

Civil Rights Attorney's Fees Awards Act of 1976 — Remedies —
42 U.S.C. § 1983 — *Lackey v. Stinnie*

Civil litigants presumptively bear their own costs. Only “express statutory authorization”¹ can justify a departure from the default “principle that ‘the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.’”² In 1976, Congress authorized federal courts to award attorney’s fees to a “prevailing party” in litigation arising under certain civil rights statutes.³ Last Term, in *Lackey v. Stinnie*,⁴ the Supreme Court disclaimed prevailing party status for litigants who obtain an unreversed preliminary injunction but whose cases become mooted before a final adjudication.⁵ Despite unanimous circuit precedent to the contrary,⁶ the Court in *Lackey* barred attorney’s fee awards for a broad class of civil rights litigants. The *Lackey* majority acknowledged that existing law did not conclusively resolve the issue; it selected the categorical bar from a range of possible rules, including various circuit court approaches.⁷ This legal indeterminacy provided an opening for a persuasive tactic that the liberal Justices seized upon in the 2024 Term: cross-ideological appeals. In oral argument and in dissent, Justice Jackson highlighted the categorical bar’s potential to harm conservative plaintiffs and causes in addition to more judicially disfavored traditional civil rights litigants.⁸ But no conservative Justice was moved. The failure of the cross-ideological appeal in *Lackey*, where legal indeterminacy left the conservative Justices free to moderate the rule as they saw fit, casts doubt on the effectiveness of these appeals before this Court.

Damian Stinnie needed a job.⁹ Like most Virginians, he needed a car to find one.¹⁰ But when he was pulled over and cited, Stinnie learned for the first time that his license had been suspended for his inability to pay a court debt resulting from traffic infractions.¹¹ When he missed a court date while in the hospital for cancer treatment, he was

¹ *Lackey v. Stinnie*, 145 S. Ct. 659, 666 (2025) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)).

² *Id.* (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975)).

³ Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b)).

⁴ 145 S. Ct. 659 (2025).

⁵ *Id.* at 671.

⁶ *Id.* at 675 (Jackson, J., dissenting).

⁷ *See id.* at 669 (majority opinion).

⁸ *See id.* at 681 (Jackson, J., dissenting); Transcript of Oral Argument at 34, *Lackey*, 145 S. Ct. 659 (No. 23-621), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/23-621_q81r.pdf [<https://perma.cc/8L5A-CSQV>].

⁹ *See Class Action Complaint* ¶¶ 52–53, *Stinnie v. Holcomb*, 355 F. Supp. 3d 514 (W.D. Va. 2018) (No. 16-cv-00044), 2016 WL 6695431.

¹⁰ *See id.* ¶¶ 339–340.

¹¹ *Id.* ¶¶ 63, 66, 68–69.

assessed \$117 in additional costs.¹² Stinnie, who survived off of food stamps and Supplemental Security Income and who occasionally slept in his car,¹³ remained unable to pay the fines and fees on his record.¹⁴ So the cycle continued: debt, license suspension, incarceration for driving on a suspended license, more debt.¹⁵ He and a class of similarly situated drivers challenged the statute that sustained this pattern — Virginia’s section 46.2-395,¹⁶ which provided for automatic license suspension for failure to pay court debt.¹⁷ They sued under 42 U.S.C. § 1983, which permits suits for deprivations of constitutional rights, on constitutional due process and equal protection grounds.¹⁸

