No. 08-CV-189

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

TERRIE PATTERSON, et al., Plaintiffs-Appellants, v. DISTRICT OF COLUMBIA, Defendant-Appellee.	No. CAB5726-87 Hon. Rufus G. King III

BRIEF OF PLAINTIFFS-APPELLANTS

Brenda Grantland
20 Sunnyside, Suite A-204
Mill Valley, CA 94941

Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION
OF THE NATIONAL CAPITAL AREA
1400 20th Street, NW, Suite 119
Washington, DC 20036
(202) 457-0800

Miriam Nemetz
Jeffrey A. Berger
Counsel of Record
Michele Keegan*
MAYER BROWN LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3855

Attorneys for Plaintiffs-Appellants

* Admitted in Maryland only; not admitted in the District of Columbia. Practicing under the supervision of firm principals.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes and Rules

Other Authorities

ISSUE PRESENTED

Whether the trial court erred as a matter of law in ruling that plaintiffs were not prevailing parties under 42 U.S.C. § 1988—the fee-shifting provision for civil rights actions—when, after four years of litigation, the trial court aggressively pushed the parties to reach a settlement that afforded plaintiffs substantial relief, urged the parties to set aside for later determination their dispute over plaintiffs' request for fees, and subsequently resolved the fee issue.

STATEMENT OF THE CASE

Plaintiff Terrie Patterson filed a lawsuit against the District of Columbia in July 1987, claiming that the seizure of her vehicle under the District's then-existing forfeiture statutes violated her Fourth, Fifth, Sixth, and Eighth Amendment rights. *District of Columbia v. Patterson*, 667 A.2d 1338, 1341 (D.C. 1995) (*Patterson I*). Several additional plaintiffs joined the action: they each complained that the District's seizure of their property under color of its forfeiture laws violated their constitutional rights; they requested the return of their vehicles (or their equivalent value); and they sought monetary relief for damages caused to their vehicles. A101-05 (¶ 7(d)-(f), (h)-(i)). In 1989, the Superior Court ruled that the District violated the plaintiffs' Fourth Amendment rights when it failed to provide them with prompt, post-seizure hearings to determine whether probable cause existed for the seizure and detention of their vehicles. *Patterson I*, 667 A.2d at 1341-42. Patterson requested a hearing in which the Superior Court ruled (in December 1989) that probable cause in fact existed. *Id*. at 1342.

Five of the plaintiffs that joined the action (Sandra Hill-Harris, Morris Hinton, Thomas Jones, Lennox Layne, and Wanda Murray) eventually entered into monetary settlements with the District, but reserved for later determination the question of any fees to which the plaintiffs were

entitled. A179-80. Plaintiffs subsequently sought attorney's fees under 42 U.S.C. § 1988 as prevailing parties in the litigation.

In orders issued in November 1992 and May 1993, the Superior Court agreed that plaintiffs were prevailing parties and awarded them approximately $35,000 in attorney's fees. A144; A150-51. Both parties appealed, and in *Patterson I*, this Court held that Patterson was not a prevailing party with respect to her Fourth Amendment claim (even though she had received the hearing she requested), and vacated the Superior Court's ruling to the extent that it awarded fees related to that claim. 667 A.2d at 1348. The Court, however, could not determine the appropriateness of fees for the Fifth Amendment claims and remanded the matter to the Superior Court. *Id*.

The Superior Court subsequently denied the request for fees, concluding erroneously that plaintiffs had waived their right to obtain fees by signing a release of claims as part of the 1992 settlement. A169-70. On appeal, this Court again reversed, finding that no such waiver occurred, and again remanded the case with instructions to the trial court to determine whether plaintiffs had established that they were prevailing parties. *Patterson v. District of Columbia*, 795 A.2d 681 (D.C. 2002) (*Patterson II*), *amend on denial of reh'g*, 819 A.2d 320 (D.C. 2003). On January 11, 2008, after a nearly five-year delay, the Superior Court held that plaintiffs were not prevailing parties and denied their claim for attorney's fees. A191. Plaintiffs filed a timely notice of appeal on February 11, 2008. A192.

STATEMENT OF THE FACTS

The main legal question presented here—whether plaintiffs meet the statutory definition of "prevailing party" in 42 U.S.C. § 1988—arises out of a decades-old civil rights action. Plaintiffs share in common the unfortunate experience of having had their vehicles seized under

the color of the District's forfeiture and seizure laws and detained for lengthy periods of time during which the plaintiffs could not obtain prompt post-seizure hearings and their property depreciated in value and/or was damaged by the District. To vindicate their constitutional rights—and in particular their Fifth Amendment rights—plaintiffs filed a civil rights action under 42 U.S.C. § 1983 in which they sought, *inter alia*, compensation for the damage the District caused to their vehicles. Their litigation efforts were partially successful: in 1992, after a series of settlement conferences and negotiations, the five plaintiffs who seek fees in this appeal entered into a settlement with the District in which they received compensation for their losses. This settlement—and the events surrounding it—demonstrate that plaintiffs are prevailing parties under Section 1988.

A. The District's Seizure Of Plaintiffs' Vehicles

A spate of property seizures by the District triggered this action. The five plaintiffs who settled their claims, along with several others, each claimed damage to (or loss of) their vehicles as a result of constitutional violations caused by the application of the District's laws. For instance, under the apparent aegis of the District's narcotics-forfeiture law (formerly D.C. CODE § 33-552, now codified as amended at D.C. CODE § 48-905.02), which permits the forfeiture of property used to facilitate the sale or receipt of narcotics, the District police seized Patterson's vehicle in March 1987 when it arrested an unauthorized driver of her vehicle for narcotics possession. A98-99 (¶ 7(a)); A121-21 (¶ 6).[1] Even though Patterson was an innocent owner because she was not aware of the driver's activities (*see* A116; D.C. CODE § 48-

[1] At the time, the police stored vehicles pending a determination by Corporation Counsel about whether to initiate a forfeiture proceeding. No process was issued or proceeding commenced until the Corporation Counsel decided whether to file a libel of information with the Civil Division of Superior Court. Property could therefore be held by the District for up to two years before a vehicle owner could obtain a judicial hearing at which he or she could present defenses. *Patterson I*, 667 A.2d at 1342.

905.02(a)(4)(B)), the District did not return her car until three years later.[2] During the interim the vehicle suffered serious damage, depreciated significantly, and became inoperable. Similarly, Sandra Hill-Harris, whose vehicle was seized in October 1985 during her son's arrest, eventually demonstrated that her car was not forfeitable because she was an innocent owner. The police did not return her vehicle until May 1987; during its detention, the car suffered severe damage and never ran again. Although she had already won her forfeiture case, she also sought damages proximately caused by the District's actions. A101-02 (¶ 7d); A121 (¶ 7).

Other plaintiffs suffered comparable losses under the forfeiture statutes. For instance, the police seized Thomas Jones's vehicle in September 1986 during an arrest that led to charges the District ultimately abandoned. Without a vehicle, Jones had to rent a car to travel to work, and when he could no longer afford the rental, he lost his job. The District finally returned his vehicle—in damaged condition and only after Jones paid storage fees—in January 1987. A102-03 (¶ 7(e)); A121-22 (¶ 8). Similarly, the police seized Wanda Murray's vehicle during an arrest for burglary in September 1987. There was no suggestion that Murray's vehicle, or the burglary, was connected to the sale or purchase of narcotics, the only ground upon which the statute permitted a forfeiture. The District refused to return the vehicle for several weeks, claiming that it was "evidence," and when Murray finally received the vehicle after paying storage fees, it had been damaged. A105 (¶ 7(i)); A123-24 (¶ 11).

Two of the plaintiffs never even received their vehicles back. The police seized Lennox Layne's vehicle in August 1987 under egregious circumstances: a notice was placed on his vehicle informing him that his car would be impounded if not moved within 72 hours. The next day (before the expiration of 72 hours), the police seized his vehicle, and rather than impound it,

[2] The District did so only after the Superior Court ruled that her vehicle was "not forfeitable" and ordered the District to return the car immediately. A116.

destroyed it pursuant to a "junk vehicle" statute later struck down as unconstitutional (*see Propert v. District of Columbia*, 948 F.2d 1327 (D.C. Cir. 1991)). A103-04 (¶ 7(f)); A122-23 (¶ 9). The police seized Morris Hinton's vehicle during his arrest for armed robbery (the charges were eventually dismissed), and even though the police did not have any grounds for forfeiture, they retained possession of the vehicle under the pretense of "safekeeping" while he remained incarcerated (having been unable to afford bail). Pursuant to then-existing District law (D.C. CODE § 4-161(a)), the owner of a vehicle being held for safekeeping would receive a notice informing him or her that the car could be auctioned off within 60 days if not claimed. A104-05 (¶ 7(h)); A123 (¶ 10). Contrary to Supreme Court precedent (*see Robinson v. Hanrahan*, 409 U.S. 30 (1972) (per curiam)), the District sent notice to Hinton's home rather than to the jail in which the District held him. Hinton never received the notice, and the property clerk auctioned his car. A104-05 (¶ 7(h)); A123 (¶ 10).

