No. 10-1268

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Catherine Hutchinson, by her guardian Sandy Julien, et al.,

Plaintiffs-Appellees,

v.

Deval L. Patrick, Governor, et al.,

Defendants-Appellants.

Appeal from Order of the United States District Court
for the District of Massachusetts

BRIEF OF *AMICI CURIAE*,

AARP, CENTER FOR LAW AND EDUCATION, INC., LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL CONSUMER LAW CENTER, INC., NATIONAL HEALTH LAW PROGRAM, INC., PUBLIC CITIZEN, INC., THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL DISABILITY RIGHTS NETWORK, INC., PUBLIC JUSTICE, P.C., WOMEN'S BAR ASSOCIATION OF MASSACHUSETTS, MASSACHUSETTS LAW REFORM INSTITUTE, INC., ARC MASSACHUSETTS, INC., AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF MASSACHUSETTS, DISABILITIES RIGHTS CENTER, INC., DISABILITY LAW CENTER, INC., DISABILITY RIGHTS CENTER, GREATER BOSTON LEGAL SERVICES, INC., LEGAL ASSISTANCE CORPORATION OF CENTRAL MASSACHUSETTS, RHODE ISLAND DISABILITY LAW CENTER, INC., SOUTH COASTAL COUNTIES LEGAL SERVICES, INC., WESTERN MASSACHUSETTS LEGAL SERVICES, INC.

In Support of Plaintiffs-Appellees and Affirmance of the District Court's Order

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June 1, 2010

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the following Amici Curiae state that they are each non-profit corporations exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, are not publicly held corporations that issue stock, and have no parent corporations:

Arc Massachusetts, Inc.
Center for Law and Education, Inc.
Disabilities Rights Center, Inc.
Disability Law Center, Inc.
Disability Rights Center
Greater Boston Legal Services, Inc.
The Judge David L. Bazelon Center for Mental Health Law
Lawyers' Committee for Civil Rights Under Law
Legal Assistance Corporation of Central Massachusetts
Massachusetts Law Reform Institute, Inc.
National Consumer Law Center, Inc.
National Disability Rights Network, Inc.
National Health Law Program, Inc.
Rhode Island Disability Law Center, Inc.
South Coastal Counties Legal Services, Inc.
Western Massachusetts Legal Services, Inc.
Women's Bar Association of Massachusetts

AARP

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae AARP hereby states that it is a non-profit corporation exempt from taxation pursuant to Section 501(c)(4) of the Internal Revenue Code, is not a publicly held corporation that issues stock, and has no parent corporations.

American Civil Liberties Union Foundation of Massachusetts

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae American Civil Liberties Union Foundation of Massachusetts states that it is a Massachusetts charitable trust exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and, to the extent that Rule 26.1 applies, it is not a publicly held corporation that issues stock and has no parent corporation.

Public Citizen, Inc.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Public Citizen, Inc. states that it is a non-profit organization that issues no stock and has no parent corporation.

Public Justice, P.C.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Public Justice, P.C. hereby states that it does not issue stock and has no parent corporation. No publicly held corporation owns any of its stock.

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INTEREST OF AMICI CURIAE

Amici Curiae ("Amici"), the groups listed in the Corporate Disclosure Statements, are organizations devoted to the cause of furthering civil rights and the legal rights of vulnerable populations. Amici join here in support of the Plaintiffs to urge affirmance of the District Court's award of attorney's fees because Amici rely on litigation to vindicate these rights. Most cases settle, and therefore it is critically important to Amici and their constituents that fees be available for settlements that are court-approved and over which the district court retains enforcement jurisdiction. Limiting the class of settlements for which fees are available only to consent decrees would undermine the purposes of the fee-shifting statutes by making the prospect of fees, even for the strongest of claims, highly speculative, thereby undermining the financial ability of Amici to undertake such cases and their constituents' ability to obtain legal redress.

Furthermore, such a limitation will make achieving settlements in civil rights cases more difficult. Amici Disability Law Center, Inc., Legal Assistance Corporation of Central Massachusetts, Greater Boston Legal Services, Inc., Massachusetts Law Reform Institute, Inc., South Coastal Counties Legal Services, Inc., and Western Massachusetts Legal Services, Inc. represent that it is the stated policy of the Massachusetts Attorney General's office not to enter into formal

consent decrees in settling cases against the Commonwealth, its officers or agencies.

All parties have consented to the filing of this amicus brief. See Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE

Amici adopt the Statement of the Issue, Statement of the Case, and Statement of the Facts included in Appellees' Brief.

SUMMARY OF ARGUMENT

This brief addresses the District Court's determination that Plaintiffs are "prevailing parties" permitted an award of attorney's fees under 42 U.S.C. § 12205. See App'x Vol. II at 962-81 ("Memorandum and Order Regarding Motion for Attorney Fees and Costs" dated February 8, 2010). The District Court's decision should be affirmed by this Court because the District Court's Order Approving Final Comprehensive Settlement Agreement of September 18, 2008 (the "Order") and the Comprehensive Settlement Agreement ("CSA") contain sufficient "judicial imprimatur" under the law of the Supreme Court, this Court, and most Circuits.

