal label of "consent decree" need not be attached; [FN7] it is the reality, not the nomenclature which is at issue. Sometimes the question has been phrased in terms of whether a given court order is the "functional equivalent of a consent decree"; the better articulation may be to ask whether the order contains the sort of judicial involvement and actions inher-

ent in a "court-ordered consent decree." The district court did not allow EAJA fees on the basis that the order it entered was the equivalent of a consent decree. Rather, it said in its award order that it entered the award on the ground that it had entered an order compelling the agency to take action, which it thought was sufficient to support an award. Indeed, Aronov never argued to the district court that this situation was so like a consent decree as to constitute the requisite judicial imprimatur. Nonetheless, the consent decree theory is the primary grounds now asserted, and the parties have addressed the issue to the en banc court. We bypass his waiver and address the argument. [FN8]

FN7. *See, e.g., Davy v. CIA*, 456 F.3d 162, 166 (D.C.Cir.2006) (holding, under the attorneys' fee provision of the Freedom of Information Act, that an award was appropriate even though the court's order was "styled 'order' as opposed to 'consent decree' "); *see also Rice Servs.*, 405 F.3d at 1026-27 (EAJA); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir.2003) (Individuals with Disabilities Education Act); *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir.2003) ( 42 U.S.C. § 1988); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159, 165 (3d Cir.2002) (same); *Am. Disability Ass'n, Inc. v. Chmielarz*, 289 F.3d 1315, 1320 (11th Cir.2002) (ADA); *Smyth*, 282 F.3d at 276 (§ 1988).

FN8. There is no basis, as a result, to consider deference to non-existing "findings" of the district court, as to whether this was the equivalent of a consent decree.

The Supreme Court has described what it meant by a "court-ordered consent decree." It distinguished such consent decrees from "private settlements" (as to which fees may not be awarded), saying "[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees." *Id.* at 604 n. 7, 121 S.Ct. 1835. *Buckhannon* contrasted final judgments on the merits and court-

Westlaw

121 S.Ct. 1835

Page 1

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590

(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

▷

Supreme Court of the United States  
BUCKHANNON BOARD AND CARE HOME,  
INC., et al., Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH  
AND HUMAN RESOURCES, et al.  
No. 99-1848.

Argued Feb. 27, 2001.

Decided May 29, 2001.

Corporation which operated assisted living residences, and which had been ordered to close such residences after state fire marshall determined that residents were incapable of "self-preservation," sued for declaratory judgment that this "self-preservation" requirement violated provisions of the Fair Housing Amendments Act (FHAA) and of the Americans with Disabilities Act (ADA). After state legislature acted to eliminate this requirement and case was dismissed as moot, corporation moved for award of prevailing party attorney fees on catalyst theory. The United States District Court for the Northern District of West Virginia, Frederick P. Stamp, Jr., Chief Judge, denied motion, and corporation appealed. The United States Court of Appeals for the Fourth Circuit, 203 F.3d 819, affirmed. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that fee-shifting provisions of FHAA and of ADA require party to secure either a judgment on merits or court-ordered consent decree in order to qualify as "prevailing party," abrogating *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574, *Marbley v. Bane*, 57 F.3d 224, *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, *Payne v. Board of Ed.*, 88 F.3d 392, *Zinn v. Shalala*, 35 F.3d 273, *Little Rock School Dist. v. Pulaski Cty. School Dist.*, #1, 17 F.3d 260, *Kilgour v. Pasadena*, 53 F.3d 1007, *Beard v. Teska*, 31 F.3d 942, *Morris v. West Palm Beach*, 194 F.3d 1203.

Affirmed.

Justice Scalia concurred and filed opinion, in which Justice Thomas joined.

Justice Ginsburg dissented and filed opinion, in which Justices Stevens, Souter, and Breyer joined.

West Headnotes

**[1] Civil Rights 78 ↪ 1482**

78 Civil Rights

78III Federal Remedies in General

78k1477 Attorney Fees

78k1482 k. Results of Litigation; Prevailing Parties. Most Cited Cases  
(Formerly 78k296)

Fee-shifting provisions of the Fair Housing Amendments Act (FHAA) and of the Americans with Disabilities Act (ADA), which permit court, in its discretion, to award reasonable attorney fees to prevailing party in litigation under the FHAA or ADA, require party to secure either a judgment on merits or court-ordered consent decree in order to qualify as "prevailing party"; fees may not be awarded, on catalyst theory, simply because plaintiff achieved desired result, because lawsuit brought about voluntary change in defendant's conduct; abrogating *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574, *Marbley v. Bane*, 57 F.3d 224, *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, *Payne v. Board of Ed.*, 88 F.3d 392, *Zinn v. Shalala*, 35 F.3d 273, *Little Rock School Dist. v. Pulaski Cty. School Dist.*, #1, 17 F.3d 260, *Kilgour v. Pasadena*, 53 F.3d 1007, *Beard v. Teska*, 31 F.3d 942, *Morris v. West Palm Beach*, 194 F.3d 1203.

**[2] Federal Civil Procedure 170A ↪ 2737.1**

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2737 Attorneys' Fees

170Ak2737.1 k. Result; Prevailing

121 S.Ct. 1835

Page 2

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

Parties; "American Rule". Most Cited Cases  
Under the "American Rule," parties are ordinarily required to bear their own attorney fees, and prevailing party is not entitled to collect from loser.

### [3] Federal Civil Procedure 170A ↪ 2737.1

170A Federal Civil Procedure  
170AXIX Fees and Costs  
170Ak2737 Attorneys' Fees  
170Ak2737.1 k. Result; Prevailing Parties; "American Rule". Most Cited Cases  
Under the "American Rule," court has general practice of not awarding attorney fees to prevailing party, absent explicit statutory authority.

### [4] Federal Civil Procedure 170A ↪ 2737.1

170A Federal Civil Procedure  
170AXIX Fees and Costs  
170Ak2737 Attorneys' Fees  
170Ak2737.1 k. Result; Prevailing Parties; "American Rule". Most Cited Cases  
"Prevailing party," to whom court may award reasonable attorney fees under fee-shifting statutes, is one who has been awarded some relief by court.

### [5] Federal Civil Procedure 170A ↪ 2737.1

170A Federal Civil Procedure  
170AXIX Fees and Costs  
170Ak2737 Attorneys' Fees  
170Ak2737.1 k. Result; Prevailing Parties; "American Rule". Most Cited Cases  
Enforceable judgments upon merits and court-ordered consent decrees create material alteration in legal relationship of parties, of kind required to permit award of "prevailing party" attorney fees under fee-shifting statutes.

### [6] Federal Civil Procedure 170A ↪ 2727

170A Federal Civil Procedure  
170AXIX Fees and Costs  
170Ak2726 Result of Litigation  
170Ak2727 k. Prevailing Party. Most Cited Cases

Courts generally have presumptive rule for award of costs to prevailing party, which court, in its discretion, may vary.

### [7] Federal Courts 170B ↪ 265

170B Federal Courts  
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on  
170BIV(A) In General  
170Bk264 Suits Against States  
170Bk265 k. Eleventh Amendment in General; Immunity. Most Cited Cases

### Federal Courts 170B ↪ 269

170B Federal Courts  
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on  
170BIV(A) In General  
170Bk268 What Are Suits Against States  
170Bk269 k. State Officers or Agencies, Actions Against. Most Cited Cases

### Federal Courts 170B ↪ 270

170B Federal Courts  
170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on  
170BIV(A) In General  
170Bk268 What Are Suits Against States  
170Bk270 k. Cities or Other Political Subdivisions, Actions Involving. Most Cited Cases  
Only states and state officers acting in their official capacity are immune from suit for damages in federal court; plaintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of state. U.S.C.A. Const.Amend. 11.

### [8] Federal Courts 170B ↪ 12.1

170B Federal Courts  
170BI Jurisdiction and Powers in General  
170BI(A) In General  
170Bk12 Case or Controversy Requirement

121 S.Ct. 1835

Page 3

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

170Bk12.1 k. In General. Most Cited Cases

Defendant's voluntary cessation of challenged practice does not deprive federal court of its power to determine legality of that practice, unless it is absolutely clear that allegedly wrongful behavior cannot reasonably be expected to recur.

[9] Federal Civil Procedure 170A ↪ 2742.5

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2742 Taxation

170Ak2742.5 k. Attorney Fees. Most Cited Cases

Request for attorney fees should not result in second major litigation

*Syllabus*<sup>FN\*</sup>

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Buckhannon Board and Care Home, Inc., which operates assisted living residences, failed an inspection by the West Virginia fire marshal's office because some residents were incapable of "self-preservation" as defined by state law. After receiving orders to close its facilities, Buckhannon and others (hereinafter petitioners) brought suit in Federal District Court against the State and state agencies and officials (hereinafter respondents), seeking declaratory and injunctive relief that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988 (FHAA) and the Americans with Disabilities Act of 1990 (ADA). Respondents agreed to stay the orders pending the case's resolution. The state legislature then eliminated the "self-preservation" requirement, and the District Court granted respondents' motion to dismiss the case as moot. Petitioners requested attorney's fees as the "prevailing party" under the

FHAA and ADA, basing their entitlement on the "catalyst theory," which posits that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. As the Fourth Circuit had previously rejected the "catalyst theory," the District Court denied the motion, and the Fourth Circuit affirmed.

*Held:* The "catalyst theory" is not a permissible basis for the award of attorney's fees under the FHAA and ADA. Under the "American Rule," parties are ordinarily required to bear their own attorney's fees, and courts follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority, *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960, 128 L.Ed.2d 797. Congress has employed the legal term of art "prevailing party" in numerous statutes authorizing awards of attorney's fees. A "prevailing party" is one who has been awarded some relief by a court. See, e.g., *Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 64 L.Ed.2d 670. Both judgments on the merits and court-ordered consent decrees create a material alteration of the parties' legal relationship and thus permit an award. The "catalyst theory," however, allows an award where there is no judicially sanctioned change in the parties' legal relationship. A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. The legislative history cited by petitioners is at best ambiguous as to the availability of the "catalyst theory"; and, particularly in view of the "American Rule," such history is clearly insufficient to alter the clear meaning of "prevailing party" in the fee-shifting statutes. Given this meaning, this Court need not determine which way petitioners' various policy arguments cut. Pp. 1839-1843.

203 F.3d 819, affirmed.

REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA,

121 S.Ct. 1835

Page 4

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

KENNEDY, AND THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 1843. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined, *post*, p. 1849. Webster J. Arceneaux, Charleston, WV, for petitioners.

Beth S. Brinkmann, Washington, DC, for United States as amicus curiae, by special leave of the Court, supporting the petitioners.

David P. Cleek, for respondents.

For U.S. Supreme Court briefs, see:2000 WL 1724963 (Pet.Brief)2000 WL 1868098 (Resp.Brief)2001 WL 22900 (Reply.Brief)

Chief Justice REHNQUIST delivered the opinion of the Court.

[1] Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Buckhannon Board and Care Home, Inc., which operates care homes that provide assisted living to their residents, failed an inspection by the West Virginia Office of the State Fire Marshal because some of the residents were incapable of "self-preservation" as defined under state law. See W. Va.Code §§ 16-5H-1, 16-5H-2 (1998) (requiring that all residents of residential board and care homes be capable of "self-preservation," or capable of moving themselves "from situations involving imminent danger, such as fire"); W. Va.Code of State Rules, tit. 87, ser. 1, § 14.07(1) (1995) (same). On October 28, 1997, after receiving cease and desist orders requiring the closure of its residential care facilities within 30 days, Buckhannon Board and Care Home, Inc., on behalf of itself and

other similarly situated homes and residents (hereinafter petitioners), brought suit in the United States District Court for the Northern District of West Virginia against the State of West Virginia, two of its agencies, and 18 individuals (hereinafter respondents), seeking declaratory and injunctive relief <sup>FN1</sup> that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988 (FHAA), 102 Stat. 1619, 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq.*

FN1. The original complaint also sought money damages, but petitioners relinquished this claim on January 2, 1998. See App. to Pet. for Cert. A11.

Respondents agreed to stay enforcement of the cease-and-desist orders pending resolution of the case and the parties began discovery. In 1998, the West Virginia Legislature enacted two bills eliminating the "self-preservation" requirement, see S. 627, I 1998 W. Va. Acts 983-986 (amending regulations); H.R. 4200, II 1998 W. Va. Acts 1198-1199 (amending statute), and respondents moved to dismiss the case as moot. The District Court granted the motion, finding that the 1998 legislation had eliminated the allegedly offensive provisions and that there was no indication that the West Virginia Legislature would repeal the amendments.<sup>FN2</sup>

FN2. The District Court sanctioned respondents under Federal Rule of Civil Procedure 11 for failing to timely provide notice of the legislative amendment. App. 147.

Petitioners requested attorney's fees as the "prevailing party" under the FHAA, 42 U.S.C. § 3613(c)(2) ("[T]he court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee and costs"), and ADA, 42 U.S.C. § 12205 ("[T]he court ..., in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs"). Petitioners argued that they were entitled to attorney's fees un-

121 S.Ct. 1835

Page 5

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855; 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

der the “catalyst theory,” which posits that a plaintiff is a “prevailing party” if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct. Although most Courts of Appeals recognize the “catalyst theory,”<sup>FN3</sup> the Court of Appeals for the Fourth Circuit rejected it in *S-1 and S-2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49, 51 (C.A.4 1994) (en banc) (“A person may not be a ‘prevailing party’ ... except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought”). The District Court accordingly denied the motion and, for the same reason, the Court of Appeals affirmed in an unpublished, *per curiam* opinion. Judgt. order reported at 203 F.3d 819 (C.A.4 2000).

FN3. See, e.g., *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574, 577, n. 2 (C.A.1 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (C.A.2 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (C.A.3 1994); *Payne v. Board of Ed.*, 88 F.3d 392, 397 (C.A.6 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (C.A.7 1994); *Little Rock School Dist. v. Pulaski Cty. School Dist., # 1*, 17 F.3d 260, 263, n. 2 (C.A.8 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (C.A.9 1995); *Beard v. Teska*, 31 F.3d 942, 951-952 (C.A.10 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (C.A.11 1999).

To resolve the disagreement amongst the Courts of Appeals, we granted certiorari, 530 U.S. 1304, 121 S.Ct. 28, 147 L.Ed.2d 1050 (2000), and now affirm.

[2][3] In the United States, parties are ordinarily required to bear their own attorney’s fees—the prevailing party is not entitled to collect from the loser. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Under this “American Rule,” we follow “a general practice of not awarding fees to a prevailing party absent explicit statutory authority.”

*Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). Congress, however, has authorized the award of attorney’s fees to the “prevailing party” in numerous statutes in addition to those at issue here, such as the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. § 2000e-5(k), the Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U.S.C. § 1973l (e), and the Civil Rights Attorney’s Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988. See generally *Marek v. Chesny*, 473 U.S. 1, 43-51, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) (Appendix to opinion of Brennan, J., dissenting).<sup>FN4</sup>

FN4. We have interpreted these fee-shifting provisions consistently, see *Hensley v. Eckerhart*, 461 U.S. 424, 433, n. 7, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and so approach the nearly identical provisions at issue here.

[4] In designating those parties eligible for an award of litigation costs, Congress employed the term “prevailing party,” a legal term of art. Black’s Law Dictionary 1145 (7th ed.1999) defines “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>.-Also termed *successful party*.” This view that a “prevailing party” is one who has been awarded some relief by the court can be distilled from our prior cases.<sup>FN5</sup>

FN5. We have never had occasion to decide whether the term “prevailing party” allows an award of fees under the “catalyst theory” described above. Dictum in *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), alluded to the possibility of attorney’s fees where “voluntary action by the defendant ... affords the plaintiff all or some of the relief ... sought,” but we expressly reserved the question, see *id.*, at 763, 107 S.Ct. 2672

121 S.Ct. 1835

Page 6

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

("We need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award"). And though the Court of Appeals for the Fourth Circuit relied upon our decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), in rejecting the "catalyst theory," *Farrar* "involved no catalytic effect." *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 194, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). Thus, there is language in our cases supporting both petitioners and respondents, and last Term we observed that it was an open question here. See *ibid*.

In *Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) (*per curiam*), we reviewed the legislative history of § 1988 and found that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." Our "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). We have held that even an award of nominal damages suffices under this test. See *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).<sup>FN6</sup>

FN6. However, in some circumstances such a "prevailing party" should still not receive an award of attorney's fees. See *Farrar v. Hobby*, *supra*, at 115-116, 113 S.Ct. 566.

[5] In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees. See *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). Although a consent decree does not always include an admission of liability by the defendant, see, *e.g.*, *id.*, at 126, n. 8, 100 S.Ct. 2570, it nonetheless is a court-ordered "chang[e][in] the legal relationship

between [the plaintiff] and the defendant." *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (citing *Hewitt*, *supra*, at 760-761, 107 S.Ct. 2672, and *Rhodes v. Stewart*, 488 U.S. 1, 3-4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (*per curiam*)).<sup>FN7</sup> These decisions, taken together, establish that 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. 489 U.S., at 792-793, 109 S.Ct. 1486; see also *Hanrahan*, *supra*, at 757, 100 S.Ct. 1987 ("[I]t seems clearly to have been the intent of Congress to permit ... an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the *trial court* or *on appeal*" (emphasis added)).

FN7. We have subsequently characterized the *Maher* opinion as also allowing for an award of attorney's fees for private settlements. See *Farrar v. Hobby*, *supra*, at 111, 113 S.Ct. 566; *Hewitt v. Helms*, *supra*, at 760, 107 S.Ct. 2672. But this dictum ignores that *Maher* only "held that fees *may* be assessed ... after a case has been settled by the entry of a consent decree." *Evans v. Jeff D.*, 475 U.S. 717, 720, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986). Private settlements do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal. See *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).

We think, however, the "catalyst theory" falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship of the parties. Even under a limited form of the "catalyst

121 S.Ct. 1835

Page 7

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

theory,” a plaintiff could recover attorney's fees if it established that the “complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.” Brief for United States as *Amicus Curiae* 27. This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary. Indeed, we held in *Hewitt* that an interlocutory ruling that reverses a dismissal for failure to state a claim “is not the stuff of which legal victories are made.” 482 U.S., at 760, 107 S.Ct. 2672. See also *Hanrahan, supra*, at 754, 100 S.Ct. 1987 (reversal of a directed verdict for defendant does not make plaintiff a “prevailing party”). A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term “prevailing party” authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

[6] The dissenters chide us for upsetting “long-prevailing *Circuit* precedent.” *Post*, at 1850 (opinion of GINSBURG, J.) (emphasis added). But, as Justice SCALIA points out in his concurrence, several Courts of Appeals have relied upon dicta in our prior cases in approving the “catalyst theory.” See *post*, at 1849; see also *supra*, at 1839, n. 5. Now that the issue is squarely presented, it behooves us to reconcile the plain language of the statutes with our prior *holdings*. We have only awarded attorney's fees where the plaintiff has received a judgment on the merits, see, e.g., *Farrar, supra*, at 112, 113 S.Ct. 566, or obtained a court-ordered consent decree, *Maher, supra*, at 129-130, 100 S.Ct. 2570—we have not awarded attorney's fees where the plaintiff has secured the reversal of a directed verdict, see *Hanrahan*, 446 U.S., at 759, 100 S.Ct. 1987, or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by “judicial relief,” *Hewitt, supra*, at 760, 107 S.Ct. 2672 (emphasis added). Never have we awarded attorney's fees for a nonjudicial

“alteration of actual circumstances.” *Post*, at 1856 (dissenting opinion). While urging an expansion of our precedents on this front, the dissenters would simultaneously abrogate the “merit” requirement of our prior cases and award attorney's fees where the plaintiff's claim “was at least colorable” and “not ... groundless.” *Post*, at 1852 (internal quotation marks and citation omitted). We cannot agree that the term “prevailing party” authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the “sought-after destination” without obtaining any judicial relief. *Post*, at 1856 (internal quotation marks and citation omitted).<sup>FN8</sup>

FN8. Although the dissenters seek support from *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884), that case involved costs, not attorney's fees. “[B]y the long established practice and universally recognized rule of the common law ... the prevailing party is entitled to recover a judgment for costs,” *id.*, at 387, 4 S.Ct. 510, but “the rule ‘has long been that attorney's fees are not ordinarily recoverable,’ ” *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967)). Courts generally, and this Court in particular, then and now, have a presumptive rule for costs which the Court in its discretion may vary. See, e.g., this Court's Rule 43.2 (“If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders”). In *Mansfield*, the defendants had successfully removed the case to federal court, successfully opposed the plaintiffs' motion to remand the case to state court, lost on the merits of the case, and then reversed course and successfully argued in this

121 S.Ct. 1835

Page 8

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

Court that the lower federal court had no jurisdiction. The Court awarded costs to the plaintiffs, even though they had lost and the defendants won on the jurisdictional issue, which was the only question this Court decided. In no ordinary sense of the word can the plaintiffs have been said to be the prevailing party here—they lost and their opponents won on the only litigated issue—so the Court's use of the term must be regarded as a figurative rather than a literal one, justifying the departure from the presumptive rule allowing costs to the prevailing party because of the obvious equities favoring the plaintiffs. The Court employed its discretion to recognize that the plaintiffs had been the victims of the defendants' legally successful whipsawing tactics.

Petitioners nonetheless argue that the legislative history of the Civil Rights Attorney's Fees Awards Act supports a broad reading of "prevailing party" which includes the "catalyst theory." We doubt that legislative history could overcome what we think is the rather clear meaning of "prevailing party"—the term actually used in the statute. Since we resorted to such history in *Garland*, 489 U.S., at 790, 109 S.Ct. 1486, *Maier*, 448 U.S., at 129, 100 S.Ct. 2570, and *Hanrahan*, *supra*, at 756-757, 100 S.Ct. 1987, however, we do likewise here.

The House Report to § 1988 states that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits," H.R.Rep. No. 94-1558, p. 7 (1976), while the Senate Report explains that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief," S.Rep. No. 94-1011, p. 5 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912. Petitioners argue that these Reports and their reference to a 1970 decision from the Court of Appeals for the Eighth Circuit, *Parham v. Southwestern Bell Tele-*

*phone Co.*, 433 F.2d 421 (C.A.8 1970), indicate Congress' intent to adopt the "catalyst theory." <sup>FN9</sup> We think the legislative history cited by petitioners is at best ambiguous as to the availability of the "catalyst theory" for awarding attorney's fees. Particularly in view of the "American Rule" that attorney's fees will not be awarded absent "explicit statutory authority," such legislative history is clearly insufficient to alter the accepted meaning of the statutory term. *Key Tronic*, 511 U.S., at 819, 114 S.Ct. 1960; see also *Hanrahan*, *supra*, at 758, 100 S.Ct. 1987 ("[O]nly when a party has prevailed on the merits of at least some of his claims ... has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney" (quoting H.R.Rep. No. 94-1558, at 8)).

FN9. Although the Court of Appeals in *Parham* awarded attorney's fees to the plaintiff because his "lawsuit acted as a catalyst which prompted the [defendant] to take action ... seeking compliance with the requirements of Title VII," 433 F.2d, at 429-430, it did so only after finding that the defendant had acted unlawfully, see *id.*, at 426 ("We hold as a matter of law that [plaintiff's evidence] established a violation of Title VII"). Thus, consistent with our holding in *Farrar*, *Parham* stands for the proposition that an enforceable judgment permits an award of attorney's fees. And like the consent decree in *Maier v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), the Court of Appeals in *Parham* ordered the District Court to "retain jurisdiction over the matter for a reasonable period of time to insure the continued implementation of the appellee's policy of equal employment opportunities." 433 F.2d, at 429. Clearly *Parham* does not support a theory of fee shifting untethered to a material alteration in the

121 S.Ct. 1835

Page 9

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

legal relationship of the parties as defined by our precedents.

Petitioners finally assert that the “catalyst theory” is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney’s fees. They also claim that the rejection of the “catalyst theory” will deter plaintiffs with meritorious but expensive cases from bringing suit. We are skeptical of these assertions, which are entirely speculative and unsupported by any empirical evidence (e.g., whether the number of suits brought in the Fourth Circuit has declined, in relation to other Circuits, since the decision in *S-1 and S-2*).

Petitioners discount the disincentive that the “catalyst theory” may have upon a defendant’s decision to voluntarily change its conduct, conduct that may not be illegal. “The defendants’ potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits,” *Evans v. Jeff D.*, 475 U.S. 717, 734, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986), and the possibility of being assessed attorney’s fees may well deter a defendant from altering its conduct.

[7][8] And petitioners’ fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case.<sup>FN10</sup> Even then, it is not clear how often courts will find a case mooted: “It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice” unless it is “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotation marks and citations omitted). If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney’s fees. Given this

possibility, a defendant has a strong incentive to enter a settlement agreement, where it can negotiate attorney’s fees and costs. Cf. *Marek v. Chesny*, 473 U.S., at 7, 105 S.Ct. 3012 (“[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney’s fees in whatever amount the court might fix on motion of the plaintiff” (internal quotation marks and citation omitted)).

FN10. Only States and state officers acting in their official capacity are immune from suits for damages in federal court. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Plaintiffs may bring suit for damages against all others, including municipalities and other political subdivisions of a State, see *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

[9] We have also stated that “[a] request for attorney’s fees should not result in a second major litigation,” *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and have accordingly avoided an interpretation of the fee-shifting statutes that would have “spawn[ed] a second litigation of significant dimension,” *Garland, supra*, at 791, 109 S.Ct. 1486. Among other things, a “catalyst theory” hearing would require analysis of the defendant’s subjective motivations in changing its conduct, an analysis that “will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant’s change in conduct.” Brief for United States as *Amicus Curiae* 28. Although we do not doubt the ability of district courts to perform the nuanced “three thresholds” test required by the “catalyst theory”—whether the claim was colorable rather than groundless; whether the lawsuit was a substantial rather than an insubstantial cause of the defendant’s change in conduct; whether the defendant’s change in conduct was motivated by the plaintiff’s threat of victory rather than threat of ex-

121 S.Ct. 1835

Page 10

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

pense, see *post*, at 1852 (dissenting opinion)-it is clearly not a formula for "ready administrability." *Burlington v. Dague*, 505 U.S. 557, 566, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

Given the clear meaning of "prevailing party" in the fee-shifting statutes, we need not determine which way these various policy arguments cut. In *Alyeska*, 421 U.S., at 260, 95 S.Ct. 1612, we said that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be a similar assumption of a "roving authority." For the reasons stated above, we hold that the "catalyst theory" is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. § 3613(c)(2), and ADA, 42 U.S.C. § 12205.

The judgment of the Court of Appeals is

*Affirmed.*

Justice SCALIA, with whom Justice THOMAS joins, concurring.

I join the opinion of the Court in its entirety, and write to respond at greater length to the contentions of the dissent.

## I

"Prevailing party" is not some newfangled legal term invented for use in late-20th-century fee-shifting statutes. "[B]y the long established practice and universally recognized rule of the common law, in actions at law, the prevailing party is entitled to recover a judgment for costs ...." *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 387, 4 S.Ct. 510, 28 L.Ed. 462 (1884).

"Costs have usually been allowed to the prevailing party, as incident to the judgment, since the statute 6 Edw. I, c. 1, § 2, and the same rule was acknowledged in the courts of the States, at the time the judicial system of the United States was

organized....

"Weighed in the light of these several provisions in the Judiciary Act [of 1789], the conclusion appears to be clear that Congress intended to allow costs to the prevailing party, as incident to the judgment...." *The Baltimore*, 8 Wall. 377, 388, 390 [19 L.Ed. 463] (1869).

The term has been found within the United States Statutes at Large since at least the Bankruptcy Act of 1867, which provided that "[t]he party prevailing in the suit shall be entitled to costs against the adverse party." Act of Mar. 2, 1867, ch. 176, § 24, 14 Stat. 528. See also Act of Mar. 3, 1887, ch. 359, § 15, 24 Stat. 508 ("If the Government of the United States shall put in issue the right of the plaintiff to recover the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue"). A computer search shows that the term "prevailing party" appears at least 70 times in the current United States Code; it is no stranger to the law.

At the time 42 U.S.C. § 1988 was enacted, I know of no case, state or federal, in which-either under a statutory invocation of "prevailing party" or under the common-law rule-the "catalyst theory" was enunciated as the basis for awarding costs. Indeed, the dissent cites only one case in which (although the "catalyst theory" was not expressed) costs were awarded for a reason that the catalyst theory would support, but today's holding of the Court would not: *Baldwin v. Chesapeake & Potomac Tel. Co.*, 156 Md. 552, 557, 144 A. 703, 705 (1929), where costs were awarded because "the granting of [appellee's] motion to dismiss the appeal has made it unnecessary to inquire into the merits of the suit, and the dismissal is based on an act of appellee performed after both the institution of the suit and the entry of the appeal." And that case is irrelevant to the meaning of "prevailing party," because it was a case *in equity*. While, as *Mansfield* observed, costs were awarded in actions *at law* to the "prevailing party," see 111 U.S., at 387, 4 S.Ct. 510, an equity court could award costs "as the equities of the case might

121 S.Ct. 1835

Page 11

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

require," *Getz v. Johnston*, 145 Md. 426, 433, 125 A. 689, 691 (1924). See also *Horn v. Bohn*, 96 Md. 8, 12-13, 53 A. 576, 577 (1902) ("The question of costs in equity cases is a matter resting in the sound discretion of the Court, from the exercise of which no appeal will lie" (internal quotation marks and citation omitted)).<sup>FN1</sup> The other state or state-law cases the dissent cites as awarding costs despite the absence of a judgment all involve a judicial finding-or its equivalent, an acknowledgment by the defendant-of the merits of plaintiff's case.<sup>FN2</sup> Moreover, the dissent cites *not a single case* in which this Court-or even any other federal court applying federal law prior to enactment of the fee-shifting statutes at issue here-has regarded as the "prevailing party" a litigant who left the courthouse emptyhanded. If the term means what the dissent contends, that is a remarkable absence of authority.

FN1. The jurisdiction that issued *Baldwin* has used the phrase "prevailing party" frequently (including in equity cases) to mean the party acquiring a judgment. See *Getz v. Johnston*, 145 Md. 426, 434, 125 A. 689, 691-692 (1924) (an equity decision noting that "[o]n reversal, following the usual rule, the costs will generally go to the prevailing party, that is, to the appellant" (internal quotation marks and citation omitted)). See also, e.g., *Hoffman v. Glock*, 20 Md.App. 284, 293, 315 A.2d 551, 557 (1974) ("Md. Rule 604a provides: 'Unless otherwise provided by law, or ordered by the court, the prevailing party shall be entitled to the allowance of court costs, which shall be taxed by the clerk and embraced in the judgment' "); *Fritts v. Fritts*, 11 Md.App. 195, 197, 273 A.2d 648, 649 (1971) ("We have viewed the evidence, as we must, in a light most favorable to appellee as the prevailing party below"); *Chillum-Adelphi Volunteer Fire Dept., Inc. v. Button & Goode, Inc.*, 242 Md. 509, 516, 219 A.2d 801, 805 (1966) ("At common law, an arbitration award became a

cause of action in favor of the prevailing party"); *Burch v. Scott*, 1829 WL 1006, \*15 (Md.Ct.App., Dec.1829) ("[T]he demurrer being set down to be argued, the court proceeds to affirm or reverse the decree, and the prevailing party takes the deposit").

FN2. Our decision to award costs in *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884), does not "tu[g] against the restrictive rule today's decision installs," *post*, at 1854 (GINSBURG, J., dissenting). Defendants had removed the case to federal court, and after losing on the merits, sought to have us vacate the judgment because the basis for removal (diversity of citizenship) was absent. We concluded that because defendants were responsible for the improper removal in the first place, our judgment's "effect [was] to defeat the entire proceeding which they originated and have prosecuted," 111 U.S., at 388, 4 S.Ct. 510. In other words, plaintiffs "prevailed" because defendants' original position as to jurisdiction was defeated. In *Ficklen v. Danville*, 146 Va. 426, 438-439, 132 S.E. 705, 706 (1926), appellants were deemed to have "substantially prevail[ed]" on their appeal because appellees "abandoned their contention made before the lower court," i.e., "abandoned their intention and desire to rely upon the correctness of the trial court's decree." In *Talmage v. Monroe*, 119 P. 526 (Cal.App.1911), costs were awarded after the defendant complied with an alternative writ of mandamus; it was the writ, not the mere petition, which led to defendant's action.

*Scatcherd v. Love*, 166 F. 53 (C.A.6 1908), *Wagner v. Wagner*, 9 Pa. 214 (1848), and other cases cited by the dissent represent a rule adopted in some

121 S.Ct. 1835

Page 12

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

States that by settling a defendant "acknowledged his liability," *Scatcherd, supra*, at 56; see also *Wagner, supra*, at 215. That rule was hardly uniform among the States. Compare 15 C.J., Costs § 167, p. 89 (1918) (citing cases from 13 States which hold that a "settlement is equivalent to a confession of judgment"), with *id.*, at 89-90, § 168, and n. a (citing cases from 11 States which hold that under a settlement "plaintiff cannot recover costs," because "[c]osts ... can only follow a judgment or final determination of the action" (internal quotation marks and citation omitted)). I do not think these state cases (and *Scatcherd*, a federal case applying state law) justify expanding the federal meaning of "prevailing party" (based on a "confession of judgment" fiction) to include the party accepting an out-of-court settlement-much less to expand it beyond settlements, to the domain of the "catalyst theory."

The only case cited by the dissent in which the conclusion of acknowledgment of liability was rested on something other than a settlement is *Board of Ed. of Madison Cty v. Fowler*, 192 Ga. 35, 14 S.E.2d 478 (1941), which, in one of the States that considered settlement an acknowledgment of liability, analogized compliance with what had been sought by a mandamus suit to a settlement. This is a slim reed upon which to rest the broad conclusion of a catalyst theory.

