No. 08-CV-189

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

In their opening brief, the five plaintiffs-appellants argued that the 1992 settlement of their constitutional claims made them "prevailing parties" under 42 U.S.C. § 1988 because (1) the settlement materially altered their relationship with the District of Columbia and (2) the Superior Court's aggressive involvement in the parties' negotiations and its supervision of the fee dispute placed its imprimatur on the settlement. The District does not dispute that the settlement—under which the District paid plaintiffs $2,300 in compensatory damages—materially altered the parties' relationship. Dist. Br. 29. Nor does the District defend the lower court's erroneous conclusion that plaintiffs failed to preserve their constitutional claims. *See* Pls.' Br. 39-41. Instead, the District argues only that plaintiffs are not prevailing parties, and thus may not obtain attorneys' fees, because the settlement lacked "the requisite judicial imprimatur." Dist. Br. 29. However, the District—echoing the Superior Court—advances an overly stringent interpretation of "judicial imprimatur" that does not appear in *Buckhannon Board & Care Home, Inc. v. W.V. Dep't of Health & Human Resources*, 532 U.S. 598 (2001). The Superior Court's active engagement in the settlement process and the attorneys' fees proceedings conferred sufficient sanction to satisfy *Buckhannon* and Section 1988.

The District relies on two erroneous propositions. *First*, the District contends that judicial involvement in a settlement does not constitute judicial imprimatur unless the court incorporates the settlement's terms into a formal order and expressly retains jurisdiction over its enforcement. The Supreme Court, however, uses the term "imprimatur" to refer to informal endorsement, sanction, and supervision, as well as formal orders and laws. Courts must consider the entire context of a settlement to gauge imprimatur, and when viewed through this wide lens, the significant involvement of the Superior Court in the settlement proceedings is sufficient to

trigger Section 1988. There is no requirement that a court of general jurisdiction expressly retain jurisdiction, and the District misapplies *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994) by suggesting otherwise. No formal order was needed, and the Superior Court presided over the fee proceedings for nearly two decades in the absence of such an order because the parties settled with the understanding that the court would later resolve the fee dispute.

Second, the District contends that the parties entered into a "private settlement," and thus plaintiffs are not prevailing parties under *Buckhannon*. The District's argument is misplaced because the term "private settlement" refers to a settlement reached entirely outside the judicial process. Here, by contrast, the parties settled in the midst of litigation in response to the Superior Court's exhortations. In any event, *Buckhannon*'s footnote reference to "private settlements" was *dicta* because *Buckhannon* did not involve a settlement. The District further contends that the voluntary nature of the settlement makes plaintiffs ineligible to receive fees. However, consent decrees and settlements incorporated into judicial orders, which the District concedes are sufficient to confer "prevailing party" status, are no less voluntary than the parties' settlement here. *Buckhannon* does not turn on voluntariness; the relevant question is whether litigation is resolved within the judicial process and under judicial supervision. Given the lower court's integral role in encouraging the settlement here, the denial of fees would thwart Congress's intent in enacting Section 1988.

Repeating arguments in its motion to dismiss, the District contends that this Court lacks jurisdiction to hear plaintiffs' appeal. But plaintiffs' intent to appeal was clear from their Notice of Appeal, which is all that the Rules of Appellate Procedure require. The identity of the appellants is no surprise: the District has been aware that these five plaintiffs intended to appeal for some time, and any technical defects in the Notice have not prejudiced the District.

I. THE COURT'S ACTIVE ROLE IN THE SETTLEMENT AND ITS CONTINUED SUPERVISION OF THE FEE DISPUTE CONFERRED THE COURT'S IMPRIMATUR ON THE SETTLEMENT.

The District asserts that plaintiffs may not recover fees because there was no "official judicial approval of the settlement" or "retention of judicial enforcement and oversight." Dist. Br. 48. The District confuses "judicial imprimatur," which refers broadly to judicial sanction, endorsement, or supervision, with a formal order or act memorializing that judicial involvement. The latter is not required. Neither is the entry of an express order retaining jurisdiction. In the absence of such an order, the Superior Court still exercised continuing authority over the lingering question of fees for more than fifteen years after the parties reached a settlement on the merits of the plaintiffs' constitutional claims.