The Congressional purposes behind fee-shifting statutes such as 42 U.S.C. § 12205 are to ensure access to the courts for civil rights plaintiffs and to encourage enforcement of civil rights through private lawsuits. These purposes can only be

promoted if the Supreme Court's standard for judicial imprimatur, as articulated in Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources, 532 U.S. 598 (2001), is applied in a flexible manner. Most Circuit Courts, including this one in Aronov v. Napolitano, 562 F.3d 84 (1st Cir. 2009) (en banc), cert. denied, 130 S. Ct. 1137 (2010), have adopted such flexibility.

In considering whether a particular court-approved settlement meets the requisite standard for judicial imprimatur, the majority of Circuit Courts eschew labels and focus on the essentials: namely, whether the district court's order reflects judicial approval of the settlement agreement and continuing oversight to enforce the agreement's binding obligations. Aronov explains that this determination requires consideration of "the content of the order against the entire context before the court." Id. at 92. Viewed in the context of the underlying litigation and the CSA, the level of judicial imprimatur here is more than ample to permit an award of attorney's fees. The Defendants' argument to the contrary is at odds with Aronov and would thwart Congressional intent by discouraging civil rights enforcement actions.

ARGUMENT

I. THIS FEE AWARD FURTHERS THE CONGRESSIONAL PURPOSES OF ENSURING ACCESS TO THE JUDICIAL PROCESS AND ENCOURAGING THE ENFORCEMENT OF CIVIL RIGHTS BY PRIVATE LITIGANTS.

Recently, in interpreting 42 U.S.C. § 1988, this Court ruled on the particularly "difficult" question left open by the Supreme Court of "whether a plaintiff can be deemed a 'prevailing party' in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal." Diffenderfer v. Gomez-Colon, 587 F.3d 445, 454 (1st Cir. 2009) (brackets and quotation omitted). This Court followed the authority of "[n]umerous circuits," determined that, "[i]n the end, this is a question of what Congress would have intended under the circumstances," id. at 454-55, and ruled that the plaintiffs were entitled to an award of attorney's fees, see id. at 454.

As it did in Diffenderfer, the Court should follow Congressional intent and the consensus approach of its sister Circuits by affirming the District Court's award of attorney's fees. Diffenderfer explained that Congress's purposes in creating the civil rights attorney's fees scheme were "to ensure effective access to the judicial process for persons with civil rights grievances and to encourage the enforcement of federal law through lawsuits filed by private persons." Id. at 455 (quotations, internal citations, and brackets omitted). Diffenderfer recognized that awarding attorney's fees to civil rights plaintiffs served these purposes by correcting a defect Congress identified in the market for legal services: many victims of civil rights violations lacked access to the judicial process because they could not afford to purchase legal services at private-market rates and the damages

in most civil rights lawsuits were too low to otherwise cover the cost of a lawyer. Id. Awarding attorney's fees to prevailing civil rights plaintiffs ameliorates this market defect by allowing such plaintiffs—regardless of financial means—to find counsel who may receive payment if their clients prevail.

This Court wrote:

> [t]o hold that mootness of a case pending appeal inherently deprives plaintiffs of their status as 'prevailing parties' would detract from § 1988's purposes. Such a rule could result in disincentives for attorneys to bring civil rights actions when an event outside the parties' control might moot the case after the district court rendered a favorable judgment but before the judgment could be affirmed on appeal. Our solution is our best view of what Congress, in designing the civil rights attorney's fees scheme, would intend.

Id. at 455 (citation omitted) (second emphases added).

Although Diffenderfer interpreted 42 U.S.C. § 1988, the Congressional purposes identified by the Court in that case also are applicable to 42 U.S.C. § 12205 of the Americans with Disabilities Act of 1990 ("ADA"), the statute at issue here. The Supreme Court has held that these "prevailing party" fee-shifting statutes should be interpreted uniformly. See Buckhannon, 532 U.S. at 603 n.4; see also Bercovitch v. Baldwin Sch., Inc., 191 F.3d 8, 11 (1st Cir. 1999) ("Creating a different standard for ADA cases would break the commonly used analogy between the ADA and those other causes of action arising in the discrimination and civil rights areas.").

Accordingly, the Court should proceed here as it did in Diffenderfer and rely on the weight of Circuit authority and overriding Congressional purposes to rule that Plaintiffs are prevailing parties entitled to attorney's fees under 42 U.S.C. § 12205. The Court should avoid creating new "disincentives" for attorneys, and the undersigned Amici, to bring actions to enforce civil rights.

II. BUCKHANNON AUTHORIZES AN AWARD OF ATTORNEY'S FEES WHEN A SETTLEMENT MATERIALLY ALTERS THE LEGAL RELATIONSHIP OF THE PARTIES AND INVOLVES JUDICIAL APPROVAL OF THAT CHANGE.

