

CASE NO. 19-2144

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

YASMIN REYAZUDDIN,

Plaintiff - Appellant,

v.

MONTGOMERY COUNTY, MARYLAND,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT

BRIEF OF *AMICI CURIAE*
THE disABILITY LAW CENTER OF VIRGINIA,
DISABILITY RIGHTS MARYLAND,
DISABILITY RIGHTS OF WEST VIRGINIA,
PROTECTION AND ADVOCACY FOR PEOPLE WITH DISABILITIES,
INC. OF SOUTH CAROLINA, AND
DISABILITY RIGHTS NORTH CAROLINA

Steven M. Traubert
Zachary Devore
Kalena C. M. Ek
disAbility Law Center of Virginia
1512 Willow Lawn Drive, Suite 100
Richmond, VA 23230
(804) 225-2042

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2144 Caption: Yasmin Reyazuddin v. Montgomery County, Maryland

Pursuant to FRAP 26.1 and Local Rule 26.1,

disAbility Law Center of Virginia
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Steven M. Traubert

Date: 12/11/2019

Counsel for: disAbility Law Center of Virginia

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2144 Caption: Yasmin Reyazuddin v. Montgomery County, Maryland

Pursuant to FRAP 26.1 and Local Rule 26.1,

Disability Rights Maryland
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Steven M. Traubert

Date: 12/11/2019

Counsel for: Disability Rights Maryland

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2144 Caption: Yasmin Reyazuddin v. Montgomery County, Maryland

Pursuant to FRAP 26.1 and Local Rule 26.1,

Disability Rights of West Virginia
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Steven M. Traubert

Date: 12/11/2019

Counsel for: Disability Rights of West Virginia

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2144 Caption: Yasmin Reyazuddin v. Montgomery County, Maryland

Pursuant to FRAP 26.1 and Local Rule 26.1,

Protection and Advocacy for People with Disabilities, Inc.
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Steven M. Traubert

Date: 12/11/2019

Counsel for: P&A for People with Disabilities, Inc.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2144 Caption: Yasmin Reyazuddin v. Montgomery County, Maryland

Pursuant to FRAP 26.1 and Local Rule 26.1,

Disability Rights North Carolina
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES NO
If yes, identify entity and nature of interest:
5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.
7. Is this a criminal case in which there was an organizational victim? YES NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Steven M. Traubert

Date: 12/11/2019

Counsel for: Disability Rights North Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
IDENTIFICATION OF AMICI CURIAE.....	1
ARGUMENT	5
I. DENYING ATTORNEY’S FEES TO PLAINTIFFS WITH DISABILITIES WHO OBTAIN LEGAL REMEDIES THROUGH LITIGATION GREATLY REDUCES ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITIES	5
II. THE DECISION BELOW HAS SERIOUS IMPLICATIONS FOR OTHER DISABILITY LAW PROVISIONS WHERE MONETARY AWARDS DO NOT LIE.....	10
III. THE MAJORITY OF ADA AND REHABILITATION ENFORCEMENT ACTIONS ARE BROUGHT BY PRIVATE COUNSEL RATHER THAN THE FEDERAL GOVERNMENT OR NON-PROFITS.....	12
CONCLUSION	15
CERTIFICATE OF COMPLIANCE.....	17

TABLE OF AUTHORITIES

CASES

<i>Bercovitch v. Baldwin Sch., Inc.</i> , 191 F.3d 9 (1st Cir. 1999).....	5
<i>Bradley v. Richmond Sch. Board</i> , 416 U.S. 696 (1974).....	9
<i>Buckhannon Board and Care Home</i> , 532 U.S. 598 (2001).....	6, 7, 8
<i>Christiansburg Garment Co. v. EEOC</i> , 434 U.S. 412 (1978).....	6
<i>Hensley v. Eckerhart</i> , 461 U.S. 424 (1983).....	6
<i>Hewitt v. Helms</i> , 482 U.S. 755 (1987).....	7
<i>Indiana Prot. and Advocacy Services v. Indiana Family and Social Services Admin.</i> , 603 F.3d 365 (7th Cir. 2010).....	1
<i>J.D. v. Colonial Williamsburg Foundation</i> , 925 F.3d 633 (4th Cir. 2019).....	11
<i>Newman v. Piggie Park Enterprises, Inc.</i> , 390 U.S. 400 (1968).....	8, 9
<i>Parham v. Southwestern Bell Tel. Co.</i> , 433 F.2d 421 (C.A.8 1970).....	6
<i>PGA Tour, Inc. v. Martin</i> , 532 U.S. 661 (2001).....	11
<i>Virginia Office for Prot. & Advocacy v Stewart</i> , 563 U.S. 247 (2011).....	1, 2