B. The Constitutional Challenges To The District's Seizures

The hardships suffered by plaintiffs—damaged vehicles, payment of storage and other fees, collateral costs (*i.e.*, towing, rental charges, loss of employment), and complete deprivation of their vehicles—prompted them to challenge the constitutionality of the District's conduct. Patterson filed suit in July 1987 under 42 U.S.C. § 1983 alleging that the District's implementation of D.C. Code § 33-552 violated her Fourth, Fifth, Sixth, and Eighth Amendment rights. *Patterson I*, 667 A.2d at 1341. In addition to injunctive and declaratory relief invalidating the statute, Patterson sought a probable cause hearing, the return of her seized car, and compensation for damage to her property. *Id.* Hill-Harris, Hinton, Jones, Layne, and

Murray joined as plaintiffs and asserted additional claims, including requests for compensation for injuries caused by alleged constitutional violations.[3] *Id*.

Plaintiffs earned a victory in January 1989 when the Superior Court ruled that they had a Fourth Amendment right to a prompt post-seizure probable cause hearing. A71. The court held that "the Fourth Amendment protections apply to civil forfeitures" and accordingly that "claimants from whom property has been seized have a right to a probable cause determination, post-seizure at their request." A92. Patterson requested such a hearing, and the Superior Court determined in December 1989 that probable cause existed for the seizure of her vehicle. *Patterson*, 667 A.2d at 1342.[4]

This January 1989 ruling did not, however, address plaintiffs' other constitutional claims, including their requests for monetary relief. For instance, the court's ruling did not resolve a motion for summary judgment filed by Hinton and Layne in October 1988, which had remained pending for years; in the motion, they argued that the seizures of their vehicles without notice, without an opportunity to be heard before disposal of the vehicle, and without "just

[3] This litigation has a complicated procedural history. About the same time Patterson filed her Section 1983 suit, the District initiated forfeiture actions against many of the plaintiffs named in Patterson's complaint, who in turn pressed counterclaims making allegations similar to those asserted in the Section 1983 suit. *Patterson I*, 667 A.2d at 1341 n.4. For instance, in *District of Columbia v. One 1986 Chevrolet Sprint 4-Door*, No. CA 6212-87, the District initiated forfeiture proceedings against Patterson (and her vehicle, *see supra* p. 3 n.1), prompting Patterson to counterclaim and challenge the constitutionality of the forfeiture statute. In September 1987, the Superior Court consolidated the forfeiture cases with the Section 1983 suit, but it eventually severed off the forfeiture actions (and the related counterclaims) in February 1989 following its establishment of plaintiffs' right to a prompt post-seizure hearing. *Patterson I*, 667 A.2d at 1341 n.4. The settlement of those counterclaims, including the May 1991 settlement in which the District agreed to pay Patterson $ 4,000 to compensate her for damage to her vehicle, is not at issue in this appeal, although it is noteworthy that just as with the settlements here, Patterson and the District reached an agreement through a pretrial settlement conference. A178 n.2.

[4] The court would not allow Patterson to raise the innocent-owner defense during the probable cause hearing, even though Patterson later won her forfeiture trial on these grounds.

compensation" for the value of vehicles violated their Fifth Amendment rights. *Patterson I*, 667 A.2d at 1342. All five plaintiffs reasserted their constitutionally premised damages claims in amended complaints (the Third and Fourth Amended Complaints, filed in February and September 1990 respectively), alleging that the forfeiture and seizure statutes violated, *inter alia*, their Fifth Amendment rights. A179. Plaintiffs' claims languished on the Superior Court's calendar until late 1991, when the clerk assigned the case to Judge Wertheim and the litigation began progressing towards trial.

C. Plaintiffs And The District Reached A Settlement After Participation In Settlement Conferences Actively Supervised By Judge Wertheim.

When the court finally took up Hinton's and Layne's long-unresolved summary judgment motion, ordering further discovery and briefing, it also began aggressively pushing the parties towards a settlement that would preclude a trial. For instance, at a January 1992 conference, Judge Wertheim learned that the plaintiffs were no longer requesting equitable relief (because changes to the statutes had altered the grounds for such relief), and that the only remaining claims for relief were "those for money damages and attorneys fees." A129. In light of this information, the court "urged the parties to reach a settlement of the remaining issues as promptly as possible in order to avoid additional representational burdens." *Id*. The court "provided a timetable to facilitate settlement," ordering plaintiffs' counsel to provide a written settlement offer to the District by late January and the District to provide a response (with a "specific counteroffer") several weeks later. *Id*. The court further advised the parties that if they could not "agree upon the matter of attorneys fees they should nevertheless seek agreement on all other matters." *Id*.

Judge Wertheim then held a settlement conference on February 18, 1992, in which he reported that "it appeared likely to the Court that settlement of the compensatory damage claims

of the five remaining plaintiffs" would occur. He noted that this would "leave only plaintiffs' claim for attorneys fees," but stated that settlement of fees "also appeared reasonably likely to the Court." A133. The court once again directed the parties to make "all diligent efforts" to settle "both the remaining damage claims and the attorneys fee claim, or at least to resolve the former and narrow the outstanding issues as to the latter." A134.

Two months later the parties had yet to reach a settlement, much to the court's consternation. After an April 9, 1992 settlement conference, it appeared to the court that the parties were $6,000 apart (not including attorney's fees). A135. The court accordingly admonished the parties that "this case has dragged on for too long," and urged the parties to settle all their claims, including the claim for fees, noting as to the latter that "if plaintiffs should be successful in their claim to attorneys fees, the cost of litigating that claim will only impose additional, unnecessary burdens on both sides." A135-36. The Court established an aggressive negotiation schedule, directing the parties to exchange demands and counterdemands within days, scheduling a settlement conference for April 21, 1992, and setting a May 26, 1992 trial date. A136. The court instructed counsel to arrive at the settlement conference with "complete authority to resolve any remaining differences at that conference," including the question of fees. *Id*.

The parties traded settlement demands per the court's order. On April 22, 1992, the District offered to settle the plaintiffs' damages claims for $1,200, but noted that it could not settle the attorney's fees claim because it "would jeopardize [the District's] intended appeal of the issue decided by Judge King." A138 (referring, presumably, to Judge King's 1989 decision granting the plaintiffs the right to a post-seizure probable cause hearing). The planned settlement conference eventually occurred on April 30, 1992, but did not produce a compromise.

Nonetheless, the parties kept negotiating, and finally, on the eve of trial and after five years of litigation, the parties reached a settlement on May 22, 1992 that resolved the plaintiffs' claims for loss of use, depreciation, and property damage to their vehicles. A139; A180. The District agreed to pay each plaintiff a substantial portion of the damages he or she claimed, for an overall total of $1,800. *Compare* A131 *with* A139. On the same day, the parties filed a praecipe that informed the Superior Court "that the claims of plaintiffs [Layne, Murray, Jones, and Hill-Harris] have been settled and counsel expect the remaining claim of Morris Hinton to be resolved next week." A140. Plaintiff Hinton eventually settled his claim for $500 on or about September 1, 1992 (A141; A180 (n.12)), and the parties received their settlement checks and signed their releases during the fall of 1992.

The court did not enter an order or judgment dismissing the action because the parties understood they were going to litigate or settle the question of attorney's fees as a separate matter. Indeed, as this Court recognized, "the parties did not intend the settlement of the underlying individual claims to include counsel fees." *Patterson II*, 795 A.2d at 683. Rather, at the court's urging, the parties focused on settling the underlying claims and declined to let their inability to agree on fees preclude the possibility of any deal.

D. The Parties' Litigation Over The Plaintiffs' Claims For Attorney's Fees.

As a consequence of the parties' inability to reach an agreement on attorney's fees that was incorporated into their settlement agreement, plaintiffs filed a request for fees on August 7, 1992. *Patterson II*, 795 A.2d at 684. In November 1992, the Superior Court ruled that plaintiffs were prevailing parties in the litigation and were entitled to fees; the court pointed to the probable cause hearing and the settlement of the plaintiffs' damages claims as victories that triggered § 1988. *Patterson I*, 667 A.2d at 1342; A142. After requesting additional briefing regarding the appropriate amount, the court in May 1993 awarded plaintiffs' counsel

approximately $35,000 in fees—roughly one-third of the amount requested. *Patterson I*, 667 A.2d at 1342-43; A146.

Both parties appealed this ruling, challenging the "prevailing party" determination and the amount of the fees awarded. This Court reversed the Superior Court's decision. It first held that plaintiffs' success in obtaining a probable cause hearing did not confer enough of a "tangible benefit" to make plaintiffs prevailing parties. *Patterson I*, 667 A.2d at 1345.[5] The Court then determined that it lacked sufficient information to decide whether plaintiffs were entitled to fees for the Fifth Amendment claims covered by the settlement, and accordingly remanded the matter to the trial court for further consideration. *Id*. at 1347.

The Superior Court took up the torch once more. This time, the Court found that "[p]laintiffs likely *were* prevailing parties" by virtue of the settled claims, *but* declined to award them fees. A168 (emphasis added). In the court's view, fees were not proper because the "[p]laintiffs released defendants from all claims including, presumably, claims for attorney's fees, in the settlement agreements." A169.