A. *The Supreme Court in* Buckhannon *recognized that a wide variety of court-approved settlements can provide the bases for attorney's fees awards.*

In Buckhannon, the Supreme Court made clear that fee awards in connection with a settlement would require at least some judicial involvement, but it allowed a flexible assessment of that involvement. The Buckhannon Court rejected the "catalyst theory," which treats a plaintiff as the "prevailing party" merely if the lawsuit brought about a voluntary change in the defendant's conduct. See 532 U.S. at 600-01. The Court noted that it had previously held "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." Id. at 604. By contrast, however:

> the 'catalyst theory' falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal relationship

> of the parties. . . . A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against holding that the term 'prevailing party' authorizes an award of attorney's fees without a corresponding alteration in the legal relationship of the parties.

Id. at 605 (emphases in original). Consequently, the rule from Buckhannon is that, "[t]o be a prevailing party, a party must show both a material alteration of the legal relationship of the parties and a judicial imprimatur on the change." Aronov, 562 F.3d at 89 (quotations and citations omitted).

Nothing in Buckhannon requires the parties to have entered into a traditional consent decree or its equivalent in order for the plaintiff to be permitted an award of fees. The Buckhannon Court listed enforceable judgments on the merits and court-ordered consent decrees merely as "examples" of relief permitting awards of attorney's fees. 532 U.S. at 605. Justice Scalia, in his concurring opinion in Buckhannon, stated that both "court-approved settlements and consent decrees" bear the sanction of judicial action in the lawsuit, even if there has been no judicial determination of the merits. Id. at 618 (Scalia, J., concurring) (emphasis added). Justice Ginsburg, in her dissent, also recognized that the majority had ruled that a plaintiff, in order to be a prevailing party, must receive "a court entry memorializing her victory. The entry need not be a judgment on the merits. Nor need there be any finding of wrongdoing. A court-approved settlement will do."

Id. at 622 (Ginsburg, J., dissenting) (emphasis added); see Roberson v. Giuliani, 346 F.3d 75, 81 (2d Cir. 2003) (stating that Buckhannon Court "intended its statements about judgments on the merits and court-ordered consent decrees as merely 'examples' of the type of judicial action that could convey prevailing party status" (footnote omitted)); see also Carbonell v. Immigration & Naturalization Serv., 429 F.3d 894, 898 (9th Cir. 2005) (same).

In this case, the District Court, in its Order, explicitly approved the CSA and retained jurisdiction over the case, directing that the case "not be closed and that judgment not enter pending compliance with the terms of the Comprehensive Settlement Agreement." App'x Vol. I at 281-82. This approval and retention of jurisdiction, particularly when read alongside the CSA's provision that "[t]he Court shall retain jurisdiction to hear and adjudicate noncompliance motions in compliance with ¶¶ 43 through 44," is well within the broad scope of enforcement mechanisms justifying an award of attorney's fees under Buckhannon. Id. at 132.

B. *If applied narrowly, as Defendants urge, Buckhannon will have a chilling effect on the very forms of public-interest litigation that Congress intended to encourage through fee-shifting provisions.*

The Buckhannon Court did not expect rejection of the catalyst theory to create "disincentives for attorneys to bring civil rights actions" because of increased difficulty in receiving attorney's fees awards. Diffenderfer, 587 F.3d at 455; see Buckhannon, 532 U.S. at 608. The Court found "entirely speculative and

unsupported by any empirical evidence" that "rejection of the catalyst theory will deter plaintiffs with meritorious but expensive cases from bringing suit." Buckhannon, 532 U.S. at 608.

Experience shows, however, that Buckhannon can create disincentives to civil rights enforcement actions, and that an overly restrictive reading of that case, such as the Defendants urge here, would further discourage public-interest organizations like Amici from litigating civil rights cases. Following Buckhannon and its rejection of the catalyst theory, many public-interest organizations have reported difficulty in settling cases because out-of-court settlements alone are insufficient to permit an award of attorney's fees. See Catherine R. Albiston & Laura Beth Nielsen, The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for the Private Attorney General, 54 U.C.L.A. L. Rev. 1087, 1128-29 (2007). "[P]laintiffs must be very careful to structure settlement agreements in a way that preserves their right to recover fees, assuming defendants will agree to such a settlement after Buckhannon." Id. at 1114-15. Many public-interest organizations, and the outside co-counsel who may assist them, are less willing to take on cases after Buckhannon because the possibility of obtaining attorney's fees is more doubtful. Id. at 1129-30.

Indeed, in Amici's experience, State Attorneys General are generally unwilling to enter into agreements resembling formal consent decrees in settling

civil rights cases. See Interest of Amici Curiae, supra. As counsel for Plaintiffs noted at the Motion Hearing held on October 15, 2009, and the District Court acknowledged:

> MR. SCHWARTZ: They don't want things called a consent decree.
>
> THE COURT: A lot of states don't like it anymore. They've become much less fashionable.

App'x Vol. II at 943. If this Court were to limit recovery of fees to only those cases in which the settlement is acknowledged as a consent decree, or bears every feature of a traditional consent decree except its name, it will go well beyond anything required by Buckhannon and will exacerbate that case's unintended consequences in discouraging civil rights enforcement.