A. Judicial Imprimatur Does Not Require "Official Judicial Approval."

The District's contention that "prevailing party" status hinges upon "official judicial approval" distorts *Buckhannon*. Dist. Br. 36-49. In *Buckhannon*, the Supreme Court ruled only that a plaintiff must show a "judicially sanctioned change in the legal relationship of the parties" in order to be a "prevailing party." 532 U.S. at 604, 605. The Court held that if a lawsuit becomes mooted by an independent action the resulting change in conduct "lacks the necessary judicial *imprimatur*." *Id*. at 605. The District pretends that *Buckhannon* is indistinguishable from this case (Dist. Br. 33-35), but the *Buckhannon* Court grappled only with the question of whether a plaintiff may be a "prevailing party" in the absence of *any* judicial involvement because, shortly after the initiation of the lawsuit, the West Virginia legislature unilaterally repealed the regulation that the plaintiffs challenged. 532 U.S. at 601-02; *see also* Pls.' Br. 16-18. The Court determined that *some* judicial approval is required, but it left open the question of *how much* judicial involvement is enough.

The Court did not hold that "judicial imprimatur" requires a formal court order.[1] Such a ruling would have been inconsistent with precedent, as the Court has generally construed "imprimatur" to encompass *any* showing of sanction, even if such endorsement is not memorialized in a written order. As the District points out, the word "imprimatur" means "a grant of approval" or "sanction," but does not necessarily require an official order or formal document. Dist. Br. 44 n.13, quoting BLACK'S LAW DICTIONARY 772 (8th ed. 2004). An official judicial decree, of course, "is not the end but the means." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

In several different contexts, the Supreme Court has construed "imprimatur" broadly, holding that government sanction or endorsement may take many forms. In the Establishment Clause context, a government may "put its imprimatur on a particular religion" without enacting legislation or making a formal pronouncement. *Lee v. Weisman*, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 264 (1990) (Marshall, J., concurring) ("If public schools are perceived as conferring the imprimatur of the State on religious doctrine," the nominal neutrality of a policy "will not save it from running afoul of the Establishment Clause"). For example, a public school that permits prayers to "be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event" places the government's "imprimatur" on an activity even though there is no formal act of sponsorship. *Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806, 817 (5th Cir. 1999), *aff'd*, 530 U.S.

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[1] *Buckhannon* references judgments on the merits and consent decrees, but almost every circuit court has recognized that "these examples are not an exclusive list." *Preservation Coal. v. Fed. Transit Admin.*, 356 F.3d 444, 452 (2d Cir. 2004); *see also* Pls.' Br. 22 n.9 (listing cases). The District cites *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003), which requires "an enforceable judgment on the merits or a consent decree" to attain prevailing party status, but *Christina A.* is out of step with the majority rule and diverges from *Buckhannon* by mistaking illustrations for a hard-line rule. *See Smith v. Fitchburg Pub. Schs.*, 401 F.3d 16, 24 (1st Cir. 2005) (identifying *Christina A.* as an outlier).

290 (2000). Even when individual choices dictate the final destination of government funds, an Establishment Clause problem may arise because "a reasonable observer" may conclude that aid reaching religious institutions through private hands "'carries with it the imprimatur of government endorsement.'" *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1013-14 (9th Cir. 2009).[2] In the Free Speech context, schools have significant latitude to restrict speech that may be perceived as school-approved. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). Formal sanction of such speech is not necessary for schools to receive this leeway; rather, a school may prohibit "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id*; *see also Curry v. Hensiner*, 513 F.3d 570, 577 n.1 (6th Cir. 2008) ("For speech to be perceived as bearing the imprimatur of the school does not require that the audience believe the speech originated from the school, only that an observer would reasonably believe that the school approved the speech."), *cert. denied*, 129 S. Ct. 725 (2008). In the criminal defense context, a prosecutor's "vouching for the credibility of witnesses" or expressed opinion about "the guilt of the accused," may confer "the imprimatur of the [g]overnment" on a credibility determination left for the jury, even absent an official governmental statement. *United States v. Young*, 470 U.S. 1, 18-19 (1985); *see also Daye v. United States*, 733 A.2d 321, 328 (D.C. 1999) (holding that prosecutor's use of first person and reference to the "truth" risked "substituting her opinion of the witness's veracity—an opinion carrying 'the imprimatur of the [g]overnment'—for the jury's own evaluation" of credibility).