The trial court granted a preliminary injunction against enforcement of the automatic suspension statute.¹⁹ Judge Moon concluded that the drivers made “a clear showing” of likely success on the merits of their claim that the automatic suspension law violated due process protections.²⁰ The court reasoned that a driver’s license is a property interest, the suspension of which minimally affords the licensee “fair notice of impending state action and an opportunity to be heard.”²¹ The court found that the drivers were “likely to show [section] 46.2-395 d[id] not provide *any* hearing, much less one that satisfies due process.”²² Because the automatic suspension statute “on its face[] d[id] not provide a meaningful opportunity to be heard,” the drivers demonstrated likely success on their claim that it “violate[d] procedural due process.”²³ The trial court then gave less fulsome treatment to the other three factors governing a request for a preliminary injunction under *Winter v. Natural Resources Defense Council, Inc.*²⁴: Irreparable harm was “clearly demonstrated” as to Stinnie; harm to the drivers outweighed any harm to the State in a balance of the equities; and the public interest in ensuring the collection of court debt was “not furthered by a license suspension scheme that neither considers an individual’s ability to pay nor provides him with an opportunity to be heard on the matter.”²⁵ Relying on its finding of the drivers’ likelihood of success on the merits of their

¹² *Id.* ¶¶ 71–74.

¹³ *Id.* ¶¶ 85, 105.

¹⁴ *See id.* ¶ 101.

¹⁵ *Stinnie v. Holcomb*, 355 F. Supp. 3d 514, 521 (W.D. Va. 2018).

¹⁶ VA. CODE ANN. § 46.2-395 (West 2019).

¹⁷ *See Stinnie*, 355 F. Supp. 3d at 522.

¹⁸ Class Action Complaint, *supra* note 9, ¶ 8; *see also Lackey*, 145 S. Ct. at 664.

¹⁹ *Stinnie*, 355 F. Supp. 3d at 532.

²⁰ *Id.* at 527 (quoting *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013)); *see also id.* at 529.

²¹ *Id.* at 528 (quoting *Snider Int’l Corp. v. Town of Forest Heights*, 739 F.3d 140, 146 (4th Cir. 2014)).

²² *Id.* at 529.

²³ *Id.* at 531.

²⁴ 555 U.S. 7, 20 (2008).

²⁵ *Stinnie*, 355 F. Supp. 3d at 532.

due process claim, the court preliminarily enjoined enforcement of the automatic suspension statute.²⁶

For sixteen months, the class members drove without threat of citation or incarceration for driving with a suspended license.²⁷ In the meantime, Virginia Department of Motor Vehicles Commissioner Richard Holcomb urged state lawmakers to repeal section 46.2-395, emphasizing that doing so would “result in [the drivers’] pending litigation being dismissed, relieving the Department from continuing to incur costly legal fees.”²⁸ Commissioner Holcomb then also obtained a stay of the case based on his representation that the legislature would likely repeal the law.²⁹ Nine months later, the legislature repealed section 46.2-395 and mandated permanent reinstatement of affected licenses.³⁰ The drivers and the Commissioner stipulated to dismissal on the ground that the suit was mooted by this development.³¹ The district court retained jurisdiction to resolve the parties’ dispute over attorney’s fees.³²

The drivers petitioned for an attorney’s fee award under 42 U.S.C. § 1988(b), which provides that a “prevailing party” in § 1983 litigation like the drivers’ class action may be awarded attorney’s fees.³³ The district court denied the fee request.³⁴ The court cited *Smyth ex rel. Smyth v. Rivero*,³⁵ a Fourth Circuit precedent holding that a preliminary injunction can never afford “prevailing party” status within the meaning of § 1988(b), even if the case is mooted before further action.³⁶

The Fourth Circuit affirmed.³⁷ Writing for the panel, Judge Thacker³⁸ rejected the drivers’ argument that *Smyth* conflicted with *Winter*, which the Supreme Court decided after *Smyth* and which “clarified] that a finding of *likely* success on the merits is a prerequisite to preliminary injunctive relief.”³⁹ Judge Harris concurred, agreeing that *Winter* did not formally supersede *Smyth* but noting that *Winter* went “a long way toward addressing [*Smyth*’s] concerns” that preliminary injunctions were too untethered from the underlying merits to be appropriate vehicles for awarding attorney’s fees.⁴⁰ *Smyth* foreclosed attorney’s fees for preliminary injunction awardees pre-*Winter*, when a

²⁶ *Id.*

²⁷ See *Lackey*, 145 S. Ct. at 673 (Jackson, J., dissenting).