Accordingly, this Court should not create additional "disincentives for attorneys to bring civil rights actions" by limiting the flexibility of Buckhannon and making it more difficult for civil rights plaintiffs to settle. Diffenderfer, 587 F.3d at 455; see Albiston, et al., supra at 1129-30.

III. THE OVERWHELMING MAJORITY OF CIRCUIT COURTS HAVE CONCLUDED THAT SETTLEMENTS IN CIVIL RIGHTS CASES THAT ARE APPROVED BY THE DISTRICT COURT AND THAT CONTAIN A PROVISION GIVING THE DISTRICT COURT THE AUTHORITY TO ENFORCE THE SETTLEMENT RELECT THE REQUISITE "JUDICIAL IMPRIMATUR" FOR AN AWARD OF ATTORNEY'S FEES.

Although their precise formulations differ, most Circuits that have applied Buckhannon to settlement agreements have clarified that the "judicial imprimatur" requirement involves two elements: (1) court approval of the settlement; and (2) judicial oversight to enforce the terms of the settlement, which is fulfilled if a district court expressly retains jurisdiction over the settlement. The Order here clearly satisfies both requirements and the Court should not require more. As demonstrated below, the Order here would permit Plaintiffs to receive fees in multiple Circuits which this Court cited with approval and relied upon in Aronov. See 562 F.3d at 90 n.7.

A. *The Eleventh Circuit*

In American Disability Association, Inc. v. Chmielarz, 289 F.3d 1315, 1317 (11th Cir. 2002), the Eleventh Circuit considered whether a plaintiff that entered into a settlement agreement "which was 'approved, adopted and ratified' by the district court in a final order of dismissal, and over which the district court expressly retained jurisdiction to enforce its terms" was a prevailing party entitled to attorney's fees under 42 U.S.C. § 12205. The court ruled the plaintiff was a prevailing party, id. at 1321, and that a formal consent decree was not necessary because "the district court's explicit approval of the settlement and express retention of jurisdiction to enforce its terms are the functional equivalent of a consent decree," id. at 1319 n.2.

Similarly, the District Court here explicitly "approved" the CSA, found it "fair, reasonable, and adequate," and "retain[ed] jurisdiction over the case . . . pending compliance with the terms of the Comprehensive Settlement Agreement" which were enforceable by the District Court per the CSA. App'x Vol. I at 281-82; see id. at 132. Therefore, the Order in this case, just like the district court's order in Chmielarz, contains the necessary judicial approval and oversight to permit an award of attorney's fees.

B. *The Second Circuit*

The Second Circuit in Roberson, 346 F.3d at 83, held that a district court's express retention of jurisdiction to enforce the terms of a settlement agreement provided "judicial sanction to a change in the legal relationship of the parties" sufficient to make plaintiffs prevailing parties, even though the district judge had not conducted any review of the terms of the settlement agreement and had not otherwise incorporated the terms of the settlement agreement into its order. See id. at 78. The district court retained jurisdiction to enforce the settlement agreement, necessarily making compliance with the settlement agreement's terms part of its order. Id. at 82. Further, because a district court has the duty to ensure that its orders are fair and lawful, any settlement agreement made part of a district court's order is "stamp[ed]" with judicial imprimatur. Id. at 83 (quotation omitted).

Consequently, the district court's retention of jurisdiction provided both judicial approval of, and oversight over, the settlement agreement. See id.

The Roberson court further noted that the settlement agreement included a clause "conditioning its effectiveness on the district court's retention of jurisdiction." Id. The district court's order therefore "effectuated the obligations of the parties under the Agreement because until the district court signed the dismissal Order retaining jurisdiction, the Agreement was not yet in effect." Id. (emphasis in original). Thus, "[i]n a very literal sense, it was the court's order that created the change in the legal relationship between plaintiffs and City defendants." Id.

The court in Roberson also concluded that it was inconsequential whether the district court could, in the first instance, enforce a settlement agreement over which it retains enforcement jurisdiction with an order of contempt. See id. If the district court initially could not enforce the settlement agreement with a contempt order, "the court at most would need to take an extra step by first ordering specific performance and then, if a party does not comply, finding that party in contempt. We doubt that the definition of 'prevailing party' should turn on such a difference." Id.

The District Court in this case "effectuated" the obligations of the parties through the Order because, under the CSA and Federal Rules of Civil Procedure,

the District Court had to approve the CSA. Id. (emphasis omitted); see App'x Vol. I at 132; Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled . . . only with the court's approval."). By its terms, the CSA was effective upon approval by the District Court and can only be enforced by the District Court which "retain[s] jurisdiction to hear and adjudicate noncompliance motions" under it. App'x Vol. I at 132.