That a judicial finding of liability was an understood requirement of "prevailing" is confirmed by many statutes that use the phrase in a context that presumes the existence of a judicial ruling. See, e.g., 5 U.S.C. § 1221(g)(2) ("[i]f an employee ... is the prevailing party ... and the decision is based on

a finding of a prohibited personnel practice"); § 1221(g)(3) (providing for an award of attorney's fees to the "prevailing party," "regardless of the basis of the decision"); § 7701(b)(2)(A) (allowing the prevailing party to obtain an interlocutory award of the "relief provided in the decision"); 8 U.S.C. § 1324b(h) (permitting the administrative law judge to award an attorney's fee to the prevailing party "if the losing party's argument is without reasonable foundation in law and fact"); 18 U.S.C. § 1864(e) (1994 ed., Supp. V) (allowing the district court to award the prevailing party its attorney's fee "in addition to monetary damages").

The dissent points out, *post*, at 1853, that the Prison Litigation Reform Act of 1995 limits attorney's fees to an amount "proportionately related to the court ordered relief for the violation." This shows that *sometimes* Congress *does* explicitly "tightly bind fees to judgments," *ibid.*, inviting (the dissent believes) the conclusion that "prevailing party" does *not* fasten fees to judgments. That conclusion does not follow from the premise. What this statutory provision demonstrates, *at most*, is that use of the phrase "prevailing party" is not the *only* way to impose a requirement of court-ordered relief. That is assuredly true. But it would be no more rational to reject the normal meaning of "prevailing party" because some statutes produce the same result with different language, than it would be to conclude that, since there are many synonyms for the word "jump," the word "jump" must mean something else.

It is undoubtedly true, as the dissent points out by quoting a nonlegal dictionary, see *post*, at 1855-1856, that the word "prevailing" can have other meanings in other contexts: "prevailing winds" are the winds that predominate, and the "prevailing party" in an election is the party that wins the election. But when "prevailing party" is used by courts or legislatures in the context of a lawsuit, it is a term of art. It has traditionally-and to my knowledge, prior to enactment of the first of the statutes at issue here, *invariably*-meant the party

121 S.Ct. 1835

Page 13

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

that wins the suit or obtains a finding (or an admission) of liability. Not the party that ultimately gets his way because his adversary dies before the suit comes to judgment; not the party that gets his way because circumstances so change that a victory on the legal point for the other side turns out to be a practical victory for him; and not the party that gets his way because the other side ceases (for whatever reason) its offensive conduct. If a nuisance suit is mooted because the defendant asphalt plant has gone bankrupt and ceased operations, one would not normally call the plaintiff the prevailing party. And it would make no difference, as far as the propriety of that characterization is concerned, if the plant did not go bankrupt but moved to a new location to avoid the expense of litigation. In one sense the plaintiff would have "prevailed"; but he would not be the prevailing party in the lawsuit. Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning.

"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 [72 S.Ct. 240, 96 L.Ed. 288] (1952).

The cases cited by the dissent in which we have "not treated Black's Law Dictionary as preclusively definitive," *post*, at 1853, are inapposite. In both *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), and *United States v. Rodgers*, 466 U.S. 475, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984), we rejected Black's definition because it conflicted with our precedent. See *Pioneer*, *supra*, at 395-396, n. 14, 113 S.Ct. 1489; *Rodgers*, *supra*, at 480, 104 S.Ct. 1942. We did not, as the

dissent would do here, simply reject a relevant definition of a word tailored to judicial settings in favor of a more general definition from another dictionary.

## II

The dissent distorts the term "prevailing party" beyond its normal meaning for policy reasons, but even those seem to me misguided. They rest upon the presumption that the catalyst theory applies when "*the suit's merit* led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint," *post*, at 1850 (emphasis added). As the dissent would have it, by giving the term its normal meaning the Court today approves the practice of denying attorney's fees to a plaintiff with a proven claim of discrimination, simply because the very *merit* of his claim led the defendant to capitulate before judgment. That is not the case. To the contrary, the Court *approves* the result in *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (C.A.8 1970), where attorney's fees were awarded "after [a] finding that the defendant had acted unlawfully," *ante*, at 1842, and n. 9.<sup>FN3</sup> What the dissent's stretching of the term produces is something more, and something far less reasonable: an award of attorney's fees when the merits of the plaintiff's case remain unresolved—when, for all one knows, the defendant only "abandon[ed] the fray" because the cost of litigation—either financial or in terms of public relations—would be too great. In such a case, the plaintiff may have "prevailed" as Webster's defines that term—"gain[ed] victory by virtue of strength or superiority," see *post*, at 1855. But I doubt it was greater strength in financial resources, or superiority in media manipulation, rather than *superiority in legal merit*, that Congress intended to reward.

FN3. The dissent incorrectly characterizes *Parham* as involving undifferentiated "findings or retention of jurisdiction," *post*, at 1858, n. 11. In fact, *Parham in-*

121 S.Ct. 1835

Page 14

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

volved a finding that the defendant *had* discriminated, and jurisdiction was retained so that that finding could be given effect, in the form of injunctive relief, should the defendant ever backslide in its voluntary provision of relief to plaintiffs. Jurisdiction was not retained to determine whether there had been discrimination, and I do not read the Court's opinion as suggesting a fee award would be appropriate in *those* circumstances.

The dissent notes that two other cases were cited in Senate legislative history (*Parham* is cited in legislative history from both the Senate and House) which it claims support the catalyst theory. If legislative history in general is a risky interpretive tool, legislative history from only one legislative chamber-and consisting of the citation of Court of Appeals cases that surely few if any Members of Congress read-is virtually worthless. In any event, *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (C.A.2 1975), does not support the catalyst theory because the defendant's voluntary compliance was not at issue. Fees were awarded on the dubious premise that discovery uncovered some documents of potential use in other litigation, making this more a case of an award of interim fees. *Thomas v. Honeybrook Mines*, 428 F.2d 981 (C.A.3 1970), is also inapposite. There, the question was whether counsel for union members, whose fruitless efforts to sue the union had nonetheless spurred the union to sue the employer, should be paid out of a fund established by the union's victory. Whether the union members were "prevailing parties" in the union suit, or whether they were entitled to attorney's fees as "prevailing parties" in the earlier suit against the union, was not even at issue.

It could be argued, perhaps, that insofar as abstract justice is concerned, there is little to choose between the dissent's outcome and the Court's: If the former sometimes rewards the plaintiff with a phony claim (there is no way of knowing), the latter sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment. But it seems to me the evil of the former far outweighs the evil of the latter. There is all the difference in the world between a rule that denies the extraordinary boon of attorney's fees to some plaintiffs who are no less "deserving" of them than others who receive them, and a rule that causes the law to be the very instrument of wrong-exacting the payment of attorney's fees to the extortionist.

It is true that monetary settlements and consent decrees can be extorted as well, and we have approved the award of attorney's fees in cases resolved through such mechanisms. See *ante*, at 1840 (citing cases). Our decision that the statute makes plaintiff a "prevailing party" under such circumstances was based entirely on language in a House Report, see *Maier v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), and if this issue were to arise for the first time today, I doubt whether I would agree with that result. See *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) (SCALIA, J.) (opining that "[r]espect for ordinary language requires that a plaintiff receive at least some relief *on the merits* of his claim before he can be said to prevail" (emphasis added)). But in the case of court-approved settlements and consent decrees, even if there has been no judicial determination of the merits, the outcome is at least the product of, and bears the sanction of, judicial action *in the lawsuit*. There is at least *some* basis for saying that the party favored by the settlement or decree prevailed *in the suit*. Extending the holding of *Maier* to a case in which no judicial action whatever has been taken stretches the term "prevailing party" (and the potential injustice that *Maier* produces) beyond what the normal meaning of that term in the litigation context can conceivably support.

121 S.Ct. 1835

Page 15

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

The dissent points out that petitioners' object in bringing their suit was not to obtain "a judge's approbation," but to "stop enforcement of a [West Virginia] rule," *post*, at 1856; see also *Hewitt, supra*, at 761, 107 S.Ct. 2672. True enough. But not even the dissent claims that if a petitioner accumulated attorney's fees in preparing a threatened complaint, but *never filed it* prior to the defendant's voluntary cessation of its offending behavior, the wannabe-but-never-was plaintiff could recover fees; that would be countertextual, since the fee-shifting statutes require that there be an "action" or "proceeding," see 42 U.S.C. §§ 3613(d), 1988(b) (1994 ed., Supp. V)-which in legal parlance (though not in more general usage) means a *lawsuit*. See *post*, at 1861 (concluding that a party should be deemed prevailing as a result of a "*post-complaint* payment or change in conduct" (emphasis added)). Does that not leave achievement of the broad congressional purpose identified by the dissent just as unsatisfactorily incomplete as the failure to award fees when there is no decree? Just as the dissent rhetorically asks *why* (never mind the language of the statute) Congress would want to award fees when there is a judgment, but deny fees when the defendant capitulates on the eve of judgment; so also it is fair for us to ask *why* Congress would want to award fees when suit has been filed, but deny fees when the about-to-be defendant capitulates under the threat of filing. Surely, it cannot be because determination of whether suit was actually contemplated and threatened is too difficult. All the proof takes is a threatening letter and a batch of timesheets. Surely *that* obstacle would not deter the Congress that (according to the dissent) was willing to let district judges pursue that much more evasive will-o'-the-wisp called "catalyst." (Is this not why we *have* district courts?, asks the dissent, *post*, at 1859.) My point is not that it would take no more twisting of language to produce prelitigation attorney's fees than to produce the decreeless attorney's fees that the dissent favors (though that may well be true). My point is that the departure from normal usage that the dissent favors cannot be justified on the ground that it establishes a regime of logical

evenhandedness. There *must* be a cutoff of seemingly equivalent entitlements to fees-either the failure to file suit in time or the failure to obtain a judgment in time. The term "prevailing party" suggests the latter rather than the former. One does not prevail in a suit that is never determined.

The dissent's ultimate worry is that today's opinion will "impede access to court for the less well-heeled," *post*, at 1850. But, of course, the catalyst theory also harms the "less well-heeled," putting pressure on them to avoid the risk of massive fees by abandoning a solidly defensible case early in litigation. Since the fee-shifting statutes at issue here allow defendants as well as plaintiffs to receive a fee award, we know that Congress did not intend to *maximize* the quantity of "the enforcement of federal law by private attorneys general," *ibid*. Rather, Congress desired an *appropriate* level of enforcement-which is more likely to be produced by limiting fee awards to plaintiffs who prevail "on the merits," or at least to those who achieve an enforceable "alteration of the legal relationship of the parties," than by permitting the open-ended inquiry approved by the dissent.<sup>FN4</sup>

FN4. Even the legislative history relied upon by the dissent supports the conclusion that some merit is necessary to justify a fee award. See *post*, at 1857, n. 9 (citing a House Report for the proposition that fee-shifting statutes are " 'designed to give [victims of civil rights violation] access to the judicial process' " (emphasis added)); *ibid*. (citing a Senate Report: " '[I]f those who violate the Nation's fundamental laws are not to proceed with impunity,' " fee awards are necessary (emphasis added)). And for the reasons given by the Court, see *ante*, at 1840, the catalyst theory's purported "merit test"-the ability to survive a motion to dismiss for failure to state a claim, or the absence of frivolousness-is scant protection for the innocent.

121 S.Ct. 1835

Page 16

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

## III

The dissent points out that the catalyst theory has been accepted by “the clear majority of Federal Circuits,” *ibid.* But our disagreeing with a “clear majority” of the Circuits is not at all a rare phenomenon. Indeed, our opinions sometimes contradict the *unanimous* and longstanding interpretation of lower federal courts. See, e.g., *McNally v. United States*, 483 U.S. 350, 365, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) (STEVENS, J., dissenting) (the Court’s decision contradicted “[e]very court to consider” the question).

The dissent’s insistence that we defer to the “clear majority” of Circuit opinion is particularly peculiar in the present case, since that majority has been nurtured and preserved by *our own misleading dicta* (to which I, unfortunately, contributed). Most of the Court of Appeals cases cited by the dissent, *post*, at 1852, and n. 5, as reaffirming the catalyst theory after our decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), relied on our earlier opinion in *Hewitt*. See *Marbley v. Bane*, 57 F.3d 224, 234 (C.A.2 1995) (relying on *Hewitt* to support catalyst theory); *Payne v. Board of Ed.*, 88 F.3d 392, 397 (C.A.6 1996) (same); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 548 (C.A.3 1994) (explicitly rejecting *Farrar* in favor of *Hewitt*); *Zinn v. Shalala*, 35 F.3d 273, 274-276 (C.A.7 1994) (same); *Beard v. Teska*, 31 F.3d 942, 950-952 (C.A.10 1994) (same); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (C.A.11 1999) (same). Deferring to our colleagues’ own error is bad enough; but enshrining the error that we ourselves have improvidently suggested and blaming it on the near-unanimous judgment of our colleagues would surely be unworthy.<sup>FN5</sup> Informing the Courts of Appeals that our ill-considered dicta have misled them displays, it seems to me, not “disrespect,” but a most becoming (and well-deserved) humility.

FN5. That a few cases adopting the catalyst theory predate *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654

(1987), see *post*, at 1851, and n. 4, is irrelevant to my point. Absent our dicta in *Hewitt*, and in light of everything else we have said on this topic, see *ante*, at 1839-1840, it is unlikely that the catalyst theory would have achieved that universality of acceptance by the Courts of Appeals upon which the dissent relies.

\* \* \*

The Court today concludes that a party cannot be deemed to have prevailed, for purposes of fee-shifting statutes such as 42 U.S.C. §§ 1988, 3613(c)(2) (1994 ed. and Supp. V), unless there has been an enforceable “alteration of the legal relationship of the parties.” That is the normal meaning of “prevailing party” in litigation, and there is no proper basis for departing from that normal meaning. Congress is free, of course, to revise these provisions—but it is my guess that if it does so it will not create the sort of inequity that the catalyst theory invites, but will require the court to determine that there was at least a substantial likelihood that the party requesting fees would have prevailed.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

The Court today holds that a plaintiff whose suit prompts the precise relief she seeks does not “prevail,” and hence cannot obtain an award of attorney’s fees, unless she also secures a court entry memorializing her victory. The entry need not be a judgment on the merits. Nor need there be any finding of wrongdoing. A court-approved settlement will do.

The Court’s insistence that there be a document filed in court—a litigated judgment or court-endorsed settlement—upsets long-prevailing Circuit precedent applicable to scores of federal fee-shifting statutes. The decision allows a defendant to escape a statutory obligation to pay a plaintiff’s counsel fees, even though the suit’s merit led the defendant to

121 S.Ct. 1835

Page 17

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint. Concomitantly, the Court's constricted definition of "prevailing party," and consequent rejection of the "catalyst theory," impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.

In my view, the "catalyst rule," as applied by the clear majority of Federal Circuits, is a key component of the fee-shifting statutes Congress adopted to advance enforcement of civil rights. Nothing in history, precedent, or plain English warrants the anemic construction of the term "prevailing party" the Court today imposes.

## I

Petitioner Buckhannon Board and Care Home, Inc. (Buckhannon), operates residential care homes for elderly persons who need assisted living, but not nursing services. Among Buckhannon's residents in October 1996 was 102-year-old Dorsey Pierce. Pierce had resided at Buckhannon for some four years. Her daughter lived nearby, and the care provided at Buckhannon met Pierce's needs. Until 1998, West Virginia had a "self-preservation" rule prohibiting homes like Buckhannon from accommodating persons unable to exit the premises without assistance in the event of a fire. Pierce and two other Buckhannon residents could not get to a fire exit without aid. Informed of these residents' limitations, West Virginia officials proceeded against Buckhannon for noncompliance with the self-preservation rule. On October 18, 1996, three orders issued, each commanding Buckhannon to "cease operating ... and to effect relocation of [its] existing population within thirty (30) days." App. 46-53.

Ten days later, Buckhannon and Pierce, together with an organization of residential homes and another Buckhannon resident (hereinafter plaintiffs),

commenced litigation in Federal District Court to overturn the cease-and-desist orders and the self-preservation rule on which they rested. They sued the State, state agencies, and 18 officials (hereinafter defendants) alleging that the rule discriminated against persons with disabilities in violation of the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.* Plaintiffs sought an immediate order stopping defendants from closing Buckhannon's facilities, injunctive relief permanently barring enforcement of the self-preservation requirement, damages, and attorney's fees.

On November 1, 1996, at a hearing on plaintiffs' request for a temporary restraining order, defendants agreed to the entry of an interim order allowing Buckhannon to remain open without changing the individual plaintiffs' housing and care. Discovery followed. On January 2, 1998, facing the state defendants' sovereign immunity pleas, plaintiffs stipulated to dismissal of their demands for damages. In February 1998, in response to defendants' motion to dispose of the remainder of the case summarily, the District Court determined that plaintiffs had presented triable claims under the FHAA and ADA.

Less than a month after the District Court found that plaintiffs were entitled to a trial, the West Virginia Legislature repealed the self-preservation rule. Plaintiffs still allege, and seek to prove, that their suit triggered the statutory repeal. After the rule's demise, defendants moved to dismiss the case as moot, and plaintiffs sought attorney's fees as "prevailing parties" under the FHAA, 42 U.S.C. § 3613(c)(2), and the ADA, 42 U.S.C. § 12205.<sup>FN1</sup>

FN1. The FHAA provides: "In a civil action ..., the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2). Similarly, the ADA provides: "In any action ..., the court ..., in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litiga-

121 S.Ct. 1835

Page 18

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

tion expenses, and costs ....” 42 U.S.C. § 12205. These ADA and FHAA provisions are modeled on other “prevailing party” statutes, notably the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994 ed. and Supp. V). See H.R.Rep. No. 101-485, pt. 2, p. 140 (1990), U.S.Code Cong. & Admin.News 1990, pt. 2, pp. 303, 423 (ADA); H.R.Rep. No. 100-711, pp. 16-17, n. 20 (1988), U.S.Code Cong. & Admin.News 1988, pp. 2173, 2177-2178, n. 20 (FHAA). Section 1988 was “patterned upon the attorney’s fees provisions contained in Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e5(k), and § 402 of the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973l (e).” *Hensley v. Eckerhart*, 461 U.S. 424, 433, n. 7, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (citing *Hanrahan v. Hampton*, 446 U.S. 754, 758, n. 4, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) (*per curiam*)). In accord with congressional intent, we have interpreted these fee-shifting provisions consistently across statutes. The Court so observes. See *ante*, at 1839, n. 4. Notably, the statutes do not mandate fees, but provide for their award “in [the court’s] discretion.”

Finding no likelihood that West Virginia would reenact the self-preservation rule, the District Court agreed that the State’s action had rendered the case moot. Turning to plaintiffs’ application for attorney’s fees, the District Court followed Fourth Circuit precedent requiring the denial of fees unless termination of the action was accompanied by a judgment, consent decree, or settlement.<sup>FN2</sup> Plaintiffs did not appeal the mootness determination, and the Fourth Circuit affirmed the denial of attorney’s fees. In sum, plaintiffs were denied fees not because they failed to achieve the relief they sought. On the contrary, they gained the very change they sought through their lawsuit when West Virginia repealed the self-preservation rule

that would have stopped Buckhannon from caring for people like Dorsey Pierce.<sup>FN3</sup>

FN2. On plaintiffs’ motion, the District Court sanctioned defendants under Federal Rule of Civil Procedure 11 for failing timely to notify plaintiffs “that the proposed [repeal of the self-preservation rule] was progressing successfully at several stages ... during the pendency of [the] litigation.” App. 144. In their Rule 11 motion, plaintiffs requested fees and costs totaling \$62,459 to cover the expense of litigating after defendants became aware, but did not disclose, that elimination of the rule was likely. In the alternative, plaintiffs sought \$3,252 to offset fees and expenses incurred in litigating the Rule 11 motion. The District Court, stating that “the primary purpose of Rule 11 is to deter and not to compensate,” awarded the smaller sum. App. 147.

FN3. Pierce remained a Buckhannon resident until her death on January 3, 1999.

Prior to 1994, every Federal Court of Appeals (except the Federal Circuit, which had not addressed the issue) concluded that plaintiffs in situations like Buckhannon’s and Pierce’s could obtain a fee award if their suit acted as a “catalyst” for the change they sought, even if they did not obtain a judgment or consent decree.<sup>FN4</sup> The Courts of Appeals found it “clear that a party may be considered to have prevailed even when the legal action stops short of final ... judgment due to ... intervening mootness.” *Grano v. Barry*, 783 F.2d 1104, 1108 (C.A.D.C.1986). Interpreting the term “prevailing party” in “a practical sense,” *Stewart v. Hannon*, 675 F.2d 846, 851 (C.A.7 1982) (citation omitted), federal courts across the country held that a party “prevails” for fee-shifting purposes when “its ends are accomplished as a result of the litigation,” *Associated Builders & Contractors v. Orleans Parish School Bd.*, 919 F.2d 374, 378 (C.A.5 1990) (citation and internal quotation marks omitted).

121 S.Ct. 1835

Page 19

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

FN4. *Nadeau v. Helgemoe*, 581 F.2d 275, 279-281 (C.A.1 1978); *Gerena-Valentin v. Koch*, 739 F.2d 755, 758-759 (C.A.2 1984); *Institutionalized Juveniles v. Secretary of Pub. Welfare*, 758 F.2d 897, 910-917 (C.A.3 1985); *Bonnes v. Long*, 599 F.2d 1316, 1319 (C.A.4 1979); *Robinson v. Kimbrough*, 652 F.2d 458, 465-467 (C.A.5 1981); *Citizens Against Tax Waste v. Westerville City School Dist. Bd. of Ed.*, 985 F.2d 255, 257-258 (C.A.6 1993); *Stewart v. Hannon*, 675 F.2d 846, 851 (C.A.7 1982); *Williams v. Miller*, 620 F.2d 199, 202 (C.A.8 1980); *American Constitutional Party v. Munro*, 650 F.2d 184, 187-188 (C.A.9 1981); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1474-1475 (C.A.10 1985); *Doe v. Busbee*, 684 F.2d 1375, 1379 (C.A.11 1982); *Grano v. Barry*, 783 F.2d 1104, 1108-1110 (C.A.D.C.1986). All twelve of these decisions antedate *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). But cf. *ante*, at 1849, and n. 5 (SCALIA, J., concurring) (maintaining that this Court's decision in *Hewitt* "improvidently suggested" the catalyst rule, and asserting that only "a few cases adopting the catalyst theory predate *Hewitt*"). *Hewitt* said it was "settled law" that when a lawsuit prompts a defendant's "voluntary action ... that redresses the plaintiff's grievances," the plaintiff "is deemed to have prevailed despite the absence of a formal judgment in his favor." 482 U.S., at 760-761, 107 S.Ct. 2672. That statement accurately conveyed the unanimous view then held by the Federal Circuits.

In 1994, the Fourth Circuit en banc, dividing 6-to-5, broke ranks with its sister courts. The court declared that, in light of *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), a plaintiff could not become a "prevailing party" without "an enforceable judgment, consent decree,

or settlement." *S-1 and S-2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49, 51 (1994). As the Court today acknowledges, see *ante*, at 1839, n. 5, and as we have previously observed, the language on which the Fourth Circuit relied was dictum: *Farrar* "involved no catalytic effect"; the issue plainly "was not presented for this Court's decision in *Farrar*." *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 194, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

After the Fourth Circuit's en banc ruling, nine Courts of Appeals reaffirmed their own consistently held interpretation of the term "prevail." FN5 On this predominant view, "[s]ecuring an enforceable decree or agreement may evidence prevailing party status, but the judgment or agreement simply embodies and enforces what is sought in bringing the lawsuit .... Victory can be achieved well short of a final judgment (or its equivalent) ...." *Marbley v. Bane*, 57 F.3d 224, 234 (C.A.2 1995) (Jacobs, J.).

FN5. *Stanton v. Southern Berkshire Regional School Dist.*, 197 F.3d 574, 577, n. 2 (C.A.1 1999); *Marbley v. Bane*, 57 F.3d 224, 234 (C.A.2 1995); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 546-550 (C.A.3 1994); *Payne v. Board of Ed.*, 88 F.3d 392, 397 (C.A.6 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (C.A.7 1994); *Little Rock School Dist. v. Pulaski Cty. School Dist., # 1*, 17 F.3d 260, 263, n. 2 (C.A.8 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (C.A.9 1995); *Beard v. Teska*, 31 F.3d 942, 951-952 (C.A.10 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (C.A.11 1999).

The array of federal-court decisions applying the catalyst rule suggested three conditions necessary to a party's qualification as "prevailing" short of a favorable final judgment or consent decree. A plaintiff first had to show that the defendant provided "some of the benefit sought" by the lawsuit. *Wheeler v. Towanda Area School Dist.*, 950 F.2d 128, 131 (C.A.3 1991). Under most Circuits'

121 S.Ct. 1835

Page 20

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

precedents, a plaintiff had to demonstrate as well that the suit stated a genuine claim, *i.e.*, one that was at least “colorable,” not “frivolous, unreasonable, or groundless.” *Grano*, 783 F.2d, at 1110 (internal quotation marks and citation omitted). Plaintiff finally had to establish that her suit was a “substantial” or “significant” cause of defendant’s action providing relief. *Williams v. Leatherbury*, 672 F.2d 549, 551 (C.A.5 1982). In some Circuits, to make this causation showing, plaintiff had to satisfy the trial court that the suit achieved results “by threat of victory,” not “by dint of nuisance and threat of expense.” *Marbley*, 57 F.3d, at 234-235; see also *Hooper v. Demco, Inc.*, 37 F.3d 287, 293 (C.A.7 1994) (to render plaintiff “prevailing party,” suit “must have prompted the defendant ... to act or cease its behavior based on the strength of the case, not ‘wholly gratuitously’”). One who crossed these three thresholds would be recognized as a “prevailing party” to whom the district court, “in its discretion,” *supra*, at 1851, n. 1, could award attorney’s fees.

Developed over decades and in legions of federal-court decisions, the catalyst rule and these implementing standards deserve this Court’s respect and approbation.

II

A

The Court today detects a “clear meaning” of the term prevailing party, *ante*, at 1843, that has heretofore eluded the large majority of courts construing those words. “Prevailing party,” today’s opinion announces, means “one who has been awarded some relief by the court,” *ante*, at 1839. The Court derives this “clear meaning” principally from Black’s Law Dictionary, which defines a “prevailing party,” in critical part, as one “in whose favor a judgment is rendered,” *ibid.* (quoting Black’s Law Dictionary 1145 (7th ed.1999)).

One can entirely agree with Black’s Law Dictionary that a party “in whose favor a judgment is rendered” prevails, and at the same time resist, as most Courts of Appeals have, any implication that *only* such a party may prevail. In prior cases, we have not treated Black’s Law Dictionary as preclusively definitive; instead, we have accorded statutory terms, including legal “term [s] of art,” *ante*, at 1839 (opinion of the Court); *ante*, at 1846 (SCALIA, J., concurring), a contextual reading. See, *e.g.*, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395-396, n. 14, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (defining “excusable neglect,” as used in Federal Rule of Bankruptcy Procedure 9006(b)(1), more broadly than Black’s defines that term); *United States v. Rodgers*, 466 U.S. 475, 479-480, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984) (adopting “natural, nontechnical” definition of word “jurisdiction,” as that term is used in 18 U.S.C. § 1001, and declining to confine definition to “narrower, more technical meanings,” citing Black’s). Notably, this Court did not refer to Black’s Law Dictionary in *Maier v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), which held that a consent decree could qualify a plaintiff as “prevailing.” The Court explained:

“The fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of [42 U.S.C.] § 1988 conditions the District Court’s power to award fees on full litigation of the issues or on a judicial determination that the plaintiff’s rights have been violated.” *Id.*, at 129, 100 S.Ct. 2570.

The spare “prevailing party” language of the fee-shifting provision applicable in *Maier*, and the similar wording of the fee-shifting provisions now before the Court, contrast with prescriptions that so tightly bind fees to judgments as to exclude the application of a catalyst concept. The Prison Litigation Reform Act of 1995, for example, directs that fee awards to prisoners under § 1988 be

121 S.Ct. 1835

Page 21

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

"proportionately related to the court ordered relief for the violation." 110 Stat. 1321-72, as amended, 42 U.S.C. § 1997e(d)(1)(B)(i) (1994 ed., Supp. V) (emphasis added). That statute, by its express terms, forecloses an award to a prisoner on a catalyst theory. But the FHAA and ADA fee-shifting prescriptions, modeled on 42 U.S.C. § 1988 unmodified, see *supra*, at 1851, n. 1, do not similarly staple fee awards to "court ordered relief." Their very terms do not foreclose a catalyst theory.

## B

It is altogether true, as the concurring opinion points out, *ante*, at 1843-1844, that litigation costs other than attorney's fees traditionally have been allowed to the "prevailing party," and that a judgment winner ordinarily fits that description. It is not true, however, that precedent on costs calls for the judgment requirement the Court ironly adopts today for attorney's fees. Indeed, the first decision cited in the concurring opinion, *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884), see *ante*, at 1843, tugs against the restrictive rule today's decision installs.

In *Mansfield*, plaintiffs commenced a contract action in state court. Over plaintiffs' objections, defendants successfully removed the suit to federal court. Plaintiffs prevailed on the merits there, and defendants obtained review here. See 111 U.S., at 380-381, 4 S.Ct. 510. This Court determined, on its own motion, that federal subject-matter jurisdiction was absent from the start. Based on that determination, the Court reversed the lower court's judgment for plaintiffs. Worse than entering and leaving this Courthouse equally "emptyhanded," *ante*, at 1845 (concurring opinion), the plaintiffs in *Mansfield* were stripped of the judgment they had won, including the "judicial finding ... of the merits" in their favor, *ante*, at 1844 (concurring opinion). The *Mansfield* plaintiffs did, however, achieve this small consolation: The Court awarded them costs here as well as below. Recognizing that defendants had "prevail[ed]" in a "formal and nominal sense,"

the *Mansfield* Court nonetheless concluded that "[i]n a true and proper sense" defendants were "the losing and not the prevailing party." 111 U.S., at 388, 4 S.Ct. 510.

While *Mansfield* casts doubt on the present majority's "formal and nominal" approach, that decision does not consider whether costs would be in order for the plaintiff who obtains substantial relief, but no final judgment. Nor does "a single case" on which the concurring opinion today relies, *ante*, at 1845 (emphasis in original).<sup>FN6</sup> There are, however, enlightening analogies. In multiple instances, state high courts have regarded plaintiffs as prevailing, for costs taxation purposes, when defendants' voluntary conduct, mooting the suit, provided the relief that plaintiffs sought.<sup>FN7</sup> The concurring opinion labors unconvincingly to distinguish these state-law cases.<sup>FN8</sup> A similar federal practice has been observed in cases governed by Federal Rule of Civil Procedure 54(d), the default rule allowing costs "to the prevailing party unless the court otherwise directs." See 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2667, pp. 187-188 (2d ed. 1983) (When "the defendant alters its conduct so that plaintiff's claim [for injunctive relief] becomes moot before judgment is reached, costs may be allowed [under Rule 54(d)] if the court finds that the changes were the result, at least in part, of plaintiff's litigation.") (citing, *inter alia*, *Black Hills Alliance v. Regional Forester*, 526 F.Supp. 257 (D.S.D.1981)).

FN6. *The Baltimore*, 8 Wall. 377, 19 L.Ed. 463 (1869), featured in the concurring opinion, see *ante*, at 1844, does not run the distance to which that opinion would take it. In *The Baltimore*, there was a judgment in one party's favor. See 8 Wall., at 384. The Court did not address the question whether costs are available absent such a judgment. *The Baltimore's* "incident to the judgment" language, which the concurrence emphasizes, *ante*, at 1844 (citing 8

Wall., at 388, 390), likely related to the once-maintained rule that a court without jurisdiction may not award costs. See *Mayor v. Cooper*, 6 Wall. 247, 250-251, 18 L.Ed. 851 (1868). That ancient rule figured some years later in *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884); the Court noted the “universally recognized rule of the common law” that, absent jurisdiction, a “court can render no judgment for or against either party, [and therefore] cannot render a judgment even for costs.” *Id.*, at 387, 4 S.Ct. 510. Receding from that rule, the Court awarded costs, even upon dismissal for lack of jurisdiction, because “there is a judgment or final order in the cause dismissing it for want of jurisdiction.” *Ibid.*; see *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994).

FN7. See, e.g., *Board of Ed. of Madison Cty v. Fowler*, 192 Ga. 35, 36, 14 S.E.2d 478, 479 (1941) (mandamus action dismissed as moot, but costs awarded to plaintiffs where “the purposes of the mandamus petition were accomplished by the subsequent acts of the defendants, thus obviating the necessity for further proceeding”); *Baldwin v. Chesapeake & Potomac Tel. Co.*, 156 Md. 552, 557, 144 A. 703, 705 (1929) (costs awarded to plaintiff after trial court granted defendant's demurrer and plaintiff's appeal was dismissed “based on an act of [defendant] performed after ... entry of the appeal”; dismissal rendered “it unnecessary to inquire into the merits of the suit”); *Ficklen v. Danville*, 146 Va. 426, 438, 132 S.E. 705, 706 (1926) (costs on appeal awarded to plaintiffs, even though trial court denied injunctive relief and high court dismissed appeal due to mootness, because plaintiffs achieved the “equivalent to ... ‘substantially prevailing’

” in “gain[ing] all they sought by the appeal”); cf. *Scatcherd v. Love*, 166 F. 53, 55, 56 (C.A.6 1908) (although “there was no judgment against the defendant upon the merits,” defendant “acknowledged its liability ... by paying to the plaintiff the sum of \$5,000,” rendering plaintiff the “successful party” entitled to costs); *Tal-mage v. Monroe*, 119 P. 526 (Cal.App.1911) (fees awarded to petitioner after court issued “alternative writ” directing respondent either to take specified action or to show cause for not doing so, and respondent chose to take the action).

FN8. The concurrence urges that *Baldwin* is inapposite because it was an action “in equity,” and equity courts could award costs as the equities required. *Ante*, at 1844 (emphasis in original). The catalyst rule becomes relevant, however, only when a party seeks relief of a sort traditionally typed *equitable*, i.e., a change of conduct, not damages. There is no such thing as an injunction *at law*, and therefore one cannot expect to find long-ago plaintiffs who quested after that mythical remedy and received voluntary relief. By the concurrence's reasoning, the paucity of precedent applying the catalyst rule to “prevailing parties” is an artifact of nothing more “remarkable,” *ante*, at 1845, than the historic law-equity separation.