On appeal, this Court again reversed, ruling "that the release agreement executed in this case was not intended to preclude a subsequent counsel fee award" under Section 1988. *Patterson II*, 795 A.2d at 683. The Court recognized that the parties had extensively discussed the issue of fees throughout the settlement negotiations, but had deferred its resolution until *after* the primary claims were resolved. *Id*. at 683-84. The Court found particularly telling that "[i]t was not until the trial court's counsel fees order was on appeal [several years after the settlements] that the District claimed that plaintiff waived their right to counsel fees when they

[5] Plaintiffs continue to believe that establishing a Fourth Amendment right to a prompt post-seizure hearing is sufficient to confer "prevailing party" status, but recognize that this Court's ruling in *Patterson I* is the law of the case and maintain their objection to that ruling for preservation purposes.

settled their individual cases." *Id*. at 684. This Court remanded once more to the trial court, and urged the court to consider not only the impact (if any) of the recent Supreme Court decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), but also "its own involvement in the settlement and any factors that may distinguish this case from *Buckhannon*." *Patterson II*, 795 A.2d at 684.[6]

Regrettably, and despite the best efforts of plaintiffs, this matter languished on the Superior Court's docket for nearly five years after remand. Finally, in January 2008, the Superior Court once more denied plaintiffs' petition for fees on the basis of two new grounds. *First*, the court stated obliquely that plaintiffs were not prevailing parties because it was "unclear whether [their Fifth Amendment] claims were preserved." A184. Even if plaintiffs had preserved their constitutional claims, the court wrote, "they were only a means to recover monetary damages and do not rise to the level of a constitutional violation necessary to obtain prevailing party status." *Id*. *Second*, the court held that plaintiffs were not prevailing parties under *Buckhannon* because the settlement between the District and the plaintiffs lacked the necessary "judicial imprimatur." *Id*. at 185-91. Finding the facts in *Buckhannon* to be "materially indistinguishable" from those here, the court concluded that "plaintiffs who settle claims are not prevailing parties unless the settlement is incorporated in a court order or reduced to a consent decree." *Id*. at 187, 189.

[6] The District later petitioned for rehearing in light of *Buckhannon*. In an order denying that petition, the Court amended its 2002 decision to include the above language. *Patterson v. District of Columbia*, 819 A.2d 320, 320 (D.C. 2003). The Court also reiterated its request that the trial court develop the record in order to decide whether plaintiffs were prevailing parties. *Id*.

SUMMARY OF THE ARGUMENT

After five years of pursuing relief under Section 1983 for violations of their federal constitutional rights caused by the District's implementation of its forfeiture and seizure statutes, plaintiffs entered into a settlement that provided them with compensation for the damages they suffered. Despite plaintiffs' success in achieving the goals of the litigation, seventeen years later the Superior Court denied their request for fees under 42 U.S.C. § 1988. In doing so, the court employed an aggressive reading of *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), that conflicts with the decision itself, subsequent cases interpreting *Buckhannon*, and the objectives of Section 1988. The Superior Court erred as a matter of law, and its decision should be reversed.

After the Supreme Court decided *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), in which it ruled that prevailing plaintiffs in public interest litigation could not obtain fees absent express statutory authority, Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976. Eventually codified as Section 1988, this fee-shifting provision states that in any action brought under 42 U.S.C. § 1983 (and several other civil rights and public interest statutes), a "court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as party of the costs." 42 U.S.C. § 1988(d). "Congress enacted the fee-shifting provision as 'an integral part of the remedies necessary to obtain' compliance with civil rights laws, S. Rep. No. 94-1011, p. 5 (1976), to further the same general purpose—promotion of respect for civil rights—that led it to provide damages" in the first place. *Evans v. Jeff D.*, 475 U.S. 717, 731 (1986); *see also Kay v. Ehrler*, 499 U.S. 432, 436 (1991) ("Although [Section 1988] was no doubt intended to encourage litigation protecting civil rights, it is also true that its more specific purpose was to enable potential plaintiffs to obtain the assistance of competent counsel in

vindicating their rights."). An award of attorney's fees here clearly will advance the "general purpose" of Section 1988 because plaintiffs demonstrated the key elements of "prevailing party" status: a material alteration of the parties' legal relationship that carries a stamp of judicial approval.

Buckhannon does not preclude the award of attorney's fees to these plaintiffs. In *Buckhannon*, which did not involve a settlement, the plaintiffs claimed fees under the theory that their litigation was the "catalyst" for legislation negating the law they challenged. Rejecting the "catalyst" theory as a basis for the award of fees, the Court held that plaintiffs were not prevailing parties because they obtained relief outside the legal system. Although expansive dicta in a footnote in *Buckhannon* alluded to the unavailability of fees for "private settlements," this reference only precludes fees for those who settle matters outside the court system. *Buckhannon* does not block the award of attorney's fees in connection with settlements that resolve litigation, afford plaintiffs a substantial part of the relief they sought, and are overseen by the court. *See infra* Section I.A.

Nearly every court has agreed that settling plaintiffs may be eligible to receive fees in certain circumstances. Here, the trial court played a significant and aggressive role in pushing the parties to settle plaintiffs' Fifth Amendment claims—holding multiple settlement conferences and admonishing the parties when they failed to reach accord. The trial court explicitly encouraged the parties to defer the issue of attorney's fees for later resolution if they could not reach agreement. The parties followed the court's directive, and after they reached a settlement that did not include fees, the trial court continued to play a role in resolving the issue of attorney's fees. The court's involvement in the settlement proceedings provided sufficient

judicial sanction to permit the award of attorney's fees under *Buckhannon*. *See infra* Section I.B.

To deny plaintiffs fees under the circumstances here would undermine the purpose of Section 1988, conflict with Congress's intent, and discourage future settlements. Congress plainly believed that settlements conferred "prevailing party" status, an understanding of the phrase that comported with its recognized meaning at the time of Section 1988's enactment. Forcing plaintiffs to decide between settling and losing any chance to recover fees, or proceeding with otherwise resolvable litigation in order to preserve eligibility for fees, would institute the worst of all worlds: it would discourage settlement to the detriment of the parties and further strain an over-burdened judicial system. *See infra* Section I.C.

The court placed its imprimatur upon a settlement that plainly effected a material alteration of the legal relationship between the parties and that produced an immediate and direct benefit to plaintiffs. Pursuant to the 1992 settlement agreement, the District paid plaintiffs a portion of the damages they suffered in exchange for the release of their constitutional claims. Such relief is significant enough to trigger Section 1988, and the Superior Court's ruling to the contrary, in which it suggested that fee awards cannot be based on constitutional claims for damages, is inconsistent with Section 1983. *See infra* Section II.

ARGUMENT

The Superior Court's ruling that plaintiffs were not prevailing parties, despite the court's significant role in the settlement and its continuing supervision over plaintiffs' request for fees, reflects an incorrect understanding of Section 1988. The trial court accordingly erred by denying plaintiffs' request for fees, a decision that is reviewed *de novo*. *Pride Transp., Inc. v. Northeastern Pa. Shippers Co-op Ass'n*, 832 A.2d 163, 169 (D.C. 2003).

I. THE 1992 SETTLEMENT HAD SUFFICIENT JUDICIAL IMPRIMATUR TO SERVE AS THE BASIS FOR A FEE AWARD UNDER SECTION 1988.

Based on the Supreme Court's decisions in *Buckhannon*, the Superior Court held that plaintiffs were not entitled to attorney's fees because the settlement between the District and the plaintiffs lacked the necessary "judicial imprimatur." A185-91. The trial court's opinion reflects a misunderstanding of *Buckhannon*.

This Court has held that a plaintiff is a prevailing party for purposes of Section 1988 if "he or she succeeds in obtaining relief by way of *a settlement agreement or* consent decree." *District of Columbia v. Jerry M.*, 580 A.2d 1270, 1274 (D.C. 1990) (emphasis added). While *Jerry M.* predated *Buckhannon*, this Court need not modify its prior ruling because while *Buckhannon* rejected the so-called "catalyst" theory, it did not decide whether a settlement can ever confer prevailing party status. In applying *Buckhannon*, every federal court of appeals but one has recognized that a party ***may*** obtain attorney's fees following a settlement of public interest litigation as long as sufficient judicial imprimatur over the settlement exists. The 1992 settlement between the plaintiffs and the district was cloaked with precisely the level of judicial sanction that justifies the award of fees under *Buckhannon*. The Superior Court's contrary ruling conflicts with the purposes and the policies underlying Section 1988.

A. *Buckhannon* Held Only That Plaintiffs Could Not Rely On A "Catalyst Theory" To Obtain A Fee Award Under Section 1988.

1. Buckhannon *must be understood in context.*

In *Buckhannon*, a five-Justice majority put to rest a circuit split regarding the application of the "catalyst theory"—generally understood as the proposition that a party prevails whenever litigation achieves the relief sought, no matter the mechanism. The Court rejected that theory as a basis for plaintiffs seeking declaratory and injunctive relief to obtain prevailing party status,

but went no further. Notably, *Buckhannon did not involve a settlement*, let alone a settlement for monetary compensation.