Moreover, although the CSA provides for enforcement mechanisms in the event of Defendants' noncompliance which do not include an order of contempt in the first instance, Plaintiffs remain prevailing parties. See Roberson, 346 F.3d at 83. After the parties discuss and mediate any noncompliance issues, the CSA allows the District Court to entertain a noncompliance motion brought by the Plaintiffs. App'x Vol. I at 132-33. The District Court then may enter an order "consistent with equitable principles," such as an order for specific performance, to achieve compliance, but may not enter an order of contempt. Id. at 133. If Defendants do not comply with such an equitable order, then the District Court may "use any appropriate equitable or remedial power then available to it," including a contempt order, to affect compliance. Id. Plaintiffs are prevailing parties even if the District Court must undertake this "extra step" to enforce the CSA. See Roberson, 346 F.3d at 83.

The Second Circuit's subsequent decision in Perez v. Westchester County Department of Corrections, 587 F.3d 143 (2d Cir. 2009), further supports the conclusion that the District Court in this case "effectuated" the change in the legal relationship between the parties by "stamp[ing]" the CSA with judicial imprimatur. Roberson, 346 F.3d at 83 (quotation omitted) (emphasis omitted). In Perez, the court held that the district court intended to place its judicial imprimatur on a settlement agreement that explicitly was "not a consent decree." 587 F.3d at 148 (quotation omitted). The district court entered an "Order of Settlement" that "provided that Plaintiffs' lawsuits would only be dismissed upon the Court's approval and entry of this Stipulation and Order." Id. at 152 (quotation and brackets omitted). This was "not a case where dismissal was effectuated by stipulation, or mutual agreement of the parties, and did not require any judicial action; rather, the settlement was only made operative by the Court's review and approval." Id. (quotation, brackets, and citation omitted). Indeed, "[i]n a quite literal sense, it was the District Court's imprimatur that made the settlement valid." Id. (footnote omitted).

In this case, the CSA, by its terms and Federal Rule of Civil Procedure 23(e), was subject to the District Court's approval and review. See App'x Vol. I at 132. The CSA was "null and void and of no force and effect" without the District

Court's approval. Id. "[I]t was the District Court's imprimatur that made the settlement valid." Perez, 587 F.3d at 152 (footnote omitted).

C. *The D.C. Circuit*

The approach of the D.C. Circuit also supports the District Court's award of attorney's fees here. The court in Davy v. Central Intelligence Agency, 456 F.3d 162, 166 (D.C. Cir. 2006), adopted a three-pronged framework for determining whether an order "is functionally a settlement agreement enforced through a consent decree" that provides the necessary approval and oversight to make a plaintiff a prevailing party. The Davy court ruled that an order is functionally a consent decree if, on its face, it: (1) contains mandatory language; (2) is entitled an "order"; and (3) bears the district court's signature, not those of the parties. Id. "That the order is styled 'order' as opposed to 'consent decree' is of no consequence." Id.

Here, the District Court's "Order Approving Final Comprehensive Settlement Agreement" certainly is entitled an "order" and bears the judge's signature. See id.; App'x Vol. I at 281-82. Furthermore, the Order contains mandatory language ordering "that this case not be closed and that judgment not enter pending compliance with the terms of the Comprehensive Settlement Agreement." App'x Vol. I at 281-82.

Of course, the CSA, by its terms, can only be enforced by the District Court. See id. at 132-33. It is immaterial that the District Court did not include the terms of the CSA in the Order because "the district court retained jurisdiction to enforce the Agreement. . . . [W]hen the district court retained jurisdiction, it necessarily made compliance with the terms of the agreement a part of its order so that a breach of the agreement would be a violation of the order." Roberson, 346 F.3d at 82 (quotation omitted). Thus, functionally, the CSA is enforced through a consent decree that permits an award of attorney's fees in this case. See Davy, 456 F.3d at 166.

D. *The Third Circuit*

Similar to the D.C. Circuit, the Third Circuit, in an opinion authored by now Supreme Court Justice Alito, held that a district court's order containing mandatory language, entitled an "order," bearing the signature of the judge, and giving the plaintiff the right to request judicial enforcement of the settlement was "a proper vehicle for rendering one side a 'prevailing party' under § 1988." Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 165 (3d Cir. 2002).

E. *The Fourth Circuit*

The Fourth Circuit's decision in Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002), is instructive because it articulates the reasoning behind the requirements of judicial approval and oversight. The Smyth court examined whether a settlement

agreement and a district court's order "were, in combination, equivalent to a consent decree," id. at 279 (emphasis added), and distinguished the characteristics of a consent decree from those of a settlement agreement, emphasizing that a consent decree "receives court approval and is subject to the oversight attendant to the court's authority to enforce its orders, characteristics not typical of settlement agreements," id. at 281; see Aronov, 562 F.3d at 91. Consent decrees are "a special case": privately negotiated, they do not always include an admission of liability but contain judicial approval and oversight that may suffice to demonstrate a court-ordered change in the legal relationship between the parties. Smyth, 282 F.3d at 281.

The Fourth Circuit noted that a district court's obligation to ensure that its orders are fair and lawful "stamps an agreement that is made part of an order with judicial imprimatur, and the continuing jurisdiction involved in the court's inherent power to protect and effectuate its decrees entails judicial oversight of the agreement." Id. at 282. A settlement agreement is made part of an order if the district court clearly incorporates the terms of the agreement into the order or retains jurisdiction over the agreement. See id. at 283. "Where the obligation to comply with the terms of the agreement is not enforceable as an order of the court but only as a contractual obligation, neither judicial approval nor oversight are ordinarily involved." Id. at 282.