No aspect of *Buckhannon* suggests that the Court intended to diverge from its general broad understanding of "imprimatur" or that this interpretation should not be applied here: the

[2] Just as individual choices that result in government funds being spent in a particular fashion without the government's prior knowledge may nonetheless cast the government's imprimatur upon those expenditures, judicial imprimatur does not require the "approval of something in existence" as the District suggests. Dist. Br. 44.

court's involvement and supervision sanctioned the settlement regardless of whether its terms were formally incorporated into a court order. *Cf. Hazelwood*, 484 U.S. at 271. The cases identified in plaintiffs' opening brief (at 23-25) echo this interpretation of judicial imprimatur. They demonstrate that the Superior Court's aggressive role in encouraging the parties to settle, along with its continuing role in the fee dispute, are sufficient to confer the court's imprimatur on the settlement. The decision in *Barrios v. California Interscholastic Federation*, 277 F.3d 1128, 1134 & n.5 (9th Cir. 2002) is illustrative: the Ninth Circuit reversed the lower court's denial of fees because the plaintiff "enter[ed] into a legally enforceable settlement agreement against the defendant" and the parties "agreed that the district court would retain jurisdiction over the issue of attorneys' fees."[3]

The cases cited by the District further support an expansive interpretation of "imprimatur," as they demonstrate that the imprimatur analysis requires consideration of all aspects of a court's role in a settlement. For instance, in *Aronov v. Napolitano*, 562 F.3d 84, 92 (1st Cir. 2009) (en banc) (cited at Dist. Br. 38), the First Circuit held that in order to determine whether a settlement has "sufficient judicial imprimatur," a reviewing court must consider "the entire context." In *Aronov*, the parties settled before the defendant (a government agency) even filed a responsive pleading. 562 F.3d at 87. In the court's view, the "context" revealed a lack of judicial sanction of the settlement because "the parties did not even appear before the court, there were no hearings," and "there never was an engagement of any sort on the merits for the district court to consider." *Id*. at 87, 92.

[3] The District sloughs off this statement in *Barrios* as *dicta* (Dist. Br. 43-44)—an ironic position given its own reliance upon *dicta* in *Buckhannon*. *See infra* at 13-14. The District cites *P.N.* v. *Seattle School District, No. 1*, 474 F.3d 1165 (9th Cir. 2007) to support its point, but *P.N.* does not stand for the proposition that a settlement may never be the basis for a fee award. Rather, the court in *P.N.* ruled that the "existence of *some* judicial sanction is a prerequisite in this circuit for a determination that a plaintiff is a 'prevailing party.'" *Id*. at 1173 (emphasis added). Thus, the court only rejected an interpretation of *Barrios* (and in turn *Buckhannon*) that suggested a plaintiff need not show "judicial *imprimatur*." *Id*. Plaintiffs do not advocate that position here.

The "context" of this settlement could not be any more different. After four years of hard-fought litigation, the Superior Court reached its breaking point; Judge Wertheim "urged the parties to reach a settlement" promptly and established quick timetables to push the parties toward that goal. A127, A129, A135. When the parties could not reach accord, the judge cajoled the parties to settle the matter during settlement conferences and in written orders. A133, A139. The parties were hardly at liberty to disregard the court's clear frustration at the trajectory of the litigation, and they eventually came to terms on plaintiffs' constitutional claims. The court's aggressive engagement in the settlement process—particularly during settlement conferences, which are clear assertions of judicial authority (Pls.' Br. 26-27)—placed the court's sanction on the settlement that resulted.

The notion that fees are unavailable unless the settlement terms are formally incorporated into a judicial order is nonsensical in this instance. The parties got as far as settling plaintiffs' primary constitutional claims, but they could not agree about attorneys' fees. A135-36, A138. Based on the court's representations, the parties completed that part of the settlement with the understanding that the court would later address fees. Pls.' Br. 29-30. The Superior Court did not enter an order of dismissal incorporating the settlement terms because dismissal of the action would have summarily eliminated plaintiffs' fee claim. Pls.' Br. 29-30. The District does not contest that plaintiffs would not have settled had they understood that their opportunity to obtain fees would be eliminated by the very act of settling (Pls.' Br. 30), yet the District now suggests, without basis, that the absence of a formal order is a death knell.

Buckhannon, and the lower court cases that interpret it, identify a spectrum of judicial imprimatur. At one end are the circumstances addressed in *Buckhannon*, in which a plaintiff achieves "victory" entirely outside the judicial process and therefore does not become entitled to

fees. At the other end is a judgment on the merits, which has the highest level of judicial sanction and clearly triggers Section 1988. The circumstances here are closer to the latter end of the spectrum. The supervised settlement was an integral part of the judicial process, had all the necessary indicia of judicial supervision and sanction, and bore no resemblance to the circumstances that led the *Buckhannon* Court to reject the "catalyst theory."