STATUTES

29 U.S.C. § 794e *et seq.*.....4

29 U.S.C. § 794e(f)(3)2

29 U.S.C.S. § 794a.....5

42 U.S.C. § 1988.....8

42 U.S.C. § 10801 *et seq.*.....4

42 U.S.C. § 12101(a)(1).....10

42 U.S.C. § 12101(a)(2).....10

42 U.S.C. § 12101(b)(1)12

42 U.S.C. § 12133 (1990)5

42 U.S.C. § 12188.....12

42 U.S.C. § 12188(b)(1)(B)13

42 U.S.C. § 15041 *et seq.*.....4

42 U.S.C. § 150415

42 U.S.C. § 150435

S.C. Code Ann. 43-33-310.....4

Va. Code § 51.5-39.132

OTHER AUTHORITIES

110 Cong. Rec. 12724 (1964).....6

H. R. Rep. No. 94-15588

S. Rep. No. 94-10118

DOJ Enforcement actions https://www.ada.gov/enforce_current.htm
(Visited November 20, 2019).....13

IDENTIFICATION OF AMICI CURIAE

The Protection and Advocacy (P&A) agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. *Virginia Office for Prot. & Advocacy v Stewart*, 563 U.S. 247, 250-251 (2011). See also, *Indiana Prot. and Advocacy Servs. v. Indiana Family and Soc. Servs. Admin.*, 603 F.3d. 365, 383 (7th Cir. 2010) (Posner, J., concurring) (explaining the various roles of P&A agencies). For more than 40 years, P&A and the entire protection and advocacy network comprised of 57 state and territorial agencies, and a Native American consortium, have been litigating in state and federal courts for the protection of the human and legal rights of all persons with disabilities. All protection and advocacy systems are required to settle matters at the lowest possible level. Litigation is used only as a last resort, as per Federal regulations. The P&A agencies have a strong interest in assuring that persons with disabilities are able to participate fully in all aspects of American life through the enforcement of civil rights laws, not the least of which is access to the judicial system.

The disAbility Law Center of Virginia, Disability Rights Maryland, Disability Rights of West Virginia, Protection and Advocacy for People with Disabilities, Inc. of South Carolina, and Disability Rights North Carolina

respectfully submit this brief of amici curiae¹ as part of our mission to advocate for the legal interests of Americans with disabilities throughout the Fourth Circuit. All parties have consented to the filing of this amicus brief under Federal Rule of Appellate Procedure 29.

dLCV is the designated P&A agency for the Commonwealth of Virginia. Va. Code § 51.5-39.13. As the designated protection and advocacy agency, dLCV has the authority to “pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals.” 29 U.S.C. § 794e(f)(3). The United States Supreme Court affirmed this authority in *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247 (2011) (involving two other protection and advocacy laws). As the P&A agency for Virginia, dLCV has a strong interest in enforcement of the Americans with Disabilities Act (“ADA”) to assure full inclusion of people with disabilities, and particularly in this case ensuring continued access to the courts.

Disability Rights Maryland (DRM) is a non-profit agency established under federal law to protect, advocate for and advance the rights of Marylanders with disabilities, and is the designated P&A System for Maryland working in partnership with people with disabilities to create a society that values people with

¹ Counsel for amici curiae authored this brief in whole and no party other than amici curiae contributed financially to this brief. Neither party involved in this litigation authored this brief or contributed to its funding.

all disabilities and supports their rights to full inclusion in our communities. Since 1975, DRM has provided essential legal services to people with disabilities, including frequently working with private counsel to refer cases or seek *pro bono* assistance for matters related to disability discrimination. DRM has an interest in this case because its outcome will affect provision of litigation services to low income persons with disabilities and to those who need extensive legal support to challenge disability discrimination. It is in the interest of persons with disabilities and the public to grant attorney's fees when illegal discrimination has been determined through use of the judicial process. Full protection of rights requires full access to courts, including in the employment context where disability discrimination continues to exist and is a contributing factor to the low employment rate, and consequent high poverty rate, of persons with disabilities.