Here, judicial approval and oversight are involved because the District Court expressly approved the CSA and retained jurisdiction in the Order. See id.; App'x Vol. I at 281-82. The District Court had to approve the terms of the CSA in order for the CSA to become effective, including the provision that the District Court "retain jurisdiction to hear and adjudicate noncompliance motions" under the CSA. App'x Vol. I at 132; see Smyth, 282 F.3d at 282. Further, the District Court ordered that the case would not be closed and judgment would not enter "pending compliance with the terms of the Comprehensive Settlement Agreement," i.e., the District Court would oversee the implementation of these terms. App'x Vol. I at 281-82; see Smyth, 282 F.3d at 283. Clearly, the Order, when considered in combination with the CSA, makes Plaintiffs prevailing parties eligible for attorney's fees.

F. *Seventh Circuit*

In T.D. v. LaGrange School District Number 102, 349 F.3d 469 (7th Cir. 2003), the Seventh Circuit followed "the Fourth Circuit's recent conclusion that some settlement agreements, even though not explicitly labeled as a 'consent decree' may confer 'prevailing party' status, if they are sufficiently analogous to a consent decree." Id. at 478 (citing Smyth, 282 F.3d at 281). The court considered whether (1) the settlement agreement was embodied in a court order or judgment, (2) the settlement agreement bore the district court judge's signature, and (3) the

district judge had continuing jurisdiction to enforce the agreement. See id. at 479. "There must be some official judicial approval of the settlement and some level of continuing judicial oversight." Id.

G. *The Tenth Circuit*

Similarly, the Tenth Circuit in Bell v. Board of County Commissioners of Jefferson County, 451 F.3d 1097 (10th Cir. 2006), stated that "[m]ost circuits recognize 'that some settlement agreements, even though not explicitly labeled as a 'consent decree' may confer 'prevailing party' status, if they are sufficiently analogous to a consent decree.'" Id. at 1003 (quoting T.D., 349 F.3d at 479). The court emphasized judicial approval and oversight. See id. Like the Seventh Circuit, the Bell court listed several factors, including whether (1) the district court incorporated a private settlement into an order; (2) the district judge signed or otherwise provided written approval of the terms of a settlement; and (3) the district court retained jurisdiction to enforce the obligations assumed by the settling parties. Id.

H. *The Federal Circuit*

Like most of its sister Circuits, the Federal Circuit requires only that a party have obtained the equivalent of an enforceable judgment or court-ordered consent decree that materially changed the legal relationship between the parties. Rice Services, Ltd. v. United States, 405 F.3d 1017, 1025 (Fed. Cir. 2005); see id.

("This approach is consistent with the approach taken by the majority of the circuits that have considered the issue.").

I. *The Ninth Circuit*

The Ninth Circuit, "in agreement with the vast majority of circuits that have considered the issue since Buckhannon," recognizes that a plaintiff who "obtained relief that was not an enforceable judgment on the merits or a consent decree . . . nonetheless can qualify as a prevailing party" provided there is sufficient judicial imprimatur. Carbonell, 429 F.3d at 899. A plaintiff even "'prevails' when he or she enters into a legally enforceable settlement agreement against the defendant." Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128, 1134 (9th Cir. 2002).

J. *Eighth Circuit: Minority Approach*

In addition to the approach discussed in the cases above, the Eighth has expressed a more restrictive minority view. See Christina A. v. Bloomberg, 315 F.3d 990, 992-94 (8th Cir. 2003) (holding a party prevails only if it receives either an enforceable judgment on the merits or a consent decree, ruling a district court's retention of jurisdiction over, and Federal Rule of Civil Procedure 23(e) approval of, a settlement agreement insufficient to create judicial imprimatur, and concluding an order not enforceable by contempt not a consent decree).

Even the Eighth Circuit, however, has indicated that its rule is more flexible and has been misinterpreted by other courts. See N. Cheyenne Tribe v. Jackson,

433 F.3d 1083, 1085 n.2 (8th Cir. 2006) (stating that Christina A. has been misread by some Circuits as limiting prevailing party status to those who obtain consent decrees and judgments on the merits).

IV. ARONOV SHOULD BE APPLIED IN A MANNER CONSISTENT WITH THE WEIGHT OF AUTHORITY FROM OTHER CIRCUITS TO AUTHORIZE AN AWARD OF ATTORNEY'S FEES IN THIS CASE WHERE THERE IS JUDICIAL APPROVAL OF, AND ONGOING JUDICIAL ENFORCEMENT AUTHORITY OVER, THE CSA.

This Court should apply its en banc decision in Aronov in a flexible manner consistent with this and other Circuits' emphasis on judicial approval and oversight and affirm the District Court's award of attorney's fees. In Aronov, this Court held that a district court's one-sentence electronic order remanding a case to the U.S. Citizenship and Immigration Service ("USCIS") did not contain sufficient judicial imprimatur to make the plaintiff a "prevailing party" under Buckhannon, a vastly different factual situation than this case. See 562 F.3d at 92. Applying the principles this Court articulated in Aronov compels the opposite result here.