²⁸ *Id.* at 680.

²⁹ *Id.*

³⁰ *Id.* at 665 (majority opinion).

³¹ *Id.*

³² *Id.*

³³ *Id.*; 42 U.S.C. § 1988(b).

³⁴ *Lackey*, 145 S. Ct. at 665.

³⁵ 282 F.3d 268 (4th Cir. 2002).

³⁶ *Stinnie v. Holcomb*, No. 16-cv-00044, 2021 WL 2292807, at *3-4 (W.D. Va. June 4, 2021).

³⁷ *Stinnie v. Holcomb*, 37 F.4th 977, 979 (4th Cir. 2022).

³⁸ Judge Thacker was joined by Judges Harris and Quattlebaum.

³⁹ *Lackey*, 145 S. Ct. at 666; see *Stinnie*, 37 F.4th at 979, 982.

⁴⁰ *Stinnie*, 37 F.4th at 983-84 (Harris, J., concurring).

party could obtain a preliminary injunction on purely equitable grounds without proving likelihood of success on the merits.⁴¹ But *Winter* requires that “a plaintiff can obtain a preliminary injunction *only* by first establishing a likelihood of success on the merits.”⁴² Furthermore, Judge Harris noted, *Smyth*’s categorical rule that “a preliminary injunction never may serve as the basis for prevailing party fees” was an outlier.⁴³ “Every other circuit to consider the issue,” ten in total, concluded that a plaintiff who obtains a preliminary injunction that becomes irreversible by mootness “may qualify as a prevailing party in appropriate circumstances.”⁴⁴ Judge Harris invited en banc reconsideration of *Smyth* in a post-*Winter* landscape.⁴⁵

Sitting en banc, the Fourth Circuit overruled *Smyth* and established that “[w]hen a preliminary injunction provides the plaintiff concrete, irreversible relief on the merits of her claim and becomes moot before final judgment because no further court-ordered assistance proves necessary, the subsequent mootness of the case does not preclude an award of attorney’s fees.”⁴⁶

The Supreme Court reversed.⁴⁷ Writing for the Court, Chief Justice Roberts⁴⁸ characterized *Winter*’s requirement that a preliminary injunction rest on a finding of likelihood of success on the merits as guaranteeing only that “a preliminary injunction award has at least *something* to do with the merits.”⁴⁹ As such, to obtain a preliminary injunction on the basis of a finding of likelihood of success on the merits is not to “succeed on the merits,”⁵⁰ and to award attorney’s fees on the basis of a preliminary injunction — even one never reversed or disturbed by a later or final judgment — would be to award attorney’s fees to a party who had not prevailed on the merits of her claim.⁵¹ Instead, the Court announced a new standard: A plaintiff may qualify as a prevailing party for purposes of § 1988(b) only “when a court conclusively resolves a claim by granting enduring judicial relief on the merits that materially alters the legal relationship between the parties.”⁵²

⁴¹ See *id.* at 984.

⁴² *Id.*

⁴³ *Id.*; see also *Stinnie v. Holcomb*, 77 F.4th 200, 209 n.6 (4th Cir. 2023) (en banc) (“The First Circuit has not yet opined on the issue, but district courts within that circuit have followed the consensus rule.” (citations omitted)).

⁴⁴ *Stinnie*, 37 F.4th at 984 (Harris, J., concurring).

⁴⁵ *Id.* at 986.

⁴⁶ *Stinnie*, 77 F.4th at 210.

⁴⁷ *Lackey*, 145 S. Ct. at 671.

⁴⁸ Chief Justice Roberts was joined by Justices Thomas, Alito, Kagan, Gorsuch, Kavanaugh, and Barrett.

⁴⁹ *Lackey*, 145 S. Ct. at 668.

⁵⁰ *Id.*

⁵¹ See *id.* at 667–68.

⁵² *Id.* at 669.