The concurrence notes that the other cited cases “all involve a judicial finding-or its equivalent, an acknowledgment by the defendant-of the merits of plaintiff's case.” *Ante*, at 1844 (emphasis added). I agree. In *Fowler* and *Scatcherd*, however, the “acknowledgment” consisted of nothing more than the defendant's voluntary provision to the plaintiff of the relief that the plaintiff sought. See also, e.g., *Jef-*

121 S.Ct. 1835

Page 23

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

*ersonville R.R. Co. v. Weinman*, 39 Ind. 231 (1872) (costs awarded where defendant voluntarily paid damages; no admission or merits judgment); *Wagner v. Wagner*, 9 Pa. 214 (1848) (same); *Hudson v. Johnson*, 1 Va. 10 (1791) (same). Common-law courts thus regarded a defendant's voluntary compliance, by settlement or otherwise, as an "acknowledgment ... of the merits" sufficient to warrant treatment of a plaintiff as prevailing. But cf. *ante*, at 1840, n. 7 (opinion of the Court). One can only wonder why the concurring opinion would not follow the same practice today.

In short, there is substantial support, both old and new, federal and state, for a costs award, "in [the court's] discretion," *supra*, at 1851, n. 1, to the plaintiff whose suit prompts the defendant to provide the relief plaintiff seeks.

## C

Recognizing that no practice set in stone, statute, rule, or precedent, see *infra*, at 1861, dictates the proper construction of modern civil rights fee-shifting prescriptions, I would "assume ... that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" *Pioneer*, 507 U.S., at 388, 113 S.Ct. 1489 (defining "excusable neglect") (quoting *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) (defining "bribery")); see also, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (defining "substantially" in light of ordinary usage); *Rutledge v. United States*, 517 U.S. 292, 299-300, n. 10, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) (similarly defining "in concert"). In everyday use, "prevail" means "gain victory by virtue of strength or superiority: win mastery: triumph." Webster's Third New International Dictionary 1797 (1976). There are undoubtedly situations in which an individual's goal is

to obtain approval of a judge, and in those situations, one cannot "prevail" short of a judge's formal declaration. In a piano competition or a figure skating contest, for example, the person who prevails is the person declared winner by the judges. However, where the ultimate goal is not an arbiter's approval, but a favorable alteration of actual circumstances, a formal declaration is not essential. Western democracies, for instance, "prevailed" in the Cold War even though the Soviet Union never formally surrendered. Among television viewers, John F. Kennedy "prevailed" in the first debate with Richard M. Nixon during the 1960 Presidential contest, even though moderator Howard K. Smith never declared a winner. See T. White, *The Making of the President 1960*, pp. 293-294 (1961).

A lawsuit's ultimate purpose is to achieve actual relief from an opponent. Favorable judgment may be instrumental in gaining that relief. Generally, however, "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 ...." *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). On this common understanding, if a party reaches the "sought-after destination," then the party "prevails" regardless of the "route taken." *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1153 (C.A.5 1985).

Under a fair reading of the FHAA and ADA provisions in point, I would hold that a party "prevails" in "a true and proper sense," *Mansfield*, 111 U.S., at 388, 4 S.Ct. 510, when she achieves, by instituting litigation, the practical relief sought in her complaint. The Court misreads Congress, as I see it, by insisting that, invariably, relief must be displayed in a judgment, and correspondingly that a defendant's voluntary action never suffices. In this case, Buckhannon's purpose in suing West Virginia officials was not narrowly to obtain a judge's approbation. The plaintiffs' objective was to stop enforcement of a rule requiring Buckhannon to evict residents like centenarian Dorsey Pierce as the price of remaining

121 S.Ct. 1835

Page 24

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

in business. If Buckhannon achieved that objective on account of the strength of its case, see *supra*, at 1852-1853-if it succeeded in keeping its doors open while housing and caring for Ms. Pierce and others similarly situated-then Buckhannon is properly judged a party who prevailed.

### III

As the Courts of Appeals have long recognized, the catalyst rule suitably advances Congress' endeavor to place private actions, in civil rights and other legislatively defined areas, securely within the federal law enforcement arsenal.

The catalyst rule stemmed from modern legislation extending civil rights protections and enforcement measures. The Civil Rights Act of 1964 included provisions for fee awards to "prevailing parties" in Title II (public accommodations), 42 U.S.C. § 2000a-3(b), and Title VII (employment), § 2000e-5(k), but not in Title VI (federal programs). The provisions' central purpose was "to promote vigorous enforcement" of the laws by private plaintiffs; although using the two-way term "prevailing party," Congress did not make fees available to plaintiffs and defendants on equal terms. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (under Title VII, prevailing plaintiff qualifies for fee award absent "special circumstances," but prevailing defendant may obtain fee award only if plaintiff's suit is "frivolous, unreasonable, or without foundation").

Once the 1964 Act came into force, courts commenced to award fees regularly under the statutory authorizations, and sometimes without such authorization. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262, 270-271, n. 46, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In *Alyeska*, this Court reaffirmed the "American Rule" that a court generally may not award attorney's fees without a legislative instruction to do so. See *id.*, at 269, 95 S.Ct. 1612. To provide the authorization *Alyeska*

required for fee awards under Title VI of the 1964 Civil Rights Act, as well as under Reconstruction Era civil rights legislation, 42 U.S.C. §§ 1981-1983, 1985, 1986 (1994 ed. and Supp. V), and certain other enactments, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994 ed. and Supp. V).

As explained in the Reports supporting § 1988, civil rights statutes vindicate public policies "of the highest priority," S.Rep. No. 94-1011, p. 3 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5910 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*)), yet "depend heavily upon private enforcement," S.Rep. No. 94-1011, at 2, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5910. Persons who bring meritorious civil rights claims, in this light, serve as "private attorneys general." *Id.*, at 5, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912; H.R.Rep. No. 94-1558, p. 2 (1976). Such suitors, Congress recognized, often "cannot afford legal counsel." *Id.*, at 1. They therefore experience "severe hardshi[p]" under the "American Rule." *Id.*, at 2. Congress enacted § 1988 to ensure that nonaffluent plaintiffs would have "effective access" to the Nation's courts to enforce civil rights laws. *Id.*, at 1.<sup>FN9</sup> That objective accounts for the fee-shifting provisions before the Court in this case, prescriptions of the FHAA and the ADA modeled on § 1988. See *supra*, at 1851, n. 1.

FN9. See H.R.Rep. No. 94-1558, at 1, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5910 ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts .... [This statute] is designed to give such persons effective access to the judicial process ...."); S.Rep. No. 94-1011, at 2 ("If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed

121 S.Ct. 1835

Page 25

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.”), quoted in part in *Kay v. Ehrler*, 499 U.S. 432, 436, n. 8, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991). See also *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) (*per curiam*) (“When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law .... [Congress] enacted the provision for counsel fees ... to encourage individuals injured by racial discrimination to seek judicial relief ....”).

Under the catalyst rule that held sway until today, plaintiffs who obtained the relief they sought through suit on genuine claims ordinarily qualified as “prevailing parties,” so that courts had discretion to award them their costs and fees. Persons with limited resources were not impelled to “wage total law” in order to assure that their counsel fees would be paid. They could accept relief, in money or of another kind, voluntarily proffered by a defendant who sought to avoid a recorded decree. And they could rely on a judge then to determine, in her equitable discretion, whether counsel fees were warranted and, if so, in what amount.<sup>FN10</sup>

FN10. Given the protection furnished by the catalyst rule, aggrieved individuals were not left to worry, and wrongdoers were not led to believe, that strategic maneuvers by defendants might succeed in averting a fee award. Cf. *ante*, at 1842 (opinion of the Court). Apt here is Judge Friendly’s observation construing a fee-shifting statute kin to the provisions before us: “Congress clearly did not mean that where [a Freedom of Information Act] suit had gone to trial and developments made it

apparent that the judge was about to rule for the plaintiff, the Government could abort any award of attorney fees by an eleventh hour tender of the information.” *Vermont Low Income Advocacy Council v. Usery*, 546 F.2d 509, 513 (C.A.2 1976) (interpreting 5 U.S.C. § 552(a)(4)(E), allowing a complainant who “substantially prevails” to earn an attorney’s fee); accord, *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1364 (C.A.D.C.1977).

Congress appears to have envisioned that very prospect. The Senate Report on the 1976 Civil Rights Attorney’s Fees Awards Act states: “[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief*.” S.Rep. No. 94-1011, at 5, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912 (emphasis added). In support, the Report cites cases in which parties recovered fees in the absence of any court-conferred relief.<sup>FN11</sup> The House Report corroborates: “[A]fter 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.” H.R.Rep. No. 94-1558, at 7 (emphases added). These Reports, Courts of Appeals have observed, are hardly ambiguous. Compare *ante*, at 1842 (“legislative history ... is at best ambiguous”), with, e.g., *Dunn v. The Florida Bar*, 889 F.2d 1010, 1013 (C.A.11 1989) (legislative history “evinces a clear Congressional intent” to permit award “even when no formal judicial relief is obtained” (internal quotation marks omitted)); *Robinson v. Kimbrough*, 652 F.2d 458, 465 (C.A.5 1981) (same); *American Constitutional Party v. Munro*, 650 F.2d 184, 187 (C.A.9 1981) (Senate Report “directs” fee award under catalyst rule). Congress, I am convinced, understood that “‘[v]ictory’ in a civil rights suit is typically a practical, rather than a strictly legal matter.” *Exeter-West Greenwich Regional School Dist. v. Pontarelli*, 788 F.2d 47, 51 (C.A.1 1986)

121 S.Ct. 1835

Page 26

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

(citation omitted).

“prevailing party” based on a finding or retention of jurisdiction.)

FN11. See S.Rep. No. 94-1011, at 5, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912-5913 (citing *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008-1009 (C.A.2 1975) (partner sued his firm for release of documents, firm released the documents, court awarded fees because of the release, even though the partner's claims were “dismissed for lack of subject matter jurisdiction”), and *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981, 984, 985 (C.A.3 1970) (union committee twice commenced suit for pension fund payments, suits prompted recovery, and court awarded fees even though the first suit had been dismissed and the second had not yet been adjudicated)).

The Court features a case cited by the House as well as the Senate in the Reports on § 1988, *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (C.A.8 1970). The Court deems *Parham* consistent with its rejection of the catalyst rule, alternately because the Eighth Circuit made a “finding that the defendant had acted unlawfully,” and because that court ordered the District Court to “retain jurisdiction over the matter ... to insure the continued implementation of the [defendant's] policy of equal employment opportunities.” *Ante*, at 1842, n. 9 (quoting 433 F.2d, at 429). Congress did not fix on those factors, however: Nothing in either Report suggests that judicial findings or retention of jurisdiction is essential to an award of fees. The courts in *Kopet* and *Thomas* awarded fees based on claims as to which they neither made “a finding” nor “retain[ed] jurisdiction.” (It nonetheless bears attention that, in line with the Court's description of *Parham*, a plaintiff could qualify as the

## IV

The Court identifies several “policy arguments” that might warrant rejection of the catalyst rule. See *ante*, at 1842-1843. A defendant might refrain from altering its conduct, fearing liability for fees as the price of voluntary action. See *ante*, at 1842. Moreover, rejection of the catalyst rule has limited impact: Desisting from the challenged conduct will not render a case moot where damages are sought, and even when the plaintiff seeks only equitable relief, a defendant's voluntary cessation of a challenged practice does not render the case moot “unless it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’ ” *Ante*, at 1843 (quoting *Friends of Earth, Inc.*, 528 U.S., at 189, 120 S.Ct. 693). Because a mootness dismissal is not easily achieved, the defendant may be impelled to settle, negotiating fees less generous than a court might award. See *ante*, at 1843. Finally, a catalyst rule would “require analysis of the defendant's subjective motivations,” and thus protract the litigation. *Ibid*.

The Court declines to look beneath the surface of these arguments, placing its reliance, instead, on a meaning of “prevailing party” that other jurists would scarcely recognize as plain. See *ibid*. Had the Court inspected the “policy arguments” listed in its opinion, I doubt it would have found them impressive.

In opposition to the argument that defendants will resist change in order to stave off an award of fees, one could urge that the catalyst rule may lead defendants promptly to comply with the law's requirements: the longer the litigation, the larger the fees. Indeed, one who knows noncompliance will be expensive might be encouraged to conform his conduct to the legal requirements before litigation is threatened. Cf. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 Vand. L.Rev. 1069, 1121 (1993) (“fee shifting in favor of prevailing

121 S.Ct. 1835

Page 27

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

plaintiffs enhances both incentives to comply with legal rules *and* incentives to settle disputes"). No doubt, a mootness dismissal is unlikely when recurrence of the controversy is under the defendant's control. But, as earlier observed, see *supra*, at 1857, why should this Court's fee-shifting rulings drive a plaintiff prepared to accept adequate relief, though out-of-court and unrecorded, to litigate on and on? And if the catalyst rule leads defendants to negotiate not only settlement terms but also allied counsel fees, is that not a consummation to applaud, not deplore?

As to the burden on the court, is it not the norm for the judge to whom the case has been assigned to resolve fee disputes (deciding whether an award is in order, and if it is, the amount due), thereby clearing the case from the calendar? If factfinding becomes necessary under the catalyst rule, is it not the sort that "the district courts, in their factfinding expertise, deal with on a regular basis"? *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 548 (C.A.3 1994). Might not one conclude overall, as Courts of Appeals have suggested, that the catalyst rule "saves judicial resources," *Paris v. Department of Housing and Urban Development*, 988 F.2d 236, 240 (C.A.1 1993), by encouraging "plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought"? *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (C.A.11 1999).

The concurring opinion adds another argument against the catalyst rule: That opinion sees the rule as accommodating the "extortionist" who obtains relief because of "greater strength in financial resources, or superiority in media manipulation, rather than *superiority in legal merit*." *Ante*, at 1847 (emphasis in original). This concern overlooks both the character of the rule and the judicial superintendence Congress ordered for all fee allowances. The catalyst rule was auxiliary to fee-shifting statutes whose primary purpose is "to promote the vigorous enforcement" of the civil rights laws. *Christiansburg Garment Co.*, 434 U.S., at 422, 98 S.Ct.

694. To that end, courts deemed the conduct-altering catalyst that counted to be the substance of the case, not merely the plaintiff's atypically superior financial resources, media ties, or political clout. See *supra*, at 1852-1853. And Congress assigned responsibility for awarding fees not to automatons unable to recognize extortionists, but to judges expected and instructed to exercise "discretion." See *supra*, at 1851, n. 1. So viewed, the catalyst rule provided no berth for nuisance suits, see *Hooper*, 37 F.3d, at 292, or "thinly disguised forms of extortion," *Tyler v. Corner Constr. Corp.*, 167 F.3d 1202, 1206 (C.A.8 1999) (citation omitted).<sup>FN12</sup>

FN12. The concurring opinion notes, correctly, that "[t]here *must* be a cutoff of seemingly equivalent entitlements to fees—either the failure to file suit in time or the failure to obtain a judgment in time." *Ante*, at 1848 (emphasis in original). The former cutoff, the Court has held, is impelled both by "plain language" requiring a legal "action" or "proceeding" antecedent to a fee award, and by "legislative history ... replete with references to [enforcement] 'in suits,' 'through the courts' and by 'judicial process.'" *North Carolina Dept. of Transp. v. Crest Street Community Council, Inc.*, 479 U.S. 6, 12, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986) (citations omitted). The latter cutoff, requiring "a judgment in time," is not similarly impelled by text or legislative history.

The concurring opinion also states that a prevailing party must obtain relief "*in the lawsuit*." *Ante*, at 1846, 1847. One can demur to that elaboration of the statutory text and still adhere to the catalyst rule. Under the rule, plaintiff's suit raising genuine issues must trigger defendant's voluntary action; plaintiff will not prevail under the rule if defendant "ceases ... [his] offensive conduct" by dying or going bankrupt. See *ante*, at

121 S.Ct. 1835

Page 28

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

1846. A behavior-altering event like dying or bankruptcy occurs outside the lawsuit; a change precipitated by the lawsuit's claims and demand for relief is an occurrence brought about "through" or "in" the suit.

## V

As to our attorney's fee precedents, the Court correctly observes, "[w]e have never had occasion to decide whether the term 'prevailing party' allows an award of fees under the 'catalyst theory,' " and "there is language in our cases supporting both petitioners and respondents." *Ante*, at 1839, n. 5. It bears emphasis, however, that in determining whether fee shifting is in order, the Court in the past has placed greatest weight not on any "judicial imprimatur," *ante*, at 1840, but on the practical impact of the lawsuit.<sup>FN13</sup> In *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), in which the Court held fees could be awarded on the basis of a consent decree, the opinion nowhere relied on the presence of a formal judgment. See *supra*, at 1853; *infra*, n. 14. Some years later, in *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), the Court suggested that fees might be awarded the plaintiff who "obtain[ed] relief without [the] benefit of a formal judgment." *Id.*, at 760, 107 S.Ct. 2672. The Court explained: "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced," or "if the defendant, under pressure of [a suit for declaratory judgment], alters his conduct (or threatened conduct) towards the plaintiff," *i.e.*, conduct "that was the basis for the suit, the plaintiff will have prevailed." *Id.*, at 761, 107 S.Ct. 2672. I agree, and would apply that analysis to this case.

FN13. To qualify for fees in any case, we have held, relief must be real. See *Rhodes v. Stewart*, 488 U.S. 1, 4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (*per curiam*) (a plaintiff who obtains a formal declaratory judgment, but gains no real "relief whatso-

ever," is not a "prevailing party" eligible for fees); *Hewitt v. Helms*, 482 U.S., at 761, 107 S.Ct. 2672 (an interlocutory decision reversing a dismissal for failure to state a claim, although stating that plaintiff's rights were violated, does not entitle plaintiff to fees; to "prevail," plaintiff must gain relief of "substance," *i.e.*, more than a favorable "judicial statement that does not affect the relationship between the plaintiff and the defendant").

The Court posits a " 'merit' requirement of our prior cases." *Ante*, at 1841. *Maher*, however, affirmed an award of attorney's fees based on a consent decree that "did not purport to adjudicate [plaintiff's] statutory or constitutional claims." 448 U.S., at 126, n. 8, 100 S.Ct. 2570. The decree in *Maher* "explicitly stated that 'nothing [therein was] intended to constitute an admission of fault by either party.'" *Ibid*. The catalyst rule, in short, conflicts with none of "our prior holdings," *ante*, at 1841.<sup>FN14</sup>

FN14. The Court repeatedly quotes passages from *Hanrahan v. Hampton*, 446 U.S., at 757-758, 100 S.Ct. 1987, stating that to "prevail," plaintiffs must receive relief "on the merits." *Ante*, at 1839, 1840, 1842. Nothing in *Hanrahan*, however, declares that relief "on the merits" requires a "judicial imprimatur." *Ante*, at 1840. As the Court acknowledges, *Hanrahan* concerned an interim award of fees, after plaintiff succeeded in obtaining nothing more than reversal of a directed verdict. See *ante*, at 1841. At that juncture, plaintiff had obtained no change in defendant's behavior, and the suit's ultimate winner remained undetermined. There is simply no inconsistency between *Hanrahan*, denying fees when a plaintiff might yet obtain no real benefit, and the catalyst rule, allowing fees when a plaintiff obtains the practical result she sought in suing. In-

121 S.Ct. 1835

Page 29

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

deed, the harmony between the catalyst rule and *Hanrahan* is suggested by *Hanrahan* itself; like *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), *Hanrahan* quoted the Senate Report recognizing that parties may prevail “through a consent judgment or without formally obtaining relief.” 446 U.S., at 757, 100 S.Ct. 1987 (quoting S.Rep. No. 94-1011, at 5, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912) (emphasis added). *Hanrahan* also selected for citation the influential elaboration of the catalyst rule in *Nadeau v. Helgemoe*, 581 F.2d, at 279-281. See 446 U.S., at 757, 100 S.Ct. 1987.

The Court additionally cites *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), which held, unanimously, that a plaintiff could become a “prevailing party” without obtaining relief on the “central issue in the suit.” *Id.*, at 790, 109 S.Ct. 1486. *Texas State Teachers* linked fee awards to a “material alteration of the legal relationship of the parties,” *id.*, at 792-793, 109 S.Ct. 1486, but did not say, as the Court does today, that the change must be “court-ordered,” *ante*, at 1840. The parties’ legal relationship does change when the defendant stops engaging in the conduct that furnishes the basis for plaintiff’s civil action, and that action, which both parties would otherwise have litigated, is dismissed.

The decision with language most unfavorable to the catalyst rule, *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), does not figure prominently in the Court’s opinion—and for good reason, for *Farrar* “involved no catalytic effect.” See *ante*, at 1839, n. 5

(quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 194, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotation marks omitted)); *supra*, at 1852. *Farrar* held that a plaintiff who sought damages of \$17 million, but received damages of \$1, was a “prevailing party” nonetheless not entitled to fees. 506 U.S., at 113-116, 113 S.Ct. 566. In reinforcing the link between the right to a fee award and the “degree of success obtained,” *id.*, at 114, 113 S.Ct. 566 (quoting *Hensley v. Eckerhart*, 461 U.S., at 436, 103 S.Ct. 1933), *Farrar’s* holding is consistent with the catalyst rule.

\* \* \*

The Court states that the term “prevailing party” in fee-shifting statutes has an “accepted meaning.” *Ante*, at 1842. If that is so, the “accepted meaning” is not the one the Court today announces. It is, instead, the meaning accepted by every Court of Appeals to address the catalyst issue before our 1987 decision in *Hewitt*, see *supra*, at 1851-1852, n. 4, and disavowed since then only by the Fourth Circuit, see *supra*, at 1852, n. 5. A plaintiff prevails, federal judges have overwhelmingly agreed, when a litigated judgment, consent decree, out-of-court settlement, or the defendant’s voluntary, postcomplaint payment or change in conduct in fact affords redress for the plaintiff’s substantial grievances.

When this Court rejects the considered judgment prevailing in the Circuits, respect for our colleagues demands a cogent explanation. Today’s decision does not provide one. The Court’s narrow construction of the words “prevailing party” is unsupported by precedent and unaided by history or logic. Congress prescribed fee-shifting provisions like those included in the FHAA and ADA to encourage private enforcement of laws designed to advance civil rights. Fidelity to that purpose calls for court-awarded fees when a private party’s lawsuit, whether or not its settlement is registered in court, vindic-

121 S.Ct. 1835

Page 30

532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590  
(Cite as: 532 U.S. 598, 121 S.Ct. 1835)

ates rights Congress sought to secure. I would so hold and therefore dissent from the judgment and opinion of the Court.

U.S.,2001.

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources  
532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855, 11 A.D. Cases 1300, 21 NDLR P 1, 01 Cal. Daily Op. Serv. 4279, 2001 Daily Journal D.A.R. 5238, 14 Fla. L. Weekly Fed. S 287, 2001 DJCAR 2590

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562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 7

ordered consent decrees with situations which failed to meet the judicial imprimatur test: for example, securing the reversal of a directed verdict, acquiring a judicial pronouncement that a defendant has violated the Constitution unaccompanied by "judicial relief," or obtaining a non-judicial "alteration of actual circumstances." *Id.* at 605-06, 121 S.Ct. 1835.

The Court emphasized three related factors. The first was that the change in legal relationship must be "court-ordered." *See id.* at 604, 121 S.Ct. 1835. Second, there must be judicial approval of the relief vis-à-vis the merits of the case. *Buckhannon* cited *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 381, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), which held a "judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order." Third, there must be judicial oversight and ability to enforce the obligations imposed on the parties. *See Buckhannon*, 532 U.S. at 604 n. 7, 121 S.Ct. 1835 (noting that judicial oversight is inherent in consent decrees but not in private settlements).

[4] These factors from *Buckhannon* are themselves, not surprisingly, contained in the law of consent decrees. A consent decree "embodies an agreement of the parties," \*91 that they "desire and expect will be reflected in, and be enforceable as, a judicial decree." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992)); *see also Ricci v. Patrick*, 544 F.3d 8, 17 (1st Cir.2008), *cert. denied*, --- U.S. ---, 129 S.Ct. 1907, --- L.Ed.2d ---, 2009 WL 229763 (Apr. 6, 2009). As the Fourth Circuit noted in *Smyth*:

A consent decree, because it is entered as an order of the court, receives court approval and is subject to the oversight attendant to the court's authority to enforce its orders, characteristics not typical of settlement agreements. [*Buckhannon*] 's admonition that consent decrees may satisfy the

prevailing party standard while private settlements ought not be so construed is thus consistent with the general purposes and effects of the two forms of resolution of disputes.

*Smyth*, 282 F.3d at 281. Court approval of a consent decree must involve some appraisal of the merits. *See id.* at 279. By contrast, a private settlement does not, ordinarily, receive court approval. *Id.* at 280. A court entering a consent decree must examine its terms to be sure they are fair and not unlawful. *See id.*; *see also T.D.*, 349 F.3d at 479 ("Mere involvement [by the court] in a settlement ... is not enough. There must be some official judicial approval of the settlement."). As an example, the Third Circuit held in *John T. ex rel. Paul T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 558-60 (3d Cir.2003), that neither a preliminary injunction nor a contempt order based on that injunction contained the necessary judicial imprimatur because neither had required the court to weigh the merits of the underlying dispute. [FN9]

FN9. A consent decree, which has attributes both of contracts and of judicial decrees, *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), must, therefore, go beyond contractual obligations.

Further, an obligation to comply and the provision of judicial oversight to enforce that obligation are the sine qua non for a consent decree. *See Smyth*, 282 F.3d at 279-81; *see also Roberson*, 346 F.3d at 82-83; *Am. Disability Ass'n*, 289 F.3d at 1320. While a consent decree begins as a settlement, it is one that "includes an injunction, or some other form of specific relief," which may ultimately be enforceable by contempt. Charles A. Wright & Mary Kay Kane, *Law of Federal Courts* § 98, at 702 n. 2 (6th ed.2002). This means enforcement through an action for breach of contract, which may be available in a private settlement, is insufficient to meet the standards for a consent decree. *See Christina A. ex rel. Jennifer A. v. Bloomberg*, 315

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 8

F.3d 990, 993 (8th Cir.2003).

"The parties to a consent decree expect and achieve a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order." *Smyth*, 282 F.3d at 280. A private settlement agreement, by contrast, does not require the same level of judicial oversight.

Another characteristic of the judicially approved obligations in a consent decree is that a party seeking to modify a consent decree must meet a significant burden to demonstrate that circumstances have changed to a degree that justifies a modification. *See generally Rufo*, 502 U.S. at 378-83, 112 S.Ct. 748; *see also Fed.R.Civ.P.* 60(b). This is so because, by its nature, a consent decree contemplates a \*92 court's continuing involvement in a matter. [FN10]

FN10. In *Pierce*, a pre-*Buckhannon* case where the Supreme Court affirmed an award of EAJA fees, the district court administered and enforced the settlement agreement reached. *See Pierce*, 487 U.S. at 556, 108 S.Ct. 2541 (noting that the government had created a \$60 million settlement fund and that a California federal court had taken responsibility for administering the settlement).

[5] Application of these principles necessarily results in the conclusion the order entered here did not meet the judicial imprimatur standards for a prevailing party. Whether an order contains a sufficient judicial imprimatur can only be determined by determining the content of the order against the entire context before the court. The order here lacked all of the core indicia of a consent decree. The court did not order USCIS to do anything. [FN11] The court made no evaluation at all of the merits of the controversy--indeed the court was never asked to do so; it was only asked to dismiss the case. There was no basis on which the court could evaluate the merits because the USCIS never filed an answer, never raised the potential defenses it had, and there

never was an engagement of any sort on the merits for the district court to consider. [FN12] Further, the order itself did not contain provisions for future enforcement typical of consent decrees. *See Kokkonen*, 511 U.S. at 381, 114 S.Ct. 1673; *Saccoccia*, 433 F.3d at 28. The order also did not resolve a dispute between the parties, it merely returned jurisdiction to the agency to allow the parties to carry out their agreement. [FN13] Indeed, the order would not \*93 create prevailing party status under the tests adopted by any of the circuits. *See, e.g., Davy*, 456 F.3d at 165-66; *Rice Servs.*, 405 F.3d at 1027; *T.D.*, 349 F.3d at 478; *Roberson*, 346 F.3d at 81; *Truesdell*, 290 F.3d at 165; *Am. Disability Ass'n*, 289 F.3d at 1320-21; *Smyth*, 282 F.3d at 276.

FN11. We need not address what the proper vehicle would have been had the USCIS failed to carry through with its representation that it would grant citizenship. But it is clear that the district court erred in concluding it could directly hold the USCIS in contempt in such circumstances because the order did not issue a mandate to the USCIS. Before a court can find a party in contempt for violating an order, it must conclude that "the words of the court's order have clearly and unambiguously forbidden the precise conduct on which the contempt allegation is based." *United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir.2005) (emphasis in original); *see also id.* ("[T]he test is whether the putative contemnor is 'able to ascertain from the four corners of the order precisely what acts are forbidden.'" (emphasis added) (quoting *Goya Foods, Inc. v. Wallack Mgmt. Co.*, 290 F.3d 63, 76 (1st Cir.2002))). A consent decree may itself contain mandatory language that is directly enforceable by a contempt action.

FN12. This case is factually distinguishable from the Tenth Circuit's recent de-

cision in *Al-Maleki v. Holder*, 558 F.3d 1200 (10th Cir.2009). There, the court upheld an award of fees under the EAJA where the district court, after the case was filed, denied the government's initial motion for an unrestricted remand after a hearing, ordered the government to file an answer, accepted the representations in the answer, then granted a joint motion to remand, and entered an order expressly directing the USCIS to administer the oath of citizenship to the applicant, Abbas Al-Maleki. The court found an order directing the agency to act was required because, as the court noted, "at the time the district court's order was entered, USCIS had not yet naturalized Al-Maleki or made a binding commitment to do so." *Id.* at 1205. Here, there were no such proceedings. No such order was entered; the court only remanded to the agency for it to act on its promise to grant citizenship. Our pointing out these factual distinctions should not be taken as agreement with the panel decision of the Tenth Circuit on this or any other point.

FN13. The dissenters appear to characterize the district court as either having essentially issued an injunction requiring the agency to perform certain actions or as somehow having turned the remand into a consent decree. The dissenters' reading is not based on the actual October 12, 2006 remand order, but on the district court's later characterization of the order. The argument is flawed for a number of reasons. First, the district court itself did not at any time characterize itself as having issued an injunction or as having approved a consent decree which incorporated other terms into its order, and properly so. The requirements of Rule 65 were never met nor sought to be met nor was this presented as a consent decree.

Second, the October 12, 2006 order on its face is merely an allowance of a motion to remand, it was not an injunction nor did it incorporate anything else. On its face, the order was unambiguous and lacked any provision mandating the USCIS to act or expressly retaining jurisdiction to force the government to act. While the allowance of motions for remand after litigation may meet the EAJA criteria for judicial imprimatur, this did not.

Third, while a district court's later characterization of what it had intended in an earlier order may at times be helpful, this situation does not fall into any of the usual patterns. For example, the district court was not involved in settlement negotiations which enabled it to shed light on the nature of the settlement. See *F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 449 F.3d 185, 192 (1st Cir.2006). Nor was this an issue of whether statements from the bench were meant to be a judicial order. See *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir.2002). Nor was there any ambiguity in its October 12 order. See *Harvey v. Johanns*, 494 F.3d 237, 242 (1st Cir.2007).

Fourth, it is also firmly the law that there must be a clear basis within the order (of October 12) for both the court's continuing jurisdiction and its power to enforce an agreement between the parties. *Kokkonen*, 511 U.S. at 381, 114 S.Ct. 1673; *Saccoccia*, 433 F.3d at 28. In *F.A.C.*, we held that a court's order must expressly retain jurisdiction or expressly incorporate the terms of a settlement agreement to satisfy *Kokkonen*. A "bare reference to 'a settlement agreement' does not satisfy *Kokkonen*." *F.A.C.*, 449 F.3d at 190. That was not done here. See also *Smith*, 401 F.3d at 24 ("For an order to be considered the functional equivalent of a consent decree, ... [t]he obligation to comply with a settle-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 10

ment's terms must be *expressly* made part of a court's order for jurisdiction to enforce the settlement after dismissal of the action to exist.'" (quoting *Smyth*, 282 F.3d at 283 (emphasis added)); *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 431-32 (5th Cir.2002) (holding a district court order that included a settlement order attached as an exhibit did not satisfy *Kokkonen* because "to make a settlement agreement part of a dismissal order by incorporation, *Kokkonen* requires a district court to clearly indicate its intention within the dismissal order itself by expressly incorporating the agreement's terms" and noting that "a number of our sister circuits have similarly interpreted *Kokkonen* ").

[6] Aronov's argument is also inconsistent with *Smith*, which held that the fact that the defendant has voluntarily agreed to change its behavior does not lead to prevailing party status for the plaintiff. A plaintiff does not become a prevailing party if the court merely recognizes what the government has voluntarily agreed to and only "requir[es] [the government] to follow through with what [it] had already voluntarily promised to do." *Smith*, 401 F.3d at 27.

Aronov makes a separate argument that a remand to the agency was necessary so that citizenship could be granted, and that this suffices to make him a prevailing party. We need not resolve the question of whether the agency could have acted without the remand, [FN14] as it does not matter to our resolution of the judicial imprimatur issue. The order remanding to the agency is alone not enough to establish the needed \*94 imprimatur. *See, e.g., Rice Servs.*, 405 F.3d at 1025 (under the EAJA, securing a remand order alone is insufficient; the claimant must secure relief on the merits); *see also Envtl. Def. Fund, Inc. v. Reilly*, 1 F.3d 1254, 1257-58 (D.C.Cir.1993) (same, applying Resource Conservation and Recovery Act). Aronov's argument is simply an effort to revive the "catalyst theory,"

which the Supreme Court has rejected.