Consistent with the majority approach of the Circuit courts, Aronov explains that a district court's order need not have the formal label "consent decree" because "it is the reality, not the nomenclature which is at issue." Id. at 90. Instead, reviewing courts should decide the question of judicial imprimatur "by determining the content of the order against the entire context before the court." Id. at 92. In this case, "the entire context before the court" includes the Order,

submissions to the District Court, hearings before the District Court, and, of course, the CSA itself. Id.; see Smyth, 282 F.3d at 279.

In Aronov, this Court determined the relevant question is "whether the order contains the sort of judicial involvement and actions inherent in a 'court-ordered consent decree.'" 562 F.3d at 90. It described several characteristics of consent decrees to determine whether the order contained the requisite judicial approval and oversight, including whether, in Buckhannon's terms, there was: (1) a court-ordered change in the legal relationship of the parties; (2) judicial appraisal of the merits of the case; and (3) judicial oversight and ability to enforce obligations imposed on the parties, obligations that can only be modified by the district court after a party meets a significant burden. See id. at 90-91. The Court used these characteristics to distinguish consent decrees from settlement agreements.

The Aronov court never stated, let alone required, that each and every characteristic of a consent decree has to be present in order for a settlement agreement to satisfy Buckhannon's criteria for an award of fees. The remand order in Aronov "lacked all of the core indicia of a consent decree"; thus, the Aronov court did not deny attorney's fees because the remand order had some characteristics of a consent decree, but not others. Id. at 92 (emphasis added). Further, the Buckhannon Court listed a court-ordered consent decree only as an example of what creates the material alteration of the legal relationship of the

parties necessary to permit an award of attorney's fees. See 532 U.S. at 604-05; Carbonell, 429 F.3d at 898; Roberson, 346 F.3d at 81. Justice Scalia stated that "court-approved settlements and consent decrees," not only consent decrees, bear the sanction of judicial action in the lawsuit, Buckhannon, 532 U.S. at 618 (Scalia, J., concurring) (emphasis added), and Justice Ginsburg recognized the Court's holding that a court-approved settlement permits a plaintiff to obtain an award of attorney's fees, id. at 622 (Ginsburg, J., dissenting). This Court should not rule that only a judgment on the merits or a consent decree can confer prevailing party status on a plaintiff by requiring every aspect of a consent decree, because to do so would create disincentives for attorneys to bring civil rights actions. See Diffenderfer, 587 F.3d at 455. It would be more difficult for civil rights attorneys to settle cases, especially where State Attorneys General have policies against entering into consent decrees.

The characteristics in Aronov, rather than being absolute requirements that must be met in every case, are illustrative of what judicial approval and oversight can encompass. When applied to this case, these characteristics permit an award of attorney's fees. See Aronov, 562 F.3d at 90-91.

A. *The District Court approved the CSA.*

This Court emphasized that, in contrast to private settlements, "a court entering a consent decree must examine its terms to be sure they are fair and not

unlawful. . . . There must be some official judicial approval of the settlement." Id. at 91 (quotation omitted). The District Court here explicitly approved the CSA under Federal Rule of Civil Procedure 23(e), finding the settlement's terms "fair, reasonable, and adequate." App'x Vol. I at 281. Simply put, with the District Court's retention of jurisdiction, this is more than enough. See Roberson, 346 F.3d at 82-83. Nevertheless, the District Court did even more.

1. The District Court effectuated the binding obligations contained in the CSA.

Under Aronov, approval of a consent decree may be satisfied, in part, by a court-ordered change in the legal relationship of the parties. 562 F.3d at 91. The district court's remand order in Aronov "did not order USCIS to do anything," in stark contrast to the Order in this case. Id. The District Court actually effectuated the binding legal obligations contained in the CSA. Without the District Court's approval in all respects, the CSA, by its terms, was "null and void and of no force and effect." App'x Vol. I at 132. Indeed, "it was the court's order that created the change in the legal relationship between the" parties. Roberson, 346 F.3d at 83. It was the Order that "effectuated the obligations of the parties under the Agreement." Id. (emphasis in original). The District Court created the change in the legal relationship of the parties by formally approving the CSA and retaining jurisdiction to enforce it. See App'x Vol. I at 132; Perez, 346 F.3d at 152 ("The Order of Settlement provided that Plaintiffs' lawsuits would only be dismissed

'upon the Court's approval and entry of this Stipulation and Order.' This is not a case where dismissal was effectuated by stipulation, or mutual agreement of the parties, and did not require any judicial action; rather, the settlement was only made operative by the Court's review and approval. In a quite literal sense, it was the District Court's imprimatur that made the settlement valid." (brackets, quotation, citation, and footnote omitted).).