The facts of *Buckhannon* are important. An assisted-living facility failed a state inspection because some of its residents were incapable of "self-preservation" (*i.e.*, incapable of removing themselves from imminent danger). *Buckhannon*, 532 U.S. at 600. The owner of the facility filed suit against the State of West Virginia and two state agencies seeking a declaration that the "self-preservation" requirement violated the Fair Housing Amendment Act of 1988 and the Americans With Disabilities Act (ADA), along with an injunction against the regulation's further application. *Id*. at 601. A year later, while the case was pending, the West Virginia legislature enacted a law eliminating the "self-preservation" requirement, and the district court subsequently dismissed the claims as moot. *Id*. The plaintiff then sought attorney's fees (under statutes that used a similar "prevailing party" formulation as Section 1988), claiming that the lawsuit inspired, or acted as a "catalyst," for the resolution of its claims. *Id*. The district court denied the motion under the prevailing law of the Fourth Circuit (which was the only appeals court at the time to have rejected the catalyst theory). *Id*. at 602 & n.3.

After the Fourth Circuit affirmed the district court's ruling, the Supreme Court granted certiorari and affirmed. Construing "prevailing party" as "a legal term of art," the majority cited Black's Law Dictionary and defined the term to mean "'[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.'" *Buckhannon*, 532 U.S. at 603 (quoting BLACK'S LAW DICTIONARY 1145 (7th ed. 1999)). The Court described an illustrative (but not exhaustive) set of prevailing party "examples" derived from its precedents: plaintiffs that received at least partial relief on the merits of their claims (*Hewitt v. Helms*, 482 U.S. 755, 760 (1987)); plaintiffs that received nothing more than an award of nominal damages (*Farrar v.*

Hobby, 506 U.S. 103, 111 (1992)); and plaintiffs that entered into settlement agreements enforced through consent decrees (*Maher v. Gagne*, 448 U.S. 122, 126 (1980)). *Buckhannon*, 532 U.S. at 604. The Court held that the "catalyst theory" fell "on the other side of the line from these examples" because it allowed "an award where there is no judicially sanctioned change in the legal relationship of the parties." *Id*. at 605. A victory under the catalyst theory, the Court explained, while "perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" in the parties' relationship. *Id*.

The Superior Court ignored *Buckhannon*'s context by suggesting that its facts "are not materially distinguishable from those in this case." A187. In actuality, the circumstances of this case differ substantially from those in *Buckhannon*. *First*, in *Buckhannon*, the plaintiffs obtained the relief sought because the West Virginia legislature, *which was not a party to the lawsuit*, eliminated the regulation that formed the impetus for the lawsuit. 532 U.S. at 601. By contrast, the District, the defendant in this litigation, agreed to a settlement pursuant to which it compensated the plaintiffs for a portion of the damages they suffered. *Second*, the *Buckhannon* plaintiff obtained "relief" outside the judicial system and the litigation process. By contrast, the settlement here occurred within the context of ongoing litigation: after four years of litigation and four months of settlement conferences and negotiations actively supervised by the trial court, the plaintiffs finally agreed to release their constitutional claims in exchange for a portion of the relief they sought.

Buckhannon was the Court's attempt to rein in what the majority viewed as an expansive definition of "prevailing party" (albeit one that nearly every circuit court had adopted) as applied in an extreme case that involved relief obtained from completely outside the judicial system. While the Court plainly eliminated the catalyst theory as a tool for civil rights plaintiffs seeking

equitable relief, it did not *hold* that a settlement *for monetary relief* can never serve as the basis for a fee claim. *See Hewitt*, 482 U.S. at 760 (describing the "settled law" that relief "need not be judicially decreed in order to justify a fee award under § 1988"). The Court ruled on one issue only—the validity of the catalyst theory, particularly when a plaintiff obtains relief via legislative activity rather than through the judicial process. It had no occasion to decide whether a settlement that resolves litigation—let alone a settlement that results in one party paying another money to settle claims—may confer prevailing party status. *See Buckhannon*, 532 U.S. at 632 n.8 (Ginsburg, J., dissenting) ("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*.") (second emphasis added). Similarly, while the Court emphasized the need for judicial involvement in the resolution of a claim, it did not have a reason or the need to specify the nature of that involvement.

2. *The* dicta *in* Buckhannon *does not disqualify settling plaintiffs from obtaining fee awards.*

Despite the limited nature of the ruling in *Buckhannon*, dicta that appears in a footnote in the majority's opinion has taken on a life of its own and spawned considerable confusion in the lower courts regarding whether and under what circumstances a settling plaintiff may receive attorney's fees. In previous cases, which *Buckhannon* did not overrule, the Court stated that success "through a settlement" did not weaken a plaintiff's claim to fees. *Maher*, 448 U.S. at 122-23; *Farrar*, 506 U.S. at 111 (to qualify as a prevailing a party, a plaintiff must obtain an "enforceable judgment * * * or comparable relief through a consent decree *or* settlement") (emphasis added); *Hewitt*, 482 U.S. at 760 ("A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—

e.g., a monetary settlement"). In a footnote, the *Buckhannon* Court addressed these precedents, stating:

> 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).

Buckhannon, 532 U.S. at 604 n.7.

The Court did not define "private settlement," but the concurring opinion in *Buckhannon* and the commonly understood meaning of "private settlement" illustrates that the Court did not refer to settlements reached in the course of ongoing litigation, but rather settlements that occur outside the legal process. The two concurring Justices confirmed that the distinction between "private settlements" and those that trigger Section 1988 is the context in which they arise. Justice Scalia wrote that "even if there has been no judicial determination of the merits," the settlement of a claim during ongoing litigation is "at the least the product of, and bears the sanction of, judicial action *in the lawsuit*." *Buckhannon*, 532 U.S. at 618 (Scalia, J., concurring). Justice Scalia noted that unlike when the resolution of the claim occurs through the legislative process, "[t]here is at least *some* basis for saying that the party favored by the settlement or decree prevailed *in the suit*." *Id*. This view accords with Justice Scalia's earlier statement in *Hewitt* (with which a majority of the Court agreed) that a "monetary settlement" "that affords the plaintiffs all or some of the relief he sought through a judgment" is sufficient to trigger Section 1988 "despite the absence of a formal judgment" in their favor. 482 U.S. at 760-61.

The inside/outside litigation dichotomy highlighted by Justice Scalia tracks the Court's use of the term "private settlement" to refer to a settlement reached outside the litigation process. The Court has used the term to describe settlements attained through arbitration procedures set

out in collective bargaining agreements, which are by their nature outside of the judicial process. *Reed v. United Transp. Union*, 488 U.S. 319, 329 (1989) (referring to "private settlement" of disputes under a collective bargaining agreement which sets out arbitration procedures); *United Paperworkers Int'l Union v. Misco, Inc*., 484 U.S. 29, 37-38 (1987) (noting that labor disputes settled through pre-litigation arbitration procedures are insulated from judicial review because the Labor Management Relations Act has a clear preference for "private settlements" of labor disputes).[7]

The Court also has referred to "private settlements" in the context of employment disputes resolved through administrative processes that precede litigation and do not directly involve the courts. In *Burnett v. Grattan*, 468 U.S. 42, 53-54 (1984), for example, the Court distinguished between federal civil rights statutes, which permit persons harmed by discrimination to obtain compensation through the judicial process, and a state administrative procedure for resolution of disputes, which "encourage[d] conciliation and private settlement through the agency's intervention." *See also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 401 (1977) (Powell, J., dissenting) (noting that Title VII places "great emphasis on private

[7] *See also Del Costello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983) (referring to "private settlement of disputes" under a collective bargaining agreement); *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 66 (1981) (Stewart, J., concurring) (noting that federal labor law is designed to promote out-of-court "private settlements" under union agreements); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570 (1976) (referring to out-of-court "private settlement procedures" agreed to by employers and workers); *Int'l Union, United Auto. Workers of America v. Hoosier Cardinal Corp*., 383 U.S. 696, 702 (1966) (discussing the "smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 237 n.14 (1963) (declining to "honor a private settlement which purported to deny employees rights guaranteed them by the [National Labor Relations] Act"); *NLRB v. Radio & Television Broad. Eng'rs Union*, 364 U.S. 573, 583 (1961) (rejecting the NLRB's argument that jurisdictional disputes between unions regarding entitlement to work is properly resolved in "private settlement" between the unions).

settlement and the elimination of unfair practices *without litigation.*") (emphasis added; internal quotation marks and alterations omitted); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 472 (1975) (Marshall, J., concurring in part, dissenting in part) (discussing "encouragement of private settlement to avoid unnecessary litigation under Title VII").[8]

These cases all employ "private settlement" as a term of art to describe settlements that occur prior to or in the infancy of litigation. *Cf. Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 866 (1994) (the parties were involved in a trademark dispute that was resolved by a "private settlement" shortly after the complaint was filed, but before the plaintiff served the complaint). By this measure, *Buckhannon*'s footnote seven does not cover the 1992 settlement and does not preclude plaintiffs from obtaining fees. The plaintiffs and the District did not settle their dispute outside the legal process based on the threat of litigation, or even shortly after litigation commenced. *Cf. Buckhannon*, 532 U.S. at 619 (Scalia, J., concurring) (distinguishing between a defendant who ceases offending behavior based on a "threatened complaint" that is never filed and a bargained-for resolution in the context of an "'action' or 'proceeding,'" *i.e.*, "a lawsuit"). Rather, the parties settled after four long years of hard-fought litigation, rulings upon multiple key motions, and a four-month negotiation process marshaled by the trial judge. Such a resolution, reached in the heat of litigation, is not the type of "private settlement" the Court had in mind when it decided *Buckhannon*.