In so holding, the majority relied on two cases articulating conditions under which a change in the legal relationship between the parties could confer prevailing party status. *Sole v. Wyner*⁵³ requires that the change be “enduring.”⁵⁴ Under *Sole*, a plaintiff who gains a preliminary injunction that is superseded by the denial of a permanent injunction after a dispositive adjudication on the merits is not a prevailing party for § 1988(b) purposes because their preliminary injunction did not endure.⁵⁵ *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*⁵⁶ requires that the change be “judicially sanctioned.”⁵⁷ The *Buckhannon* Court offered that a “court-ordered consent decree,” like a “judgment on the merits,” would satisfy the “judicially sanctioned” requirement.⁵⁸ But in cases where the desired change results from a defendant’s voluntary conduct *before* any judicially sanctioned change in the parties’ legal relationship, *Buckhannon* denies a plaintiff prevailing party status.⁵⁹

The Court “recognize[d] that neither [*Sole* nor *Buckhannon*] resolve[d] this case.”⁶⁰ But the majority announced a new requirement, which it said “follows naturally” from those cases’ principles: “[T]he enduring nature of” the change in the parties’ legal relationship “must itself be judicially sanctioned.”⁶¹ Prevailing party status will not attach to a plaintiff who achieves a “transient victory” by way of a preliminary injunction and whose case is subsequently mooted by external events.⁶²

Justice Jackson dissented.⁶³ She would have held that a plaintiff enjoys prevailing party status under § 1988(b) when it obtains “[a] preliminary injunction that mandates a judicially sanctioned legal change in the parties’ relationship and is never reversed by a final ruling on the merits.”⁶⁴ Justice Jackson contested the majority’s “assum[ption] that the only kind of resolution to a suit that can precipitate a fee award is a ‘conclusive’ final judgment on the merits.”⁶⁵ She noted that said requirement appears nowhere in the text or in contemporaneous understandings of “prevailing party” as a term of art.⁶⁶ And Justice Jackson pointed to consent decrees and default judgments as types of case resolutions for which attorney’s fees are routinely awarded, even where they

⁵³ 551 U.S. 74 (2007).

⁵⁴ *Id.* at 86; *see Lackey*, 145 S. Ct. at 668.

⁵⁵ *Sole*, 551 U.S. at 86.

⁵⁶ 532 U.S. 598 (2001).

⁵⁷ *Id.* at 605; *see Lackey*, 145 S. Ct. at 668.

⁵⁸ *Buckhannon*, 532 U.S. at 605.

⁵⁹ *See id.*

⁶⁰ *Lackey*, 145 S. Ct. at 669.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Justice Jackson was joined by Justice Sotomayor.

⁶⁴ *Lackey*, 145 S. Ct. at 677–78 (Jackson, J., dissenting).

⁶⁵ *Id.* at 672.

⁶⁶ *Id.* at 672–73.

involve no assessment or adjudication of the plaintiff’s claims at all.⁶⁷ Furthermore, *Winter*’s requirement that all preliminary injunctions be premised on a determination of likelihood of success on the merits ensures that the award of a preliminary injunction does reflect a court’s “actual[] determin[ation of] whether a legal claim is meritorious.”⁶⁸

According to Justice Jackson, the *Lackey* majority’s core analytical error was to derive from the holdings of *Sole* and *Buckhannon* — requiring that a prevailing party obtain relief that is both enduring and judicially sanctioned, respectively — an additional requirement that the enduring *nature* of the relief itself be judicially sanctioned.⁶⁹ She maintained that a change in the parties’ legal relationship resulting from an unreversed preliminary injunction “satisfies both *Buckhannon* and *Sole*”⁷⁰ by virtue of being both judicially sanctioned and enduring.⁷¹ The majority’s requirement that the enduring nature of the change itself be judicially sanctioned “overreads [the Court’s] precedents.”⁷² Worse, Justice Jackson warned, the majority’s categorical bar would hamper civil rights and civil liberties advocacy in contravention of the purpose of § 1988: “to ensure ‘effective access to the judicial process’ for persons with civil rights grievances.”⁷³ On Justice Jackson’s read, the Court went “out of its way to adopt a rule that categorically prohibits fee shifting while interpreting a statute that expressly authorizes fee awards.”⁷⁴