2. The District Court appraised the merits of the case.

In its Order, the District Court stated that it had reviewed affidavits and memoranda submitted by the parties and held a hearing on July 25, 2008. App'x Vol. I at 281. At the hearing itself, the District Court highlighted its appraisal of the merits, concluding "[s]ubstantively I think if this case had gone to trial it would have been something of a horse race." Id. at 224. Considering "the content of the order against the entire context before the court," this case is a far cry from the facts in Aronov, where the district court made no evaluation of the merits because it was only asked to dismiss the case. 562 F.3d at 92. Defendants in Aronov did not even file an answer. Id.

Moreover, as the Supreme Court has indicated, any approval of a settlement agreement that permits an award of attorney's fees should not place a substantial burden on district courts. In this case, the District Court held multiple hearings and reviewed multiple submissions before approving the CSA. The Buckhannon Court

sought to provide "a clear formula allowing for ready administrability and avoiding the result of a second major litigation over attorney's fees." Id. at 89 (citing Buckhannon, 532 U.S. at 609-11). If this Court were to require more for approval than the District Court's extensive review in this case, Buckhannon's purposes would be thwarted.

Furthermore, a district court may appraise the merits of a case in a variety of ways, and any rule from this Court should be flexible to account for this fact. See, e.g., Chmielarz, 289 F.3d at 1317 (settlement agreement was "approved, adopted, and ratified" by the district court in a final order of dismissal); Truesdell, 290 F.2d at 165 (order contained mandatory language, was entitled an "order," and bore the signature of the district court judge); Tri-City Cmty. Action Program v. City of Malden, 680 F. Supp. 2d 306, 312 (D. Mass. 2010) ("The Third, Fifth, Ninth, and District of Columbia Circuits have held in cases similar to the one at bar that a preliminary injunction does confer prevailing party status on a plaintiff, even post-Buckhannon. The reasoning of those cases is persuasive.").

Finally, no one disputes a formal consent decree satisfies the judicial approval requirement of Buckhannon. The standard that must be met for court approval of a consent decree is "that it is fair, adequate, and reasonable; that the proposed decree will not violate the Constitution, a statute or other authority; and that it is consistent with the objectives of Congress." Conservation Law Found. v.

Franklin, 989 F.2d 54, 58 (1st Cir. 1993) (quoting Durrett v. Hous. Auth. of City of Providence, 896 F.2d 600, 604 (1st Cir. 1990)) (brackets and quotation marks omitted). This is, of course, part of the test that this Court requires for approval of class action settlements, see Durrett, 896 F.2d at 604, and is the test the District Court applied to the CSA.

B. *The District Court retained jurisdiction to enforce the terms of the CSA and must approve any modifications.*

With respect to judicial oversight, the Aronov court remarked that a consent decree provides for "judicial oversight and ability to enforce the obligations imposed on the parties." 562 F.3d at 90. "'The parties to a consent decree expect and achieve a continuing basis of jurisdiction to enforce the terms of the resolution of their case in the court entering the order.' Smyth, 282 F.3d at 280. A private settlement agreement, by contrast, does not require the same level of judicial oversight." Id. at 91. Further, "the judicially approved obligations in a consent decree" can only be modified after a party meets a "significant burden" because a "consent decree contemplates a court's continuing involvement in a matter." Id. at 91-92. The one-sentence remand order in Aronov did not contain such provisions for future enforcement but merely returned jurisdiction to the agency to allow the parties to carry out their agreement. Id. at 92.

In determining whether there is sufficient judicial imprimatur for an award of attorney's fees, context matters. This Court must determine the content of the

order "against the entire context before the court," id., including the CSA and the Order in combination, see Smyth, 282 F.3d at 279. The terms of the CSA can only be modified by mutual agreement of the parties and approval of the District Court, a higher burden for the parties to meet than is required for relief from an order under Federal Rule of Civil Procedure 60(b), which only requires a motion and court approval. See App'x Vol. I at 134; Aronov, 562 F.3d at 91-92. The District Court retained jurisdiction over the case in the Order and ordered that judgment would not enter and the case would not be closed pending compliance with the terms of the CSA. App'x Vol. I at 281-82. Furthermore, the terms of the CSA can only be enforced by the District Court, first by an order consistent with equitable principles short of contempt, and then, if Defendants do not comply, by any equitable or remedial order, including an order of contempt. Id. at 132-33. Consequently, like parties to a consent decree, the parties in this case obtained a continuing basis of jurisdiction to enforce the terms of the CSA explicitly set forth in the District Court's Order, as well as broad oversight and enforcement authority that includes contempt powers in the CSA itself. See Aronov, 562 F.3d at 91; Roberson, 346 F.3d at 83; Chmielarz, 289 F.3d at 1319 n.2; see also Aronov, 562 F.3d at 91 (noting consent decrees ultimately enforceable by contempt); Roberson, 346 F.3d at 83 (concluding that determination of "prevailing party" should not turn on whether a court may issue an order of contempt in the first instance).

CONCLUSION

For the foregoing reasons, Amici respectfully request that this Court affirm the District Court's determination in its February 8, 2010 Memorandum and Order Regarding Motion for Attorney Fees and Costs that Plaintiffs are prevailing parties permitted an award of attorney's fees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,858 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Times New Roman font.

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