The cases relied upon by the District (*see* Dist. Br. 38-41) are not remotely similar to this case. In *John T. v. Delaware County Intermediate Unit*, 318 F.3d 545, 560 (3d Cir. 2003), the parties reached a settlement "through negotiations out of court" prior to an *administrative hearing*; consequently, no court ever addressed the case or "endorsed the agreement with a 'judicial imprimatur.'" In *Bell v. Board of County Commissioners of Jefferson County*, 451 F.3d 1097, 1103 (10th Cir. 2006), the court held that a post-trial settlement did not entitle plaintiff to more fees than the court had already awarded, but the settlement was reached after a trial and without the guidance or supervision of the court. The fee request in *Smyth v. Rivero*, 282 F.3d 268, 273 (4th Cir. 2002) did not spring from a settlement for monetary consideration, but rather arose out of the plaintiffs' agreement to move a hearing date in return for the state agency's agreement not to seek repayment of the benefits that were the subject of the litigation. Following the postponement of the hearing, the agency voluntarily eliminated the policy that would have required repayment, and the plaintiffs claimed entitlement to fees because the continuation of the hearing eventually led to the desired result. *Id*. The Fourth Circuit questioned whether the agreement was even a settlement (*id*. at 278), and it held that the plaintiffs were not prevailing parties because the agency's voluntary change in policy was analogous to the legislative shift in *Buckhannon* (*id*. at 285). The circumstances in *Smyth*, as well as in *John T.* and *Bell*, are leagues away from those here, where the court aggressively presided over settlement discussions, cajoled

the parties into reaching an agreement that resulted in the payment of valuable consideration, and then presided over the ensuing fee dispute for seventeen years.

The District also cites cases that have no bearing on whether the Superior Court's actions satisfy the standard set forth in *Buckhannon*. For instance, the District cites *Settlemire v. District of Columbia Office of Employee Appeals*, 898 A.2d 902 (D.C. 2006), but that case did not involve a settlement. In *Oil, Chemical & Atomic Workers International Union v. Department of Energy*, 288 F.3d 452, 458 (D.C. Cir. 2002), the issue was not whether there was sufficient imprimatur, but rather whether there was a material alteration in the relationship of the parties, a point that the District has conceded here. *Torres v. Walker*, 356 F.3d 238 (2d Cir. 2004), is also off-point; it addressed the fee cap provision of the Prison Litigation Reform Act, not whether a settling party may be considered a "prevailing party."

The most relevant cases on which the District relies—*Toms v. Taft*, 338 F.3d 519 (6th Cir. 2003) and *T.D. v. LaGrange School District No. 102*, 349 F.3d 469 (7th Cir. 2003)—are easily distinguishable because they did not feature the level of judicial involvement present here. *See* Pls.' Br. 27-28. Unlike the district courts in *Toms* and *T.D.*, the Superior Court had sustained and direct involvement in the settlement negotiation, and it retained continuing authority to decide the question of attorneys fees after the execution of the settlement. *Compare Toms*, 338 F.3d at 529; *T.D.*, 349 F.3d at 479. Nevertheless, to the extent these courts held that fees may only be awarded if a settlement is incorporated into a formal court order, as the District suggests (at 38-39, 47), they adhere to an overly strict interpretation of Section 1988 that departs from *Buckhannon* without explanation.

B. The Court Continued to Exercise Its Authority Over the Settlement.

In addition to its pervasive involvement in the settlement proceedings, the Superior Court conferred its imprimatur by continuing to preside over the parties' fee dispute. For seventeen

years after the parties reached their settlement, the Superior Court exercised its authority to resolve the plaintiffs' request for fees. The District does not dispute the court's involvement, but instead contends that plaintiffs are not eligible for fees because the court did not *expressly* retain jurisdiction in an order of dismissal. Dist. Br. 35, 45, 48-49.

The lack of such an order is not dispositive. As plaintiffs previously explained, the Superior Court—a court of general jurisdiction (D.C. CODE § 11-921(a))—did not enter a jurisdictional order because, unlike a federal court subject to Article III limitations, it did not need "ancillary jurisdiction" to exercise authority over a fee issue left unresolved by the settlement. Pls.' Br. 31-32, citing *DeGroot v. DeGroot*, 939 A.2d 664, 668 (D.C. 2008) ("The Superior Court is 'a court of general jurisdiction.'"). The District does not dispute the distinction between Article III federal courts and D.C. courts, but nonetheless asserts that plaintiffs are not eligible for fees because, unlike in *Smyth* and *Roberson v. Giuliani*, 346 F.3d 75 (2d Cir. 2003), "the Superior Court did not expressly retain jurisdiction to monitor compliance with a court order." Distr. Br. 41. However, *Smyth* and *Roberson* are distinguishable because they are federal cases in which a trial court, consistent with its Article III limitations, could exercise "ancillary jurisdiction" to enforce a settlement only if the "court's 'retention of jurisdiction' over the settlement contract" was included as "one of the terms set forth in the order." *Kokkonen*, 511 U.S. at 381. Moreover, there was no order of dismissal in which the Superior Court could include such a statement of retention because the parties did not seek to dismiss the case given the pendency of the fee dispute.