With very limited exception, the courts have not interpreted the dicta in footnote seven as a *per se* bar to the recovery of attorney's fees by plaintiffs who settle suits in the midst of litigation. Nearly all courts have understood Section 1988's reach to go beyond just enforceable

[8] The Court has also referred to private negotiations that occur in lieu of filing bankruptcy as "private settlements." *United States v. Kras*, 409 U.S. 434, 445 (1973) (holding that filing fees which prevented an indigent person from filing for bankruptcy protection are not unconstitutional since the indigent can negotiate adjustment of his debts by "private settlement").

judgments on the merits and consent decrees, recognizing that the "broader language in *Buckhannon* indicates that these examples are not an exclusive list." *Preservation Coalition of Erie County v. Fed. Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004) (interpreting *Buckhannon* to confer prevailing party status whenever there is "a material alteration of the legal relationship of the parties") (internal quotation marks omitted). Only a single federal appellate court has read *Buckhannon* restrictively —treating the Court's references to enforceable judgments and consent decrees as exclusive categories, rather than "examples" of judicial imprimatur. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2002).

The remaining circuits have held that "judicial action with sufficient judicial imprimatur other than a judgment on the merits or a court-ordered consent decree may allow for an award of attorney's fees." *Smalbein v. City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (per curiam).[9] These courts heeded *Hewitt's* ruling that in "all civil litigation, the judicial decree is not the end but the means." 487 U.S. at 761. As Justice Scalia wrote:

> At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant.

Id. (emphasis in original). Settlements, of course, generally result in "action"—often the payment of money—that secures redress "from the defendant" for the benefit of the plaintiff.

---

[9] *See also, e.g., Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 24 (1st Cir. 2005); *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir. 2003); *John T. v. Del. County Intermediate Unit*, 318 F.3d 545, 558 (3d Cir. 2003); *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."); *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008), *cert. denied* 129 S. Ct. 131 (2008); *T.D. v. La Grange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003); *Richard S. v. Dep't of Dev. Servs.*, 317 F.3d 1080, 1086-88 (9th Cir. 2003); *Bell v. Bd. of County Comm'rs*, 451 F.3d 1097 (10th Cir. 1996); *Oil, Chem. & Atomic Workers Int'l Union v. Dep't of Energy*, 288 F.3d 452, 458-59 (D.C. Cir. 2002); *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1025 (Fed. Cir. 2005).

This Court should follow the majority rule because that reading of *Buckhannon* best conforms to the Court's emphasis on "judicial imprimatur" generally (as well as *Hewitt*'s understanding of what lies "[a]t the end of the rainbow"). The majority rule also comports with *Jerry M.*, and demonstrates that *Buckhannon* did not depart from the controlling rule in this Court that a party may obtain fees if "he or she succeeds in obtaining relief by way of *a settlement agreement*." *Jerry M.*, 580 A.2d at 1274 (emphasis added). That leaves only a question that has split the lower courts: the level of imprimatur necessary to trigger Section 1988 when a plaintiff obtains relief through a settlement.

B. Plaintiffs Are Prevailing Parties Because The Court Actively Supervised The 1992 Settlement And Continued To Preside Over The Parties' Fee Dispute.

The settlement in this case involved a sufficient level of judicial sanction to justify the award of fees under Section 1988. Several courts have held that an enforceable settlement that features active judicial involvement both before and after settlement, particularly in the determination of fees, provides "judicial imprimatur" sufficient to support the award of attorney's fees. *See Buckhannon*, 532 U.S. at 622 (Scalia, J., concurring) (a party prevails when "there has been an enforceable 'alteration of the legal relationship of the parties'"). In *Richard S. v. Department of Developmental Services*, 317 F.3d 1080, 1083-84 (9th Cir. 2003), the plaintiffs brought a Section 1983 class action alleging that the state's protocol for transferring institutionalized individuals to community residences violated the ADA. After three years of litigation, the parties reached a settlement during a court-ordered settlement conference, presented the court with the basic terms of the settlement, and stipulated to future resolution of the issue of attorney's fees. *Id*. at 1084-85. The court explained that the settlement was "not a 'purely private settlement agreement,'" in part because it resulted from a settlement conference during which the parties orally stated the terms of the agreement on the record and after which

the parties committed the agreement to paper and presented it to the court. *Id*. at 1088. The Ninth Circuit concluded that the plaintiffs were prevailing parties because "[t]hrough their legally enforceable settlement agreement and the district court's retention of jurisdiction, plaintiffs obtained a judicial imprimatur that alters the legal relationship of the parties, as required by *Buckhannon*." *Id*. (internal quotation marks omitted). *See also Ostby v. Oxnard Union High*, 209 F. Supp. 2d 1035, 1041 (C.D. Cal. 2002) (a plaintiff who settles with "a defendant is a 'prevailing party' for purposes of federal fee-shifting statutes").

The decision upon which *Richard S.* was based—*Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1130-31 (9th Cir. 2002)—confirms that a settlement may confer prevailing party status upon a plaintiff. In *Barrios*, a disabled high school baseball coach filed suit under the ADA when league officials would not let him bring his wheelchair onto the field of play. The parties met in chambers for a settlement conference, and then continued negotiations over the next several months until they finally reached an agreement under which the league permitted him to take the field in his wheelchair and paid him $10,000 in compensation. *Id*. at 1133. The parties expressly agreed to reserve the question of fees. *Id*. On appeal from the district court's denial of the plaintiff's motion for fees, the Ninth Circuit held that the plaintiff was a prevailing party because he "enter[ed] into a legally enforceable settlement agreement against the defendant." *Id*. at 1134. The court rejected the argument that *Buckhannon* scuttled the plaintiff's fee request because the plaintiff did "not claim to be a 'prevailing party' simply by virtue of his being a catalyst of policy change." *Id*. at 1134 n.5. Rather, the plaintiff claimed prevailing party status because "his settlement agreement afford[ed] him a legally enforceable instrument." *Id*. The court further recognized that footnote seven's *dicta* notwithstanding, "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." *Id*. *See also Hawkins v. Berkeley Unified Sch. Dist.*, 2008 U.S. Dist. Lexis 94673, at *19-*20 (N.D. Cal. Nov. 20, 2008) ("there is sufficient judicial imprimatur if the settlement agreement provides for a court's retention of jurisdiction to resolve the issue of attorney's fees and costs").

Other courts have interpreted *Buckhannon* to permit an award of attorney's fees under similar circumstances. In *American Disability Association, Inc. v. Chmielarz*, 289 F.3d 1315, 1317-18 (11th Cir. 2002), the parties, after a year of litigation, reached a settlement and presented it to the court in a stipulation of voluntary dismissal with prejudice. The Eleventh Circuit ruled that the plaintiff was a prevailing party "even absent the entry of a formal consent decree" because the court retained jurisdiction not only to enforce the settlement, but also to determine the amount of fees to which the plaintiff was entitled. *Id*. at 1318, 1320. In *Roberson v. Giuliani*, 346 F.3d 75, 82 (2d Cir. 2003), the district court stated its intention to police the settlement, and even though the court did not "specifically review[] or approve[] the terms of the settlement agreement," the Second Circuit still held that the plaintiffs were prevailing parties because of the continuing judicial supervision. *See also Smalbein*, 353 F.3d at 906 (finding the plaintiff to be a prevailing party where the trial court signaled its intention to supervise the determination of attorney's fees).

One can distill from these cases two factors—active judicial involvement in the settlement and continuing authority to decide the issue of fees—that confer prevailing party status. Each of these factors is present here.[10]

[10] Other circuits have interpreted *Buckhannon* more stringently, requiring, for example, the terms of the agreement to be made part of a district court order before a plaintiff may be considered a prevailing party. *See, e.g.*, *Smyth v. Rivero*, 282 F.3d 268, 279 (4th Cir. 2002). To

1. The trial court played an active role in the settlement.

The first element of judicial imprimatur is satisfied by the court's supervisory role in the settlement process. After the parties had engaged in heated litigation for over four years, Judge Wertheim "urged the parties to reach a settlement of the remaining issues as promptly as possible in order to avoid additional representational burdens." A129. On two separate occasions, he provided aggressive timetables to coax the parties toward settlement. A127; A135. When the parties could not reach settlement, he expressed his frustration that the case had "dragged on for too long" and again demanded that the parties resolve their differences. A135-36. To this end, he held and supervised two settlement conferences, the later of which eventually led to a settlement—a "legally enforceable" agreement, *Barrios*, 277 F.3d at 1134—that resolved plaintiffs' Fifth Amendment claims. A133; A139.[11]

Such active judicial involvement in the settlement of litigation carries with it the stamp of judicial authority and approval. Participation in settlement conferences is not voluntary; the court's rules require parties to attend, "to explore possibilities for early resolution through settlement," and to arrive with "authority * * * to participate fully in all settlement discussions." D.C. SUPER. CT. R. CIV. P. 16(b), (j). Lack of preparation or failure to participate in settlement

---

the extent these cases could be construed as forbidding the award of fees in this situation, they adopt an overly strict and ultimately incorrect interpretation of *Buckhannon* (*see supra* pp. 18-23) that departs from the meaning and purpose of Section 1988 (*see infra* pp. 33-38), as well as *Hewitt's* recognition that "the judicial decree is not the end but the means." 482 U.S. at 761.