FN14. *Compare Etape v. Chertoff*, 497 F.3d 379, 383-87 (4th Cir.2007) (holding that a district court has exclusive jurisdiction once a § 1447(b) suit is filed), and *United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir.2004) (en banc) (same), with *Xie v. Mukasey*, 575 F.Supp.2d 963, 964-65 (E.D.Wis.2008) (holding that the court and USCIS have concurrent jurisdiction), and *Bustamante v. Chertoff*, 533 F.Supp.2d 373, 376 (S.D.N.Y.2008) (same).

#### B. Substantial Justification

Even if the court order in this case had the attributes of a consent decree, the remaining condition for an EAJA award has not been met. We also hold as a matter of law that the government has met its burden to show its pre-litigation actions or inactions [FN15] which led to this suit were substantially justified.

FN15. The parties agree that the government's post-litigation conduct was substantially justified.

[7] An action is "substantially justified" if "it has a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n. 2, 108 S.Ct. 2541. The government's conduct must be "justified to a degree that could satisfy a reasonable person." *Id.* at 565, 108 S.Ct. 2541; *see also Schock*, 254 F.3d at 5. The government need only have "a reasonable basis both in law and in fact for its position." *De Allende v. Baker*, 891 F.2d 7, 12 (1st Cir.1989); *see also United States v. Yoffe*, 775 F.2d 447, 449 (1st Cir.1985).

[8] Importantly, for EAJA purposes, the position of a government agency can be substantially justified even if a court ultimately determines the agency's reading of the law was not correct. *Pierce*, 487 U.S. at 566 n. 2, 108 S.Ct. 2541 ("[A] position can be justified even though it is not correct, and we be-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 11

lieve it can be substantially ... justified if a reasonable person could think it correct."). The government's position as to what the law requires may be substantially justified even if its interpretation of its legal obligations is not ultimately affirmed by a court. *Schock*, 254 F.3d at 5. In *De Allende*, we held that the district court abused its discretion in awarding attorneys' fees under the EAJA when the government was "at least reasonable" in denying a visa, even though the applicant's interpretation of the underlying law ultimately prevailed. *De Allende*, 891 F.2d at 12, 13; see also *Li v. Keisler*, 505 F.3d 913, 920 (9th Cir.2007) (holding, under the EAJA, that "[i]n the absence of guidance from this court, the government's position was substantially justified"); *Trahan v. Brady*, 907 F.2d 1215, 1219-20 (D.C.Cir.1990) (finding substantial justification where government acted in response to what it reasonably, though incorrectly, believed was its statutory obligation).

And of course, if the agency reasonably believes the action or inaction is required by law, then, by definition it cannot be the basis for an award of EAJA fees. See *Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 41 (1st Cir.2001) (the government's pre-litigation conduct of initiating a debarment procedure was substantially justified because it was required to do so by statute).

Aronov's argument rests on a fundamental misapprehension of what substantially justified means. His argument is addressed to why he thinks the agency is not legally "right" in its position and not to whether the USCIS position was substantially justified, a different question. The test is whether a reasonable person could think the agency position is correct. *Pierce*, 487 U.S. at 566 n. 2, 108 S.Ct. 2541. \*95 While we think the agency was "right" in how it handled the matter, the substantial justification analysis does not hinge on whether the agency was right or wrong but on whether its actions were reasonable.

Aronov concedes no case flatly held the law required the agency to adopt his position. Nonethe-

less, he argues the position was unreasonable because no statute mandates USCIS to use the backlogged FBI name check, [FN16] and that § 1447(b) establishes a "statutory deadline" of 120 days after the interview to grant or deny citizenship, and so violation of the deadline means the government's position was not substantially justified.

FN16. In May 2008, USCIS had approximately 270,000 name check cases pending for all categories of applicants, and over 80% of the cases had been pending for more than 90 days. In April 2008, USCIS and the FBI announced a joint plan to eliminate the backlog in name check searches by refining the search process and increasing the amount of staff dedicated to conducting searches. See Citizenship and Immigration Services Ombudsman, *Annual Report 2008*, at 6-7, available at [http://www.dhs.gov/xlibrary/asets/CISOMB\\_Annual\\_Report\\_2008.pdf](http://www.dhs.gov/xlibrary/asets/CISOMB_Annual_Report_2008.pdf).

The number of pending name checks dropped to approximately 95,000 by August 2008. See Press Release, *Update on Pending FBI Name Checks and Projected Naturalization Processing Times*, [http://www.dhs.gov/xnews/releases/pr\\_1220993097713.shtm](http://www.dhs.gov/xnews/releases/pr_1220993097713.shtm). An amicus brief filed by the American Immigration Lawyers Association reported a study of cases filed in district courts in the First Circuit. It concluded that plaintiffs had filed 137 cases involving naturalization delay litigation in 2007.

[9] The decision by the agency not to grant Aronov citizenship until his background check was completed, even if that exceeded 120 days, stemmed from two statutory mandates under which the agency must operate. First, 8 U.S.C. § 1446(a) provides that "[b]efore a person may be naturalized, an employee of [the USCIS] ... shall conduct a personal investigation of the person applying for natur-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 12

alization." Second, in a budgetary statute that has continuing effect, Congress provided that "none of the funds appropriated or otherwise made available to the [USCIS] shall be used to complete adjudication of an application for naturalization unless the [USCIS] has received confirmation from the [FBI] that a full criminal background check has been completed." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub.L. No. 105-119, 111 Stat. 2440, 2448-49 (1997) [hereinafter 1997 Appropriations Act]. These are statutory commands the agency could not ignore.

Aronov's argument is that the phrase "confirmation from the [FBI] that a full criminal background check has been completed" did not require the USCIS or the FBI to include an FBI name check in that process. While it might have been reasonable, he argues, to require the FBI name check if it could have been completed within 120 days, it was not reasonable to do so if that name check requirement virtually guaranteed that the application process would take longer than 120 days to complete.

It is true that Congress did not define for the agency what a full criminal background check was. Congress chose to let the USCIS, with its particular expertise, decide the content of that "confirmation from the [FBI][of] a full criminal background check." 1997 Appropriations Act, 111 Stat. at 2448-49. That delegation to USCIS is entirely sensible for a number of reasons, including the sometimes rapidly evolving law enforcement technologies. The USCIS decided in 2002 that the inclusion of FBI name checks provided better full criminal background investigations. It reached this conclusion after the terrorist attacks of September 11, 2001 and after it \*96 discovered that deficiencies in its previous screening process had resulted in the grant of naturalization to a man suspected of ties to the terrorist group Hezbollah. See S.S. Hsu & N.C. Aizenman, *FBI Name Check Cited in Naturalization Delays*, Wash. Post, June 17, 2007, at A1. Also, Congress used the word "full" criminal back-

ground check, which supports the choice of the commonly used FBI name checks. [FN17]

FN17. The FBI provides name check information to dozens of federal, state, and foreign agencies "seeking background information from FBI files on individuals before bestowing a privilege--[w]hether that privilege is government employment or an appointment; a security clearance; attendance at a White House function; a Green card or naturalization; admission to the bar; or a visa for the privilege of visiting our homeland." *Foreign Travel to the United States: Testimony Before the H. Comm. on Gov't Reform* (July 10, 2003) (statement of Robert J. Garrity, Jr., Assistant Dir. (Acting), Records Mgmt. Div., FBI), available at 2003 WL 21608243.

Further, Congress has since essentially endorsed the USCIS's choice to use FBI name checks as part of the required criminal background check when, in 2007 (after the delay in this case), it addressed the delays by appropriating \$20 million to USCIS to "address backlogs of security checks associated with pending applications and petitions" provided that the agency submitted a plan to eliminate the backlogs and ensure that the agency "has the information it needs to carry out its mission." [FN18] Consolidated Appropriations Act of 2008, Pub.L. No. 110-161, div. E, tit. IV, 121 Stat. 1844, 2067 (Dec. 26, 2007).

FN18. Congress's appropriation also addresses amicus's policy argument that the fact that cases brought under § 1447(b), like Aronov's, have spurred the agency to speed up the name check process should lead us to award fees. While § 1447(b) claimants and their counsel may play a commendable role in bringing attention to the backlog problem, amicus's argument is relevant only to the catalyst theory. Further, the government had been aware of the backlog in security checks before the peak

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 13

in litigation that amicus cites, *see, e.g.*, Citizenship and Immigration Services Ombudsman, *Annual Report 2004*, at 4-5, available at [http://www.dhs.gov/xlibrary/assets/CISReport\\_to\\_Congress.pdf](http://www.dhs.gov/xlibrary/assets/CISReport_to_Congress.pdf), and it responded by securing additional resources to address the problem, *see, e.g.*, *Oversight of the Federal Bureau of Investigation: Hearing before the S. Judiciary Comm.* (Sept. 17, 2008) (statement of Robert S. Mueller, III, Dir., FBI) ("[W]hen we had the backlog, [and] recognized it, we sought the funding, [and] received the funding to address the back-log").

Congress chose not to prohibit the use of the FBI name check, but rather provided funding to expedite the process USCIS had chosen. The agency's, and the FBI's, choices to use name checks were clearly within their legal authority and were reasonable. Principles of administrative law require that courts defer to reasonable interpretations by an agency on matters committed to the agency's expertise by Congress. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Global NAPS, Inc. v. Verizon New Eng., Inc.*, 505 F.3d 43, 47 (1st Cir.2007). Agencies are also entitled to deference with respect to policy determinations. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *Global NAPS*, 505 F.3d at 47; *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir.1997). Once the USCIS made that choice, it acted under the requirements of law--its own regulations--in awaiting the full background check. Aronov argues the agency was not permitted to make that choice because it was mandated by statute, § 1447(b), to complete all checks within 120 days.

\*97 In its briefing to this court, USCIS has taken

the position that the statute does not impose a flat 120-day deadline to grant citizenship. The agency argues that the plain text of the statute says only that if the agency fails to make a determination of citizenship within the 120-day period after the interview, "the applicant may apply to the United States district court" for it to "determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter." 8 U.S.C. § 1447(b). The agency also supports its reading with a reference to the Congressional history. *See* 135 Cong. Rec. H4539, H4542-43, 1989 WL 182156 (daily ed. July 31, 1989) (legislative history of § 1447(b)'s 120-day provision) (discussing the importance of addressing delays but making no mention of a deadline on the agency).

If the statute is read literally, as the USCIS argues, the agency could reasonably believe it does not violate the statute by not acting within 120 days on the grounds that the statute does not command it to act within the deadline. *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) (holding that dismissal of government's forfeiture action for failure to follow statutory timing guidelines was unwarranted because "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction").

Aronov replies that even if the statute does not set a deadline of 120 days, the agency by regulation has. *See* 8 C.F.R. § 335.3(a) ("A decision to grant or deny the application shall be made at the time of the initial examination or within 120 days after the date of the initial examination of the applicant...."). That regulation should, of course, be read in the context of the regulations defining when an initial determination may take place. Aronov was mistakenly given a premature initial examination. *See id.* § 335.2(b).

Even were the agency's views wrong as to the requirement for FBI name checks and as to whether the statute and/or regulation imposed a flat 120-day

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 14

deadline, its views were still substantially justified. Neither the Supreme Court nor this court has ever held that FBI name checks are not required as part of full FBI background checks or that § 1447 imposes an absolute time limit for granting citizenship regardless of whether the name check is completed. At most, then, this is a situation in which an agency has imposed regulatory requirements on itself that are in tension, and the solution it chose, to bend the 120-day rule because the background check was not completed, is entirely reasonable.

Independently, the choice by USCIS to favor national security in requiring a full check of the background of a citizenship applicant over a self-imposed 120-day deadline, regardless of whether the interview was prematurely granted here, cannot be unreasonable. As the USCIS has stated:

Although [FBI name checks] may require a more lengthy processing time, USCIS believes that performing them is essential to identifying national security and public safety concerns that would not have been uncovered by other means. This is particularly true given that in[ ] a few cases, the information obtained from the FBI through this process has reflected very significant issues and risks. FBI name checks disclose information to USCIS that is otherwise not available.... USCIS is committed to effective background checks, and thus is committed to the FBI name check.

\*98 USCIS, *Response to the Citizenship and Immigration Services Ombudsman's 2006 Report*, at 10, available at <http://www.dhs.gov/xlibrary/assets/US-CIS-Response-Ombudsman-06-Report-May-2007.pdf>. It is not unreasonable for the agency to require greater certainty when deciding whether to grant citizenship. See *Alexander v. INS*, 74 F.3d 367, 370 (1st Cir.1996) ("[T]he right in question--American citizenship--is one of the most precious imaginable.").

Indeed, the importance of the greater certainty that the name check provides is highlighted by the

agency's choice in 2007 to address the backlog problem by distinguishing between applicants for residency and applicants for citizenship--USCIS grants residency to applicants if their cases were otherwise complete but their name checks remained pending over 180 days from the date of the initial request. See USCIS Interoffice Memorandum, *Revised National Security Adjudication and Reporting Requirements* (Feb. 4, 2008), available at <http://www.uscis.gov/files/pressrelease/DOC017.PDF>

. The agency reasonably concluded that, if the name checks turned up negative information about applicants, it could initiate removal proceedings against those granted residency while it would have much more difficulty proceeding against those granted citizenship. See S.S. Hsu, *U.S. to Skirt Green-Card Check*, Wash. Post, Feb. 12, 2008, at A3 (citing statement by USCIS spokesperson Christopher S. Bentley).

Aronov advances one more reason why, in his view, the agency had been unreasonable. He argues that the USCIS had created a system for giving priority to certain applicants, under which the agency would request the application be expedited if, for example, the applicant were facing military deployment. One of the official factors is whether the applicant has filed an action for mandamus. [FN19] Aronov says that this has created an incentive system which requires candidates to sue to get priority in having FBI name checks done, which unreasonably forces applicants to sue. As the USCIS points out, the logic of this argument is to impose EAJA fees on it in the numerous instances it has benefited an applicant by giving priority to the applicant's name check.

FN19. The criteria for expediting are: "Military deployment must be imminent," "Age-out benefits," "Writ of Mandamus," "Immigration Judge cases--grant of lawful permanent residence," and "Compelling reasons as provided by the requesting office (i.e., critical medical condition) assessed on a case by case basis."

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 15

The reasoning assumes there is some right in the applicant to priority, but there is no statutory right, given to Aronov or anyone else, to jump the queue. And the agency's choice to give priorities to the categories it selected was a rational allocation of resources, [FN20] which must be spent on \*99 litigation if the agency does not work out a voluntary solution. [FN21] For the same reasons, Aronov's argument that he should be given fees against the FBI if not the USCIS fails.

FN20. Aronov and amicus argue that in an EAJA action, a court can never consider the resources of the agency on the question of whether the agency's actions were substantially justified. That is not so. Aronov and amicus wrongly rely on the Court's statement in *Commissioner, INS v. Jean*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990), that under the EAJA, "[t]he Government's general interest in protecting the federal fisc is subordinate to the specific statutory goals of encouraging private parties to vindicate their rights." *Id.* at 164-65, 110 S.Ct. 2316 (footnote omitted). This statement addresses only the argument, which the government does not make here, that the agency's need for resources should outweigh a successful applicant's right to an award. It is simply irrelevant to the separate issue of whether the government's prelitigation position was substantially justified. A court can, and should, take into account the resources that an agency has to meet its statutory commands and to proceed in fairness to all applicants in light of the constraints under which it operates. The EAJA was meant to allow plaintiffs to challenge "unjustified governmental action"; the state of an agency's resources is material to whether its choice was or was not justified. Here, the agency was justified in acting as it did in light of its resources.

FN21. In *Al-Maleki*, the Tenth Circuit found the government's prelitigation conduct not substantially justified. There, the issue was defined as whether the USCIS had unreasonably rejected petitioner's informal efforts to resolve the matter and failed, after the 120-day period, to request an expedited FBI name check. The only justification presented by the government, unlike this case, was that it was unable, at that point, to request expedition. The circuit court found this was factually untrue. It also held "[b]ecause USCIS ha[d] not offered any other justification for its prelitigation actions," *Al-Maleki*, 558 F.3d 1200, 1205, there was no abuse of discretion. Thus, that court was not faced with the justifications offered to us.

### III.

The order awarding attorneys' fees is *reversed* and the application for fees is ordered dismissed with prejudice.

TORRUELLA, Circuit Judge (Dissenting).

This appeal presents a recurring example of what appears to be this Court's varying standards when judging governmental power as compared to those that apply to citizen challenges to government authority.

I join Judge Lipez's dissent, which carefully explains how the government failed to comply with its own regulations and deadlines, thereby unreasonably forcing Aronov to sue to obtain relief. I write separately only to lament the double standard we apply. It is with monotonous regularity that we dispatch claims of immigration petitioners who have failed to meet one filing deadline or another. [FN1] That outcome is sometimes dictated by law. Yet, when a successful plaintiff attempts to get relief provided by the law by seeking \$4,270.94 in attorney's fees incurred while forcing the government to adjudicate his much-delayed application, this Court uses exceptional en banc procedures to re-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 16

verse the award. [FN2] Even established rules do not seem to influence this Court when it seeks to expand government power or shield federal agencies from the consequences of their own failings. Instead, this Court adopts amorphous policy interests alleged by the government through bombastic exaggeration and doomsday predictions in its en banc petition. See Majority Opinion at p. 86 (citing USCIS's argument that the panel opinion would have "dangerous systematic consequences far beyond this case" and would be an "enormous disincentive for the agency to settle these cases").

FN1. See, e.g., *Chedad v. Gonzales*, 497 F.3d 57, 66 (1st Cir.2007) (rejecting an immigrant's claim to adjustment of status by refusing to toll the time period for voluntary departure while a motion to reopen was pending), *overruled by Dada v. Mukasey*, --- U.S. ---, 128 S.Ct. 2307, 171 L.Ed.2d 178 (2008); *Sharari v. Gonzales*, 407 F.3d 467, 473 (1st Cir.2005) (explaining limitation on judicial review of BIA determinations regarding timeliness of asylum applications); *Zhang v. INS*, 348 F.3d 289, 292 (1st Cir.2003) (explaining the strict jurisdictional timing requirements on appeals of asylum applications and limitation on tolling).

FN2. See also *United States v. Vega-Santiago*, 519 F.3d 1, 7 (1st Cir.2008) (en banc) (Torruella, J., dissenting).

On the issue of whether Aronov was a prevailing party, the majority ignores our sensible precedent that we defer to a district \*100 court on the meaning of its own orders. See *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 19 (1st Cir.2002) (affirming a denial of attorney's fees against Massport). The majority then proceeds to resolve the issue without itself bothering to decide the jurisdictional effect of the district court's order. In other words, the majority adopts the government's position on imprimatur without deciding whether USCIS was free to act without the district

court's explicit approval of the parties' proposed course of action. The majority concludes that even assuming the district court's order constituted a transfer of its exclusive jurisdiction back to USCIS, the district court's decision was not a consideration of the merits. This conclusion replaces the district court's own explanation of its order with an assumption that the district court exercised its power to remand without consideration. Such a conclusion is unfair to our district courts and is not even supported by the precedent on which the majority relies: See *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1025 (Fed.Cir.2005) (stating that, depending on the context and effect of the order, a remand to an administrative agency can constitute prevailing on the merits). Here, where the remand order effectively mandated the relief Aronov sought and changed the jurisdictional landscape such that that relief could be awarded, the majority must strain to avoid seeing judicial imprimatur. [FN3]

FN3. In this regard, I see the Tenth Circuit's recent decision as indistinguishable from the present case on the prevailing party issue. See *Al-Maleki v. Holder*, 558 F.3d 1200 (10th Cir.2009). The majority simultaneously admits that the decision may be contrary to its view while attempting to distinguish it on the thinnest of grounds. That the remand order in that case was slightly more detailed and that more litigation had transpired before the remand order cannot be sufficient to distinguish *Al-Maleki*. *Id.* at 1205. These differences in formatting are not relevant to the effect and force of the remand order or to the Tenth Circuit's conclusion that the government's catalyst arguments were unconvincing. *Id.* Rather the functional posture of both cases is the same: the district court agreed with the parties' joint request for remand for the purpose of allowing the plaintiff's application. Thus, the majority adoption of the government's position that *Al-Maleki* is distinguishable is strained, el-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 17

evates form over function, and effectively does create a circuit split.

Similarly, in supporting its ruling for the government on this issue, the majority effectively says that district courts do not have authority to sanction parties that fail to comply when the court allows a clear and unambiguous motion seeking to compel some specific action. This extension of the rule that formal injunctions must not incorporate other documents by reference, *see* Fed.R.Civ.P. 65(d), seems to me to be both questionable and cumbersome. Nonetheless, the majority unhesitatingly adopts it to support the government's position.

Finally, on the issue of substantial justification, the majority again reaches to support the government's position. Though the agency's own regulation spells out a clear rule--decisions must be made within 120 days of the initial examination--the majority calls the agency's violation of its own rule reasonable. Specifically, to avoid granting Aronov relief, the majority relies on the government's attenuated insinuations that our national security will be threatened by ruling against it. But Aronov's modest request for attorney's fees does not seek to prevent the government from performing background checks. Rather he seeks only to recover the costs he was forced to incur to obtain adjudication of his petition after an excessive delay attributable to backlog and a failure to \*101 follow protocol. Only through acquiescence to the government's policy suggestions can the majority conclude that it would be unreasonable to expect USCIS to conduct the necessary background checks while complying with its own timing regulations.

With due respect, I suggest that our jurisprudence would better reflect the time-honored motto, "Equal justice under law," [FN4] if we showed the same doctrinal flexibility and credulity to policy arguments presented by citizens asking us to limit governmental power, or for compensation for harm caused by governmental error, as shown by the majority to the government in this appeal. For these reasons, and the reasons stated by Judge Lipez, I re-

spectfully dissent.

FN4. As appears engraved on the building housing the Supreme Court of the United States.

LIPEZ, Circuit Judge, with whom TORRUELLA, Circuit Judge, joins, dissenting.

I respectfully dissent from the decision of the majority narrowing the class of plaintiffs who can obtain attorney's fees under the Equal Access to Justice Act ("EAJA"). With its strangely dismissive view of a decision of the district court explaining why Aronov is a prevailing party, the majority refuses to accord that status to an immigrant who, facing a substantial delay in the processing of his application for naturalization, exercised his statutory right to sue the U.S. Citizenship and Immigration Service ("USCIS") and obtained an order from the district court remanding the matter to USCIS so that he could be made a citizen. Invoking national security concerns that are not implicated here, the majority characterizes as substantially justified the conduct of USCIS, whose delay in processing the naturalization application was both contrary to statute and to its own regulations. These legal conclusions are unwarranted, unwise, and contrary to the purpose and promise of the EAJA.

#### I.

The facts of this case are straightforward. Aronov applied for naturalization with the Vermont Service Center of USCIS on May 22, 2004. On February 14, 2005, USCIS conducted an initial examination of Aronov regarding his application. As the government acknowledges, the agency's interview with Aronov was premature. USCIS's own regulation dictates that an initial examination should be undertaken only after an applicant's full background check has been completed. 8 C.F.R. § 335.2(b). After Aronov was interviewed, federal law required USCIS to adjudicate his application within 120 days. *See* 8 U.S.C. § 1447(b); 8 C.F.R. § 335.3(a). Aronov heard nothing from USCIS for over a year. He made repeated inquiries about the status of his

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 18

application. On March 23, 2006, 402 days after his examination, Aronov received a letter from the agency requesting six months more to complete additional review. At that time, Aronov's statutory right to sue USCIS in federal district court to compel action on his application had already accrued. See 8 U.S.C. § 1447(b). On August 28, 2006, 560 days after his initial examination, and 440 days past USCIS's deadline for adjudicating the application, Aronov filed suit.

Thirty-nine days later, the background check was complete. On October 6, 2006, the government and Aronov filed a Joint Motion for Remand Pursuant to 8 U.S.C. § 1447(b). In full, the joint motion read:

Pursuant to 8 U.S.C. § 1447(b), the parties in this action, plaintiff ... and defendants \*102 Michael Chertoff, Secretary of the United States Department of Homeland Security, et al., hereby jointly move this Honorable Court to remand this matter to the USCIS, so that [it] can grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006. In support of this motion, the parties state as follows:

1. On or about August 28, 2006, plaintiff Alexandre Aronov filed this action.
2. Since that date, USCIS has completed its review of plaintiff's application for naturalization and, if jurisdiction is returned to the agency, would grant the application and schedule plaintiff's oath ceremony for no later than November 8, 2006.
3. The governing statute, 8 U.S.C. § 1447(b), provides that, in cases in which the agency has failed to render a decision on an application for naturalization within 120 days of the examination of the applicant, the applicant may file suit in district court requesting to adjudicate the application and "[s]uch court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter."

Wherefore, with good cause having been shown, the parties respectfully request that this Court re-

mand this matter to USCIS so that it can grant plaintiff's application for naturalization and schedule plaintiff for an oath ceremony for no later than November 8, 2006.

On October 12, 2006, the court entered an electronic order granting the motion and the remand. The docket text for the remand order states: "Judge Nancy Gertner: Electronic ORDER entered granting 3 Joint Motion to Remand to U.S. Citizenship and Immigration Services." [FN1]

FN1. The "3" references the docket number of the joint motion and was hyperlinked to the joint motion's text.

On November 28, 2006, Aronov filed an application for attorney's fees pursuant to the EAJA. [FN2] The government opposed Aronov's application, asserting that he was not a prevailing party in the litigation under the test established in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), and that the government's position regarding his application was substantially justified. The district court agreed with Aronov and ordered the government to pay him \$4,270.94 in attorney's fees and costs. In its order, the district court explained the significance of its October 12 remand order, stating, "the government here was granted not a dismissal, but a remand to the agency *conditional* on the granting of plaintiff's naturalization by November 8, 2006. Had the naturalization not so occurred, the parties might very well be back in front of this Court litigating a contempt action." *Aronov v. Chertoff*, No. 06-11526, 2007 U.S. Dist. LEXIS 40455, at \*5 (D.Mass. Jan. 30, \*103 2007) (emphasis in original). A timely appeal by the government followed. A panel of the court affirmed the award. *Aronov v. Chertoff*, 536 F.3d 30 (1st Cir.2008). Subsequently, a majority of the en banc court granted the government's petition for rehearing en banc, vacating the panel opinion.

FN2. The EAJA provides:

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 19

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.  
 28 U.S.C. § 2412(d)(1)(A).

## II.

Although parties are ordinarily required, win or lose, to bear their own attorney's fees, *see, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), a number of exceptions to this default rule have been adopted by statute. One such exception, the EAJA, authorizes an award of attorney's fees and costs to a litigant who has brought a civil suit against the United States if (1) she is the prevailing party in the matter; (2) the government fails to show that its position was substantially justified; and (3) no special circumstances would make such an award unjust. 28 U.S.C. § 2412(d)(1)(A); *see also Schock v. United States*, 254 F.3d 1, 4 (1st Cir.2001). By offering qualifying litigants attorney's fees and other expenses, the EAJA seeks "to remove economic deterrents to parties who seek review of unreasonable government action." *Schock*, 254 F.3d at 4.

The court reviews the district court's decision to grant or deny a fee application under the EAJA for abuse of discretion, *id.*, "mindful that the district court has an 'intimate knowledge of the nuances of the underlying case,' " *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir.2002) (quoting *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 292 (1st Cir.2001)). "Such de-

ference is particularly appropriate where, as here, the correctness of the court's decision depends in large part on the proper characterization of its own statements." *Id.*

### A. Prevailing Party

The Supreme Court has long held that a plaintiff who obtains a "settlement agreement[ ] enforced through a consent decree" is a "prevailing party." *See Buckhannon*, 532 U.S. at 604, 121 S.Ct. 1835 (citing *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980)). In cases following *Buckhannon*, most courts have also permitted fees where the plaintiff obtains an order equivalent to a consent decree. *See Roberson v. Giuliani*, 346 F.3d 75, 81-82 (2d Cir.2003) (noting the agreement of a majority of appellate courts). For example, the Fourth Circuit held that orders lacking the title "consent decree" support an award if they are "functionally a consent decree," *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir.2002), a formulation we have also employed. *See Smith v. Fitchburg Pub. Schs.*, 401 F.3d 16, 24 (1st Cir.2005); *see also Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1025 (Fed.Cir.2005) (court action "equivalent" to a consent decree or judgment on the merits); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir.2003) (settlements "sufficiently analogous" to consent decrees).

Given the posture of the underlying litigation, the question in this case is whether the district court's remand order is functionally equivalent to a consent decree. If the order is functionally equivalent to a consent decree, then *a fortiori* it possesses whatever "judicial imprimatur" a consent decree possesses, *see Buckhannon*, 532 U.S. at 605, 121 S.Ct. 1835, and the order makes Aronov a prevailing party. According to the majority, "three related factors" must characterize an order that is the functional equivalent of a consent decree. First, there must be a "court-ordered" change in the legal relationship resulting from the underlying litigation. Second, \*104 "there must be judicial approval of the relief vis-a-vis the merits of the case." Third, there must be "judicial

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 20

oversight and ability to enforce the obligations imposed on the parties." These factors must all be present if a court order is to constitute the functional equivalent of a consent decree. According to the majority, none of the factors was present here.

The majority is wrong. All three factors were present here. The change in legal relationship between USCIS and Aronov was court-ordered. The court satisfied the requirements for approval of a consent decree, which do not require the court to state explicitly that it has approved the relief in relation to the merits of the case. Lastly, the court retained jurisdiction to enforce the agreement by incorporating the terms of the joint motion into the remand order.

### 1. The change in legal relationship was court-ordered

During the litigation, only the district court possessed the authority to give Aronov the relief he requested. After Aronov filed suit, USCIS lost jurisdiction to adjudicate his application, thereby precluding USCIS from naturalizing Aronov without further court involvement. 8 U.S.C. § 1447(b) ("Such court has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the [USCIS] to determine the matter."); see *Etape v. Chertoff*, 497 F.3d 379, 384-85 (4th Cir.2007). The parties acknowledged this jurisdictional point in their joint motion for remand to the district court, which highlights the terms of 8 U.S.C. § 1447(b). [FN3] They understood that there had to be an intervening judicial order before Aronov could obtain relief. Nothing about this order was automatic; the district court had the discretion to either determine the naturalization issue itself or remand to USCIS with instructions.

FN3. Elsewhere parties have litigated the question of whether the court maintains exclusive jurisdiction or, alternatively, concurrent jurisdiction with the USCIS. Most courts have held that the district court has

exclusive jurisdiction over the application until it has acted pursuant to the statute. See, e.g., *Etape*, 497 F.3d at 384-85 (holding that section 1447(b) vests the district court with exclusive jurisdiction over a naturalization application); *United States v. Hovsepian*, 359 F.3d 1144, 1159 (9th Cir.2004) (en banc) (same). But see, e.g., *Bustamante v. Chertoff*, 533 F.Supp.2d 373, 381 (S.D.N.Y.2008) (reaching the opposite conclusion). In its initial argument to us, the government did not suggest that USCIS maintained jurisdiction over Aronov's application after he filed suit in district court. In the en banc proceedings, the government alluded to the concurrent jurisdiction argument. Whatever the government's intent with the allusion, it is beside the point. The government's conduct of the litigation reflected its view that it could not act on Aronov's naturalization application without a remand order from the district court. Moreover, as the Tenth Circuit recently pointed out in *Al-Maleki v. Holder*, 558 F.3d 1200, 1205 (10th Cir.2009), even if USCIS did retain concurrent jurisdiction over the application after the suit was filed, "the district court resolved the litigation *before* USCIS could voluntarily naturalize [the applicant]." *Id.* (emphasis in original). This order of events distinguishes *Buckhannon* regardless of the jurisdictional question.

This is not the catalyst scenario of *Buckhannon*. There, the plaintiff alleged that West Virginia law conflicted with federal law, 532 U.S. at 601, 121 S.Ct. 1835, and the West Virginia legislature retained its authority throughout the litigation to "unilateral[ly]" amend its laws. See *Smyth*, 282 F.3d at 278 (using this expression). It exercised that authority and rendered the suit moot, after which the government moved to dismiss the case. Here USCIS could do no such thing. It lacked the authority to "unilaterally" provide Aronov the relief he requested.

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 21

ted. The district \*105 court's order was necessary to return authority to the agency. [FN4]

FN4. Contrary to the majority's suggestion, the fact that USCIS acted voluntarily in coming to an agreement with Aronov does not make Aronov ineligible for fees. Voluntary conduct by a defendant is a necessary part of any consent decree process. Indeed, as the Supreme Court has said, "the voluntary nature of a consent decree is its most fundamental characteristic." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 521-22, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986). Yet a plaintiff who obtains a consent decree is eligible for fees. *Maher*, 448 U.S. at 129-30, 100 S.Ct. 2570. Similarly, awarding Aronov fees because the remand order is functionally equivalent to a consent decree would not conflict with our holding in *Smith*. See *Smith*, 401 F.3d at 26-27 (noting the defendant's voluntary conduct). The *Smith* panel expressly set aside as waived the question of whether the order there was functionally equivalent to a consent decree. *Id.* at 24.

Moreover, the remand order mandated a change in the legal relationship of the parties--namely, that Aronov's status change from alien to citizen through an oath ceremony that would take place no later than November 8, 2006. According to the court, it "remanded specifically 'so that USCIS can grant plaintiff's application for naturalization, and schedule plaintiff's oath ceremony for no later than November 8, 2006.'" *Aronov*, 2007 U.S. Dist. LEXIS 40455, at \*4 (quoting Joint Mot. to Remand). There is no mistaking the district court's meaning here. Its remand order incorporated by reference the joint motion of the parties and thereby ordered USCIS to fulfill the promise that it made to Aronov and the court in the joint motion. This was the district court's own understanding of its order. See *id.* at \*4-5.

A district court is in the best position to explain the meaning of its own order. We defer routinely to the district court's view of the significance of its remand order. See *Kinton*, 284 F.3d at 30 ("Clearly, the district court is in the best position to determine whether its statements ... should be considered as the functional equivalent of a judicial order within the meaning of *Buckhannon*."); *Harvey v. Johanns*, 494 F.3d 237, 242 (1st Cir.2007) ("We must, of course, accord deference to the district court's interpretation of the wording of its own order."); see also *Lefkowitz v. Fair*, 816 F.2d 17, 22 (1st Cir.1987) ("[U]ncertainty as to the meaning and intent of a district court order can sometimes best be dispelled by deference to the views of the writing judge.").