The District suggests, without basis, that because the settlements involved the payment of money from the District to the plaintiffs and "did not impose any future obligations on the

defendant," there was nothing for the Superior Court to enforce or oversee. Dist. Br. 49.[4] But the parties settled the merits of the case only because they could not agree on fees and consequently postponed the plaintiffs' fees request for another day. The reservation of the fee claim was as much a part of the settlement as the agreement on damages. Settling parties can either include fees as part of the settlement, or leave the matter for later determination. The parties here chose the second route; they expected the Superior Court to "retain judicial enforcement or oversight" (*id*.) over the fees question, and the lower court did just that.

As a last ditch effort, the District tinkers with the standard of review. It labels the Superior Court's legal conclusions regarding the retention of jurisdiction as "findings of fact," and contends that they should be reviewed under a "clearly erroneous" standard. Dist. Br. 27 n.10, 45. However, the lower court's statements about the level of judicial imprimatur and plaintiffs' eligibility to receive fees under Section 1988 are pure conclusions of law, which are reviewed *de novo*. *In re Ingersoll Trust*, 950 A.2d 672, 692 (D.C. 2008) ("our review of the legal issues is *de novo*"). Indeed, after *Buckhannon*, "every Circuit to address the issue has determined that the characterization of prevailing-party status for awards under fee-shifting statutes such as § 1988 is a legal question subject to *de novo* review." *Bailey v. Mississippi*, 407 F.3d 684, 687 (5th Cir. 2005). Plaintiffs' invocation of a "clear error" standard of review is particularly odd because the trial court did not purport to make any factual findings; it did not hold an evidentiary hearing or call any witnesses. A177-91. Instead, the Superior Court answered only the legal question this Court asked it to reevaluate—whether, in light of *Buckhannon*, the plaintiffs were prevailing parties. *See Patterson v. District of Columbia*, 819

[4] The District criticizes plaintiffs for distinguishing between monetary settlements and equitable settlements, but it then draws the exact same contrast. *Compare* Dist. Br. 34 *with id*. at 49. It is not clear why the monetary nature of the settlement would affect this aspect of the "prevailing party" analysis when the Superior Court continued to exercise its authority over the fees dispute for 17 years after the settlement.

A.2d 320, 320-21 (D.C. 2003) (per curiam) (ordering Superior Court to consider impact of *Buckhannon* on remand). The lower court reached the wrong answer to that question, and along the way it did not make any factual findings to which this Court owes deference.

II. *BUCKHANNON*'S REFERENCE IN *DICTA* TO "PRIVATE SETTLEMENTS" MUST BE UNDERSTOOD IN CONTEXT.

The District misconstrues the phrase "private settlement" as used in *Buckhannon* and overlooks the significant differences between *Buckhannon* and this case. Plaintiffs explained that the phrase "private settlement," as used by the Supreme Court, is a term of art that refers to settlements reached outside the litigation process. Pls.' Br. 19-21 (citing cases in the collective bargaining, employment, and bankruptcy contexts). In *Buckhannon* itself, Justice Scalia alluded to the difference between settlements reached in the midst of litigation and those that occur independent of litigation; he distinguished between the resolution of a dispute outside the judicial process and the settlement of a claim during litigation, which is "the product of, and bears the sanction of, judicial action in the lawsuit." 532 U.S. at 618 (Scalia, J., concurring) (emphasis omitted).

The District does not respond to these points, relying instead on distinguishable cases that involve settlements reached outside the legal process and that ultimately support plaintiffs' understanding of the term "private settlement." Dist. Br. 43, 46-47. For instance, the District cites *P.N.*, but in that case the parties reached a settlement before the litigation commenced and before an administrative hearing was even held. 474 F.3d at 1168. Moreover, the parties in *P.N.* did not reserve the question of fees, unlike here where the postponement of the fee issue was a *de facto* condition of settlement. The circumstances in *Smith v. Fitchburg Public Schools*, 401 F.3d 16 (1st Cir. 2005), are similar to *P.N.*: the parties settled during a non-judicial, administrative hearing in which the hearing officer played a minimal role in the settlement. 401 F.3d at 20-21.

Foreshadowing this case, the First Circuit suggested that judicial supervision of a settlement *may* satisfy Section 1988 under certain circumstances: it refused to "foreclose the possibility that such judicial intervention in a clearer, or more extreme, case might justify an award of attorneys' fees under *Buckhannon*." *Id*. at 27. This is such an "extreme" case.