[11] The Superior Court distinguished *Barrios* (and *Richard S.*) by noting that the terms of the 1992 settlement "were not incorporated into an order of dismissal." A189. However, it should be no surprise that the Superior Court did not enter an order of dismissal or a judgment containing the terms of the settlement because the parties intended to litigate—and continued litigating—the issue of attorney's fees after they had settled the damages claims. Dismissal of the action after the settlements would have prevented the plaintiffs from seeking fees. Moreover, as discussed below, the incorporation of a settlement into a dismissal order is a procedural step necessary only in federal courts of limited jurisdiction that are bound by Article III. *See infra* pp. 31-32.

discussions is sanctionable conduct. *Id*. at R. 16(*l*). The supervision of the settlement process via conferences is a significant assertion of judicial authority because "meaningful and productive settlement conferences are vital to the judicial process in assisting district courts in managing their heavy case load." *Pitman v. Brinker Int'l, Inc.*, 216 F.R.D. 481, 484 (D. Ariz. 2003). Disregarding the assertion of judicial power inherent in a settlement conference overlooks that such conferences constitute an exercise of a court's "authority to preserve the efficiency, and more importantly the integrity, of the judicial process." *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989); *see also In re Novak*, 932 F.2d 1397, 1404 (11th Cir. 1991) (settlement conferences "provide neutral forums to foster settlement, which, in turn, eases crowded court dockets" and "allow courts to *manage* their dockets efficiently" by providing them with "information from the parties concerning the status of cases") (internal quotation marks omitted). Judge Wertheim's considerable engagement in the settlement process via settlement conferences—as well as his orders urging the parties forward—cloaked the settlement with sufficient judicial sanction to satisfy *Buckhannon*. Moreover, and as a practical matter, it was neither easy nor necessarily possible for the parties to ignore Judge Wertheim's remonstrance at the parties' failure to settle. *See* A135.

Some courts have suggested that judicial involvement in a settlement may not be the basis for a fee award. For instance, the Sixth Circuit stated that even though "the settlement conference occurred at the district court, with the district judge's involvement, the resulting settlement did not bear the necessary 'judicial imprimatur.'" *Toms v. Taft*, 338 F.3d 519, 529 (6th Cir. 2003); *see also T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 479 (7th Cir. 2003) ("mere involvement in the settlement * * * is not enough"). However, neither *Toms* nor *T.D.* featured the level of judicial involvement present in this case: in both those cases, the parties

attended a single court-ordered settlement conference, whereas the trial judge in this instance supervised multiple settlement conferences, established aggressive timetables for the parties to exchange settlement demands, and cajoled the parties when they failed to reach a settlement as expected. Additionally, the district courts in *Toms* and *T.D.* did not retain continuing authority to decide the question of attorney's fees as the trial court did here. *See infra* pp. 29-32.

More fundamentally, neither the Sixth Circuit in *Toms* nor the Seventh Circuit in *T.D.* offered a persuasive rationale for why a court's involvement in facilitating settlement negotiations would *not* create sufficient "judicial imprimatur" to make a plaintiff eligible for attorney's fees. The *Buckhannon* Court certainly never suggested a definition of "judicial imprimatur" that would exclude the court's active involvement in the negotiation and settlement process. "Imprimatur" refers to "[a] general grant of approval" (BLACK'S LAW DICTIONARY 760 (7th ed. 1999)), and settlements reached under the supervision of a judge and in the context of mandatory settlement conferences would seem to bear precisely such a stamp of approval.

Indeed, courts have granted prevailing party status to plaintiffs entering into settlements that carry far less judicial imprimatur than the 1992 settlement. For instance, courts have held that a settlement reached as the result of an administrative proceeding before a hearing officer or an administrative law judge conferred prevailing party status. *A.R. v. New York City Dep't of Educ.*, 407 F.3d 65, 69-71, 75-76 (2d Cir. 2005); *P.N. v. Clementon Bd. of Educ.*, 442 F.3d 848, 852-55 (3d Cir. 2006). In those cases, there was *no judicial imprimatur* because the parties settled in an administrative context *before even commencing* a civil action. Yet, the courts still held that the settling plaintiffs could obtain attorney's fees under a "prevailing party" statute. *Id.* Courts have even considered plaintiffs to be "prevailing parties" after they obtained relief from a settlement reached through mediation or independent negotiations that occurred *prior to* the

commencement of an administrative proceeding. *K.R. v. Jefferson Twp. Bd. of Educ*., 2002 U.S. Dist. Lexis 13267, at *4-*6, *16 n.7 (D.N.J. Jun. 25, 2002) (parties settled a case at mediation prior to commencing an administrative proceeding); *Ostby*, 209 F. Supp. 2d at 1037, 1039-40 (same); *Brandon K. v. New Lenox Sch. Dist.*, 2001 U.S. Dist. Lexis 20006, at *2, *6-*8 (N.D. Ill. Dec. 3, 2001) (parties independently reached a settlement on the morning of the administrative hearing). If a plaintiff who enters into a settlement with a defendant completely outside the judicial system may be considered a prevailing party, and if the ultimate goal of the *Buckhannon* inquiry is the location of some measure of "judicial action *in the lawsuit*" (*Buckhannon*, 532 U.S. at 6198 (Scalia, J., concurring)), then the plaintiffs here, who participated in a settlement process marked by aggressive judicial intervention and oversight, are no less deserving of eligibility for fees because the court's involvement in the parties' settlement provides "at least *some* basis for saying that the party favored by the settlement or decree prevailed *in the suit*." *Id*.

2. The trial court maintained continuing authority over the settlement and the question of fees.

The second "judicial imprimatur" factor is also present here because the trial court "retain[ed] 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. Because the parties could not agree on attorney's fees—the most significant impediment to the completion of their settlement—the court advised the parties "to seek agreement on all other matters" and leave the question of fees until later. A129. Judge Wertheim repeated this admonition during the February 2002 settlement conference. A134 (directing the parties to make "all diligent efforts" to settle "both the remaining damage claims and the attorneys fee claim, or at least to resolve the former and narrow the outstanding issues as to the latter"). The parties heeded his request, hammering out a settlement of the damage claims, while leaving the question

of fees for later resolution. A140 (notifying court of settlement of claims without reference to fees). Indeed, given the plaintiffs' justifiable unwillingness to resolve the matter without obtaining fees, it is clear that plaintiffs would have not have agreed to reach settlement on the constitutional claims unless the court agreed to subsequently hear argument on the question of fees.

The events that followed the May 1992 settlement confirm that the Court retained authority over both the settlement and the question of fees. Plaintiffs filed a motion for attorney's fees in August 1992, but they did not file a new complaint or otherwise commence a fresh proceeding. Instead, they filed a motion within the preexisting suit as a continuation of the litigation. The motion for attorney's fees was pending while the parties fulfilled their settlement responsibilities in September 1992, and the court eventually ruled in November 1992 that plaintiffs were prevailing parties. It requested further briefing on the proper amount, and then ruled in May 1993 that plaintiffs were entitled to approximately 35% of the amount requested.

The circumstances here are similar to those in *Smalbein* and *Barrios*. In *Smalbein*, the parties settled for monetary compensation, but agreed to litigate attorney's fees in the future because they could not reach agreement on the issue while negotiating the settlement. 353 F.3d at 906-08 & nn. 3-5, 8-9. The court of appeals affirmed the grant of fees in part because it ruled that the parties had anticipated the district court exercising jurisdiction over the question of fees such that it was a material part of the settlement agreement. *Id*. The 1992 settlement is similar: just as the parties in *Smalbein* "knew and accepted" (*id*. at 908) that attorney's fees would be sought in the future, the parties here (along with court) "knew and accepted" that the parties reached a settlement only because the resolution of the fee dispute was postponed until a later

date. *See* A129 (advising parties that if they could not "agree upon the matter of attorneys fees they should nevertheless seek agreement on all other matters").

The ruling in *Barrios* mirrors the ruling in *Smalbein*. The court held that the plaintiff was a prevailing party because the parties entered into a settlement and agreed "that the district court would retain jurisdiction over the issue of attorney's fees." *Barrios*, 227 F.3d at 1134 n.5. The Ninth Circuit held that this alone provided "sufficient judicial oversight to justify an award of attorneys' fees and costs." *Id*.