Here, the majority dismisses the district court's assessment of its October 12 remand order in its subsequent decision on attorney's fees as a "post-hoc explanation for a prior order." If the majority means that the district court's explanation is meaningless because the court could not incorporate by reference the terms of the joint motion into the remand order as a matter of law, then it is incorrect. Whether a court has incorporated an agreement into an order depends on context. In *F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico*, 449 F.3d 185 (1st Cir.2006), we held that an oral settlement agreement between two parties to a complex RICO dispute was not incorporated into a dismissal order that referred to it. *Id.* at 190. However, we expressly limited our rejection of the incorporation claim to "the present case," noting, "[h]ard and fast rules may be unwise because of variations in language and context." [FN5] *Id.*

FN5. In *F.A.C.*, we discussed the importance of context to the incorporation of a settlement agreement into a dismissal order. *F.A.C.*, 449 F.3d at 190. Here we are dealing with a remand order. If anything, the case for incorporating by reference the terms of a preceding motion into a remand order is stronger than the case for incorpor-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 22

ating by reference the terms of a settlement agreement into a dismissal order. Remand, unlike dismissal, expressly contemplates an ongoing adjudication of a case by a lower court or administrative agency, pursuant to the order of the remanding court. See *Blacks Law Dictionary* (8th ed.2004). Remanding courts intend, and the parties expect, the remand order to instruct the lower court or agency about what further proceedings should take place, and orders often accomplish this by incorporation--e.g., "We remand for proceedings consistent with this opinion."

**\*106** This is a sensible approach. District courts routinely enter orders granting a party's motion without elaboration. The idea that such an order cannot incorporate by reference the terms of the motion to which the order responds is at odds with the daily practice of the courts. To be sure, incorporation by reference may be inappropriate for the entry of a consent decree that addresses a complex lawsuit with many issues and multiple parties. But this is not remotely such a case. The relief Aronov sought was straightforward: "[a]djudicating [his] Application for Naturalization ... or, in the alternative, [r]equiring [USCIS] to adjudicate [his] application for naturalization." Only two parties were involved. The terms of their joint motion were clear. There was no impediment, legal or practical, to the incorporation of that joint motion into the district court's remand order.

One cannot examine the record below and conclude--against the district court's interpretation of its own remand order--that the court did not refer to the joint motion with the intent of incorporating its terms, and with the full expectation that the promises made therein would be fulfilled. The parties' joint motion makes specific representations to the court about the action the defendant would take. The court's order refers to the joint motion twice, once by name and once by docket number. USCIS could only understand that the court was ordering it

to carry out the promise made to the court. USCIS would naturalize Aronov by November 8, 2006, and thereby change his status from alien to citizen.

## **2. The court satisfied the requirements for entering a consent decree**

The majority contends that a district court must "appraise," "weigh" or "evaluate" the merits of a case in relation to the relief provided by the consent decree. The requirements for entering a consent decree were recently summarized by the Supreme Court in *Frew ex rel. Frew v. Hawkins*:

Consent decrees entered in federal court must be directed to protecting federal interests. In [*Local No. 93* ], we observed that a federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based.

540 U.S. 431, 437, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004) (citing *Local No. 93*, 478 U.S. at 525, 106 S.Ct. 3063 (collecting cases)); see also *Conservation Law Found. of New Eng., Inc. v. Franklin*, 989 F.2d 54, 59 (1st Cir.1993) (listing same requirements). We have also held that district courts must determine that a proposed consent decree is fair, adequate and reasonable before entering it. For example, in *Conservation Law Foundation*, we wrote, "[d]istrict courts must review a consent decree to ensure that it is 'fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; [and] that it is consistent with the objectives of Congress....' " 989 F.2d at 58 (quoting *Durrett\*107 v. Housing Auth. of Providence*, 896 F.2d 600, 604 (1st Cir.1990)); see also *United States v. City of Miami*, 664 F.2d 435, 441 (Former 5th Cir.1981).

We agree that it would be difficult for a district court to determine the fairness, reasonableness and adequacy of a proposed agreement without making some evaluation of the merits of the case in relation to the relief provided by the consent decree.

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 23

However, "how deeply the judge must inquire, what factors he must take into account, and what weight he should give the settling parties' desires will vary with the circumstances." *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir.1985); see also *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1088 (1st Cir.1994) (holding that the substance of the fairness inquiry will depend on the context). Moreover, neither *Frew* nor *Conservation Law Foundation* require that a judge explicitly state, in the court's order or elsewhere on the record, that she has determined that a proposed agreement meets these requirements. See *Frew*, 540 U.S. at 437, 124 S.Ct. 899; *Conservation Law Found.*, 989 F.2d at 58 (holding that a court must "review" a proposed consent decree). As a reviewing court, we assume that a judge understands the role the district court is supposed to play in deciding whether to enter a consent decree, and that the judge acts in accordance with that understanding. As we explained previously regarding this very issue,

the question is whether the record contains adequate facts to support the decision of the district court to approve the proposed compromise. As to this, as the Supreme Court has observed, "a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based."

*United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 280 (1st Cir.2000) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 437, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968)).

Here, the record "contain[s] adequate facts to support the decision of the trial court to approve the proposed compromise[ ]." *TMT Trailer Ferry*, 390 U.S. at 437, 88 S.Ct. 1157. Again, the context is simple. There is one plaintiff, one government agency, and a specific form of relief that is being sought. The judge had the benefit of both the complaint and the parties' joint motion for remand. The complaint identified the factual and legal bases for providing relief. The joint motion isolated the rel-

evant facts and law, and asserted "good cause" for remanding to the agency for naturalization. From these documents, the district court could readily evaluate the merits of Aronov's claim in relation to the relief described in the joint motion, and determine that the jointly proposed agreement was "fair, adequate, and reasonable." [FN6] The court also could determine \*108 that it met the requirements imposed by *Frew*. In short, the record contains adequate facts to support the court's decision to approve the proposed agreement and incorporate it in an order of the court, and there is no reason to assume, as the majority apparently does, that the court failed to make the necessary determination.

FN6. There is no legal support for the majority's contention that a defendant must file an answer or "raise defenses" before a consent decree (or its equivalent) may be entered by a federal court. Consent decrees may be entered at any stage of litigation, and are regularly entered before a defendant has filed an answer. See Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 913 (noting that parties often negotiate consent decrees before the complaint is filed, and that during the period of study nearly one-third of Title VII consent decrees involving the Department of Justice and public employers were entered the day the complaint was filed). Here, in contrast, both parties filed documents with the court. The joint character of the motion for remand provided the court a reasonable basis for evaluating the merits of the case.

### 3. The court retained jurisdiction to enforce the agreement

The majority argues that the district court's order "did not contain provisions for future enforcement typical of consent decrees." But a consent decree need not contain a separate provision explicitly re-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 24

taining jurisdiction for future enforcement. We have held that if the terms of an agreement are incorporated into an order, the district court retains jurisdiction to enforce that agreement. *Smith*, 401 F.3d at 24 ("Either incorporation of the terms of the agreement or a separate provision retaining jurisdiction over the agreement will suffice [to retain jurisdiction to enforce the agreement].") (quoting *Smyth*, 282 F.3d at 283)); see also *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (stating this proposition for dismissal orders). [FN7] Here, the district court incorporated by reference the terms of the joint motion. This incorporation was sufficient to retain jurisdiction for purposes of future enforcement. [FN8]

FN7. The majority's statement that "it is also firmly the law that there must be a clear basis within the order ... for both the court's continuing jurisdiction and its power to enforce an agreement between the parties" demonstrates its refusal to accept *Smith*, which states that incorporation of a settlement agreement in an order is sufficient for purposes of retaining jurisdiction to enforce that agreement. *Smith*, 401 F.3d at 24. We have also said that "hard and fast rules may be unwise [on the question of incorporation] because of variations in language and context." *F.A.C.*, 449 F.3d at 190; see supra section II(A)(1). The only authority the majority cites in support of its view, *Kokkonen*, does not support it. Indeed, the language "clear basis within the order" appears nowhere in *Kokkonen*. See *Kokkonen*, 511 U.S. at 379-82, 114 S.Ct. 1673. In fact, as several courts have noted, *Kokkonen* is silent on whether reference suffices to incorporate an agreement for purposes of retaining jurisdiction. See, e.g., *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 431-32 (5th Cir.2002) ("[T]he *Kokkonen* Court did not explicitly hold that a district court's order

of dismissal must contain an express statement incorporating a settlement agreement in order to vest the court with ancillary jurisdiction...."); *Lucille v. City of Chicago*, 31 F.3d 546, 549 (7th Cir.1994) (Cudahy, J., concurring).

FN8. To determine whether the remand order was the functional equivalent of a consent decree, I need not decide whether the remand order itself satisfied the procedural requirements necessary for injunctions or to support a motion for contempt. See Fed.R.Civ.P. 65(d) (discussing form of order); *United States v. Saccoccia*, 433 F.3d 19, 28 (1st Cir.2005) (requiring terms to be clear and unambiguous). The crucial question, as the majority acknowledges, is whether the district court retained jurisdiction over the agreement. The remand order did this by incorporating the terms of the joint motion by reference. Given this circumstance, if USCIS had failed to comply with the remand order, Aronov could have asked the court to issue an injunction confirming the naturalization obligation of USCIS and ordering compliance with it. Courts routinely issue supplemental orders to enforce a consent decree as a prelude to the invocation of contempt authority. See, e.g., *King v. Greenblatt*, 127 F.3d 190, 192 n. 5 (1st cir.1997) (describing the district court's issuance of injunctions "to implement the thrust of the earlier consent decree"). The majority fails to recognize the distinction between consent decrees and injunctions. It suggests wrongly that I have characterized the district court "as having essentially issued an injunction." That is not so. I have concluded that the district court entered the functional equivalent of a consent decree. There are key differences between consent decrees and injunctions—the viability of incorporation by reference being a principal one. The majority ap-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 25

pears to believe that any order that does not meet the heightened standards applicable to injunctions and the contempt sanction "does not order [the parties] to do anything" and leaves the issuing court powerless to enforce the order. Such a conclusion belies the law and common sense.

**\*109 4. The district court's order was the functional equivalent of a consent decree**

In summary, the change in legal relationship between USCIS and Aronov was mandated by the remand order that incorporated USCIS's representation that it would naturalize Aronov by a certain date. The law does not require that the district court state explicitly that it has evaluated the fairness, reasonableness, and adequacy of a proposed consent decree. It is enough if the record would permit the district court to make that evaluation. The record in this simple case is ample for that purpose. By incorporating the parties' joint motion, the remand order provided a continuing basis for enforcing the agreement if USCIS did not comply with its representations to the court. Thus, the court's remand order was the functional equivalent of a consent decree, and Aronov was a prevailing party. [FN9]

FN9. The Tenth Circuit's recent decision in *Al-Maleki*, 558 F.3d 1200, 1205, affirmed an award of attorney's fees under EAJA to a naturalization applicant who had filed suit under section 1447(b) after there was a substantial delay in the adjudication of his application. The court's prevailing party analysis is strongly supportive of my analysis here. As I have already noted, *supra* note 4, the court distinguished *Buckhannon* on the grounds that the district court had resolved the litigation in favor of the applicant before USCIS naturalized him. *Id.* at 1205. Moreover, the applicant, like Aronov, had submitted a joint motion with USCIS representing to the court that USCIS would naturalize him by a certain date.

*Id.* The Tenth Circuit noted that the court's order was "bas[ed] ... [on] the parties' stipulations" in the joint motion, and that the order was judicially enforceable against USCIS if the agency failed to comply. *Id.* Entry of such an order, the Tenth Circuit said, "not USCIS's stipulation, was the action which indelibly alter[ed] the legal landscape between USCIS and [the applicant]." *Id.* (internal quotation marks and citation omitted). This order sufficed to make the applicant a prevailing party.

**B. Substantial Justification**

In addressing the "substantial justification" issue, the majority announces a broad rule to protect USCIS's authority to make policy choices favoring national security interests. As I will explain, no such authority is at issue. The question is much narrower: whether the delay in this case was substantially justified, in light of the fact that USCIS exceeded both the statutory and regulatory deadlines governing the naturalization process.

The government bears the burden of demonstrating that its position was substantially justified. *Schock v. United States*, 254 F.3d 1, 5 (1st Cir.2001). The Supreme Court has interpreted the "substantially justified" language in the EAJA to require reasonableness: "[A]s between the two commonly used connotations of the word 'substantially,' the one most naturally conveyed by the phrase before us here is not 'justified to a high degree,' but rather 'justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988); *see also Schock*, 254 F.3d at 5; *Dantran, Inc. v. U.S. Dep't of Labor*, 246 F.3d 36, 40-41 (1st Cir.2001). Thus, the key question is whether the government's position has "a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n. 2, 108 S.Ct. 2541.

The majority argues that the government's prelitigation position insisting on \*110 compliance

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 26

with the name check policy is substantially justified because it "stemmed from two statutory mandates under which it must operate," and because that policy has since been endorsed by Congress. The first statute, 8 U.S.C. § 1446(a), provides that "[b]efore a person may be naturalized, an employee of the [USCIS], or of the United States designated by the Attorney General, shall conduct a personal investigation of the person applying for naturalization." The second mandate cited by the majority, the 1998 Appropriations Act, states: "During fiscal year 1998 and each fiscal year thereafter, none of the funds appropriated or otherwise made available to [USCIS] shall be used to complete adjudication of an application for naturalization unless [USCIS] has received confirmation from the Federal Bureau of Investigation that a full criminal background check has been completed...." Depts. of Commerce, Justice & State, The Judiciary & Related Agencies Appropriations Act of 1998, Pub.L. No. 105-119, 111 Stat. 2440, 2448-49 (1997) (8 U.S.C. § 1446 note). The majority also suggests that "Congress has since essentially endorsed USCIS's choice to use FBI name checks ... by appropriating \$20 million to USCIS to 'address backlogs....'" See Consolidated Appropriations Act of 2008, Pub.L. No. 110-161, 121 Stat. 1844 (2007).

Relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the majority asserts that the court must defer to USCIS's decision to employ the NNCP check because in these statutes Congress has committed decision-making authority to the agency on these issues. The agency has concluded, it says, that the comprehensive FBI name checks are "essential" to the background investigations. Although a small percentage of name checks take a considerable amount of time to complete, isolated delays should not prevent the government from maintaining the name check requirement as its policy.

This argument misconstrues what is at stake in this case. There is no challenge to the authority of US-

CIS to adopt the name check program as a policy. What is challenged is the application of that policy in this instance. Even if USCIS is entitled to invoke *Chevron* to defend its use generally of the FBI name check process, see generally Cass Sunstein, *Chevron Step Zero*, 92 Va. L.Rev. 187 (2006) (analyzing the standards for determining whether an agency interpretation is entitled to evaluation under the *Chevron* framework), deference to the general policy does not imply that the government was substantially justified in its dilatory handling of Aronov's naturalization application.

The government's 440-day delay in acting on Aronov's naturalization application exceeded the deadline imposed by section 1447(b), which gives a district court jurisdiction to entertain a lawsuit by the applicant and evaluate a naturalization application if the agency has failed to adjudicate the application within 120 days after conducting its initial examination. See *Etape*, 497 F.3d at 385; see also *Hovsepian*, 359 F.3d at 1163 ("A central purpose of [section 1447(b)] was to reduce the waiting time for naturalization applicants." (citing H.R.Rep. No. 101-187, at 8 (1989); 135 Cong. Rec. H4539-02, H4542 (1989) (statement of Rep. Morrison))). Both the courts and the agency itself have interpreted section 1447(b) as imposing a 120-day deadline for agency action. See, e.g., *Al-Maleki*, 558 F.3d 1200, 2009 WL 692612, at \*5 (treating statute as imposing a deadline); *Hovsepian*, 359 F.3d at 1161; 8 C.F.R. § 335.3(a) ("A decision to grant or deny the application shall be made at the time of the initial examination or within 120-days after the date of the initial examination \*111 of the applicant for naturalization ....") (emphasis added); see also *Walji v. Gonzales*, 500 F.3d 432, 439 (5th Cir.2007) ("[B]ecause the clear intent of Congress was to accelerate naturalization applications, and the statutory and regulatory language gives a definite time frame for decision once an examination has occurred, [§ 1447] is violated in situations [where the 120-day deadline is not met].").

The majority's contention that the statute does not

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 27

command USCIS to act within the deadline is untenable. Although the majority acknowledges that the agency has adopted a regulation, 8 C.F.R. § 335.3(a), that treats the 120-day time frame as a deadline, the majority regards the statutory and regulatory frame as merely aspirational, with no consequences for the agency if it fails to comply. [FN10] If Congress had taken such a related view of its 120-day time frame, it would not have explicitly provided that an applicant whose naturalization application remains unresolved at the end of the 120-day period may file suit in federal court to have the application either adjudicated by the court or remanded to the agency with instructions to adjudicate it. *See, e.g., Etape*, 497 F.3d at 384-85 (concluding that after an applicant has filed suit with the district court pursuant to § 1447(b), the court has exclusive jurisdiction over the application). [FN11]

FN10. The majority also contends that USCIS "could reasonably believe it does not violate the statute by not acting within 120 days on the grounds that the statute does not command it to act within the deadline." The agency's own regulations belie this claim. As noted, part 335.3(a) expressly treats the 120-day time frame as a deadline. Moreover, as a matter of policy, if the naturalization applicant goes to the trouble of filing a lawsuit seeking mandamus on the basis that the 120-day deadline has expired, the agency will capitulate and expedite the FBI name check request. According to a document entitled "FBI Name Check Expedite Criteria," which Aronov attached to his Reply to the government's Response to his Motion for attorney's fees, "In order for USCIS to expedite an FBI Name Check request, one of the following criteria must be established: ... Writ of Mandamus--lawsuit pending in Federal Court." This policy is an unmistakable acknowledgment that the petitioner invoking his or her statutory right to file suit under

section 1447(b) has a sound basis in law and fact for doing so. It is therefore more accurate to say that the agency's wholesale disregard of the 120-day statutory and regulatory deadline reflects its judgment that most naturalization applicants whose applications are delayed beyond the 120-day statutory deadline will not invoke their statutory right to sue.

FN11. In addition to section 1447(b)'s specific command, the Administrative Procedures Act ("APA") offers a more general directive to agencies to resolve matters presented to them within a reasonable amount of time. *See* 5 U.S.C. § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."). Our assessment of what is reasonable is informed by the relevant statutes and regulations. *See Towns of Wellesley, Concord and Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir.1987) (discussing the guidelines, including the existence of a "rule of reason," which govern the time an agency may take to make a decision) (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C.Cir.1984)); *Caswell v. Califano*, 583 F.2d 9, 16 (1st Cir.1978) (indicating that courts may look to statutory text to provide a reasonable time limit on agency action). Here, section 1447(b) and 8 C.F.R. § 335.3(a) provide such guidance. *See Sze v. INS*, No. C-97-0569 SC, 1997 WL 446236, at \*7 (N.D.Cal. July 24, 1997) ("[T]he 120-day rule provides the court with a measure of what constitutes a reasonable period for INS to process naturalization applications.").

Moreover, the idea that the agency's early examination of Aronov was some sort of one-time "mis-

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 28

take," as the majority suggests, is belied by the briefs, which contain ample discussion of the "flood" of section 1447(b) lawsuits arising from delays in the \*112 NNCP process. [FN12] As they reveal, it was the agency's *regular practice* to violate its own regulations by examining candidates before receiving NNCP results, and then to compound that error by missing the statutory and regulatory adjudication deadline, thereby giving rise to a substantial number of lawsuits against the agency, at a cost both to taxpayers and applicants. USCIS engaged in precisely that conduct in Aronov's case. Yet, according to the majority, this is a pre-litigation position "justified to a degree that could satisfy a reasonable person." That is an indulgent reasonable person who would view this government conduct so benignly. [FN13]

FN12. See Brief for American Immigration Lawyers Association, as Amicus Curiae in Support of Plaintiff, at 6-7.

FN13. I acknowledge the oddity that arises because of the agency's regulations. If USCIS had complied with its regulations and waited to interview Aronov until the FBI name check had been completed, his waiting time for the completion of the naturalization process might have been longer than it was here. This fact does not alter the legal analysis. Once USCIS gave Aronov his initial interview, it had to confront the clear timing obligation imposed by Congress.

Finally, the majority imports national security concerns into its defense of USCIS's handling of Aronov's application. It asserts sweepingly that "the choice by USCIS to favor national security ... regardless of whether the interview was prematurely granted here, cannot be unreasonable." There is no basis in federal law for holding that an agency is substantially justified in ignoring its own regulations as long as it dutifully cites a national security interest.

Moreover, the majority's invocation of these national security interests reflects its continuing misapprehension of what this case is about. There is no challenge to the general validity of the name-check policy. There is no suggestion that Aronov's naturalization application should have been approved without the security check that the agency deemed necessary. [FN14] Once Aronov filed a lawsuit, his application was approved promptly. Indeed, the agency adopted a policy of giving priority to naturalization applicants who filed lawsuits pursuant to section 1447(b). If a naturalization applicant went through the time, trouble and expense of filing a lawsuit against the government, the applicant was moved to the head of the line. That policy might make sense to USCIS, but it should \*113 not be cost-free in light of the additional expense it imposes on the applicant for naturalization. [FN15]

FN14. In citing these national security interests, the majority accepts uncritically the relevance of the government's argument that "background checks are critical to insuring public safety and national security." I do not dispute this proposition, which is irrelevant to the disposition of the case. The majority also accepts uncritically the government's assertion that awarding Aronov attorney's fees would "create an enormous incentive for individuals frustrated with delays in the naturalization process to file mandamus lawsuits." It is the agency itself that gives applicants an incentive to file suit by choosing to request expedition of name checks if an applicant files suit. The agency could remove this incentive by requesting expedition before a suit is filed, as the record shows it could. Finally, the majority also endorses the government's suggestion that awarding attorney's fees will create a "disincentive for the agency to settle these cases." Yet the government already pursues such settlements in jurisdictions where it faces the risk of having to pay attorney's fees. See,

562 F.3d 84  
 562 F.3d 84  
 (Cite as: 562 F.3d 84)

Page 29

*e.g.*, *Kats v. Frazier*, No. Civ. 07-479, 2008 WL 2277598 (D.Minn. May 30, 2008); *Ghanim v. Mukasey*, 545 F.Supp.2d 1146 (W.D.Wash.2008); *Phompanya v. Mukasey*, No. C07-597MJP, 2008 WL 538981 (W.D. Wash. Feb 25, 2008); *Berishev v. Chertoff*, 486 F.Supp.2d 202 (D.Mass.2007). The agency's decision to seek an early compromise despite facing a risk of paying attorney's fees is easy to understand. By refusing to settle the agency would risk the payment of substantially higher EAJA fees because its unreasonable litigation position would compound the cost of its unreasonable pre-litigation position.

FN15. This is the same conclusion reached by the Tenth Circuit in *Al-Maleki*, 558 F.3d 1200, 1206. There the court was faced with the same relevant facts: USCIS had failed to meet its 120-day deadline for adjudicating an application; the applicant inquired about the delay, giving the agency notice of it; the source of the delay was the name check; after the applicant filed suit, USCIS asked the FBI to expedite the name check and adjudication was soon thereafter complete. As the court pointed out, these facts undermine the agency's contention that it is unable to process applications in a timely fashion because of the backlog in name check requests. *Id.* at 1210. Rather, USCIS has simply elected to ignore delayed applications until a lawsuit is filed. But USCIS's knowledge that its statutory deadline has passed and its capacity to address the problem by requesting expedition of the name check should motivate the agency to act before a suit is filed. Its decision to expedite requests only if it is sued "is not reasonable in fact." *See id.*

Although I do not foreclose the possibility that the government could provide substantial justification

grounded in the facts of a particular case for not complying with the 120-day statutory requirement, the government has advanced no such particularized justification here. Instead, the agency has offered only general justifications for the delay, including the importance of the agency's policy of requiring name checks for security purposes and the significant backlog of names that the FBI is processing. These explanations, however, do not justify the agency's disregard of the clear statutory mandate. Although I also acknowledge that the agency has valid--indeed persuasive-- reasons for requiring comprehensive FBI name checks under ordinary circumstances, that policy determination cannot justify the failure to comply with a statutory deadline. *See, e.g., Rotinsulu v. Mukasey*, 515 F.3d 68, 72 (1st Cir.2008) ("An agency has an obligation to abide by its own regulations.").

Despite the agency's plaint to the contrary, USCIS was not caught in a hopeless bind between the national security imperatives of name check review and the 120-day statutory and regulatory deadline. As the facts in this case demonstrate, USCIS could have addressed the name check delay in a manner consistent with the applicable laws and regulations, and without sacrificing national security interests, by doing generally and more promptly exactly what it did here. Instead of waiting for a lawsuit, the agency could have bumped applicants "mistakenly" interviewed before their name checks were completed to the front of the name check line *before* the 120-day deadline lapsed, saving the applicants and the agency the expense of a lawsuit. At the very least, in those cases where the deadline has already passed and the applicant has informed the agency of this fact, USCIS could ask the FBI for expedited treatment of the name check. [FN16] What the agency surely cannot do with "substantial justification" is blatantly ignore the requirements imposed on it by Congress and by itself.

FN16. *See supra* notes 14, 15 and accompanying text.

The majority's attempt to invoke an administrative

562 F.3d 84  
562 F.3d 84  
(Cite as: 562 F.3d 84)

Page 30

policy to trump an explicit statutory command turns *Chevron* deference on its head. See *Stinson v. United States*, 508 U.S. 36, 44, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) ("Under *Chevron*, if a statute is unambiguous the statute governs ...." (citations omitted)). In light of the 120-day statutory directive, the regulatory confirmation of that directive, the agency's long delay (nearly four times the statutory period in length), and the absence of any evidence that the government tried to expedite \*114 Aronov's application to comply with the statute until he sued, the government's conduct toward Aronov can only be classified as unreasonable and not substantially justified. See *Russell v. Nat'l Mediation Bd.*, 775 F.2d 1284, 1290 (5th Cir.1985) (concluding that the government's position was not substantially justified because it breached a clear statutory mandate). Accordingly, I would hold that the government was not substantially justified in its pre-litigation position.

### III.

In order to defend the government's position and avoid the simple truth of this case, the majority has burdened its analysis of the prevailing party issue with undue complexity, and its analysis of the substantial justification issue with unwarranted national security concerns. After waiting through a delay that violated statutory and regulatory deadlines by 440 days, Aronov invoked his explicit statutory right to petition a district court to determine his naturalization application or order USCIS to do so. The lawsuit prompted the agency to complete the name check that had apparently caused the delay within a few weeks of the filing of the lawsuit. With that process completed, the parties asked the court to remand the case to the agency so the naturalization process could be completed. Invoking the EAJA, Aronov then successfully sought a modest award of \$4,270.94 in attorney's fees from the district court for the time and trouble he incurred. When the government appealed that award to us, a majority of the panel ruled for Aronov.

But Aronov's time and trouble were far from over.

There was the government's petition for en banc review, and now this. The majority's fierce embrace of the government's opposition to this modest award is out of all proportion to the stakes. Its refusal to credit the district court's explanation of its remand order is unprecedented. Its invocation of national security concerns to justify the government's handling of Aronov's application is unjustified. We are left with a holding that is contrary to the purpose and the promise of the EAJA. I respectfully dissent.

562 F.3d 84

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# **ATTACHMENT 3**

## When Does a Party Prevail?: A Proposed “Third-Circuit-Plus” Test for Judicial Imprimatur

### I. INTRODUCTION

Congress has encouraged individual plaintiffs to bring civil rights lawsuits by providing that their attorney’s fees will be paid for if a judge deems them to be the “prevailing party.”<sup>1</sup> Congress utilizes these fee-shifting statutes to further important public policies by allowing private citizens to bring suits to protect their civil rights.<sup>2</sup> However, when parties resolve their suits via private settlement, the question of whether a party has “prevailed” is not always easily answered. Federal courts of appeals have split three ways on the questions of whether a party to a private settlement may be considered a prevailing party, and if so, what degree of judicial involvement is required for such a determination. This circuit split results in varying availability of attorney’s fees to civil rights plaintiffs throughout the country. This disagreement among circuits thus undermines Congress’s public policy of encouraging “private attorneys general” that underlies the fee-shifting statutory regimes.<sup>3</sup>

This split of authority stems from the Supreme Court’s lack of guidance in its most recent attorney’s fees case, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.<sup>4</sup> There the Court eliminated the “catalyst theory”—a widely

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1. See, e.g., Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (b) (2000); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (2000); Fair Housing Act, 42 U.S.C. § 3613(c)(2) (2000); Americans with Disabilities Act of 1990, 42 U.S.C. § 12205 (2000); Voting Rights Act Amendments of 1975, 42 U.S.C. § 19731(e) (2000); see also *Marek v. Chesny*, 473 U.S. 1, 43–51 (1985) (appendix to opinion of Brennan, J., dissenting); Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 439–40; Robin Stanley, Note, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To the Prevailing Party Goes the Spoils . . . and the Attorney’s Fees!*, 36 AKRON L. REV. 363, 368 (2003) (“Congress introduced fee-shifting statutes to encourage individuals to use private enforcement for the implementation of public policies.”).

2. See, e.g., Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 (“The idea behind the ‘private attorney general’ can be stated relatively simply: Congress can vindicate important public policy goals by empowering private individuals to bring suit.”).

3. See *infra* Part II.A.

4. 532 U.S. 598 (2001).

used test<sup>5</sup> for determining prevailing party status—by adhering to a strict interpretation of the “plain language”<sup>6</sup> of the fee-shifting statutes. The Court reasoned that the catalyst theory permitted fee awards in the absence of any court-ordered or judicially sanctioned change in the parties’ legal relationship.<sup>7</sup> To illustrate, the Court explained that both a judgment on the merits and a consent decree involved the necessary judicial approval and oversight to provide prevailing party status.<sup>8</sup> However, it failed to adequately delineate the parameters of prevailing party status in the private settlement context. This failure has led to a divergence of views as to how much judicial imprimatur in the resolution of a lawsuit is required before a party can be said to have “prevailed.”<sup>9</sup> This question gains importance in light of the various ways in which a suit may end.

The level of judicial imprimatur in the resolution of a suit varies according to the manner in which a suit concludes. If a case actually culminates in a trial verdict, the prevailing party is readily ascertainable because the judgment on the merits bears full judicial sanction. However, not all cases are tried to conclusion, as parties often negotiate a settlement prior to litigation in order to save costs.<sup>10</sup> Parties wishing to resolve a dispute prior to litigation may enter their private agreement as an official judgment of the court, known as a consent decree.<sup>11</sup> This action bears the highest level of judicial involvement short of proceeding to trial. Alternatively, parties may enter a purely private settlement<sup>12</sup> and

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5. *Buckhannon*, 532 U.S. at 600–02. Prior to *Buckhannon*, a party could “prevail” under the catalyst theory if it achieved a favorable result on any issue in its suit, even if the defendant’s change in behavior was voluntary and unconnected with any judicial decree. See *infra* Part III.A. In *Buckhannon*, the Court struck down the catalyst theory as a basis for prevailing party status and ruled that a party only prevails when it obtains actual judicial relief. See *infra* Parts III.B. The theory is so named because the prevailing party’s lawsuit, or threat thereof, has acted as a catalyst to achieve the desired result, even if that result occurred through a defendant’s voluntary cessation of allegedly offending activities. See *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429–30 (8th Cir. 1970) (“[The plaintiff]’s lawsuit acted as a catalyst which prompted the [defendant] to take action . . . seeking compliance with the requirements of Title VII.”).

6. *Buckhannon*, 532 U.S. at 605.

7. See *infra* notes 88–97 and accompanying text.

8. See *infra* notes 93–94 and accompanying text.

9. See *infra* notes 152–154 and accompanying text.

10. See *infra* note 33.

11. See *infra* Part II.B.1.

12. As used in this Comment, the term “purely private settlement” denotes a private settlement that has been negotiated between the parties, who then stipulate to a dismissal of the action by the court. Purely private settlements are distinguished from those situations in which the terms of the settlement are incorporated into the court order dismissing a case. See *infra* note 113.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

petition the judge to enter a stipulated dismissal order.<sup>13</sup> Such an action generally bears the least judicial imprimatur. Parties may also opt for a resolution somewhere between private settlements and consent decrees on the spectrum of judicial involvement.<sup>14</sup>

The three-way split among the circuits revolves around whether a party to a private settlement that falls short of a consent decree can ever be termed a prevailing party. Contrary to the majority of circuits interpreting the issue, the Ninth Circuit has ruled that a party with nothing more than a private settlement may be awarded fees as a prevailing party.<sup>15</sup> At the other end of the spectrum, the Eighth Circuit has ruled that nothing short of a consent decree or a judgment on the merits may serve as the basis for prevailing party status.<sup>16</sup> Finding a middle ground, and representative of the majority of circuits to have considered the issue, the Third Circuit ruled that a party with a settlement agreement may be a prevailing party if the settlement bears sufficient judicial imprimatur.<sup>17</sup>

This Comment argues that of the various approaches taken by the circuits, the Third Circuit's comes closest to satisfying the Supreme Court's concerns regarding judicial approval and oversight. However, while the Third Circuit's test satisfies the Court's concern regarding oversight, it fails to satisfy the concern regarding approval. A good remedying test should clearly spell out the level of judicial oversight and approval that gives rise to prevailing party status.<sup>18</sup> Therefore, the Third Circuit's test should be augmented by adding an explicit merits-review requirement to create a "Third-Circuit-plus" test. Because *Buckhannon* was decided in the context of two civil rights laws, this Comment addresses the various policy concerns from the viewpoint of furthering Congress's civil rights public policy. The proposed test could also apply to other federal statutory regimes.<sup>19</sup>

Part II of this Comment examines the history of the Supreme Court's prevailing party jurisprudence prior to *Buckhannon*. Part III analyzes the

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13. See *infra* Part II.B.2.

14. A court may incorporate the private settlement terms into the order of dismissal and/or explicitly retain jurisdiction over the settlement agreement. See *infra* Part II.B.3 and accompanying text.