Buckhannon's citation to *Kokkonen* does not "refute" the argument that settlements reached outside the judicial process are treated differently than settlements reached in the midst of litigation. Dist. Br. 35, citing *Buckhannon*, 532 U.S. at 604 n.7. *Kokkonen* is not a "prevailing party" case (*see supra* p. 10); the Court addressed the circumstances under which a *federal court* may exercise ancillary jurisdiction to enforce a settlement. The *Buckhannon* Court cited *Kokkonnen* for that holding, not to define the term "private settlement." The District exaggerates the import of *Buckhannon*'s reference to *Kokkonen* by suggesting otherwise.

Even though it does not govern the May 1992 settlement, which was not a "private settlement," the Court's footnote reference to "private settlements" is nonetheless *dicta* that lacks precedential weight. *Buckhannon* did not involve a settlement.[5] The plaintiff in *Buckhannon* obtained the desired result—the elimination of the regulation that it challenged in the federal lawsuit—not because it settled with the defendants, but rather because the West Virginia legislature *independently* eliminated the regulation, mooting the litigation. 532 U.S. at 601. The lack of judicial involvement in the resolution of the litigation animated *Buckhannon*'s ruling, and any discussion of settlements is classic *dictum*: it is "[a] judicial comment" that is "unnecessary to the decision in the case and therefore not precedential." BLACK'S LAW DICTIONARY 1100 (7th ed. 1999) (defining *obiter dictum*); *see also id*. at 465 (defining *judicial dictum* as an "opinion by

[5] It certainly did not involve a monetary settlement, as Justice Ginsburg noted. *Buckhannon*, 532 U.S. at 632 n.8 (Ginsburg, J., dissenting). The District makes noise about plaintiffs' citation of Ginsburg's dissenting opinion (Dist. Br. 34), but plaintiffs referenced Justice Ginsburg's statement for the uncontroversial proposition that the *Buckhannon* Court ruled on the facts with which it was presented: a plaintiff sought equitable relief and then benefited from a change in the law brought about by legislative fiat.

a court that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision"). The Supreme Court has so consistently reiterated that a judicial statement is "unquestionably dictum" if it is "not essential to [the] disposition of any of the issues contested" that the point can hardly be argued. *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001); *see also SEC v. Edwards*, 540 U.S. 389, 396 (2004) ("we will not bind ourselves unnecessarily to passing dictum that would frustrate Congress' intent"); *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821) ("general expressions" of law in a case "may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision" because those "expressions" may "serve to illustrate" the question before the court, but "their possible bearing on all other cases is seldom completely investigated").

The District suggests that the Court's passing mention of "private settlement" is not *dicta* because *Buckhannon*'s "central holding" was that a settlement is a "voluntary" action and thus cannot be the basis for a fee award. Dist. Br. 31, 34 ("A monetary settlement is just the sort of 'voluntary change in the defendant's conduct' within the scope of the 'catalyst' theory"). Here, the District contradicts itself. It admits, as it must given the language in *Buckhannon*, that a party to a consent decree is eligible to recover fees under Section 1988. *Id.* at 37. Consent decrees, however, are no less voluntary than any other settlements; in fact, "the voluntary nature of a consent decree is its most fundamental characteristic." *Local Number 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 521-22 (1986); *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) ("Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms."). The District similarly concedes (at 38-44) that *some* settlements may trigger Section 1988 if they are incorporated into an order of dismissal that contains an express retention of federal jurisdiction. Yet, such settlements are also voluntary.

See Richard S. v. Dep't of Developmental Servs., 317 F.3d 1080, 1083-84 (9th Cir. 2003) (concluding that plaintiffs were prevailing parties after entering into a voluntary settlement); *Roberson*, 346 F.3d at 82 (holding that plaintiffs could recover fees in a case involving a voluntary settlement); *Smalbein v. Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (per curiam) (same).

Thus, the axis upon which *Buckhannon* turns is not the voluntariness of the action, but the level of judicial involvement in the process by which the plaintiff obtains relief. This is apparent from the *Buckhannon* majority's emphasis on the need for "judicially sanctioned change" (532 U.S. at 605) and its recognition that the Court never before had "awarded attorney's fees for a nonjudicial 'alteration of actual circumstances'" (*id*. at 606). It would make little sense if the Court listed consent decrees as an example of a "material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees" (*id*. at 604), but then concluded that relief gained as a consequence of voluntary action precluded the applicability of Section 1988. The more plausible reading of *Buckhannon* is that the Court sought to foreclose use of the catalyst theory as a basis for fees where a defendant moots the litigation or provides the relief requested through actions that are independent of the judicial process.