The Superior Court shunted aside this aspect of the settlement, writing that "[i]t is the character of the judicial imprimatur on the underlying settlement, not on the issue of attorney's fees, that determines whether a settling plaintiff has prevailed." A190. However, as courts have pointed out, determining the "character of the judicial imprimatur" depends on the level of judicial oversight: where a court retains jurisdiction to monitor the settlement and, in some instances, determine the payment of fees, prevailing party status may be found. *Smalbein*, 353 F.3d at 905-06; *Barrios*, 277 F.3d at 1134 n.5. The Superior Court here exercised significant oversight, demonstrated not in the least by its continuing supervision over the plaintiffs' request for fees, which occurred simultaneously to the payments contemplated by the settlement.

The absence of an express retention of jurisdiction by the Superior Court, as discussed in *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 381 (1994) and many other "prevailing party" cases, is neither surprising nor pertinent. *See* A191 ("the Court did not expressly retain jurisdiction over any underlying issue or even the issue of attorney's fees"). An express statement of jurisdiction is critical for an Article III court of "limited jurisdiction" that possesses "only that power authorized by Constitution and statute." *Kokkonen*, 511 U.S. at 377. Thus, in the federal sphere, a judge may exercise "ancillary jurisdiction" over a settlement

agreement, but only if the parties "embody the settlement" in a dismissal order, a procedural move that effectively extends the court's power. *Id*. at 381-82.

The Superior Court, however, is a court of general jurisdiction. D.C. CODE § 11-921(a) ("the Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia"); *DeGroot v. DeGroot*, 939 A.2d 664, 668 (D.C. 2008) ("The Superior Court is 'a court of general jurisdiction.'") (quoting *Andrade v. Jackson,* 401 A.2d 990, 992 (D.C. 1979)). It possesses the authority to monitor the settlement and respond to the request for attorney's fees without any express retention of jurisdiction. Consequently, the absence of a court order of dismissal expressly retaining jurisdiction should not negate plaintiffs' status as prevailing parties under Section 1988. Annabelle Chan, *The* Buckhannon *Stops Here:* Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources *Should Not Apply to the New York Equal Access to Justice Act*, 72 FORDHAM L. REV. 1341, 1364 (2004) ("concern over federal courts' jurisdiction to enforce private settlements * * * seems inappropriate with respect to state courts" because "state courts do not face the same jurisdictional problems that federal courts do in the enforcement of private settlements").[12]

* * *

Because the court extensively supervised and facilitated the settlement between the parties and then continued to exert its authority to determine the fee issue, the 1992 settlement was cloaked with sufficient judicial imprimatur to justify an award of attorney's fees. To hold

[12] The absence of an express provision may also reflect that different types of settlements lend themselves to distinct levels of post-settlement judicial supervision. The 1992 settlement, unlike the settlements in *Toms* and *T.D.* (as well as most of the other cases interpreting *Buckhannon* restrictively), involved monetary relief, not injunctive relief. Injunctive settlements often require a higher level of judicial supervision to ensure adherence to the settlement's terms, and parties therefore may expressly bargain for continuing jurisdiction. By contrast, monetary settlements tend to require less judicial monitoring, and accordingly parties may not be inclined to expressly negotiate such a jurisdictional provision.

any differently, as explained below, would undermine the purposes of fee-shifting in promoting the vindication of civil rights.

C. Defining "Prevailing Party" To Exclude These Plaintiffs Would Conflict With The Purpose Underlying Section 1988.

An interpretation of "prevailing party" that excludes settlements reached during litigation marked by extensive and continuing judicial supervision over the negotiation and resolution of outstanding issues, such as fees, would not only defeat the intent of Congress in enacting Section 1988, but would discourage settlement and prove inequitable to civil rights plaintiffs.

First, interpreting Section 1988 to disallow fees for the type of settlement reached here would contravene the statute's purpose. The Supreme Court has regularly looked to the legislative history of Section 1988 in interpreting its meaning (*see Tex. State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782, 790 (1989); *Maher*, 448 U.S. at 129; *Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1980)), because the standard to be used in determining "prevailing party" status is whether there has been a "material alteration of the legal relationship of the parties *in a manner which Congress sought to promote in the fee statute*." *Garland*, 489 U.S. at 792-93 (emphasis added). While the Court held in *Buckhannon* that the legislative history did not demonstrate a congressional embrace of the "catalyst theory" as a basis for attorney's fees (532 U.S. at 607), the same cannot be said for settlements.

In fact, Congress expressly intended settling parties to be eligible for fees: the Senate report stated 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, at 5 (1976) (emphasis added) (citing *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1008 (2d Cir. 1975) ("federal courts may award counsel fees based on benefits resulting from litigation efforts even where adjudication on the merits is never reached, e.g., after a settlement")). The House report

similarly emphasized 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. REP. NO. 94-1558, at 7 (1976). It specifically noted that "[a] 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion." *Id*. In short, Congress meant to provide settling plaintiffs with the opportunity to obtain attorney's fees when it enacted Section 1988.

The legislative history reflects an understanding of "prevailing party" that encompasses settling plaintiffs and that is consistent with the understood meaning of the phrase in 1976. The definition of "prevailing party" in Black's Law Dictionary, which the Court used as its touchstone in *Buckhannon*, has not remained static over time.[13] In 1976, "prevailing party" referred to a party "who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of his original contention." BLACK'S LAW DICTIONARY 1352 (rev. 4th ed. 1968). Under this definition, the "prevailing party" is "[t]he party ultimately prevailing when the matter is finally set at rest," and regardless of the "degree of success," the key inquiry is "whether, at the end of the suit * * * the party who made a claim against the other has successfully maintained it." *Id*.

Plaintiffs' eligibility for attorney's fees here is consistent with congressional intent and the meaning of "prevailing parties." Plaintiffs litigated their case for nearly five years before settling on the eve of trial. Although they did not obtain formal relief in the manner of a judgment or order, they certainly prevailed on their ultimate request—compensation for the

[13] While the very practice of using a definition in Black's Law Dictionary to trump a stated intent of Congress is questionable, it remains a mystery why the majority in *Buckhannon* chose to cite a 1999 edition of the dictionary (532 U.S. at 603), rather than an edition that existed at the time of Section 1988's passage. If "prevailing party" is indeed "a legal term of art," Congress, by using that term, would have incorporated its meaning circa 1976. Using the 1999 definition imposes upon Congress a meaning of which it could not have been aware.

damages the District caused to their vehicles—albeit "not to the extent" of their original claim. *Id*. At the end of the day, the plaintiffs prevailed on their quest for compensation; they "successfully maintain[ed]" their claim. The goal was to obtain something for their loss, and the settlement accomplished that mission.

Second, depriving settling plaintiffs like those here of prevailing party status would have a negative impact on settlements in civil rights cases (and other suits in which fees are available for "prevailing parties"). Every court, including this one, recognizes that "settlement of disputes, both in trial courts and on appeal, is to be encouraged as sound public policy." *Makins v. District of Columbia*, 861 A.2d 590, 597 (D.C. 2004). But the Superior Court's overly expansive reading of *Buckhannon* discourages settlement by eliminating the possibility of fees if a plaintiff agrees to compromise in an ongoing judicial proceeding, no matter how involved the trial court may be in brokering that compromise. Plaintiffs are left with the unenviable choice of settling and losing the ability to obtain fees—no matter how sweet the deal and no matter how hard the court is pushing settlement—or proceeding to trial in the hopes of emerging victorious, despite all the attendant risks that accompany a trial on the merits (including angering a judge that has been adamantly counseling the parties to settle). Stefan R. Hanson, *Buckhannon, Special Education Disputes, and Attorneys' Fees: Time for a Congressional Response Again*, 2003 BYU EDUC. & L. J. 519, 521 (under *Buckhannon*, "plaintiffs are less likely to seek settlement, instead choosing to persevere to judgment to obtain reimbursement of their attorneys' fees"). The added strain on the legal system of continued proceedings by plaintiffs who otherwise would settle if not for the loss of fees has nothing to recommend it. *See* Marisa L. Ugalde, *The Future of Environmental Citizen Suits After* Buckhannon Board & Home, Inc. v. West Virginia Department of Health & Human Resources, 8 Envtl. Law. 589, 614 (2002) (expansive

application of *Buckhannon* "results in a decrease of private settlements, which consequently means an increase in prolonged litigation and overcrowded court dockets"); Macon Dandridge Miller, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347, 1370 (2002) ("*Buckhannon's* rule likely would discourage informal settlement and increase litigation, which is inefficient.").

This effect is not hypothetical; one recent study showed that *Buckhannon* has discouraged settlement. Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1120-21, 1128-29 (2007). The researchers' findings demonstrated that "rather than encouraging early settlement as the Court predicted, *Buckhannon* may reduce opportunities for negotiating private settlements and therefore prolong litigation." *Id*. at 1129. Furthermore, the study showed that the reduced availability of settlement has discouraged plaintiffs from even bringing civil rights actions (*id.* at 1130-31), a result directly contrary to Congress's goal in enacting Section 1988. *See* S. REP. NO. 94-1011, at 2 ("If private citizens are to be able to assert their civil rights * * * then citizens must have the opportunity to recover what it costs them to vindicate these rights in courts.").