15. See *infra* Part IV.A.

16. See *infra* Part IV.B.

17. See *infra* Part IV.C.

18. See *infra* note 107 and accompanying text.

19. See *infra* note 28 and accompanying text.

Supreme Court decision in *Buckhannon*, focusing on its concerns regarding “judicial imprimatur.” Part IV presents the ensuing disagreements among the circuit courts regarding how much judicial imprimatur in a private settlement is sufficient to bestow prevailing party status. Part V argues that the competing approaches taken by the Eighth and Ninth Circuits are overly restrictive and overly broad respectively and then proposes a judicial imprimatur test based on the Third Circuit’s approach in *Truesdell*. Part VI concludes this Comment.

## II. BACKGROUND

This Part first analyzes the “American Rule” of attorney’s fees and the purposes behind fee-shifting statutes. It next explores the characteristics of the various litigation conclusion mechanisms—purely private settlements, consent decrees, and those that fall somewhere between the two in terms of the level of judicial involvement. The approaches of the various circuits are founded upon a distinction in the level of judicial involvement in purely private settlements versus consent decrees. As a threshold matter, one must understand the distinguishing characteristics of these two dismissal mechanisms.

### A. The “American Rule” and Fee-Shifting Statutes

Undergirding the Court’s “prevailing party” jurisprudence is the default “American rule,” under which each side bears the burden of paying its own attorney’s fees—in other words, the “prevailing party is not entitled to collect from the loser.”<sup>20</sup> However, several federal courts created a “private attorney general exception to the traditional American rule,” which recognized that “[w]here the law relies on private suits to effectuate congressional policy in favor of broad public interests, attorney’s fees are often necessary to ensure that private litigants will initiate such suits.”<sup>21</sup> On the heels of the Supreme Court’s disapproval of this judicially created right to a fee award,<sup>22</sup> Congress passed the Civil

20. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 602 (2001) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975)).

21. *Wilderness Soc’y v. Morton*, 495 F.2d 1026, 1029–30 (D.C. Cir. 1974), *overruled by Alyeska*, 421 U.S. at 263; *see also* Dobbs, *supra* note 1, at 439; Karlan, *supra* note 2, at 186–87; Daniel Steuer, *Another Brick in the Wall: Attorney’s Fees for the Civil Rights Litigant After Buckhannon*, 11 GEO. J. ON POVERTY L. & POL’Y 53, 53–54 (2004).

22. The Court in *Alyeska* ruled that courts did not have the authority to award fees to prevailing parties under any common-law theory, but could only do so under explicit statutory authority. 421 U.S. at 263.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

Rights Attorney's Fees Awards Act<sup>23</sup> to explicitly provide a prevailing party the right to a fee award when vindicating rights under federal civil rights law.<sup>24</sup>

In these statutes, Congress specifically encourages private citizens to act as "private attorneys general" by providing for fee shifting.<sup>25</sup> Indeed, one commentator has described "prevailing party" fee shifting as the "fuel that drives the private attorney general engine."<sup>26</sup> Absent fee shifting, few if any private parties would have the economic ability to see a civil rights action through to completion.<sup>27</sup> This Comment focuses on the policy behind the various civil rights statutes, although there are many other federal statutory regimes that allow for "prevailing party" fee shifting.<sup>28</sup> Given that *Buckhannon* has consistently been applied to

23. 42 U.S.C. § 1988(b) (2004).

24. See *supra* note 1. Less often, federal statutes allow a court to award attorney's fees "whenever the court determines such award is appropriate." Endangered Species Act, 16 U.S.C. § 1540(g)(4) (2000); see, e.g., Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d) (2000); Clean Air Act, 42 U.S.C. §§ 7604(d), 7607(f), 7622(e)(2) (2000). The Supreme Court has recognized that Congress intended for these "whenever appropriate" fee-shifting statutes "to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 688 (1983). Hence, courts following *Buckhannon* have consistently maintained the catalyst theory as available for fee shifting in those statutes. See, e.g., *Loggerhead Turtle v. County Council*, 307 F.3d 1318, 1325 (11th Cir. 2002) ("[W]e agree that *Buckhannon* does not invalidate use of the catalyst test as a basis for awarding attorney's fees under the [Endangered Species Act] . . .").

25. The Court has recognized:

When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law . . . . If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

*Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 401–02 (1968). There are over one hundred federal statutes that award fees to the "prevailing party." See *Marek*, 473 U.S. at 43–51 (appendix to opinion of Brennan, J., dissenting).

26. Karlan, *supra* note 2, at 205.

27. *Id.* at 205–06 ("[M]ost civil rights plaintiffs are unable to afford counsel and without a fees statute, the available counsel would be limited to attorneys willing to represent them pro bono.")

28. Many of the arguments presented in this Comment could be imported into those contexts. The contexts of federal legislation other than civil rights in which *Buckhannon's* construction of "prevailing party" applies include: special education, voting rights, freedom of information, fair credit reporting, endangered species protection, and employee retirement income. See, e.g., Lucia A. Silecchia, *The Catalyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a*

“prevailing party” fee-shifting statutes outside the civil rights context,<sup>29</sup> it is important that courts adopt a consistent approach to fee shifting that best serves Congress’s intent to encourage private citizen suits through the availability of fee shifting.<sup>30</sup>

*B. The Continuum of Litigation-Conclusion Mechanisms  
Short of Final Judgments*

The circuits split when deciding whether parties may be considered to have prevailed in situations falling between private settlements on the one hand and consent decrees on the other. Private settlements are contractual by nature—that is, they represent an agreement between two private parties. Consent decrees, on the other hand, are a hybrid of private contract and judicial decree.<sup>31</sup> Additionally, parties may enter into dismissals that ultimately entail a degree of judicial involvement more than private settlements but somewhat less than consent decrees.

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*Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 3–4 n.9 (2004) (collecting articles) (“Because environmental law relies heavily on citizen suits, those in the environmental arena speculated on what the Court’s interpretation of ‘prevailing party’ in *Buckhannon* might mean in that context.”); Stanley, *supra* note 1, at 368 n.28 (citing various federal statutes containing “prevailing party” fee-shifting provisions); Mark C. Weber, *Special Education Attorneys’ Fees After Buckhannon Board & Care Home, Incorporated v. West Virginia Department of Health and Human Resources*, 2002 BYU EDUC. & L.J. 273.

29. The Court in *Buckhannon* recognized that it interprets all “fee-shifting provisions consistently.” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 n.4 (2001). See generally Silecchia, *supra* note 28, at 41–42 (“[N]early 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.”) (quoting Kyle A. Loring, Note, *Catalyst Theory Meets the Supreme Court—Common Sense Takes a Vacation*, 43 B.C. L. REV. 973, 993 (2002)).

30. One commentator has noted that because some environmental protection statutes include “prevailing party” language while others include “whenever appropriate” language, “the availability of the catalyst theory is now automatically barred in one set of environmental statutes and yet still viable in another.” Silecchia, *supra* note 28, at 61. Silecchia later observes,

There seems to be no clear distinction between environmental statutes employing the two different standards. For example, the [Clean Air Act] and the [Clean Water Act] use different standards, although there is no compelling reason to do so. Moreover, having two standards can create confusion. Absent a true difference in the citizen enforcement regimes of the statutes that employ these standards, there seems to be no reason to continue to have two different standards.

*Id.* at 81; see also Stanley, *supra* note 1, at 396–97 (“Those particularly harmed are plaintiffs enforcing several environmental fee-shifting statutes where damages are not recoverable and only injunctive relief is available.”); Marisa Ugalde, *The Future of Environmental Citizen Suits After Buckhannon Board & Home, Inc. v. West Virginia Department of Health and Human Resources*, 8 ENVTL. LAW. 589, 608–09 (2002) (“[T]he *Buckhannon* decision inevitably results in an illogical and unjustifiable inconsistency in the enforcement of federal environmental laws.”).

31. See *infra* Part II.B.1–2.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

This Part will first discuss consent decree characteristics and then will explore the contrasting elements of purely private settlements. It concludes with a look at the characteristics—in terms of judicial involvement—of those dismissals that fall between private settlements and consent decrees on the continuum of judicial involvement.

*1. Consent decrees*

A consent decree is “an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees.”<sup>32</sup> Although the agreement underlying the consent decree is a private agreement, the parties submit that agreement to the court for incorporation into a formal decree.<sup>33</sup> A judge’s involvement is fairly extensive. A judge cannot merely rubber stamp a consent decree. On the contrary, a judge “must review a consent decree to ensure that it is ‘fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; [and] that it is consistent with the objectives of Congress.’”<sup>34</sup> This fairness review is a key characteristic that distinguishes consent decrees from purely private settlements.

Additionally, courts have recognized that in deciding whether to approve a consent decree, the trial judge must “consider the nature of the litigation and the purposes to be served by the decree.”<sup>35</sup> Thus, for example, it is appropriate for a judge to consider the extent to which a consent decree furthers congressional purposes when the original suit was brought under federal civil rights laws. Accordingly, “the decree must be consistent with the public objectives sought to be attained by Congress.”<sup>36</sup> These factors illustrate a judge’s high level of involvement

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32. *Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 378 (1992); *see also* BLACK’S LAW DICTIONARY 419 (7th ed. 1999) (defining “consent decree” as “[a] court decree that all parties agree to”).

33. The Supreme Court has recognized that a consent decree is “primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating.” *Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland*, 478 U.S. 501, 528 (1986).

34. *Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 58 (1st Cir. 1993) (quoting *Durrett v. Hous. Auth.*, 896 F.2d 600, 604 (1st Cir. 1990)); *see also* 46 AM. JUR. 2D *Judgments* § 216 (2004).

35. *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (per curiam) (Rubin, J., concurring).

36. *Id.* (citing *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980)).

in the consent decree process. Specifically, before approving a consent decree, a judge should determine that the proposed settlement “represents a reasonable factual and legal determination based on the facts of record.”<sup>37</sup> Without being an actual review of the merits, this factual and legal determination that the settlement is reasonable reflects the judicial stamp of approval necessary for any official court decree.

Because of its unique nature, scholars have described the consent decree as “a kind of legal hermaphrodite, with characteristics both of a contract and of a court order.”<sup>38</sup> Courts have recognized that the “dual character . . . ‘result[s] in different treatment for different purposes.’”<sup>39</sup> Because it is a decree, a consent decree is enforceable “by judicial sanctions, including citation for contempt if it is violated.”<sup>40</sup> Accordingly, consent decrees are desirable to parties because they have “the force of *res judicata*, protecting the parties from future litigation,” while saving “the time, expense, and . . . psychological toll [as well as] the inevitable risk of litigation.”<sup>41</sup>

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37. *Id.*

38. Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 894; *see also* United States v. ITT Cont'l Baking Co., 420 U.S. 223, 237 n.10 (1975) (“Consent decrees and orders have attributes both of contracts and of judicial decrees.”); *Smyth v. Rivero*, 282 F.3d 268, 280 (4th Cir. 2002). The court in *Smyth* cites to Judge Rubin’s concurrence in *City of Miami*:

Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court’s sanction on and power behind a decree that violates Constitution, statute, or jurisprudence.

664 F.2d at 441 (comparing level of judicial scrutiny in consent decree to that employed in review of a class action settlement).

39. *Smyth*, 282 F.3d at 280 (quoting Local No. 93, Int’l Ass’n of Firefighters v. City of Cleveland, 478 U.S. 501, 519 (1986)).

40. *City of Miami*, 664 F.2d at 440. For a discussion of why the contempt power is important in the prevailing party analysis, *see infra* Part V.B.2. Parties may value this retained jurisdiction because it gives them an easier way to obtain subsequent enforcement of the settlement than if they had a purely private settlement. *See* 46 AM. JUR. 2D *Judgments* § 224 (2004).

41. *City of Miami*, 664 F.2d at 439. The court points out that if parties settle by way of purely private contract, “the only penalty for failure to abide by the agreement is another suit.” *Id.*; *see infra* note 47 and accompanying text.

429] Prevailing Parties, Attorney's Fees, and Judicial Imprimatur2. *Purely private settlements*

Purely private settlements are distinct from consent decrees in the level of both judicial approval and judicial oversight.<sup>42</sup> First, private settlements "ordinarily do[] not receive the approval of the court."<sup>43</sup> Typically, when two parties have reached a private settlement they will then stipulate to a dismissal of the suit.<sup>44</sup> A judge's involvement is minimal<sup>45</sup> and is limited to ensuring that the defendant is not seriously prejudiced.<sup>46</sup>

Private settlements are also distinguished from consent decrees in terms of enforcement. Clear Supreme Court precedent establishes that a federal court's inherent authority does not support "an assertion of jurisdiction to enforce a settlement agreement entered into by the parties and resulting in dismissal of the case pursuant to a stipulation by the parties."<sup>47</sup> Therefore, any breach of the terms of a purely private settlement agreement gives rise to a claim for breach of contract but not for contempt of court as is available under a consent decree.

3. *Dismissal orders incorporating settlement terms*

As an alternative to either a purely private settlement or a consent decree, parties may opt for an intermediate level of judicial scrutiny. Often, after parties conclude settlement negotiations, they will want the court to retain jurisdiction over the enforcement of the agreement. If parties do not want the settlement memorialized in a consent decree, they may seek retained jurisdiction by requesting that the judge either incorporate the terms of the settlement agreement into the order of dismissal or include a separate provision in the dismissal order

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42. *Smyth*, 282 F.3d at 280–81. See *infra* note 113.

43. *Id.* at 280. Other circuit courts have also recognized that "[t]here are only certain designated types of suits, for instance consent decrees, class actions, shareholder derivative suits, and compromises of bankruptcy claims where settlement of the suit requires court approval." *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 835 (3d Cir. 1995).

44. FED. R. CIV. P. 41(a)(1) provides for a voluntary dismissal by stipulation of both parties. See generally 8 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* §§ 41.01–41.34 (3rd ed. 1998).

45. See *infra* notes 190, 194 and accompanying text.

46. 8 MOORE, *supra* note 44, § 41.01(2).

47. *Smyth*, 282 F.3d at 282 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379–81 (1994)).

acknowledging the settlement agreement and specifically retaining jurisdiction to enforce its terms.<sup>48</sup>

The primary distinction between an incorporated settlement agreement and a consent decree is the level of judicial approval. In consent decrees, the judge is required to sign off on the fairness of the settlement through a formal "fairness hearing."<sup>49</sup> By contrast, nothing requires a judge to perform any kind of review of the terms of a settlement when those terms are simply incorporated into the dismissal order. Presumably, a judge would undertake a cursory review of the incorporated settlement terms pursuant to its general "responsibility to ensure that its orders are fair and lawful."<sup>50</sup> Incorporated settlements can thus be viewed on the continuum as involving more judicial imprimatur than purely private settlements but somewhat less than consent decrees. The issue of whether incorporated settlements should be considered as the functional equivalent of consent decrees lies at the heart of the ensuing post-*Buckhannon* debate.

### III. SUPREME COURT PREVAILING PARTY JURISPRUDENCE

A review of the Supreme Court's pronouncements prior to *Buckhannon* reveals some contours of the requirements for prevailing party status. Taken as a whole, the pre-*Buckhannon* fees cases present three general requirements for a determination of prevailing party status: (1) a judicial determination that a party has achieved success on the merits, (2) direct relief at the time of the judgment or settlement, and (3) a court-ordered sanctioning of a material alteration in the parties' legal relationship. The Court has upheld a fee award only in situations where there is sufficient judicial imprimatur in the dismissal.<sup>51</sup> This Part first reviews the Court's prevailing party decisions decided prior to *Buckhannon*. This Part then examines the *Buckhannon* decision and its implications for parties seeking to secure prevailing party status.

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48. *Id.*

49. *See supra* notes 34–36 and accompanying text.

50. *Smyth*, 282 F.3d at 282.

51. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 606 (2001) ("Never have we awarded attorney's fees for a nonjudicial alteration of actual circumstances." (internal cross-reference omitted)); *infra* notes 90–97 and accompanying text.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur**A. Decisions Prior to Buckhannon*

Through a series of early decisions, the Court provided guidelines regarding what constitutes a prevailing party for federal fee-shifting statutes. In *Hewitt v. Helms*,<sup>52</sup> the Court elaborated a merit requirement, which requires that a plaintiff achieve some judicial determination that he has “receive[d] at least some relief on the merits of his claim before he can be said to prevail,”<sup>53</sup> either at the conclusion of litigation or at any interlocutory stage.<sup>54</sup> This does not mean that a party must receive a formal adjudication in the form of a judgment on the merits. The Court recognized in *Maher v. Gagne*<sup>55</sup> that a litigant can receive a fee award when “prevail[ing] through a settlement rather than through litigation.”<sup>56</sup> The Court also recognized that a party to a consent decree may also be a prevailing party.<sup>57</sup> A judge reviewing a consent decree must examine the merits of the plaintiff’s claim, albeit to a lesser extent than in a judgment on the merits, to make sure that prevailing party status is not awarded to

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52. 482 U.S. 755 (1987).

53. *Id.* at 760. *Hewitt* involved a former inmate who “brought suit under 42 U.S.C. § 1983 against a number of prison officials, alleging that the lack of a prompt hearing on his misconduct charges and his conviction for misconduct on the basis of uncorroborated hearsay testimony violated his rights to due process.” *Id.* at 757. The inmate was released on parole prior to the adjudication of his suit. *Id.* While his suit was pending, the state Bureau of Corrections amended its policies. *Id.* at 759. Upon motion for attorney’s fees as a prevailing party, the Third Circuit held that its prior ruling that the plaintiff’s constitutional due process rights had been violated while still incarcerated was a form of judicial relief sufficient to grant prevailing party status. *Id.* at 759.

The Court noted that “[t]he most that [the plaintiff] obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made.” *Id.* at 760. Although the Court did not precisely define the term “prevailing party,” it did state that “[w]hatever the outer boundaries of that term may be, *Helms* does not fit within them.” *Id.* at 759–60. The Court thus established that purely procedural victories, such as here surviving a motion to dismiss, did not have sufficient judicial determination of the merits to base an award of attorney’s fees.

54. *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (“Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims.”).

55. 448 U.S. 122 (1980).

56. *Id.* at 129. The Court cited to a Senate report for 42 U.S.C. § 1988, which stated that “for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.” *Id.* (citing S. REP. NO. 94-1011).

57. *Id.* (“[T]he Senate Report expressly stated that ‘for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief.’”) (quoting S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912).

one who brings a “nonfrivolous but nonetheless potentially meritless lawsuit.”<sup>58</sup>

In addition to the merit requirement, the Court has elaborated both a timing requirement and a material alteration requirement. The timing requirement simply requires that “[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.”<sup>59</sup> The material alteration requirement mandates that a party prevails for fee-shifting purposes only when there has been a “material alteration of the legal relationship of the parties.”<sup>60</sup> In other words, a prevailing party must be able to point to “a resolution of the dispute which changes the legal relationship between itself and the defendant.”<sup>61</sup> This material alteration requirement is separate from the merit requirement in the sense that a settlement may alter the legal relationship between two parties even when the judge has not evaluated the merits of the plaintiff’s underlying claims.

Concurrent with these Supreme Court pronouncements, the federal courts of appeals developed the catalyst theory, under which courts consider a plaintiff the “prevailing party” if [the party] achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct.”<sup>62</sup> The catalyst theory served the purpose of the Civil Rights Attorney’s Fees Awards Act by encouraging impecunious clients to enforce their rights.<sup>63</sup> Most circuits adopted the catalyst theory for federal fee-shifting statutes on the theory that, defined in its “practical sense,”<sup>64</sup> the term “prevailing party” allows for fee shifting when a party’s “ends are accomplished as a result of the litigation.”<sup>65</sup>

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58. *Id.* at 606.

59. *Farrar v. Hobby*, 506 U.S. 103, 111 (1992).

60. *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989) (describing the material alteration in the legal relationship as the “touchstone” of prevailing party status).

61. *Id.* at 792; *see also* *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (“[P]laintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.”) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1st Cir. 1978)).

62. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 601 (2001). The Eighth Circuit was the first court of appeals to recognize the catalyst theory. *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421, 429–30 (8th Cir. 1970).

63. *See supra* notes 22–27 and accompanying text.

64. *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982) (quoting *Dawson v. Patrick*, 600 F.2d 70, 78 (7th Cir. 1979)).

65. *Associated Builders & Contractors v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (quoting *Williams v. Leatherbury*, 672 F.2d 549, 550 (5th Cir. 1982)). Prior to *Farrar* all

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

The Supreme Court's 1992 decision in *Farrar v. Hobby*<sup>66</sup> provided "one of the clearest formulations of the prevailing party jurisprudence"<sup>67</sup> while at the same time casting doubt on the continued viability of the catalyst theory. The Court summarized its prior rulings<sup>68</sup> and enumerated the necessary components of "prevailing party" status: a party (1) "must obtain at least some relief on the merits of his claim";<sup>69</sup> (2) must be directly benefited by the relief "at the time of the judgment or settlement";<sup>70</sup> and (3) must have secured a "material alteration of the legal relationship of the parties."<sup>71</sup> Although the Fourth Circuit read *Farrar* as vitiating the catalyst theory,<sup>72</sup> the vast majority of circuit courts reaffirmed the continued viability of the catalyst theory after

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circuit courts recognized the catalyst theory. See *Nadeau*, 581 F.2d at 279–81; *Gerena-Valentin v. Koch*, 739 F.2d 755, 758–59 (2d Cir. 1984); *Institutionalized Juveniles v. Sec'y of Pub. Welfare*, 758 F.2d 897, 910–17 (3d Cir. 1985); *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979); *Robinson v. Kimbrough*, 652 F.2d 458, 465–67 (5th Cir. 1981); *Citizens Against Tax Waste v. Westerville City Sch. Dist. Bd. of Educ.*, 985 F.2d 255, 257–58 (6th Cir. 1993); *Stewart*, 675 F.2d at 851; *Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980); *Am. Constitutional Party v. Munro*, 650 F.2d 184, 187–88 (9th Cir. 1981); *J & J Anderson, Inc. v. Erie*, 767 F.2d 1469, 1474–75 (10th Cir. 1985); *Doe v. Busbee*, 684 F.2d 1375, 1379–80 (11th Cir. 1982); *Grano v. Barry*, 783 F.2d 1104, 1108–10 (D.C. Cir. 1986).

66. 506 U.S. 103 (1992).

67. *Walker v. City of Mesquite*, 313 F.3d 246, 249 (5th Cir. 2002) (discussing *Farrar*).

68. *Farrar*, 506 U.S. at 108–12.

69. *Id.* at 111 (citing as examples "enforceable judgment against the defendant . . . or comparable relief through a consent decree or settlement" (internal citations omitted)).

70. *Id.* (citing *Hewitt v. Helms*, 482 U.S. 755, 764 (1987)).

71. *Id.* (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)). The Court condensed these factors into a more succinct statement: "In short, 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." *Id.* at 111–12.

72. *S-1 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994). The *Farrar* Court explained, "Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." 506 U.S. at 112–13 (citations omitted). The Fourth Circuit interpreted this language to stand for the proposition that "[a] person may not be a 'prevailing party' plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought in a § 1983 action." *S-1*, 21 F.3d at 51. The court then cited to *Farrar* as justification for its holding that the catalyst theory was "no longer available." *Id.* The Supreme Court later recognized, however, that *Farrar* "involved no catalytic effect," *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 194 (2000), and that the fate of the catalyst theory was still "an open question." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 n.5 (2001).

*Farrar*.<sup>73</sup> The circuit courts based their decisions to reaffirm the catalyst theory on the grounds that Congressional intent in passing the Civil Rights Attorney's Fees Awards Act required a broad definition of prevailing party.<sup>74</sup>

Prior to *Buckhannon*, the Supreme Court had a fairly extensive history of interpreting fee-shifting statutes and deciding what constituted prevailing party status. This jurisprudence coexisted with a large body of circuit court precedent advocating the use of the catalyst theory. Indeed, at the time of *Buckhannon*, all but one of the circuit courts adhered to a broad interpretation of "prevailing party" and embraced the catalyst theory in order to satisfy the policy considerations of federal fee-shifting statutes.<sup>75</sup> However, those policy considerations would not save the catalyst theory from the buzz saw of *Buckhannon's* literalist reading of the statutes.

### B. The Buckhannon Decision

In *Buckhannon*, the Supreme Court considered whether the catalyst theory was a proper basis for "prevailing party" status. *Buckhannon's* lack of sufficient guidance regarding how to precisely delineate the bounds of the term "prevailing party" has led to confusion among the circuit courts.<sup>76</sup>

#### 1. The background of Buckhannon

In 1997, the state of West Virginia decided that the Buckhannon Board and Care Home had violated a state law that required "all residents of residential board and care homes be capable of 'self-preservation,' or capable of moving themselves 'from situations involving imminent

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73. See *Stanton v. S. Berkshire Reg'l Sch. Dist.*, 197 F.3d 574, 577 n.2 (1st Cir. 1999); *Marble v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *Payne v. Bd. of Educ.*, 88 F.3d 392, 397-98 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 276 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski City Sch. Dist.*, # 1, 17 F.3d 260, 263 n.2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-52 (10th Cir. 1994); *Morris v. W. Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999).

74. See, e.g., *Baumgartner*, 21 F.3d at 548 ("[F]rom a policy standpoint, if defendants could deprive plaintiffs of attorney's fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing these civil rights suits, a result inconsistent with Congress' intent in enacting section 1988.").

75. See *supra* note 73 and accompanying text.

76. See *infra* Part IV.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

danger, such as fire.”<sup>77</sup> After the state ordered it to cease and desist its operations, Buckhannon filed suit<sup>78</sup> alleging that the state’s “self-preservation” requirement violated the Fair Housing Amendments Act of 1988 (FHAA)<sup>79</sup> and the Americans with Disabilities Act of 1990 (ADA).<sup>80</sup> Soon thereafter, the state legislature eliminated the “self-preservation” requirement,<sup>81</sup> and the district court subsequently granted the state’s motion to dismiss the case as moot.<sup>82</sup> Following dismissal, the plaintiffs sought attorney’s fees, arguing that their suit acted as a catalyst to the legislative change in the law.<sup>83</sup> The district court held that the plaintiffs were not prevailing parties based on the Fourth Circuit’s earlier precedent rejecting the catalyst theory,<sup>84</sup> a decision which the Fourth Circuit affirmed in an unpublished, per curiam opinion.<sup>85</sup>

## 2. *The Supreme Court opinion*

In *Buckhannon*, the Supreme Court affirmed the Fourth Circuit’s rejection of the catalyst theory.<sup>86</sup> The Court refused to rely on policy considerations to determine the meaning of “prevailing party”; rather, it turned to *Black’s Law Dictionary*, which defines “prevailing party” as “[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.”<sup>87</sup> The Court reiterated its prior holding that a plain textual reading requires a party to receive “at least some relief on the merits of his claim before he can be said to prevail.”<sup>88</sup> This ran counter to the broad application of the catalyst theory, which

77. *Buckhannon*, 532 U.S. at 600 (quoting W. VA. CODE §§ 16-5H-1 to 16-5H-2 (1998)).

78. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 203 F.3d 819 (Table), 2000 WL 42250, at \*1 (4th Cir. Jan. 20, 2000).

79. 42 U.S.C. §§ 3601–19 (2000).

80. 42 U.S.C. §§ 12101–12213.

81. *Buckhannon*, 2000 WL 42250, at \*1.

82. *Id.*

83. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609 (2001). Both statutes provide for an award of attorney’s fees to the “prevailing party.” 42 U.S.C. § 3613(c)(2); 42 U.S.C. § 12205.

84. *Buckhannon*, 532 U.S. at 601 (citing *S-1 v. State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994)).

85. *Id.*

86. *Id.* In a five to four split, Chief Justice Rehnquist authored the majority opinion for himself and Justices Scalia, Thomas, O’Connor, and Kennedy. Justice Scalia, joined by Justice Thomas, wrote a concurring opinion. Justice Ginsburg wrote for the dissent, joined by Justices Stevens, Souter, and Breyer.

87. *Id.* at 603 (quoting BLACK’S LAW DICTIONARY 1145 (7th ed. 1999)).

88. *Id.* (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).

permitted a fee award if the plaintiff could show "that the 'complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.'"<sup>89</sup> The catalyst theory also permitted a party to recover attorney's fees in situations "where there is no judicially sanctioned change in the parties' legal relationship."<sup>90</sup> The Court's adherence to the plain meaning of the term "prevailing party" required a rejection of the catalyst theory.

The Court synthesized from its prior decisions a rule that a party only "prevails" when the change in the legal relationship between the two parties has sufficient "judicial imprimatur."<sup>91</sup> As examples of situations entailing a sufficient level of judicial imprimatur to permit a fee award, the Court mentioned both a judgment on the merits<sup>92</sup> and a consent decree.<sup>93</sup> Both resolutions involve a sufficient "court-ordered 'chang[e] [in] the legal relationship between [the plaintiff] and the defendant.'"<sup>94</sup> By contrast, the Court viewed the catalyst theory as falling "on the other side of the line from these examples."<sup>95</sup> In footnote seven of the opinion, the Court rejected dicta from its earlier cases that "allow[ed] for an award of attorney's fees for private settlements."<sup>96</sup> The Court explicitly stated that private settlements "do not entail the judicial approval and oversight involved in consent decrees."<sup>97</sup>

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89. *Id.* at 605 (citation omitted).

90. *Id.* The Court further noted that the term "prevailing party" does not "authorize[] federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief." *Id.* (internal cross-reference omitted).

91. *Id.* The Court reasoned that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.*

92. *Id.* at 604. The Court in *Hanrahan v. Hampton* declared that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." 446 U.S. 754, 758 (1980). The Court recognized that "even an award of nominal damages suffices under this test." *Buckhannon*, 532 U.S. at 604 (citing to *Farrar v. Hobby*, 506 U.S. 103, 113 (1992)).

93. *Buckhannon*, 532 U.S. at 604 (citing to *Maher v. Gagne*, 448 U.S. 122 (1980)). A consent decree is "[a] court decree that all parties agree to." BLACK'S LAW DICTIONARY 419 (7th ed. 1999); see *infra* Part II.B.1.

94. *Buckhannon*, 532 U.S. at 604 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

95. *Id.* at 605.

96. *Id.* at 604 n.7.

97. *Id.* ("And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal."); see also *infra* note 108.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

Although *Buckhannon* recognized the legislative history of the Civil Rights Attorney's Fees Awards Act and various policy considerations for upholding the catalyst theory,<sup>98</sup> the Court found the "legislative history . . . clearly insufficient to alter the accepted meaning of the statutory term"<sup>99</sup> and eschewed any "roving [judicial] authority" to "disregard the clear legislative language . . . on the basis of . . . policy arguments."<sup>100</sup> The Court concluded by restating the principle that "[a] request for attorney's fees should not result in a second major litigation."<sup>101</sup> The Court also expressed concern that the case-by-case "analysis of the defendant's subjective motivations in changing its conduct," required by the catalyst theory, was "clearly not a formula for 'ready administrability.'"<sup>102</sup>

### 3. *What Buckhannon adds to the prevailing party jurisprudence*

In order to "prevail" prior to *Buckhannon*, a party must have received "actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."<sup>103</sup> *Buckhannon* clarified the existing rule by requiring that the "chang[e] [in] the legal

98. See *infra* note 100; *supra* Part II.A.

99. *Buckhannon*, 532 U.S. at 608.

100. *Id.* at 610. The petitioners asserted that "the 'catalyst theory' [was] necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees." *Id.* at 608. Furthermore, petitioners argued that abandoning "the 'catalyst theory' [would] deter plaintiffs with meritorious but expensive cases from bringing suit." *Id.* The Court rejected this argument, pointing out that the catalyst theory could also act as a disincentive for a defendant to voluntarily change conduct, whether legal or not, because of "the possibility of being assessed attorney's fees." *Id.*

In his concurrence, Justice Scalia refuted the dissent's policy concerns:

The dissent's ultimate worry is that today's opinion will "impede access to court for the less well-heeled[.]" But, of course, the catalyst theory also harms the "less well-heeled," putting pressure on them to avoid the risk of massive fees by abandoning a solidly defensible case early in litigation. Since the fee-shifting statutes at issue here allow defendants as well as plaintiffs to receive a fee award, we know that Congress did not intend to *maximize* the quantity of "the enforcement of federal law by private attorneys general[.]" Rather, Congress desired an *appropriate* level of enforcement—which is more likely to be produced by limiting fee awards to plaintiffs who prevail "on the merits," or at least to those who achieve an enforceable "alteration of the legal relationship of the parties," than by permitting the open-ended inquiry approved by the dissent.

*Id.* at 620 (Scalia, J., concurring) (internal cross-references omitted).

101. *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)).

102. *Id.* at 610 (quoting *Burlington v. Dague*, 505 U.S. 557, 566 (1992)).

103. *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992); see *supra* note 71.

relationship”<sup>104</sup> must have sufficient “judicial *imprimatur*”<sup>105</sup> to qualify a party as prevailing in the suit.<sup>106</sup> To clarify the concept of *imprimatur*, the Court explained in a footnote that any resolution of a suit that lacks sufficient judicial approval and oversight<sup>107</sup> would not suffice for prevailing party status.<sup>108</sup> By referring to both approval and oversight in its endorsement of consent decrees, the Court implied that to sustain prevailing party status a private agreement must contain both an element of enforceability and some level of judicial approval of the terms of the settlement.<sup>109</sup> The issue of judicial approval closely tracks the Court’s concern regarding the “merit requirement”—in other words, a party

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104. *Buckhannon*, 532 U.S. at 604 (citing *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

105. *Id.* at 605 (emphasis added). Courts following *Buckhannon* have recognized that “the core of the Court’s reasoning was the concept of ‘judicial *imprimatur*.’” *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 24 (1st Cir. 2004).

106. The dissent emphasized that, “in determining whether fee-shifting is in order, the Court in the past has placed greatest weight not on any ‘judicial *imprimatur*,’ but on the practical impact of the lawsuit.” *Buckhannon*, 532 U.S. at 641 (Ginsburg, J., dissenting). Thus, a plaintiff prevails when he has achieved what he sought in bringing the suit in the first place, whether or not the success is court-ordered. *Id.* at 642–43 (Ginsburg, J., dissenting). To this, Justice Scalia in his concurrence responded,

[M]any statutes . . . use the phrase [“prevailing party”] in a context that *presumes* the existence of a judicial ruling. . . . When “prevailing party” is used by courts or legislatures in the context of a lawsuit, it is a term of art. It has traditionally—and to my knowledge, prior to enactment of the first of the statutes at issue here, *invariably*—meant the party that wins the suit or obtains a finding (or an admission) of liability.