Section 1983 has undergirded landmark Warren Court–era cases like *Brown v. Board of Education*⁷⁵ and *Miranda v. Arizona*⁷⁶ along with scores of modern-day lawsuits by victims of police brutality or misconduct or other constitutional deprivations.⁷⁷ By making it significantly harder to finance that type of civil rights litigation, which often is resolved after a preliminary injunction,⁷⁸ *Lackey* dealt a devastating blow to those typically ideologically left-leaning efforts.⁷⁹ But Justice

⁶⁷ *Id.* at 676.

⁶⁸ *Id.*

⁶⁹ *See id.* at 677.

⁷⁰ *Id.* at 678.

⁷¹ *Id.* at 677–78.

⁷² *Id.* at 678.

⁷³ *Id.* at 678–79 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. REP. NO. 94-1558, at 1 (1976))).

⁷⁴ *Id.* at 678.

⁷⁵ 347 U.S. 483 (1954).

⁷⁶ 384 U.S. 436 (1966).

⁷⁷ *See, e.g., Winston Secures Largest Jury Verdict in Firm’s Pro Bono History in Section 1983 Case Against NYPD Officers*, WINSTON & STRAWN LLP (Aug. 9, 2023), <https://www.winston.com/en/insights-news/winston-secures-largest-jury-verdict-in-firms-pro-bono-history-in-section-1983-case-against-nypd-officers> [<https://perma.cc/NMZ3-M3FT>]; Complaint ¶ 2, *Schaffer v. Chauvin*, No. 20-cv-01577 (D. Minn. July 15, 2020), 2020 WL 3988441.

⁷⁸ Brief of ACLU et al. as *Amici Curiae* Supporting Respondents at 7, *Lackey*, 145 S. Ct. 659 (No. 23-621).

⁷⁹ A coalition of legacy civil rights and civil liberties organizations filed a joint amicus brief urging the Court not to bar attorney’s fee awards for plaintiffs who win preliminary injunctions before their cases are mooted. *See generally id.*

Jackson's oral argument questioning appealed to the cross-ideological consequences of the conservative Justices' preferred rule. Several of the Justices identified that the categorical bar applied uncomfortably to plaintiffs with time-bound claims, for whom a preliminary injunction would provide everything they wanted from court.⁸⁰ Through a hypothetical highlighting that tension, Justice Jackson appeared to try to appeal to the conservatives: "What if I just want to march in the parade tomorrow? I'm a religious organization, for example. . . . I agree with traditional marriage, and tomorrow is the LGBTQ parade and I want to march in it."⁸¹ A preliminary injunction allowing parade participation would provide those Pride counterprotesters all the relief they wanted.⁸² Furthermore, in dissent, Justice Jackson pointed out that a "multitude" of civil liberties and civil rights organizations posited in amicus briefs that the categorical bar would "jeopardize their missions"⁸³ — she explicitly referenced the Alliance Defending Freedom, a conservative Christian advocacy group,⁸⁴ alongside two liberal or non-partisan organizations.⁸⁵ These attempts to appeal to her conservative colleagues and highlight the consequences of their preferred rule for the causes and parties about which they care were unavailing.

The Court's conservative supermajority constrains the liberal Justices' strategic options in divided cases.⁸⁶ The liberal Justices might make concessions, seeking to compromise in the instant case.⁸⁷ They might cooperate with seemingly amenable colleagues to invite reciprocation.⁸⁸ They might even engage in a pattern that Professors Micah Schwartzman and Nelson Tebbe have termed appeasement, "offering unilateral concessions" intending to "avoid[] further conflict, but with the self-defeating effect of emboldening the other party."⁸⁹ Of course, they also have the option of not behaving strategically — instead sticking to their guns, which is to say "follow[ing] their considered interpretations of the Constitution"⁹⁰ or other law. And they can attempt to persuade their conservative colleagues to see things their way.