Congress made clear that a plaintiff "should not be penalized for seeking an out-of-court settlement." H.R. REP. NO. 94-1558, at 7. Plaintiffs bringing civil rights actions, such as the five settling plaintiffs here, certainly should not be penalized for participating in a judicially supervised settlement conference, in accordance with their duties under the Superior Court's rules, which eventually produced the desired result. Yet, that is precisely the result produced by the Superior Court's expansive and incorrect interpretation of *Buckhannon* and Section 1988.

Third, it is particularly inequitable to deny plaintiffs fees in this case based on an overly

restrictive reading of *Buckhannon*. Congress enacted Section 1988 "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); *see also Evans*, 475 U.S. at 741 (Section 1988 is a "powerful weapon" because it improves the ability of victims of civil rights violations "to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial"). Indeed, a key function of the statute is to attract counsel to champion civil rights causes that may otherwise be ignored if not for the possibility of a fee award if the plaintiffs prevail. H.R. REP. NO. 94-1558, at 1 ("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" and Section 1988 "is designed to give such persons effective access to the judicial process"); S. REP. NO. 94-1011, at 2 ("fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate" their civil rights because "[i]n many cases arising under the civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer"). Plaintiffs here might never have obtained representation, and consequently received some compensation for the losses they suffered, if not for the possibility of fees under Section 1988.

It would be a particularly cruel irony for plaintiffs to be denied attorney's fees for their resolute prosecution of this civil rights action simply because they acceded to the trial court's wishes and settled the merits of their claim, but postponed resolution of the fee question to a later date. Had plaintiffs known that postponement of the fee question would result in a loss of eligibility for fees—contrary to the controlling rule at the time of settlement as articulated in *Jerry M.*—they naturally would not have entered into a settlement without obtaining fees are part of the agreement. Similarly, had plaintiffs known that postponement of the fee question would spawn an additional seventeen years of litigation—contrary to the Supreme Court's admonition

about turning fee requests into "a second major litigation" (*Hensley*, 461 U.S. at 437)—they would have either insisted on fees being made part of the agreement or gone to trial.

II. THE 1992 SETTLEMENT OF PLAINTIFFS' FIFTH AMENDMENT CLAIMS MATERIALLY ALTERED THE PARTIES' LEGAL RELATIONSHIP.

In determining the magnitude of relief needed to trigger Section 1988, "'[t]he touchstone of the prevailing party inquiry'" has always been and still remains "'the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'" *Sole v. Wyner*, 127 S. Ct. 2188, 2194 (2007) (quoting *Garland*, 489 U.S. at 792-93). A legal relationship is materially altered when a plaintiff obtains relief on a significant issue in the litigation and that relief modifies the defendant's behavior in a manner which benefits the plaintiff. *Hewitt*, 482 U.S. at 760-61 ("[T]o be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant."). The settlement of plaintiffs' Fifth Amendment claims for monetary compensation clearly made them "prevailing parties" under this standard. Nonetheless, the Superior Court erroneously held that the settlement was not *enough* of a victory because plaintiffs' constitutional claims "were only a means to recover monetary damages," a concept in tension with the very purpose of Section 1983 and the civil rights laws.

First, plaintiffs clearly obtained "relief on the merits" of their Fifth Amendment claims. Relief need not be in the form of a trial judgment or victory on a dispositive motion: "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" *Hanrahan*, 446 U.S. at 757 (quoting H.R. Rep. No. 94-1558, at 7 (1976)). As the Court stated in *Maher*, "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." 448 U.S.

at 126, 129 (plaintiff was a prevailing party because the court entered a consent decree ordering a government agency to alter its regulations). Indeed, a plaintiff may be a prevailing party even if the relief obtained does not concern a "central issue" in the litigation; the Supreme Court long ago chose to require "only that a party succeed on *a significant issue* and receive *some of the relief sought* in the lawsuit to qualify for a fee award." *Garland*, 489 U.S. at 784, 791 (emphasis added). Nor does the relatively small amount of the relief obtained prevent a plaintiff from attaining "prevailing party" status. Even a "plaintiff who wins nominal damages is a prevailing party under § 1988" because "the *degree* of the plaintiff's success does not affect eligibility for a fee award." *Farrar*, 506 U.S. at 114 (internal quotation marks omitted) (revising the lower court's denial of fees for a plaintiff awarded nominal damages (of $1) by a jury).

Applying these standards, the plaintiffs easily clear this hurdle. The 1992 settlement resolved their Fifth Amendment claims, which certainly constituted a "significant issue," if not the "central issue," in the litigation. While the plaintiffs did not receive all they sought, they compromised and obtained some relief. The sum they received—a total of $2,300—may seem modest, but the relatively low dollar amount does not negate the applicability of Section 1988, which helps individuals to vindicate civil rights violations that may have only a relatively small financial impact. *Farrar*, 506 U.S. at 122 (1992) (O'Connor, J., concurring) (Section 1988 is "a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory").

Second, the relief granted by the 1992 settlement naturally affected "the behavior of the defendant toward the plaintiff" in a manner that benefited the plaintiffs. *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (*per curiam*). The plaintiffs received an immediate benefit from the 1992 settlement; by paying the plaintiffs, the District undertook obligations it would not have

undertaken absent the settlement, *i.e.*, it changed its behavior toward the plaintiffs. *See Barrios* 277 F.3d at 1134 ("a plaintiff 'prevails' when he or she enters into a legally enforceable settlement agreement against the defendant * * * because the plaintiff can force the defendant to do something he otherwise would not have to do."). The plaintiffs thus stand in contrast with the plaintiff in *Hewitt* in which the Court denied fees because the plaintiff had "long since been released from prison," and he "could not get redress" from his "victory" in a lawsuit regarding the alteration of prison conditions. 482 U.S. at 763. *See also Rhodes*, 488 U.S. at 4 (plaintiffs were not prevailing parties where declaratory judgment ordering change in prison conditions was not entered until after the plaintiffs were deceased or released from custody).

The Superior Court did not undertake the above analysis; it ruled instead that plaintiffs failed to preserve their constitutional claims, and that even if preservation were not a concern, constitutional claims for damages cannot serve as a basis for attorney's fees. A184. Neither the law nor the facts support the trial court's conclusion. Plaintiffs clearly preserved their constitutional claims: the Third Amended Complaint filed in February 1990 sought monetary relief under Section 1983 to compensate for, *inter alia*, the District's violation of plaintiffs' Fifth Amendment rights (A96-7 (¶ 1); A106-07 (¶ 8(iii)); A113-14), and the Fourth Amended Complaint filed in September 1990 again requested compensation under Section 1983 and expressly reserved all constitutional claims (A119 (¶ 1 & n.1); A120-24 (¶ 6-11)). Moreover, this Court implicitly recognized the viability of plaintiffs' Fifth Amendment claims for monetary damages in *Patterson I* when it remanded the case for consideration of whether the settlement of those claims conferred prevailing party status. Preservation, in short, is a non-issue.

More fundamentally, the trial court's suggestion that a plaintiff may not obtain fees when he or she asserts a constitutional claim to recover damages is puzzling. Section 1983 exposes the

District to liability to any "party injured in an action at law" when it deprives that party "of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. It is beyond dispute that a plaintiff may seek monetary relief as part of a Section 1983 claim; indeed, "'the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.'" *Farrar*, 506 U.S. at 112 (quoting *Carey v. Piphus*, 435 U.S. 247, 254 (1978)); *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (the purpose of Section 1983 is to "provid[e] remedies for deprivations of rights established elsewhere").

Thus, there is no basis for the Superior Court's suggestion that if, for instance, a plaintiff prevails on a Section 1983 claim seeking "just compensation" under the Fifth Amendment's Takings Clause for the appropriation of valuable property, the plaintiff may not obtain attorney's fees because the constitutional claim "was a means to recover monetary damages." A184. *See Goss v. City of Little Rock*, 151 F.3d 861, 864-66 (8th Cir. 1998) (awarding attorney's fees for violation of Takings Clause). Constitutional violations often harm citizens financially, and the trial court cited no precedent for its suggestion that a request for monetary damages precludes a plaintiff from taking advantage of Section 1988. Any other conclusion would undermine the salutary purposes of both Sections 1983 and 1988.

CONCLUSION

For the reasons explained above, the judgment of the Superior Court should be reversed and the case remanded for an appropriate award of attorney's fees.

Respectfully submitted,

_____

Brenda Grantland
20 Sunnyside, Suite A-204
Mill Valley, CA 94941

Arthur B. Spitzer
AMERICAN CIVIL LIBERTIES UNION
OF THE NATIONAL CAPITAL AREA
1400 20th Street, NW, Suite 119
Washington, DC 20036
(202) 457-0800

Miriam Nemetz
Jeffrey A. Berger
Counsel of Record
Michele Keegan
MAYER BROWN LLP
1909 K Street, N.W.
Washington, DC 20006
(202) 263-3855

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certified that he caused a copy of the foregoing Opening Brief for Plaintiffs-Appellants and Appendix to be served on the following counsel by UPS overnight mail, sent on or before 5:00 p.m. on March 25, 2009.

James McKay
Solicitor General of the District of Columbia
Office of the Attorney General
441 4th Street N.W., Suite 1060 N
Washington, DC 20001

_____

Jeffrey A. Berger