*Id.* at 614–15 (Scalia, J., concurring). Therefore, a party does *not* prevail if the success achieved does not bear some judicial *imprimatur*.

107. *Id.* at 604 n.7.

108. The Court also notes in footnote seven that “federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal.” *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994)). *Kokkonen* stands for the proposition that federal district courts do not possess inherent ancillary jurisdiction to enforce breach of contract claims when one party has violated a private settlement agreement. *See Kokkonen*, 511 U.S. at 380 (“No case of ours asserts, nor do we think the concept of limited federal jurisdiction permits us to assert, ancillary jurisdiction over any agreement that has as part of its consideration the dismissal of a case before a federal court.”). The Court in *Kokkonen* did recognize, however, that federal district courts may retain jurisdiction to enforce a settlement agreement when “the settlement agreement [has] been made part of the order of dismissal—either by separate provision (such as a provision ‘retaining jurisdiction’ over the settlement agreement) or by incorporating the terms of the settlement agreement in the order.” *Id.* at 381.

109. Inclusion of these two elements satisfies the *Garland* requirement that a prevailing party obtain a change in the legal relationship. *See supra* notes 60–61 and accompanying text.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

prevails only if he receives judicial relief on some merit of his claim.<sup>110</sup> Judicial approval of a settlement necessarily implicates a review of the suit's underlying merits. Hence, a judge's fairness review in the consent decree context includes some degree of inquiry into the strength of the plaintiff's claims.<sup>111</sup> This inquiry into the merits suggests that the Court's reference to approval is merely a gloss on the previously elaborated merit requirement.

But this endorsement of imprimatur begs the question as to exactly how much judicial approval and oversight are needed before a settlement agreement can serve as a proper basis for prevailing party status. Can a settlement agreement with sufficient judicial imprimatur be the functional equivalent of a consent decree and hence serve as the basis for prevailing party status?<sup>112</sup> On the continuum between consent decrees and purely private settlements,<sup>113</sup> there is a line representing the point at which a party obtains a "judicially sanctioned change in the legal relationship of the parties"<sup>114</sup> and "crosse[s] the 'statutory threshold' of

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110. *Buckhannon*, 532 U.S. at 606. The Fourth Circuit recognized that "[g]enerally, the Supreme Court has stated, 'a determination of 'legal merit' is necessary for an award of attorney's fees.'" *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (citing *Buckhannon*, 532 U.S. at 606).

111. *See United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (recognizing that a valid consent decree "requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation").

112. Many circuit courts considering this question have answered it in the affirmative. *See, e.g., Smyth*, 282 F.3d at 281 ("[A]n order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs us, even if not entitled as such."); *infra* notes 152-154 and accompanying text.

*Smyth* recognized, however, that "approval and oversight of an agreement alone will not suffice to make a party a prevailing party. The party must likewise demonstrate that it has received some of the relief it sought in bringing the lawsuit in the first place." *Id.* at 282 n.11. In *Smyth*, the settlement achieved by the plaintiffs was "insufficient to support prevailing party status" because "[a]n agreement that the plaintiff will join a motion to dismiss a lawsuit in return for the defendant's promise not to seek sanctions against the plaintiff . . . [did] not render the plaintiff a prevailing party even if incorporated into an enforceable court order." *Id.* (emphasis added).

113. The term "purely private settlements" does not appear in the text of *Buckhannon*. It is used, however, by Judge Melloy in his dissenting opinion to *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003), as distinguishable from "a settlement agreement with retained enforcement jurisdiction, or a consent decree." *Id.* at 996 (Melloy, J., dissenting). As used in this Comment, the term "purely private settlement" will denote a private settlement that is not incorporated into a court order dismissing a case.

114. *Buckhannon*, 532 U.S. at 605; *see also* *Oil, Chemical & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 460 (D.C. Cir. 2002) (Rogers, J., dissenting) ("Finding a common thread in its precedent, the Court in effect established a line: a party prevails only upon obtaining a 'judicially sanctioned change in the legal relationship of the parties.'" (citation omitted)).

prevailing party status.”<sup>115</sup> Indeed, the Supreme Court recognized this continuum when it declared, “the ‘catalyst theory’ falls on the other side of the line from [judgments on the merits and consent decrees].”<sup>116</sup>

Consent decrees fall on the “sufficient-judicial-imprimatur” side of the line because they “involve[] judicial approval and oversight that may suffice to demonstrate the requisite ‘court-ordered chang[e] [in] the legal relationship between [the plaintiff] and the defendant.’”<sup>117</sup> On the contrary, “[p]rivate settlements do not entail the judicial approval and oversight”<sup>118</sup> necessary for a determination that a party has prevailed on the merits. Thus, purely private settlements fall on the other side of the line from consent decrees when courts determine prevailing party status. Unfortunately, the Court in *Buckhannon* did not answer the question of how much judicial imprimatur of the change is needed before a private settlement crosses over to the “prevailing party” side of the line. This unanswered question has subsequently spawned disagreement among the various circuit courts as to where to draw the line.<sup>119</sup>

#### IV. THE AFTERMATH: CIRCUIT COURT INTERPRETATIONS OF *BUCKHANNON*

In the absence of clear policy guidelines from the Supreme Court, the circuit courts looked to the examples enumerated by the Court as guideposts to determine what is sufficient judicial imprimatur.<sup>120</sup> Circuit courts have split on the question of how much judicial approval and oversight is sufficient, or even whether judicial approval and oversight can ever make a private agreement sufficiently equivalent to a consent decree such that it supports prevailing party status.<sup>121</sup> This Part explores

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115. *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989).

116. *Id.* at 605.

117. *Smyth*, 282 F.3d at 281 (quoting *Buckhannon*, 532 U.S. at 606).

118. *Buckhannon*, 532 U.S. at 604 n.7.

119. *See infra* Part IV.A–C.

120. According to the Court in footnote seven, consent decrees have enough judicial imprimatur while private settlements do not. *See supra* note 108.

121. *See infra* Parts IV.C and V.B. One commentator has stated:

While courts have been surprisingly uniform in finding that *Buckhannon* invalidates the catalyst theory in “prevailing party” statutes, they have been far less unanimous in defining these very fact-specific cases that circumvent *Buckhannon*. Unfortunately, the wide variety of judicial actions involved in these cases suggests that a second generation of post-*Buckhannon* litigation may be arising to ascertain the precise types of judicial action needed to constitute a true change in legal relationship as required by *Buckhannon*.

Silecchia, *supra* note 28, at 51.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

decisions issued by the Ninth, Eighth, and Third Circuits to illustrate these differing approaches:

*A. The Ninth Circuit's Approach in Barrios*

The Ninth Circuit first considered *Buckhannon* in *Barrios v. California Interscholastic Federation*.<sup>122</sup> In *Barrios*, the plaintiff, a paraplegic high school baseball coach, filed a complaint and application for a temporary restraining order to allow him to remain on the field to coach his team during games.<sup>123</sup> The parties subsequently reached a settlement agreement, but *Barrios's* petition for attorney's fees was denied by the district court.<sup>124</sup> The parties then "stipulated to a dismissal with prejudice," which made "no mention of the issue of attorneys' fees."<sup>125</sup> Subsequent to the district court's decision but prior to the Ninth Circuit hearing the case on appeal, the Supreme Court issued the *Buckhannon* ruling.

On appeal, the Ninth Circuit held that *Barrios* was a prevailing party and that *Buckhannon* did not control the outcome of the case.<sup>126</sup> The court read *Buckhannon* narrowly as applying only to parties acting as a catalyst of policy change.<sup>127</sup> The Ninth Circuit reasoned that even though the catalyst theory was no longer valid for conferring prevailing party status following *Buckhannon*,<sup>128</sup> *Barrios* was a prevailing party because he obtained a legally enforceable settlement agreement.<sup>129</sup> The

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122. 277 F.3d 1128 (9th Cir. 2002).

123. *Id.* at 1130–32.

124. On the issue of attorney's fees, the district court held that *Barrios* was indeed a "prevailing party" under the ADA. *Id.* at 1134. However, the district court ruled that "Barrios' victory was at best *de minimis* and thus undeserving of attorneys' fees and costs." *Id.*

125. *Id.* at 1133. The settlement agreement provided, among other things, that "the issue of whether any [party] is the prevailing party and whether any [party] is entitled to attorneys' fees, and if so, the amount thereof, is expressly reserved for the Court to decide upon motion by any [party]." *Id.*

The district court initially "entered a judgment and order according to the terms of the settlement agreement," but that order was subsequently vacated upon motion by the defendant California Interscholastic Federation, because, as *Barrios* conceded, "the settlement did not address whether a judgment or stipulation for dismissal would be filed." *Id.*

126. *Id.* at 1134 n.5.

127. *Id.* Specifically, the court declared: "Barrios, however, does not claim to be a 'prevailing party' simply by virtue of his being a catalyst of policy change; rather, his settlement agreement affords him a legally enforceable instrument, which under *Fischer*, makes him a 'prevailing party.'" *Id.* (citing *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000)).

128. *Id.* (citing *Bennett v. Yoshina*, 259 F.3d 1097 (9th Cir. 2001)).

129. *Id.*; see *supra* note 127.

Ninth Circuit avoided dealing with the Supreme Court's language regarding the insufficiency of private settlements by characterizing *Buckhannon's* footnote seven as "dictum [which merely] suggests that a plaintiff 'prevails' only when he or she receives a favorable judgment on the merits or enters into a court-supervised consent decree."<sup>130</sup>

*B. The Eighth Circuit's Approach in Bloomberg*

The Eighth Circuit considered the question of judicial imprimatur for "prevailing party" status in *Christina A. v. Bloomberg*.<sup>131</sup> In the context of a proposed class action settlement agreement,<sup>132</sup> the district court in *Bloomberg* conducted a "fairness hearing" pursuant to Federal Rule of Civil Procedure 23(e)," approved the agreement,<sup>133</sup> and specifically "retain[ed] jurisdiction for the 'purpose of enforcing the Settlement Agreement.'"<sup>134</sup> The district court then awarded attorney's fees to the plaintiff class as prevailing parties.<sup>135</sup>

On appeal, the Eighth Circuit reversed the award of attorney's fees by focusing its inquiry on the settlement agreement's form rather than the level of judicial imprimatur:

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130. *Id.* (emphasis added).

131. 315 F.3d 990 (8th Cir. 2003).

132. *Id.* at 991. The *Bloomberg* plaintiffs, juvenile inmates at the South Dakota State Training School, sued as a class to effectuate changes in school policies and treatment of them as inmates:

At issue, among other things, were (1) the restraint methods used by the institution's employees, (2) the lengthy confinements to which inmates were subjected, (3) the provision (or lack thereof) of mental health services, (4) the training of staff, (5) the "arbitrary" method of discipline and punishment, (6) the presence of male staff members in the female shower area, (7) the monitoring of telephone calls and visits, and (8) the lack of special education courses for inmates who need additional educational assistance.

*Id.*

133. While the district court did conduct a fairness review pursuant to FED. R. CIV. P. 23(e), it did not incorporate any of the "specific terms and conditions agreed upon by the parties in its opinion and order." *Id.*

134. *Id.* Class action settlements must receive the "approval of the court." FED. R. CIV. P. 23(e). The "universally applied standard" for a court's approval "is whether the settlement is fundamentally fair, adequate, and reasonable. Some courts also require that settlements be consistent with the public interest. Finally, the court must determine that the terms of the settlement do not violate any applicable federal law." 5 MOORE, *supra* note 44, § 23.85[1] (compiling cases and listing various multi-factor tests that various courts apply). A court's involvement in a class action settlement may include granting preliminary approval of the settlement, conducting a fairness hearing prior to final approval, considering class members' objections, and making specific findings and conclusions regarding the fairness of an approved settlement. *See id.* §§ 23.85[3]-[8].

135. *Bloomberg*, 315 F.3d at 991.

429] Prevailing Parties, Attorney's Fees, and Judicial Imprimatur

The Supreme Court specified that a judgment on the merits or a "settlement agreement[] enforced through a consent decree" is sufficient to meet this standard. . . . If the agreement between the inmate class and the institution is a private settlement, then it is clear from *Buckhannon* that the inmate class is not a "prevailing party" entitled to attorney's fees under 42 U.S.C. § 1988.<sup>136</sup>

The Eighth Circuit thus viewed the question as a matter of classification—in other words, if the settlement is a private settlement then there is not sufficient judicial imprimatur, and if the settlement is a consent decree then there is sufficient imprimatur. The court stated the *Buckhannon* rule as such: "a party prevails only if it receives either an enforceable judgment on the merits or a consent decree."<sup>137</sup> The court apparently viewed those two options as comprising the exhaustive list of judicial relief that may convey prevailing party status. The line is simply drawn right behind consent decrees, and no amount of judicial imprimatur on a private settlement will suffice to convey prevailing party status.<sup>138</sup> In reaching this conclusion, the *Bloomberg* court reasoned that a settlement, even in the class action context, was not the functional equivalent of a consent decree because it is not directly enforceable through the court's contempt power.<sup>139</sup>

136. *Id.* at 992 (citations omitted).

137. *Id.* at 993 (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

138. The circuit court in *Bloomberg* explicitly rejected the district court's pronouncement that the class action settlement at issue was the functional equivalent of a consent decree and hence a fee award was justified:

The district court indicated that, although the settlement agreement was not a formal consent decree, "to read *Buckhannon* to require one particular form for resolving a dispute in order to become a prevailing party is to read the opinion too narrowly." *Christina A. v. Bloomberg*, 167 F. Supp. 2d 1094, 1098 (D.S.D. 2001). The court went on to say that the settlement agreement served essentially the same purpose as a formal consent decree since it changed the legal relationship between the parties by requiring the appellants to make specific improvements to the training school and by allowing the appellees to enforce the agreement in court. *Id.* at 1099. We disagree with this conclusion.

*Bloomberg*, 315 F.3d at 993. In fact, in a footnote, the circuit court recast the district court's holding to conform to its conception of the proper analytical framework. *Id.* at 993 n.3 ("We do not read the district court's opinion as holding that an agreement that falls short of the essential requirements of a consent decree is sufficient. We believe that the court finds that the approved agreement is, indeed, *some form of consent decree.*") (emphasis added).

139. *Id.* at 994 ("[T]he availability of . . . non-contempt remedies fails to support the conclusion that the settlement agreement serves essentially as a consent decree.").

*C. The Third Circuit's Approach to Judicial Imprimatur*

Subsequent to *Buckhannon*, the Third Circuit considered what extent of judicial imprimatur was needed for a litigant to be a prevailing party under a private settlement in *Truesdell v. Philadelphia Housing Authority*.<sup>140</sup> In *Truesdell*, the plaintiff, participating in a Section 8 Federal Housing Assistance Program administered by the Philadelphia Housing Authority ("PHA"), brought a § 1983 action to enforce his rights under the U.S. Housing Act of 1937.<sup>141</sup> The terms of the subsequent settlement requiring the PHA to undertake certain actions were included in the district court's order. These actions included a retroactive rent adjustment that the PHA had previously refused to grant to the plaintiff.<sup>142</sup> However, the district court denied Truesdell's motions for attorney's fees.<sup>143</sup>

On appeal, the PHA argued that "because it never admitted liability nor consented to what counsel termed in oral argument a 'gratuitous resolution,' the [dismissal order] was a stipulated settlement—not a court approved consent decree—and therefore no attorney's fees should be awarded."<sup>144</sup> To resolve the issue, the *Truesdell* court discussed whether the judicial order, "in form, may support an award of attorney's fees."<sup>145</sup>

The Third Circuit recognized that since "attorney's fees may be awarded based on a settlement when it is enforced through a consent decree,"<sup>146</sup> a judicial order that was enough like a consent decree may be sufficient to warrant a fee award.<sup>147</sup> The court reasoned that if the private settlement is enforceable against the opposing party through a court order, even though not titled "Consent Decree," then the party in whose favor that order is entered may be termed the prevailing party.<sup>148</sup> The *Truesdell* court found the judicial order enforcing the private settlement sufficient to confer prevailing party status based on the following

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140. 290 F.3d 159 (3d Cir. 2002).

141. *Id.* at 161.

142. *Id.*

143. *Id.* at 163.

144. *Id.* at 164–65.

145. *Id.* at 165.

146. *Id.* (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

147. *Cf. Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) ("[A]n order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs us, even if not entitled as such.").

148. *Truesdell*, 290 F.3d at 165.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

characteristics: (1) the order contained “mandatory language” requiring the PHA to take certain actions inuring to the benefit of the plaintiff,<sup>149</sup> (2) the document was entitled “Order,” (3) the document bore “the signature of the district court judge, not the parties’ counsel,” and (4) the document “gave Truesdell the right to request judicial enforcement of the settlement against PHA.”<sup>150</sup> In a subsequent case, the court explained that compliance with these four factors is enough for a stipulated settlement to be sufficiently “judicially sanctioned”<sup>151</sup> for prevailing party purposes.

The Third Circuit’s approach falls between the Ninth and Eighth Circuits in terms of the level of judicial imprimatur required for prevailing party status. The approaches of these three circuits illustrate how circuit courts following *Buckhannon* have diverged on the question of who can be a prevailing party. A majority of circuits have agreed with the Third Circuit in holding that a party may be deemed “prevailing” after having obtained a private settlement with sufficient judicial imprimatur,<sup>152</sup> but other circuits have disagreed, either adopting a

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149. At least one other circuit court has found the presence of mandatory language in a district court’s dismissal order determinative. *See* *New England Reg’l Council of Carpenters v. Kinton*, 284 F.3d 9, 30 (1st Cir. 2002) (“The district court did not compel [the defendant] to adopt the regulations. Under the *Buckhannon* rule, that ends the matter.”).

150. *Truesdell*, 290 F.3d at 165. Regarding the importance of the enforceability, the court cites *Farrar* for its holding that “[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.” *Id.* (citing *Farrar v. Hobby*, 506 U.S. 103, 113 (1992)).

151. *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003).

152. *E.g.*, *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir. 2003) (“We therefore join the majority of courts to have considered the issue since *Buckhannon* in concluding that judicial action other than a judgment on the merits or a consent decree can support an award of attorney’s fees, so long as such action carries with it sufficient judicial imprimatur.”); *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 478–79 (7th Cir. 2003) (recognizing that some private settlements entail sufficient judicial approval and oversight to serve as the basis of an award for attorney’s fees); *Smyth v. Rivero*, 282 F.3d 268, 281 (4th Cir. 2002) (“We will assume, then, that an order containing an agreement reached by the parties may be functionally a consent decree for purposes of the inquiry to which *Buckhannon* directs us, even if not entitled as such.”); *Am. Disability Ass’n v. Chmielarz*, 289 F.3d 1315, 1319 (11th Cir. 2002) (same); *see also Doe v. Boston Pub. Sch.*, 358 F.3d 20, 24 n.4, 30 (1st Cir. 2004) (taking “no position on whether forms of judicial imprimatur other than a judgment on the merits or a court-ordered consent decree may suffice to ground an award of attorneys’ fees,” but recognizing that other circuits have considered the question and implying that “plaintiffs who achieve their desired result via private settlement may . . . be considered ‘prevailing parties’” with sufficient judicial imprimatur).

narrow view of what constitutes a prevailing party<sup>153</sup> or an overly permissive view of prevailing party.<sup>154</sup>

#### V. ANALYSIS

A court should award prevailing party status only when a party's settlement has sufficient judicial imprimatur under the *Buckhannon* requirements of approval and oversight. In this regard, the Ninth Circuit's approach is overly broad and fails to follow the rule set forth in *Buckhannon*. On the other hand, courts should respect Congress's intent to encourage private suits to enforce important public policies. Accordingly, courts should allow fee shifting to prevailing parties with less than a judgment on the merits or a consent decree, provided the

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153. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003) ("*Buckhannon*, as indicated, makes it clear that a party prevails only if it receives either an enforceable judgment on the merits or a consent decree."); *see also Toms v. Taft*, 338 F.3d 519, 528 (6th Cir. 2003) ("The Supreme Court has limited the term 'prevailing party' to a party who obtains either a judgment on the merits or a court-ordered consent decree.") (citation omitted); *Oil, Chemical & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 456-57 (D.C. Cir. 2002) ("We therefore hold that in order for plaintiffs in FOIA actions to become eligible for an award of attorneys' fees, they must have 'been awarded some relief by [a] court,' either in a judgment on the merits or in a court-ordered consent decree."); *infra* Part IV.C.

There is some question as to whether the D.C. Circuit in *Atomic Workers* actually held that nothing outside of a judgment on the merits or a consent decree suffices for prevailing party status. The dissent in *Atomic Workers* characterizes the majority holding in that regard as merely a "suggestion." 288 F.3d at 459 (Rogers, J., dissenting). And the Second Circuit in *Roberson* includes the D.C. Circuit as among the circuits that have concluded that "judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees, so long as such action carries with it sufficient judicial imprimatur." 346 F.3d at 81. The *Roberson* court characterizes *Atomic Workers* as "implying that had there been [an alteration in the legal relationship of the parties], *Buckhannon* would not preclude an award of fees." *Id.* (citing *Atomic Workers*, 288 F.3d 452, 458-59). The inquiry in *Atomic Workers* concerned whether the stipulation and orders in the case were in fact consent decrees and was not to determine whether there was sufficient judicial imprimatur. *Atomic Workers*, 288 F.3d at 458-59. There is a noted lack of recognition by the majority in *Atomic Workers* that something other than a consent decree may be the functional equivalent of a consent decree.

Additionally, the dissent in *Atomic Workers* based its argument on the assumption that the majority was focusing solely on "whether the relief obtained was either a judgment on the merits or a consent decree" when it should have instead "looked for action compelled by the court, focusing on the underlying concern of the Supreme Court in *Buckhannon* that there be some 'judicial imprimatur on the change' in the parties' legal status." *Id.* at 462 (Rogers, J., dissenting) (citation omitted). This Comment, therefore, includes the D.C. Circuit, together with the Eighth and Sixth Circuits, as adopting a narrow reading of *Buckhannon*. *See infra* Part IV.B.

154. *See Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002) (distinguishing *Buckhannon* based on the fact that the plaintiffs in *Buckhannon* were "a catalyst of policy change" whereas the *Barrios* plaintiff had a "legally enforceable instrument" in his settlement agreement); *infra* Part IV.A.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

parties' settlement contains sufficient imprimatur. In this regard, the Eighth Circuit's approach is overly restrictive. The Third Circuit's approach comes closest to satisfying the Court's imprimatur concerns; however, it should be augmented to include an explicit merit-review requirement.

*A. The Ninth Circuit's Approach Is Overly Broad*

The Ninth Circuit's approach to determining "prevailing party" status runs counter to Supreme Court precedent. Because a judge does not inquire into whether a party has succeeded on any merits in the typical stipulated dismissal context,<sup>155</sup> such a resolution does not warrant an award of attorney's fees. Had the Ninth Circuit appropriately followed the reasoning of *Buckhannon*, it would have concluded that Barrios was not a prevailing party because he secured a private settlement agreement and nothing more. The judicial order dismissing the case did not require the parties to comply with the terms of the settlement agreement, nor did it retain jurisdiction to enforce the terms of the settlement agreement.<sup>156</sup>

In *Barrios*, the Ninth Circuit improperly expanded the class of "prevailing party" further than any circuit court interpreting *Buckhannon*. The court reasoned that because Barrios could "enforce the terms of the settlement agreement against the [defendant]... Barrios was the 'prevailing party' in his civil rights litigation."<sup>157</sup> In so holding, the Ninth Circuit felt it proper to follow its own prevailing party precedent<sup>158</sup> rather than clear Supreme Court language in *Buckhannon*. Thus, the Ninth Circuit has a rule that "a plaintiff 'prevails' when he or

155. See *supra* notes 45-46 and accompanying text.

156. The Ninth Circuit's characterization of the court's order is a stipulated dismissal with prejudice. *Barrios*, 277 F.3d at 1133.

157. *Id.* at 1134.

158. The Ninth Circuit had previously held:

"[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." The Court explained that "a material alteration of the legal relationship occurs [when] the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." In these situations, the legal relationship is altered because the plaintiff can force the defendant to do something he otherwise would not have to do.

*Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)).

she enters into a legally enforceable settlement agreement against the defendant.”<sup>159</sup>

The Ninth Circuit in *Barrios* ignored the clear implications of the entire *Buckhannon* decision. It did this by characterizing the footnote seven “approval and oversight” language in *Buckhannon* as dictum—technically correct in that *Buckhannon* did not involve a settlement agreement—which it was not bound to follow. However, this construction of footnote seven’s language ignores the context in which it is found.<sup>160</sup> Footnote seven’s reference to “approval and oversight” appears in the midst of the Court’s explication of the requirements for prevailing party status.

The Court in *Buckhannon* clearly held that a “‘prevailing party’ is one who has been awarded some relief by the court.”<sup>161</sup> It also stated that a party only prevails when there is sufficient “judicial *imprimatur*” and “judicial[] sanction[]” in the “change in the legal relationship of the parties.”<sup>162</sup> The Court distilled its “merit requirement” from prior precedent—a requirement that is clearly not met in *Barrios* as the only judicial involvement in the suit was through a stipulated dismissal order without any approval or retained jurisdiction over the settlement terms. By awarding prevailing party status to the plaintiff in *Barrios*, the Ninth Circuit ignored the *Buckhannon* requirements that the change in the parties’ relationship be court-ordered and that the prevailing party have “established his entitlement to some relief on the merits of his claims.”<sup>163</sup>

In *Barrios*, the parties’ settlement expressly reserved the question of prevailing party status and attorney’s fees for the court to determine.<sup>164</sup> The court in *Barrios* held that the private settlement agreement’s deferral to the court to determine the question of attorney’s fees provided

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159. *Barrios*, 277 F.3d at 1134. The Ninth Circuit subsequently reaffirmed its *Barrios* holding. See *Richard S. v. Dep’t of Developmental Servs.*, 317 F.3d 1080, 1086 (9th Cir. 2003).

160. See *infra* notes 170–171 and accompanying text; see also Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 65 OHIO ST. L.J. 357, 389–90 (2004) (“By ignoring the requirement for a judicial sanction in the settlement it said would support fees, the Ninth Circuit refused to apply the Supreme Court’s reasoning, and its distinction of the case is not fully persuasive.”).

161. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001).

162. *Id.* at 605.

163. *Id.* at 604 (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980)).

164. See *supra* note 125.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

“sufficient judicial oversight to justify an award of attorneys’ fees and costs.”<sup>165</sup> This reasoning runs counter to *Buckhannon*’s holding that a party only prevails when the change in the legal relationship is “court-ordered.”<sup>166</sup> Also, the merit requirement is not met because the trial judge in *Barrios* undertook no review of the underlying claim’s merits.<sup>167</sup> Nothing in the private settlement agreement conferred continuing “federal jurisdiction to enforce a private contractual settlement.”<sup>168</sup> It is safe to say that the dismissal order at issue in *Barrios* did not convey the necessary judicial sanction to change the parties’ relationship. Such “is not the stuff of which legal victories are made.”<sup>169</sup>

Circuit courts that have considered the *Barrios* reasoning have rejected its take on *Buckhannon*. For example, the Third Circuit characterized *Barrios* as “distinguish[ing] *Buckhannon* on very narrow grounds.”<sup>170</sup> Similarly, the First Circuit viewed “[t]he *Barrios* court’s reading of *Buckhannon* [as] contraven[ing] the Supreme Court’s unambiguous rejection of private settlement as sufficient grounds for ‘prevailing party’ status.”<sup>171</sup> The Ninth Circuit improperly held in *Barrios* that a plaintiff could be a prevailing party with nothing more than a private settlement.

*B. The Eighth Circuit’s Approach Is Overly Narrow and Restrictive**1. Form over substance*

In contrast to the Ninth Circuit’s decision, the Eighth Circuit’s reasoning in *Bloomberg* adopts a narrow and overly restrictive approach, focusing too much on the form of the judicial order as determinative of whether a party has prevailed. The Eighth Circuit viewed *Buckhannon* as “mak[ing] it clear that a party prevails *only* if it receives either an enforceable judgment on the merits or a consent decree.”<sup>172</sup> On appeal, the Eighth Circuit’s elevation of form over substance resulted from its

165. *Barrios v. Cal. Interscholastic Fed’n*, 277 F.3d 1128, at 1134 n.5 (9th Cir. 2002).

166. *Buckhannon*, 532 U.S. at 604.

167. *See Barrios*, 277 F.3d at 1133.

168. *Buckhannon*, 532 U.S. at 604 n.7.

169. *Hewitt v. Helms*, 482 U.S. 755, 760 (1987).

170. *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 560 (3d Cir. 2003).

171. *Doe v. Boston Pub. Sch.*, 358 F.3d 20, 25 (1st Cir. 2004); *see also* *N.Y. State Fed’n of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm’n*, 272 F.3d 154, 158–59 (2d Cir. 2001).

172. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

disregard of the judicial approval and oversight<sup>173</sup> involved in the case. In *Bloomberg*, the district court in a class action settlement context had approved the terms of the proposed settlement for fairness.<sup>174</sup> The court disregarded the approval element and improperly reasoned away the oversight element.

On the question of the district court's approval of the settlement terms, the Eighth Circuit was unpersuaded as to its effect for prevailing party determination: "Although Rule 23(e) requires the district court to approve the class action agreement, it does not require the court to establish the *terms* of the agreement. Therefore, the district court's approval of the settlement agreement does not, by itself, create a consent decree . . ." <sup>175</sup> In making this assertion, the court impliedly presupposed that in consent decree situations the court, rather than the parties, "establish[es] the terms" of the agreement.<sup>176</sup> This supposition has no basis in reality, as the parties themselves are the ones that establish the terms of a consent decree and then submit those terms for judicial approval.<sup>177</sup>

For *Buckhannon* prevailing party purposes, class action settlement agreements entail the same level of judicial approval as consent decrees.<sup>178</sup> Misunderstanding the sufficiency of a court's approval in the class action settlement, the Eighth Circuit failed to address the fact that the district court's "fairness review" for the purposes of Rule 23(e) should have entailed sufficient judicial approval for "prevailing party" status.

The Eighth Circuit also misunderstood the sufficiency of the district court's oversight in retaining jurisdiction over the settlement. In a footnote the court stated, "the district court *purported* to retain jurisdiction over the agreement in order to enforce its provisions against appellants."<sup>179</sup> The court apparently believed that the district court did

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173. *Buckhannon*, 532 U.S. at 604 n.7.

174. *See supra* text accompanying note 134.

175. *Bloomberg*, 315 F.3d at 992-93.

176. *Id.*

177. *See supra* Part II.B.1.

178. *Compare supra* note 34 and accompanying text (noting that judges review consent decrees to determine whether they are "fair, adequate, and reasonable") with 5 MOORE, *supra* note 44, § 23.85[1].

179. *Bloomberg*, 315 F.3d at 994 n.5 (emphasis added). The distinction between the class action settlement and the consent decree settlement is negligible when determining prevailing party status. While it is true that the parties to a consent decree specifically intend their agreement to be memorialized in a judicial decree and that class action parties may not wish for such incorporation,

429] Prevailing Parties, Attorney's Fees, and Judicial Imprimatur

not have jurisdiction to enforce the terms of the settlement agreement, either through its inherent jurisdiction to enforce its own orders or through incorporating the terms of the agreement into the dismissal order. But the court failed to explain why the explicit retention of jurisdiction was not sufficient. The court reasoned that because the plaintiffs could only enforce the class action settlement through a breach of contract action, they were not prevailing parties under a *Buckhannon* analysis.<sup>180</sup> The court ignored the reality that the district court's retained jurisdiction allowed for enforcement of the settlement terms.<sup>181</sup>

In fact, both Supreme Court and Eighth Circuit precedent call for the opposite result on the enforcement issue. The Court in *Kokkonen* explicitly recognized that a district court may retain jurisdiction over a dismissed settlement agreement through either incorporation of the terms in a dismissal order or through a specific "retaining jurisdiction" provision in the dismissal order.<sup>182</sup> Commentators have reached similar conclusions.<sup>183</sup> Even the Eighth Circuit "has repeatedly recognized the possibility of federal enforcement jurisdiction over a settlement

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in both contexts the court must examine the terms for fairness and retain jurisdiction to enforce the terms of the settlement. The judge is also required in both contexts to ensure fairness of the agreement before signing off on it. However, at least one court has described the level of scrutiny in the consent decree context as "more careful" than that in the class action settlement context. *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981). See *supra* notes 34–36 and accompanying text.

180. *Bloomberg*, 315 F.3d at 993 ("[C]onsent decrees . . . are enforceable through the supervising court's exercise of its contempt powers, and private settlements [are] enforceable only through a new action for breach of contract.") (quoting *Hazen ex rel. LeGear v. Reagan*, 208 F.3d 697, 699 (8th Cir. 2000)).

181. A court may enforce a consent decree directly through contempt power. With an incorporated settlement, a court may also enforce the terms through the contempt power, albeit through a circuitous route. See *infra* note 200.

182. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (recognizing that a settlement agreement may be "made part of the order of dismissal—either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order").

183. Although "district courts have no inherent power to enforce settlement agreements" in the class action context, "[i]t is common in class actions for courts to explicitly retain jurisdiction over settlement agreements and to incorporate the terms of such agreements in dismissal orders." 5 MOORE, *supra* note 44, § 23.87. Moore further recognizes that class action settlements are akin to consent decrees:

A class action settlement, like an agreement resolving any other legal claim, is a private contract negotiated between the parties. Nevertheless, Rule 23(e) requires the court to intrude on that private consensual agreement to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.