Disability Rights of West Virginia ("DRWV") is the federally-mandated protection and advocacy system for people with disabilities in West Virginia. DRWV is a private, nonprofit agency. West Virginia has the highest rate of disability in the nation. For more than 40 years, DRWV, and the entire protection and advocacy network, have been litigating in state and federal courts for the protection of the human and legal rights of all persons with disabilities. All services are confidential and free of charge. The protection of reasonable accommodations afforded under the ADA is of paramount importance to the

mission of the protection and advocacy system. In West Virginia it is of significant importance because West Virginia has the highest rate of unemployment for persons with a disability in the nation.

Protection and Advocacy for People with Disabilities, Inc. is designated by the State of South Carolina to serve as the federally-mandated protection and advocacy system for people with disabilities in South Carolina, S.C. Code Ann. 43-33-310, and is a private, nonprofit agency. Services are confidential and free of charge. Individuals with disabilities face significant employment issues in South Carolina. A significant number of cases involving violations of the ADA are handled by the protection and advocacy system, including P&A in South Carolina or a similar nonprofit entity. Therefore, any decision that limits the ability of a plaintiff, who has received a favorable jury verdict, to collect legal fees on a matter involving the request for a reasonable accommodation would have a disproportionately adverse impact on people with disabilities, and their advocates throughout the protection and advocacy agencies in South Carolina and across the nation.

Disability Rights North Carolina is North Carolina's designated Protection and Advocacy System and as such is authorized and required by federal law to protect and advocate for the rights of individuals with disabilities. *See* 42 U.S.C. § 10801 *et seq.*; 42 U.S.C. § 15041 *et seq.*; 29 U.S.C. § 794e *et seq.* (2018). Disability Rights NC, as a Protection and Advocacy organization, must pursue legal,

administrative, and other appropriate remedies or approaches to ensure the protection of, and the advocacy for, the rights of such individuals within the State. 42 U.S.C. §§ 15041, 15043 (2018). In fulfilling its mission, Disability Rights NC regularly litigates employment and other matters in state and federal court, and pursues attorney's fees under applicable disability laws to support its work.

ARGUMENT

I. DENYING ATTORNEY'S FEES TO PLAINTIFFS WITH DISABILITIES WHO OBTAIN LEGAL REMEDIES THROUGH LITIGATION GREATLY REDUCES ACCESS TO JUSTICE FOR PEOPLE WITH DISABILITIES

Civil rights laws relating to people with disabilities are written to provide access to effective legal representation to plaintiffs of limited means by including attorney's fees as a remedy. These include the Rehabilitation Act at 29 USCS § 794a, the Americans with Disabilities Act (ADA), and the Civil Rights Act of 1964.² Withholding attorney's fees in accessibility cases where the opposing party grants an accommodation only after a lengthy litigation process and judgment on

² See 42 U.S.C. § 12133 (1990) (Title II of the ADA states that "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202."); *Bercovitch v. Baldwin Sch., Inc.*, 191 F.3d 9, 11 (1st Cir. 1999).

the merits creates a strong disincentive against attorneys representing clients in those cases. The Supreme Court noted in *Christiansburg Garment Co. v. EEOC* that the primary purpose of allowing attorney's fees as an award in civil rights litigation is to "make it easier for a plaintiff of limited means to bring a meritorious suit." 434 U.S. 412 420 (1978), quoting 110 Cong. Rec. 12724 (1964) (remarks of Sen. Humphrey). This was further expanded upon in *Hensley v. Eckerhart*, when Justice Brennan quoted Senate Report No. 94-1011, p. 2, saying that "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." 461 U.S. 424, 441 (1983).

The Supreme Court discussed the situation at issue in this case in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, and said that "[a]s the dissent would have it, by giving the term its normal meaning the Court today approves the practice of denying attorney's fees to a plaintiff with a proven claim of discrimination, simply because the very merit of his claim led the defendant to capitulate before judgment. **That is not the case.** To the contrary, the Court approves the result in *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (C.A.8 1970), where attorney's fees were awarded 'after [a] finding that the defendant had acted unlawfully.'" 532 U.S. 598, 616 (2001) (Scalia, J.,

concurring) (emphasis added). The Supreme Court had previously emphasized that “[a]t 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. . . . The real value of the judicial pronouncement—what makes it a proper judicial resolution of a ‘case or controversy’ rather than an advisory opinion—is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff.” *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)

In a Rehabilitation Act or ADA employment case, the provision of a long disputed accommodation is hardly a “purely technical” victory – instead, the final adjudication by a jury that the defendant acted unlawfully materially and legally altered the status of the parties and ended an employment practice that the jury had found to be unlawful discrimination. That is the very sort of material alteration of the status between the parties following a judicial finding that the Supreme Court has indicated should be treated as producing a prevailing party. *Buckhannon Bd. and Care Home*, 532 U.S. at 607 n. 9, 616 (Scalia, J., concurring).