This interpretation of *Buckhannon*—which allows a plaintiff to recover a fee award after entering into a settlement that features the appropriate level of judicial sanction, but disallows a fee award if the dispute ends without judicial involvement—fits best with the purposes of Section 1988. As plaintiffs explained previously (at 33-38), while the legislative history may not directly support an interpretation of "prevailing party" that encompasses the "catalyst theory" as applied in *Buckhannon*, the legislative history strongly supports an interpretation of "prevailing party" that encompasses judicially supervised settlements, even if their terms are not

memorialized in a formal order. Congress intended that plaintiffs be eligible for fees "without formally obtaining relief" (S. REP. NO. 94-1011, at 5 (1976)), as demonstrated by its citation to cases in which courts awarded fees to settling plaintiffs. *See, e.g.*, *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"). In keeping with the meaning of "prevailing party" as understood in 1976 (Pls.' Br. 34 & n.13), the legislative history reflects the belief that plaintiffs "should not be penalized for seeking an out-of-court settlement" by losing eligibility for fees. H.R. REP. NO. 94-1558, at 7 (1976); *cf. Marek v. Chesny*, 473 U.S. 1, 10 (1985) ("in considering § 1988 * * * Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court.").

The District implies that *Buckhannon* refused to consider Section 1988's legislative background but it cites *Buckhannon* selectively. Dist. Br. 35-36. The *Buckhannon* Court acknowledged that previous courts had relied on legislative history and conducted its own analysis of that history. 532 U.S. at 607-08. While the Court ultimately found that the legislative history did not support the "catalyst theory," and instead supported the proposition that the term "prevailing party" implies the existence of at least some judicial imprimatur, the Court did not assess whether the legislative history spoke to the level of imprimatur necessary to trigger Section 1988. By itself, the term "prevailing party" does not offer insight into how much imprimatur is enough, and the legislative history of Section 1988 bolsters the conclusion that a settling plaintiff may be eligible for fees when a court plays an active role in the settlement.

Excluding judicially approved settlements, such as the May 1992 settlement, from the orbit of Section 1988 would have adverse ramifications on civil rights litigation. Section 1988

was enacted because "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy" for private citizens seeking to vindicate their rights. S. REP. NO. 94-1011, at 2. The availability of fees also attracts counsel that otherwise may not be able to represent aggrieved parties. *Evans v. Jeff D.*, 475 U.S. 717, 741 (1986) (Section 1988 allows plaintiffs "to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights by means of settlement or trial"). Under the District's proposed rule, civil rights plaintiffs and their counsel have no "out" from litigation; settlement will make them ineligible for fees even though it may be mutually advantageous for both parties. As a consequence, settlements may become less likely in civil rights litigation if the parties cannot agree on the question of fees as part of the settlement, a result that harms plaintiffs, defendants, and courts alike. Pls.' Br. 35-36. The District does not dispute these dangers. Nor does it deny the inequity of depriving plaintiffs of attorneys' fees precisely because they heeded the trial court's admonition to postpone resolution of the fees dispute until after the settlement of their constitutional claims. *Id.* at 37-38.

III. THE NOTICE OF APPEAL SATISFIES RULE 3 BECAUSE THE PLAINTIFFS' INTENT TO APPEAL WAS OBJECTIVELY CLEAR.

The District's jurisdictional argument (repeated without significant change from its motion to dismiss) fails because plaintiffs' intent to appeal is "objectively clear" from their Notice of Appeal. The Rules of Appellate Procedure require nothing more. As plaintiffs explained in their opposition to the District's motion to dismiss, which should be denied, this Court "continues to construe Rule 3 liberally" (*Vines v. Mfrs. & Traders Trust Co.*, 935 A.2d 1078, 1083 (D.C. 2007)), and Rule 3(c) states that an appeal *may not* be dismissed "for failure to name a party whose intent to appeal is otherwise clear from the notice." D.C. App. R. 3(c)(4). The District argues that "[i]t would have been easy to have listed the names" of all the plaintiffs

in the Notice (Dist. Br. 15), but "would have been easy" is not the guiding test. Rather, the Rules require only that the plaintiffs' intent to appeal be "objectively clear" from the four corners of the Notice, regardless of whether the Notice lists the names of all the plaintiffs or includes "et al." Fed. R. App. P. 3(c), Adv. Comm. Notes, 1993 Amends.