*Id.* § 23.82[1].

agreement where the district court approves, and expressly retains jurisdiction to enforce, the agreement.”<sup>184</sup>

Instead of explaining why the district court’s retention of jurisdiction was not sufficient, the *Bloomberg* majority focused on general principles of dismissal that had no apparent connection to the facts of the case. The court cited to *Moore’s Federal Practice* for the proposition that “a voluntary dismissal without prejudice under Rule 41(a)(2) [as here] renders the proceedings a nullity and leaves the parties as if the action had never been brought.”<sup>185</sup> But in this particular case, the parties have something more than they had before the action was brought—a settlement reviewed by the judge and enforceable through the court’s retained jurisdiction. The *Bloomberg* plaintiffs presented a strong case for prevailing party status—the party obtained a dismissal short of a consent decree, which nevertheless contained sufficient judicial approval and oversight to justify prevailing party status.<sup>186</sup>

## 2. The Roberson reasoning undermines the logic of Bloomberg

The Second Circuit in *Roberson* adopted a view opposite that of the Eighth Circuit regarding the importance of the enforcement remedy in determining prevailing party status.<sup>187</sup> The *Roberson* district court adopted the same reasoning regarding the distinction between settlements and consent decrees as did the Eighth Circuit in *Bloomberg*.<sup>188</sup> In rejecting the district court’s arguments, the Second Circuit presented reasoning that effectively refutes the Eighth Circuit’s rationale in *Bloomberg*.

In *Roberson*, although the district court had incorporated the settlement terms into the dismissal order and specifically retained

184. *Bloomberg*, 315 F.3d at 997 (Melloy, J., dissenting); see, e.g., *Hayden Ass’n, v. ATY Bldg. Sys., Inc.*, 289 F.3d 530, 532–33 (8th Cir. 2002) (citing *Kokkonen* for the proposition that a settlement agreement may be made part of a district court’s order of dismissal by a provision retaining jurisdiction over a settlement agreement); *Gilbert v. Monsanto*, 216 F.3d 695, 699–700 (8th Cir. 2000) (same).

185. *Bloomberg*, 315 F.3d at 993–94 (citing 8 MOORE, *supra* note 44, § 41.40[9][b]).

186. See *infra* Part V.D.1.

187. *Roberson v. Giuliani*, 346 F.3d 75, 83 (2d Cir. 2003).

188. *Roberson v. Giuliani*, No. 99 Civ. 10900 (DLC), 2002 U.S. Dist. LEXIS 2750, at \*8–9 (S.D.N.Y. Feb. 21, 2002) (“Here, there is neither an enforceable judgment on the merits nor a court-ordered consent decree. . . . The Court’s continuing jurisdiction in order to enforce the terms of the Agreement does not, however, constitute a ‘judicial sanctioning’ of the alteration of their legal relationship such that the plaintiffs can be considered prevailing parties under the *Buckhannon* standard.”).

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

jurisdiction to enforce the terms of the settlement agreement, it ruled that “[t]he [c]ourt’s continuing jurisdiction in order to enforce the terms of the Agreement does not . . . constitute a ‘judicial sanctioning’ of the alteration of their legal relationship such that the plaintiffs can be considered prevailing parties under the *Buckhannon* standard.”<sup>189</sup> The district court distinguished the settlement at issue from consent decrees on three grounds: first, the level of judicial scrutiny involved;<sup>190</sup> second, the court’s inherent power to enforce a consent decree;<sup>191</sup> and third, the fact that consent decrees are “directly enforceable through the contempt power of the court.”<sup>192</sup> The first element corresponds to *Buckhannon*’s approval element while the second and third correspond to the oversight element.

On appeal, the Second Circuit found the district court’s enumerated distinctions to be insignificant for purposes of a prevailing party inquiry.<sup>193</sup> On the first point, the circuit court reasoned that “because the court has the general responsibility to ensure that its orders are fair and lawful, it retains some responsibility over the terms of a settlement

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189. *Id.* at \*3.

190. *Id.* (“Although it may be minimal, there is a level of judicial scrutiny of the terms of a consent decree that is entirely absent when a lawsuit is dismissed based on the parties’ agreement to settle it.”).

191. *Id.* On this point, the district court correctly cites the *Kokkonen* principle, but seems to either misconstrue its applicability to the agreement at hand or to ignore it entirely. Specifically, the district court declared that

[w]here . . . “the parties’ obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal—either by separate provision (such as a provision ‘retaining jurisdiction’ over the settlement agreement) or by incorporating the terms of the settlement agreement in the order”—a federal court retains jurisdiction to enforce the settlement agreement.

*Id.* at \*13 (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 382 (1994)). The district court’s opinion is silent as to why the “retaining jurisdiction” provision in the instant case was not sufficient judicial oversight for prevailing party status.

192. *Roberson*, 346 F.3d at 80. The district court relied on the Second Circuit’s decision in *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916–17 (2d Cir. 1998), for the proposition that “because the district court lacked authority to condition the dismissal on compliance with the settlement agreement, it lacked a basis for finding contempt.” *Roberson*, No. 99 Civ. (DLC), 2002 U.S. Dist. LEXIS 2750, at \*15–16. The Second Circuit responded that its *Hester* decision did not offer an opinion on how an explicit retention of jurisdiction would have changed the outcome of the case, if at all. It is therefore an open question in this circuit whether a district court could enforce an agreement through its contempt power in circumstances like those facing us in this appeal.

*Roberson*, 346 F.3d at 83 n.9.

193. *Roberson*, 346 F.3d at 83.

agreement.”<sup>194</sup> Accordingly, when the court incorporates or references the terms of the settlement into its dismissal order, there will be at least the same “minimal . . . level of judicial scrutiny”<sup>195</sup> that the district court reasoned was sufficient in the consent decree context.<sup>196</sup>

The next two points raised dealt with the difference between incorporated settlements and consent decrees in terms of the enforcement remedy. The Eighth Circuit in *Bloomberg* had used this distinction as the principal reason for holding that a settlement could not serve as the basis for prevailing party status.<sup>197</sup> On the second point, the Second Circuit found it insignificant that the district court’s jurisdiction over a consent decree is inherent while its jurisdiction over an incorporated settlement only stems from its inclusion in a court order.<sup>198</sup> Regarding the third point, the court explained that the fact that the contempt power is inherent in a consent decree and not in a stipulated settlement is not “significant enough to deprive plaintiffs of prevailing party status.”<sup>199</sup> The court reasoned that “[i]n the case of both consent decrees and private settlement agreements over which a district court retains enforcement jurisdiction, the district court has the authority to force compliance with the terms agreed upon by the parties.”<sup>200</sup> Where *Bloomberg* found the lack of a direct contempt remedy in the incorporated settlement context dispositive, the Second Circuit correctly recognized that this argument was unsound.

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194. *Id.* at 82.

195. *Roberson*, 2002 U.S. Dist. LEXIS 2750, at \*9.

196. However, this minimal level of judicial scrutiny may not be enough to satisfy the Supreme Court’s concern’s regarding the level of judicial imprimatur required for prevailing party status. This Comment suggests that more is required. *See infra* Part V.C.2.

197. *See supra* notes 179–181 and accompanying text.

198. The court stated:

Consent decrees are enforceable in federal court because they are orders of the court, the Agreement is enforceable in federal court because a violation of the Agreement is a violation of the court’s dismissal Order. Both are, in the terms used by the *Buckhannon* Court, “court-ordered change[s] in the legal relationship between the plaintiff and the defendant.”

*Roberson*, 346 F.3d at 83 (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001)).

199. *Id.*

200. *Id.* The court recognized that in the context of enforcing a private settlement, “the court at most would need to take an extra step by first ordering specific performance and then, if a party does not comply, finding that party in contempt. We doubt that the definition of ‘prevailing party’ should turn on such a difference.” *Id.*

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

The *Roberson* logic effectively undermines the reasoning of *Bloomberg*.<sup>201</sup> While there are distinctions between consent decrees and stipulated settlement agreements incorporated into the record, the *Bloomberg* court failed to adequately explain how those distinctions affect the prevailing party analysis. The Supreme Court's focus and concern in *Buckhannon* was the level of judicial imprimatur on the parties' agreement. The Eighth Circuit's approach bears a disconnect from the Supreme Court's approval and oversight concerns. The Eighth Circuit in *Bloomberg* wrongly decided that the universe of prevailing parties was limited only to those receiving either judgments on the merits or consent decrees.<sup>202</sup>

C. An Endorsement of a "Third-Circuit-Plus" Test

While the approach of the Third Circuit comes closer to satisfying the *Buckhannon* imprimatur concerns than the approaches of the other circuits, it still lacks a sufficient test for judicial approval. An ideal test can be created by modifying the Third Circuit's test from *Truesdell* to include a judicial approval element. Specifically, a judge should be required to conduct some level of review of the suit's merits in order to satisfy the approval requirement. Such a test can be crafted such that it would simultaneously satisfy the Supreme Court's *Buckhannon* concerns while allowing courts to expand the class of prevailing parties consistent with congressional intent.<sup>203</sup>

A close reading of *Buckhannon* reveals that a satisfactory judicial imprimatur test needs approval as well as oversight. The Court in *Buckhannon* was concerned that the catalyst theory "allow[ed] an award where there is no judicially sanctioned change in the legal relationship of the parties."<sup>204</sup> The Court reasoned that prevailing party status required that there be at least some participation by a judge—a judicial finger in

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201. The Second Circuit approved of the "vigorous and persuasive dissent by Judge Melloy" in *Bloomberg*. *Id.* at 82 n.7. The court specifically referred to Judge Melloy's pronouncement that "[t]he Court in *Buckhannon* did not limit the availability of prevailing party status to only those cases resolved through a consent decree or final judgment on the merits. Rather, the Court set forth criteria to guide the analysis of whether there is a judicially sanctioned, material change in the legal relationship of the parties."

*Id.* (quoting *Bloomberg*, 315 F.3d at 996 (Melloy, J., dissenting)).

202. Although joined by two other circuit courts in so holding, the Eighth Circuit is in the minority. *See supra* note 153.

203. *See infra* Part V.C.4.

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

the pot—so as to justify the notion that the party has “prevailed” in the actual suit in some way.<sup>205</sup> The Court’s reasoning suggests that the form of the resolution is important, but that it is not the only requirement. Significantly, the Court declined to “abrogate the ‘merit’ requirement of [its] prior cases”<sup>206</sup> by reaffirming its declaration in *Hewitt* that “[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.”<sup>207</sup> Respect for the Court’s “merit requirement” urges that a judge may not simply incorporate the terms of the settlement and add his signature without any review of the merits of the original complaint. Furthermore, in *Buckhannon*, the Court referred to “judicial approval and oversight” as the distinguishing factors between consent decrees and private settlements.<sup>208</sup> It follows that a party may only “prevail” when a judge has been sufficiently involved in the resolution of the case in both the areas of oversight and approval.

*1. The Third Circuit’s judicial imprimatur test satisfies judicial oversight*

The Third Circuit’s *Truesdell* formula adequately satisfies the *Buckhannon* concern requiring sufficient judicial oversight in a private settlement context.<sup>209</sup> Specifically, the test allows a party to prevail when the dismissal order contains mandatory language, is entitled “Order,” is signed by the judge, and provides for retained jurisdiction to enforce the terms of the settlement agreement.<sup>210</sup> The Supreme Court in *Buckhannon* specifically approved of consent decrees as having the requisite oversight for prevailing party status. This is so because courts have inherent jurisdiction to enforce consent decrees.<sup>211</sup> As noted above, courts may retain jurisdiction over private settlements either through incorporating the settlement terms or through a specific provision.<sup>212</sup> Such jurisdiction

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205. In his concurrence, Justice Scalia points out:

[I]n the case of court-approved settlements and consent decrees, even if there has been no judicial determination of the merits, the outcome is at least the product of, and bears the sanction of, judicial action in the lawsuit. There is at least some basis for saying that the party favored by the settlement or decree prevailed in the *suit*.

*Id.* at 618 (Scalia, J., concurring).

206. *Id.* at 606.

207. *Id.* at 603 (citing *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)).

208. *Id.* at 604 n.7.

209. See *supra* notes 150–151 and accompanying text.

210. *Truesdell v. Phila. Hous. Auth.*, 290 F.3d. 159, 165 (3d Cir. 2002).

211. See *supra* note 40 and accompanying text.

212. See *supra* note 108.

429] Prevailing Parties, Attorney's Fees, and Judicial Imprimatur

over a settlement means that the court may enforce the terms of the settlement through its contempt power.<sup>213</sup> By requiring that a party prevails only when its dismissal order contains mandatory language and provides for retained jurisdiction, the Third Circuit's test provides for sufficient judicial oversight under *Buckhannon*.

The Third Circuit's judicial imprimatur test satisfies the oversight concern, while maintaining judicial flexibility to allow for an award of attorney's fees even though the court-approved settlement may not be in the specific form of a consent decree. The Third Circuit correctly recognized that an agreement need not be titled "Consent Decree" to have sufficient judicial imprimatur. Given the many ways in which the parties may negotiate for a settlement and the many contexts under which they labor, it is not surprising that some private settlements, although not classified as consent decrees, will nonetheless involve a great deal of judicial oversight and approval.

This test also avoids an overly restrictive formulation that inequitably narrows the class of parties that can recover attorney's fees as prevailing parties,<sup>214</sup> while at the same time avoiding a definition of "prevailing party" that is too permissive of plaintiffs who have not received sufficient judicial imprimatur.<sup>215</sup> The test recognizes that there is a category of settlement, falling between consent decrees and purely private settlements on the continuum, that contains sufficient imprimatur to confer prevailing party status under federal fee-shifting statutes. The *Truesdell* elements satisfy the Court's concerns regarding judicial oversight because they provide for continuing jurisdiction to enforce the settlement terms.

*2. The need for an additional merit-review element to the Third Circuit's test*

While the Third Circuit's judicial imprimatur test addresses the *Buckhannon* concern regarding oversight—in the sense of retaining jurisdiction—it fails to sufficiently address the judicial approval concern. On their face, the elements cited by the Third Circuit in *Truesdell* address a district court's formal procedures for approving a private settlement. However, *Buckhannon* requires that a court must also review the terms of the settlement to determine whether a party has prevailed on

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213. See *supra* notes 198–200 and accompanying text.

214. See *supra* discussion regarding *Bloomberg*, Part V.B.

215. See *supra* discussion of *Barrios*, Part V.A.

the merits of the suit.<sup>216</sup> This merit requirement also finds ample support in pre-*Buckhannon* Supreme Court precedent.<sup>217</sup> Hence, the Third Circuit's test needs a specific merit-review element in order to ensure sufficient judicial imprimatur for prevailing party status.

The *Truesdell* elements do not require a judge to review either the terms of the settlement or the underlying merits of the plaintiff's claim. Under the Court's *Buckhannon* reasoning, this is insufficient judicial imprimatur. The Court rejected the catalyst theory in part because it potentially classified a party as prevailing even when there has been no judicial determination of the claim's merits.<sup>218</sup> The Court could not countenance a definition of "prevailing party" that awarded "attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the 'sought-after destination' without obtaining any judicial relief."<sup>219</sup> The *Truesdell* test, without an approval element, could likewise countenance an award of attorney's fees to a party without a judge's approbation of the underlying claim's merits. Nothing in the *Truesdell* test specifically requires the judge to review and approve the specific terms of the settlement or determine that the party is entitled to some relief on the claim's merits.

Courts have argued that the trial judge's "responsibility to ensure that its orders are fair and lawful stamps an agreement that is made part of an order with judicial imprimatur."<sup>220</sup> Under this conception, a judge need not undertake any specific review of the settlement terms or underlying merits; the court's general mandate to ensure that its orders are fair suffices for judicial imprimatur.<sup>221</sup> In *Roberson*, for example, the

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216. The Supreme Court in *Buckhannon* stated that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." 532 U.S. at 603 (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987)); see *supra* notes 52-58 and accompanying text.

217. See *Hewitt*, 482 U.S. at 760 ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail."); *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) ("Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims."); *supra* notes 52-58 and accompanying text.

218. *Buckhannon*, 532 U.S. at 606.

219. *Id.*; see *supra* note 90.

220. *Smyth v. Rivero*, 282 F.3d 268, 282 (4th Cir. 2002); see also *Roberson v. Giuliani*, 346 F.3d 75, 82-83 (2nd Cir. 2003) ("[W]hen the district court retained jurisdiction . . . it gave judicial sanction to a change in the legal relationship of the parties, regardless of the actual scrutiny applied.").

221. *Smyth*, 282 F.3d at 282.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

Second Circuit found sufficient judicial imprimatur for prevailing party purposes even though the district court “had not specifically reviewed or approved the terms of the settlement agreement.”<sup>222</sup> The cases following this line of reasoning equate the enforcement remedy, when combined with the court’s general mandate to ensure that its orders are fair, as sufficing for judicial imprimatur.

This logic does not hold up because it lacks sufficient specific judicial approval of the underlying merits of the suit. In order to satisfy *Buckhannon*, the settlement should have enough judicial imprimatur to make it the functional equivalent of a consent decree.<sup>223</sup> The level of judicial review when simply ensuring that the court’s orders are fair does not rise to the level of fairness review when approving of a consent decree.<sup>224</sup> Settlements such as those in *Roberson* cannot logically be deemed the functional equivalent of consent decrees.<sup>225</sup> In a consent decree, the judge must not only ensure that the terms of the settlement are fair and reasonable, but must make sure that “the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation.”<sup>226</sup>

### 3. Proposed “Third-Circuit-plus” test

This comment proposes that courts adopt a judicial imprimatur test for determining prevailing party status that is a combination of the Third Circuit’s *Truesdell* elements plus an explicit approval element, as discussed above.<sup>227</sup> Specifically, the “Third-Circuit-plus” test consists of two prongs: (1) judicial oversight, and (2) judicial approval. The oversight prong is satisfied when the four *Truesdell* elements are met.<sup>228</sup> That is, this prong is satisfied if an order: (a) contains mandatory language, (b) is entitled “Order,” (c) is signed by the judge, and (d) provides for retained jurisdiction, either through incorporating the terms of the settlement or through including a separate “provision ‘retaining jurisdiction’ over the settlement agreement.”<sup>229</sup>

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222. *Roberson*, 346 F.3d at 82.

223. See *supra* note 112 and accompanying text.

224. See *supra* notes 34–37 and accompanying text.

225. See *supra* notes 34–36 and accompanying text.

226. *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981).

227. See *supra* Part V.C.1–2.

228. See *supra* notes 149–151 and accompanying text.

229. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994).

The approval element is satisfied if the trial judge undertakes a review of the underlying merits of the claim to determine that the corresponding settlement represents a fair conclusion to the dispute.<sup>230</sup> The approval element of this proposed test contemplates that, after undertaking such a review, a judge will memorialize the finding, either on the record or in writing, that the terms of the settlement are fair to both sides based on a review of the merits of the claim. This element prevents a party from achieving prevailing party status when its claim was merely colorable but potentially meritless.<sup>231</sup> This element thus satisfies the “merit requirement,” which is a necessary precursor to prevailing party status.<sup>232</sup>

The added merit-review element requires that a judge determine that a plaintiff has achieved success on some of the merits of his claim. In other words, the judge should review both the terms of the settlement and the plaintiff’s underlying claim to ensure that the resolution is meritorious.<sup>233</sup> This is not an equation of liability to the defendant.<sup>234</sup> Indeed, one reason consent decrees are attractive to defendants is that

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230. By requiring the judge to make a determination at the time of dismissal, the “Third-Circuit-plus” test satisfies the Supreme Court’s concern in *Farrar* that the prevailing party must benefit directly from the relief at the time of settlement. See *supra* note 69 and accompanying text.

A similar version of this test has been proposed. See Laura Kendall, Note, *The Losing Argument Continues for Prevailing Without Winning: A Critical Summary of the Impact of Buckhannon on the Catalyst Theory*, 54 CASE W. RES. L. REV. 573, 595 (2003) (“[I]n order for a ‘functional equivalent’ of a consent decree to preserve the stamp of *imprimatur* required by *Buckhannon*, the court should be required to both endorse the terms of the settlement and explicitly retain jurisdiction over the case.”) (citing *Reed v. Shenandoah Mem. Hosp.*, 2002 WL 1964826, at \*10 (D. Neb. Aug. 12, 2002) (“A district court approval of a private settlement along with explicit retention of jurisdiction to enforce the settlement terms makes a settlement the functional equivalent of a consent decree, providing the necessary judicial *imprimatur* on the change of conduct.”)). The “Third-Circuit-plus” test provides more detailed guidelines regarding the proposed levels of approval and oversight than does Kendall’s proposal. Furthermore, the *imprimatur* test as envisioned by Kendall would allow for prevailing party status when a judge has merely incorporated the terms of the settlement into the dismissal order; Kendall’s test does not require a judge to specifically review the settlement terms for fairness or to specifically enquire as to the merits of the underlying suit. “Third-Circuit-plus” contemplates a more focused review into the merits in order to satisfy the Court’s concerns regarding the merit requirement.

231. See *supra* note 219 and accompanying text.

232. See *supra* note 218.

233. Such a review would satisfy the demands of Supreme Court precedent; namely, a party prevails, according to the Court in both *Garland* and *Buckhannon*, when it secures: (1) “material alteration of the legal relationship of the parties,” *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989), and (2) “at least some relief on the merits of his claim before he can be said to prevail,” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001).

234. See *supra* notes 57–58 and accompanying text.

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

they do not always entail a declaration of liability or wrongdoing.<sup>235</sup> If a consent decree entails sufficient judicial imprimatur, then it follows that a party's settlement does not have to include an admission of liability in order to be considered a prevailing party. This lack of liability admission is distinguishable from a judicial finding that a party's underlying claim was meritorious enough to base prevailing party classification on. It is one thing to say that a party's claims have merit in the settlement context and another to say that the defendant bears liability—the latter requiring a full adjudication of possible defenses and immunities.

This judicial finding of merit must be more than that the plaintiff stated a colorable claim and that the lawsuit was nonfrivolous.<sup>236</sup> The level of merit review should be more than that typically undertaken in a stipulated dismissal order following a purely private settlement.<sup>237</sup> Even in situations where the dismissal order incorporates the terms of the private settlement into the dismissal order, the judge should undertake a significant merit review in order to satisfy the *Buckhannon* approval concern. This judicial inquiry need not be searching or overly exact, but it should include sufficient judicial imprimatur on the parties' resolution as called for by the "Third-Circuit-plus" test.

#### 4. Reasons to adopt "Third-Circuit-plus": a return to policy

The circuit split exists in part because the Supreme Court failed to provide guidance regarding how much judicial involvement is necessary for prevailing party status and also in part because the Court explicitly eschewed policy as a basis for striking down the catalyst theory.<sup>238</sup> The split arose when lower courts attempted to decide what level of judicial imprimatur is sufficient for "prevailing party" status in a policy void. However, the decision as to how much judicial imprimatur suffices for prevailing party status necessarily rests on some form of policy determination. If a court believes that plain meaning interpretation,

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235. See *Buckhannon*, 532 U.S. at 604.

236. See *id.* at 605. The Court noted:

Even under a limited form of the "catalyst theory," a plaintiff could recover attorney's fees if it established that the complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted. This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary.

*Id.*

237. See *supra* notes 42–46 and accompanying text.

238. See *supra* note 100 and accompanying text.

regardless of congressional intent, should win the day, then that court will likely follow the lead of the Eighth Circuit in restricting the class of prevailing parties. On the other hand, if a court believes that congressional intent should always trump an overly literalist reading of statutory text, then that court will likely follow the Ninth Circuit in expanding the prevailing party class as much as possible. The proposed "Third-Circuit-plus" test attempts to find a balance between these competing views.

The purpose of the civil rights statutes was to "encourage individuals injured by racial discrimination to seek judicial relief."<sup>239</sup> Congress designed the fee-shifting statutes to empower impecunious litigants in their dealings with civil rights violators. An overly strict reading of *Buckhannon*, such as that taken by the Eighth Circuit, improperly shifts power back to the defendants in civil rights litigation.<sup>240</sup> If a plaintiff can only receive a fee award from the court by obtaining a judgment on the merits or a consent decree, the defendant has leverage in negotiating the settlement. The defendant in such situations can, in effect, unduly pressure the plaintiff who desires to settle to do so with little or no consideration of attorney's fees.<sup>241</sup> Additionally, an overly strict reading of *Buckhannon* "likely would discourage informal settlement and increase litigation, which is inefficient."<sup>242</sup> However, the "Third-Circuit-plus" test shifts the balance of power back to the plaintiffs. If a plaintiff can receive a fee award based on a settlement with sufficient judicial

239. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); see *supra* note 63.

240. See, e.g., *Weber*, *supra* note 28, at n.8 ("[A]ttorneys' fees are simply another item of relief, and if the plaintiff's right to obtain them is limited, settlements will be biased downward.").

241. In such situations, the defendant knows that the plaintiff can only get court-awarded attorney's fees if it reaches at least a consent decree. Therefore, the defendant has an incentive not to include attorney's fees in any potential settlement that is not stylized as a consent decree. The defendant may simply refuse to agree to submit the settlement to the court as a consent decree. A similar line of reasoning was recognized in the special education context following *Buckhannon*. See *Weber*, *supra* note 160, at 398-99 (concluding that the plaintiff's "natural response [in such a situation] is to split some of the difference between the fees and the offered services, accepting less of either or both").

242. Macon Dandridge Miller, Comment, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347, 1370 (2002) ("[Strict application of] *Buckhannon*'s rule likely would discourage informal settlement and increase litigation, which is inefficient. Instead of settling a case out of court with its opponent, a party may be compelled to continue with litigation—consuming judicial resources and increasing costs—in order to recover attorney's fees."); see also *Steuer*, *supra* note 21, at 82-83 ("A looser interpretation of *Buckhannon* could mitigate its pernicious effects by allowing more private settlements to qualify as the functional equivalent of a consent decree.").

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

imprimatur, attorney's fees reenter the equation during settlement negotiations.<sup>243</sup>

At the same time, courts also do not have the leeway after *Buckhannon* to stretch the term "prevailing party" beyond its plain meaning.<sup>244</sup> There is a competing tension between expanding the class of prevailing parties in order to satisfy congressional policy and the Supreme Court's adherence to plain meaning of the term "prevailing party."<sup>245</sup> While civil rights legislative policy urges an expansive reading of prevailing parties beyond those that secure a judgment on the merits or a consent decree, the Court's rule in *Buckhannon* urges that courts not expand the class too far. Specifically, a party to a private settlement can only be termed a prevailing party when the settlement bears sufficient judicial imprimatur, which only occurs when a court has both approved of the settlement terms against the backdrop of the underlying merits of the claim and retained jurisdiction to enforce those terms. The "Third-Circuit-plus" test is designed to expand the class of prevailing parties while adhering faithfully to the Supreme Court's guidance in *Buckhannon*. Accommodating both of these competing interests requires allowing prevailing party status when a party has something less than a consent decree but more than a purely private settlement.<sup>246</sup>

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243. The reasoning of this situation is the reverse of the discussion in note 241, *supra*. If the plaintiff does not depend so much on the cooperation of the defendant to receive attorney's fees, the defendant must now consider the amount of fees in the settlement negotiation or else will be forced to litigate to conclusion.

244. See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 at 610 (2001) ("Given the clear meaning of 'prevailing party' in the fee-shifting statutes, we need not determine which way these various policy arguments cut. . . . To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be [an impermissible] assumption of a roving [judicial] authority." (citation omitted)).

245. Commentators have derided the Court's decision in *Buckhannon* and in other cases as a general assault on the private attorney general regime. See, e.g., Karlan, *supra* note 2, at 186 ("[T]he Court has launched a wholesale assault on one of the primary mechanisms Congress has used for enforcing civil rights: the private attorney general."); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 372 (2002) ("[T]he narrow majority of the Court has rejected settled interpretations of federal civil rights laws to limit the protection that Congress has sought to give to the civil and economic rights of many vulnerable people, including older people, people with disabilities, women, and working people.").

246. See *supra* Part V.C.1-3.

*D. Applying "Third-Circuit-Plus" to Bloomberg and Barrios*

*1. The Bloomberg plaintiffs would prevail under "Third-Circuit-plus"*

Applying the "Third-Circuit-plus" formulation to the facts of *Bloomberg* demonstrates that the settlement agreement was sufficient to confer prevailing party status. The district court's dismissal met the *Truesdell* elements for sufficient judicial "oversight": it was entitled "Order"<sup>247</sup> and specifically retained jurisdiction over the parties to enforce the settlement agreement.<sup>248</sup> While the record does not so indicate, this Comment assumes that the district court's dismissal order contained mandatory language and was signed by the district court judge, not the parties' attorneys.

To pass muster under the "Third-Circuit-plus" test, the *Bloomberg* settlement would also need to have sufficient judicial merit review. Settlements in class action suits require the judge to undertake a "fairness review."<sup>249</sup> Various circuits have different multifactor tests for determining if a proposed class action settlement is fair.<sup>250</sup> Some circuits include factors that implicitly require a judge to look at the merits of the underlying claims.<sup>251</sup> For example, in the Eighth Circuit district courts determining the fairness of a class action settlement must consider a variety of factors, including "the probability of success in the litigation."<sup>252</sup> Assuming the trial judge in *Bloomberg* followed proper procedure and undertook such a review, the settlement would qualify the *Bloomberg* plaintiffs as prevailing parties under the approval prong of the "Third-Circuit-plus" test.<sup>253</sup> While the district court's opinion granting attorney's fees<sup>254</sup> did not mention a specific inquiry into the

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247. *Christina A. v. Bloomberg*, 167 F. Supp. 2d 1094, 1099 (D.S.D. 2001), *rev'd*, 315 F.3d 990 (8th Cir. 2003).

248. *Id.*

249. *See supra* notes 134–135 and accompanying text.

250. *See* 8 MOORE, *supra* note 44, § 23.85[1] (compiling cases and listing various multifactor tests that various courts apply).

251. *Id.*

252. *Lambert v. Flight Transp. Corp. (In re Flight Transp. Corp. Sec. Litig.)*, 730 F.2d 1128, 1135 (8th Cir. 1984).

253. *See also Weber*, *supra* note 160, at 406 ("[C]ase law supports the proposition that judicial approval of a class settlement suffices for a judicial imprimatur on the alteration of the legal relation of the parties.") (citing *Nat'l Coalition for Students with Disabilities v. Bush*, 173 F. Supp. 2d 1272 (N.D. Fla. 2001)).

254. *Christina A. v. Bloomberg*, 167 F. Supp. 2d 1094, 1094 (D.S.D. 2001).

429] *Prevailing Parties, Attorney's Fees, and Judicial Imprimatur*

merits, it did indicate that "the Settlement Agreement appears adequately to deal with many of the due process and confinement issues discussed in the Complaint."<sup>255</sup> Because *Bloomberg* would be a case in which both approval and oversight elements were satisfied, the Eighth Circuit incorrectly focused only on the form of the judicial order, and not on the material alteration of the parties' relationship, to determine that prevailing party status was not satisfied.

2. *The Barrios plaintiff would not prevail under "Third-Circuit-plus"*

While the Eighth Circuit interpreted the class of prevailing parties too narrowly, the Ninth Circuit in its decisions following *Buckhannon* interpreted the class too broadly. Under the proposed "Third-Circuit-plus" test, *Barrios* is a case in which there would not be enough judicial imprimatur on that change in the legal relationship to satisfy prevailing party status.

Specifically, *Barrios* fails to satisfy the oversight prong of "Third-Circuit-plus" test. The order dismissing the lawsuit did not contain mandatory language and did not retain jurisdiction to enforce the settlement terms.<sup>256</sup> The Ninth Circuit found dispositive the fact that the settlement agreement provided "that the district court would retain jurisdiction over the issue of attorneys' fees, thus providing sufficient judicial oversight to justify an award of attorneys' fees and costs."<sup>257</sup> However, an agreement between the parties that a court will subsequently decide the issue of attorney's fees does not equate to actual judicial oversight as contemplated by *Buckhannon*. Nothing in the *Barrios* settlement or dismissal provided for continued jurisdiction over the settlement terms. *Barrios* also fails the "Third-Circuit-plus" approval prong. Nothing in the record indicates that the trial judge reviewed the settlement terms to determine whether the plaintiff was succeeding on any meritorious claims.<sup>258</sup>

Applying the "Third-Circuit-plus" test to both *Bloomberg* and *Barrios* reveals that neither of these cases was properly resolved under a faithful reading of *Buckhannon*. Application of the proposed test reveals that the Eighth Circuit improperly denied attorney's fees whereas the Ninth Circuit improperly awarded attorney's fees. *Buckhannon* was

255. *Id.* at 1097.

256. *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1133 (9th Cir. 2002).

257. *Id.* at 1134 n.5.

258. *Id.* at 1133.

concerned that a party be classified as prevailing only when the resolution to its suit contained sufficient judicial imprimatur, or approval and oversight. Adoption of the "Third-Circuit-plus" test throughout the circuits would properly balance congressional fee-shifting goals with the Court's adherence to plain meaning.

#### VI. CONCLUSION

Circuit courts have split three ways in determining just how much judicial sanctioning a party must secure to become a prevailing party. By conferring prevailing party status on private settlement participants when the court order contains 1) mandatory language, 2) the title "Order," 3) the signature of the judge, and 4) retention of jurisdiction to enforce the terms of the settlement agreement, the Third Circuit comes closest to satisfying the Supreme Court's concerns about judicial imprimatur, while avoiding the overly harsh or overly broad constructions adopted by the Eighth and Ninth Circuits. However, this test should be augmented by a merits-review element requiring courts to examine the degree of alteration in the parties' legal relationship in order to fully comply with the proposed "Third-Circuit-plus" judicial imprimatur test.

In order to bring clarity to the issue, courts should adopt a "prevailing party" test that implicates both judicial approval and oversight by focusing on whether a dismissing court conducted a "merit" review of the settlement and retained jurisdiction of the settlement's enforcement. Until uniformity is achieved, practitioners should inform themselves of and comply with the requirements for "prevailing party" status in their respective jurisdictions prior to finalizing the judicial involvement in a potential settlement. By adopting a clear rule for when a party "prevails," courts may still promote the policy concerns of the Civil Rights Attorney's Fees Awards Act while adhering to the plain meaning of the term "prevailing party" in federal fee-shifting statutes.

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\* I would like to thank Professor C. Douglas Floyd and the entire *BYU Law Review* staff for their invaluable assistance in editing and critiquing this Comment. I especially thank my wife, Robin, and my children, Katelyn, Rachel, Ethan and Parker, for their love, support, and encouragement.