⁸⁰ *E.g.*, Transcript of Oral Argument, *supra* note 8, at 7–8, 13, 30–31.

⁸¹ *Id.* at 34.

⁸² *Id.* at 35.

⁸³ *Lackey*, 145 S. Ct. at 681 (Jackson, J., dissenting).

⁸⁴ *About Us*, ALL. DEFENDING FREEDOM, <https://adfflegal.org/about> [<https://perma.cc/QEJ8-SWXD>].

⁸⁵ *See Lackey*, 145 S. Ct. at 681 (Jackson, J., dissenting).

⁸⁶ *See* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 271 (2020).

⁸⁷ *Id.* at 272.

⁸⁸ *Id.*

⁸⁹ *Id.* Professors Schwartzman and Tebbe have raised appeasement in the context of the Court's Establishment Clause jurisprudence. *Id.* at 276–77. Others have since suggested that Justice Kagan's choice to vote with the conservative majority in several cases this Term — including *Lackey* — may be properly understood as appeasement. *E.g.*, STRICT SCRUTINY: *A Term for the Rich, the Reactionaries, and the Ruthless*, at 40:53–41:50 (Spotify, July 7, 2025).

⁹⁰ Schwartzman & Tebbe, *supra* note 86, at 272.

What form that persuasion takes is, like the liberal Justices' strategic choices, constrained by the composition and politics of the Court. As a threshold matter, the Court's reliable six-Justice conservative supermajority has curbed forms of persuasion and compromise that sometimes peeled off a fifth vote in the era of a 5–4 Court and ideological “drifting” by Republican appointees.⁹¹ In recent Terms, the Court's conservatives have frequently handed wins to litigants aligned with traditionally conservative causes, from big business to “culture war” issues.⁹²

So it is no surprise that the liberal Justices who attempted persuasion in the 2024 Term often did so through cross-ideological appeals: attempts to evoke conservative Justices' sympathies by highlighting how the conservatives' preferred dispositions could harm parties to which they are sympathetic, benefit parties they disfavor, or otherwise impinge on core conservative values.

One type of cross-ideological appeal addresses a case's partisan impact on litigants: For example, when the conservative Justices' preferred outcome will clearly harm conservatives' disfavored parties, a liberal justice might shed light on how that same rule will or could also harm favored parties. Justice Jackson's *Pride* counterprotest hypothetical can be understood this way. Because of the historical association of § 1983 and civil rights plaintiffs with liberal-coded causes,⁹³ Justice Jackson highlighted that the conservatives' preferred rule could also harm conservative plaintiffs. When, conversely, the outcome to which the conservative Justices are inclined will immediately advantage favored parties, a liberal Justice might raise that rule's potential to benefit disfavored parties as well. For example, at oral argument in *Trump v.*

⁹¹ Brandon Bartels, *It Took Conservatives 50 Years to Get a Reliable Majority on the Supreme Court. Here Are 3 Reasons Why.*, WASH. POST (June 29, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/06/29/it-took-conservatives-50-years-to-get-a-reliable-majority-on-the-supreme-court-here-are-3-reasons-why> [<https://perma.cc/RRC7-B8RK>]; see also Abigail Simon, *The Era of the Swing Justice Is Over. Here's How Democrats May Adapt*, TIME (Aug. 13, 2018, at 10:36 ET), <https://time.com/5363918/supreme-court-brett-kavanaugh-conservative-bloc> [<https://perma.cc/NPV5-9R56>].