Extending *Buckhannon* and depriving plaintiffs of attorney’s fees in matters like this one will “impede access to court for the less well-heeled, and shrink the

incentive Congress created for the enforcement of federal law by private attorneys” to attempt enforcement of critical civil rights law. *Id.*, at 622-23.³

In this case, withholding attorney’s fees when the opposing party granted the accommodation only after drawn-out litigation will contravene the Congressional intent to increase access to enforcement mechanisms available only through the courts in accessibility cases for plaintiffs with limited means. Private attorneys will have a more limited capacity to accept accessibility cases like this one because of the high likelihood that they will be unable to recover their fees. The burden on already overloaded nonprofit organizations will mean that fewer plaintiffs will receive adequate legal representation, resulting in a heightened risk of discrimination.

³ Congress passed the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. §1988 (1994 ed. and Supp. IV). As explained in the Reports supporting Section 1988, civil rights statutes vindicate public policies “of the highest priority,” S. Rep. No. 94–1011, p. 3 (1976) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U. S. 400, 402 (1968) (*per curiam*), yet “depend heavily on private enforcement,” S. Rep. No. 94–1011, at 2. Persons who bring meritorious civil rights claims, in this light, serve as “private attorneys general.” *Id.*, at 5; H. R. Rep. No. 94–1558, p. 2 (1976). Such suitors, Congress recognized, often “cannot afford legal counsel.” *Id.*, at 1. They therefore experience “severe hardshi[p]” under the “American Rule.” *Id.*, at 2. Congress enacted Section 1988 to ensure that nonaffluent plaintiffs would have “effective access” to the Nation’s courts to enforce civil rights laws. *Id.* at 1. That objective accounts for the fee-shifting provisions before the Court in this case, prescriptions of the FHAA and the ADA modeled on Section 1988. See *supra*, at 3–4, n 1.

Central to promoting vigorous enforcement of civil rights laws is enforcement by private plaintiffs, which requires provision of attorney's fees and costs. The "private attorney general" doctrine provides for the enforcement of public rights through the use of private lawsuits. The incentive for the private suit is the award of attorney's fees following successful determination of a litigated right. (*Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968); see also *Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 719 (1974).

This diversion of resources negatively impacts a non-profit organization's capacity to fulfill its mission. When an agency accepts a case requiring litigation, it must scale back on representation of other clients and refuse services to potential clients with valid legal claims. There is also less time to devote to other priorities, including projects that our federal grants require us to pursue, resulting in delays to those projects.

dLCV and other non-profit legal organizations are able to justify diverting resources in large part because a portion of those resources will be recouped in the form of attorney's fees recovered from the opposing party. If this is no longer an option in cases where the opposing party grants the accommodation only after a jury finds against them, many non-profit legal organizations will be incentivized to scale back on the amount of pro bono legal services they provide in accessibility cases. Combined with similar incentives for private attorneys, fewer accessibility

cases are likely to be litigated, and fewer people with disabilities will be able to enforce their right to accommodations. In major cases, P&A agencies have often worked jointly with private law firms, and are therefore concerned that if legal fees and expenses are not available, private firms may be less willing to participate with the P&A network and share their expertise.

II. THE DECISION BELOW HAS SERIOUS IMPLICATIONS FOR OTHER DISABILITY LAW PROVISIONS WHERE MONETARY AWARDS DO NOT LIE

Congress provided for rights under the ADA because “physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination.” 42 U.S.C. §12101(a)(1). Title III of the ADA, which applies to places of public accommodations, does not provide for damages; instead, plaintiffs may seek only prospective compliance and attorney’s fees.

Access to the courts for people with disabilities is necessary to realize Congress’ intent “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. §12101(a)(2). Enforcing access rights entails pursuing only declaratory and

injunctive relief. For example, a public accommodation may be required to adapt its rules with regard to a patron who needs such a change due to a disability. *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001)(holding that rules must be reasonably modified to permit participation in a golf tournament); *J.D. v. Colonial Williamsburg Found.*, 925 F.3d. 633 (4th Cir. 2019) (holding that severe food sensitivities may constitute a disability under the ADA requiring reasonable accommodation).