The District is wrong that "absolutely nothing in the notice" (Dist. Br. 16) demonstrates plaintiffs' intent to appeal. The Notice contains express references to the order below and the procedural history of the case, which leave no doubt as to the appellants' identities. A192-193. The District acknowledged in both its motion to dismiss (at 12) and its appellate mediation statement (A194-96) that Patterson's involvement in the fee dispute ended in 1995 and that only the five current plaintiffs-appellants are seeking fees.[6] These same five plaintiffs have been the appellants in the two previous trips to this Court, as the previous Notices of Appeal demonstrate (SA5, SA7), and when this Court remanded the case to the Superior Court, it asked the trial court to consider the "prevailing party" status of these five plaintiffs. The Notice refers to this entire procedural history, and the District plainly understands that these five plaintiffs—and not Patterson—have been litigating the fee dispute since 1995.[7] Under these circumstances, the objective clarity of the appellants' identity and their intent to appeal is obvious. The District claims "that the only inference that can be drawn from the face of the notice is that a single party, Patterson, is appealing" (Dist. Br. 24-25), but given the District's concession that Patterson has

[6] Reference to the mediation statement is not improper, as the District contends. Dist. Br. 24 n.8. The District argues that documents filed with this Court may not be included in an appendix, but it provides no support for that notion, except for an errant citation to Rule 30(a), which does not bar their use. Given that the District itself relies upon documents filed with this Court, its objection is somewhat disingenuous. *See* Dist. Br. 15-16 (citing previously filed Notices of Appeal). Moreover, the District's estoppel point is a red herring: plaintiffs do not cite the mediation statement to show that the District is barred from making its jurisdictional argument, but rather to show that its jurisdictional argument is misplaced because the District understood the plaintiffs' intent to appeal.

[7] Contrary to the District's assertion (Dist. Br. 26 n.9), plaintiffs clearly preserved their objection to *Patterson I*'s ruling that winning a right to a post-seizure hearing does not trigger Section 1988. Pls.' Br. 10 n.5. Regardless of Patterson's involvement in this appeal, the remaining plaintiffs naturally may maintain their objection to that ruling for purposes of further review.

not been involved in this matter for some time (Dist. Mot. to Dismiss at 9), it cannot possibly infer or believe that Patterson is appealing the January 2008 order.

The District does not claim that it suffered prejudice as a result of any technical omissions in the Notice, but instead contends that the question of prejudice "is irrelevant." Dist. Br. 23. However, the purpose of Rule 3 is "to provide all parties and the court with sufficient notice of a litigant's intent to seek appellate review," *Berrey v. Asarco Inc.*, 439 F.3d 636, 642 (10th Cir. 2006), and a technical failure to adhere strictly to Rule 3(c) "will not foreclose the court's review" if "there is no prejudice to the adverse party." *Sather v. Comm'r*, 251 F.3d 1168, 1172 (8th Cir. 2001). The District claims to be unaware of federal decisions taking prejudice into account, but plaintiffs cited two such cases in their opposition to the District's motion to dismiss—*Sather* and *Independent Petroleum Association*, 235 F.3d 588, 593 (D.C. Cir. 2001) ("without a showing of prejudice by the appellee, technical errors in the notice of appeal are considered harmless"). Prejudice is part of the analysis, and the District has not been harmed by any "technical errors" that may exist in plaintiffs' Notice of Appeal.

It is clear from the face of the Notice of Appeal that all five plaintiffs-appellants intended to appeal the lower court's January 2008 fee ruling. Consequently, the District's case-or-controversy argument, which is premised upon Patterson being the sole appellant, is without merit. Dist. Br. 25-27. Particularly in light of the lack of prejudice caused to the District—which did not raise this argument until more than 14 months after the filing of the Notice of Appeal, and which operated in the interim under the belief that all five plaintiffs had appealed the lower court's order—there is no basis for dismissal.

CONCLUSION

The Supreme Court warned against fee requests turning into a "a second major litigation" (*Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)), yet the litigation over the plaintiffs' fee

request has lasted almost three times as long as the litigation over the merits. At the insistence of the Superior Court, and under its supervision, the plaintiffs resolved their primary constitutional claims in May 1992 and postponed their fee claims for a later day. Plaintiffs are now being penalized for this course of conduct because, in the District's view, the Superior Court never entered a formal order of dismissal that incorporated the terms of the settlement, a procedure that would have been nonsensical because the fee question was outstanding. The Supreme Court in *Buckhannon* never imposed such high hurdles for litigants, and the Superior Court's involvement in the settlement proceedings is sufficient to satisfy the "judicial imprimatur" standard. The Superior Court's ruling that plaintiffs are not prevailing parties is in error, and it should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certified that he caused a copy of the foregoing Reply Brief of Plaintiffs-Appellants to be served on the following counsel by UPS overnight mail, sent on or before 5:00 p.m. on June 10, 2009.

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