Where an individual with a disability seeks to enforce the right to access or accommodations, there is little distinction between declaratory relief and injunctive relief. In most such cases, the nature and scope of the injunctive relief is *pro forma* after a determination or declaration that a party has violated the ADA. Once a party prevails as to liability, in essence, the defendant is directed to provide the access or accommodation that was requested. The remedy is merely the inevitable by-product of the liability determination (such as a summary judgment or verdict by the factfinder).

Affirming the result in this case would invite defendants to delay access or accommodations until a decision on the merits, and then change their position before the entry of the injunctive relief that was a foregone conclusion. The decision below – if affirmed – creates significant opportunity for gamesmanship and manipulation of the federal judiciary; defendants could take advantage of the

time and care put into the remedy phase by usurping the court's power before the trial judge could issue a decision and judgment implementing a jury's verdict. Given the lack of damages available in Title III cases, individuals whose rights are violated will be harmed by the inability to retain counsel, and by the strategic advantage afforded to defendants who could delay their ADA obligations until *after* the eleventh hour.

Although a Title I employment case such as this may appear to present a more complex remedy phase, a finding of liability implicates Congress' mandate "for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). The Court's decision in this case has implications across the ADA and other disability and civil rights laws. Therefore, amici urge the Court to hold that a finding of liability is sufficient to support an award of attorney's fees.

III. THE MAJORITY OF ADA AND REHABILITATION ENFORCEMENT ACTIONS ARE BROUGHT BY PRIVATE COUNSEL RATHER THAN THE FEDERAL GOVERNMENT OR NON-PROFITS

In passing the ADA, Congress made a specific decision to provide for enforcement by both the federal government and private entities. 42 U.S.C. § 12188. The ADA provides that the United States government may file suit in

federal district courts against entities who violate the ADA. 42 U.S.C. § 12188(b)(1)(B).

While the United States Department of Justice (DOJ) has the authority to seek compliance with the ADA in federal district court, such actions are rare. During the past three years, the United States has pursued enforcement actions under the ADA in certain cases.⁴ Within the Fourth Circuit, the DOJ has brought one suit in the District of South Carolina to enforce employment rights under Title I of the ADA. In the past three years, the United States has also reached six settlement agreements with state and local governments under Title II of the ADA. Four of those settlement agreements were in Virginia and two were in South Carolina. Under Title III of the ADA covering public accommodations, the DOJ has reached settlement agreements in nine matters within the Fourth Circuit under Title III of the ADA. Of those matters, seven of them took place in Virginia, one in North Carolina, and one in Maryland. This is a total of 16 actions under all three titles of the ADA.

The total number of private ADA law suits is much higher than the number of DOJ enforcement actions. According to a Westlaw Docket Search in all of the

⁴ See Addendum A for a list of DOJ enforcement actions with the Fourth Circuit Court of Appeals within the past three years. The full list of DOJ Enforcement actions is available at https://www.ada.gov/enforce_current.htm (Visited November 20, 2019).

federal district courts within the Fourth Circuit during the past three years,⁵ there have been a total of 257 actions filed using the Nature of Suit Code 446-Americans with Disabilities – Other. While some of these suits were filed by non-profit advocacy groups, the vast majority of them were filed by private citizens. Of these suits, only in 162 cases was the plaintiff represented by counsel. Of those 162 suits, 157 plaintiffs had representation by private counsel.⁶ Given that suits under Title III of the ADA can only result in injunctive relief as discussed above, private attorneys can only afford to bring these cases if they are able to receive attorney's fees.

P&A agencies are tasked with providing legal representation to ensure the civil rights of people with disabilities. However, due to funding limitations, these agencies are only able to litigate the barest fraction of the requests for services received. In 2018, dLVCV received 1,851 formal requests for legal advocacy services from people with disabilities, and was only able to provide basic information and referral services to 1,453 of those requesting assistance, while the remaining 398 people who requested services received some form of

⁵ As of November 19, 2019.

⁶ This includes 2 instances where private law firms were partnered with non-profit agencies.

representation. Of those 398, only 20 – roughly 1% of the requests for legal advocacy – received representation in formal litigation.

As P&A agencies are unable to provide representation to every person with a disability and a valid legal claim, the private bar must be available to ensure people with disabilities have equal access to justice. Decisions that limit an attorney's ability to recover the reasonable fees and costs associated with successful litigation for non-monetary relief will effectively eliminate the already limited private bar available to enforce the civil rights of people with disabilities.

CONCLUSION

The enforcement of civil rights statutes including the ADA and the Rehabilitation Act depends upon the ability of plaintiffs to obtain attorney's fees. Defendants being able to avoid the payment of attorney's fees by waiting to receive an adverse finding by a court before providing a requested accommodation will provide a substantial disincentive for attorneys to provide counsel in such cases. Such ability by a defendant contravenes Congressional intent and the plain language of the statutes, and denies access to justice for people with disabilities facing unlawful discrimination. This court should follow Supreme Court precedent, its' own precedent, Congressional intent, and the plain language of the statutes and hold that a plaintiff who receives an accommodation under the

Rehabilitation Act only following years of litigation resulting in a favorable jury verdict is a prevailing party.

Respectfully submitted,

By: /s/ Steven M. Traubert
Steven M. Traubert, VSB 41128
Zachary Devore, VSB#65401
Kalena C. M. Ek, VSB#74858
disAbility Law Center of Virginia
1512 Willow Lawn Drive
Suite 100
Richmond, VA 23230
(804) 225-2042
Steven.traubert@dlcv.org
Zachary.devore@dlcv.org
Kalena.ek@dlcv.org
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

[X] this brief contains [3,518] words.

2. This brief complies with the typeface and type style requirements because:

[X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word*] in [*14pt Times New Roman*]

Dated: December 11, 2019

/s/ Steven M. Traubert
Counsel for Amici Curiae

ADDENDUM

ADDENDUM – ADA ENFORCEMENT ACTIONS BY UNITED STATES
DEPARTMENT OF JUSTICE FROM NOVEMBER 20, 2016 TO PRESENT
WITHIN THE FOURTH CIRCUIT

TITLE I – EMPLOYMENT

United States v. York County, South Carolina, 0:19-CV-01654, (S.C. 2019)

Settlement Agreement (June 10, 2019), available at,

https://www.ada.gov/york_county_sa.html (visited November 19, 2019).

TITLE II – STATE AND LOCAL GOVERNMENT

1) Central Virginia Regional Jail Authority, DJ-204-80-101 (March 12, 2019)

available at, https://www.ada.gov/central_va_jail_sa.html (Visited

November 20, 2019) (effective communication).

2) Entities of the Commonwealth of Virginia (March 25, 2019), available at

https://www.ada.gov/entities_commonwealth_va_sa.html (Visited

November 20, 2019) (effective communication).

3) South Carolina Department of Corrections DJ # 204-67-174 (March 29,

2018), available at https://www.ada.gov/south_carolina_doc_sa.html

(Visited November 20, 2019) (effective communication).

4) Fauquier County, Virginia, DJ # 204-79-321, (January 31, 2017), available

at https://www.ada.gov/fauquier_county_sa.html (Visited November 20,

2019) (voting).

- 5) City of Chesapeake, Virginia Polling Places (May 5, 2017) available at, https://www.ada.gov/chesapeake_va_sa.html (Visited November 20, 2019).
- 6) Richland County Board of Elections and Voting Registration South Carolina (May 22, 2017), available at, https://www.ada.gov/richland_county_sa.html (Visited November 20, 2017).

TITLE III – PUBLIC ACCOMMODATION

- 1) Bar T Year Round Program for Kids (D. MD. 2017), available at, https://www.ada.gov/bar-t_sa.html (Visited November 20, 2019).
- 2) Carilion Roanoke Memorial Hospital (W.D. VA 2018), available at https://www.ada.gov/carilion_hospital_sa.html (Visited November 20, 2019).
- 3) Charlotte Radiology P.A. (W.D. N.C. 2018), available at, https://www.ada.gov/charlotte_radiology_sa.html (Visited November 20, 2019).
- 4) GPM investment (E.D. VA 2019), available at, https://www.ada.gov/gpm_sa.html (Visited November 20, 2019)
- 5) Landmark Hotel Group (E.D. VA 2019), available at, https://www.ada.gov/landmark_hotel_sa.html (Visited, November 20, 2019).

- 6) Lincare Inc. (E.D. VA 2019), available at,
https://www.ada.gov/lincare_sa.html (Visited November 20, 2019).
- 7) Professional Publications (E.D. VA 2019), available at,
https://www.ada.gov/ppi_sa.html (Visited November 20, 2019).
- 8) Selma Medical Associates (W.D. VA 2019), available at,
https://www.ada.gov/selma_medical_sa.html (Visited November 20, 2019).
- 9) Spotsylvania Medical Center (E.D. VA 2017), available at,
https://www.ada.gov/spotsylvania_sa.html (Visited November 20, 2019).