⁹² See William Wolfe, *Big Wins at the Supreme Court Prove that the Culture War is Worth Fighting*, STANDING FOR FREEDOM CTR. (July 2, 2025), <https://www.standingforfreedom.com/2025/07/02/big-wins-at-the-supreme-court-prove-that-the-culture-war-is-worth-fighting> [<https://perma.cc/Y8E2-TA2B>]; Ana Builes & Brian Frazelle, *This Group's Record in Front of the Roberts Court Is Mind-Boggling*, SLATE (July 11, 2025, at 15:37 ET), <https://slate.com/news-and-politics/2025/07/chamber-of-commerce-supreme-court-record.html> [<https://perma.cc/PXF2-S63L>] (“[T]he court has adopted the position advocated by the U.S. Chamber of Commerce in nearly 70 percent of its cases since John Roberts became chief justice 20 years ago.”); Andrew Chung, *Supreme Court's Conservatives Leaned into US Culture Wars with Transgender Cases*, REUTERS (July 3, 2025, at 10:39 ET), <https://www.reuters.com/legal/litigation/supreme-courts-conservatives-leaned-into-us-culture-wars-with-transgender-cases-2025-07-03> [<https://perma.cc/K59U-RKJQ>]. The Court's liberal wing has begun to note this trend. E.g., *Diamond Alt. Energy, LLC v. EPA*, 145 S. Ct. 2121, 2143 (2025) (Jackson, J., dissenting) (“This case gives fodder to the unfortunate perception that moneyed interests enjoy an easier road to relief in this Court than ordinary citizens.”).

⁹³ See David H. Gans, *Repairing Our System of Constitutional Accountability: Reflections on the 150th Anniversary of Section 1983*, 2022 CARDOZO L. REV. DE NOVO 90, 91.

*CASA, Inc.*⁹⁴ — in which the conservatives’ inclination against universal injunctions would immediately inure to the second Trump administration’s benefit — Justice Sotomayor pressed Solicitor General John Sauer on how that stance would similarly protect a disfavored administration undertaking unconstitutional action.⁹⁵ The star of her hypothetical — a gun-seizing Democrat familiar from conservative political messaging⁹⁶: “[S]o, when a new president orders that because there’s so much gun violence going on in the country . . . and he says, I have the right to take away the guns from everyone . . . and he sends out the military to seize everyone’s guns — we and the courts have to sit back and wait until . . . every plaintiff whose gun is taken comes into court?”⁹⁷ Justice Sotomayor thus underscored that the conservatives’ preferred rule’s short-term benefit to a preferred litigant might later redound to the benefit of a disfavored party.

Liberal Justices have also used cross-ideological appeals when the conservatives’ preferred outcome otherwise conflicts with conservative values, with the liberal Justice speaking in the language of those values. For example, when conservatives seemed poised to command a local school board to grant parental opt-outs from LGBTQ-inclusive storybooks at the *Mahmoud v. Taylor*⁹⁸ oral argument, Justice Jackson expressed concern that the conservatives’ preferred outcome would contravene the traditionally conservative value of “local control” of schools.⁹⁹

In none of the above-mentioned cases did the liberal Justices’ cross-ideological appeals pick off even one conservative Justice from the majority. While cross-ideological appeals may have uses other than persuasion — for example, highlighting hypocrisy or inconsistency — they have consistently failed to coax conservatives to defy the supermajority bloc.

⁹⁴ 145 S. Ct. 2540 (2025).

⁹⁵ Transcript of Oral Argument at 13, *CASA*, 145 S. Ct. 2540 (No. 24A884), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24a884_co7d.pdf [<https://perma.cc/AM6C-NSZV>].

⁹⁶ See, e.g., *Transcript of the Ingraham Angle: Democrats Openly Embracing Gun Confiscation*, FOX NEWS (Sep. 3, 2019, at 23:00 ET), <https://foxnews.com/transcript/democrats-openly-embracing-gun-confiscation> [<https://perma.cc/56VJ-T22X>]; *Kamala for Gun Confiscation: In Her Own Words*, NRA-ILA (Sep. 16, 2024), <https://www.nra.org/articles/20240916/kamala-for-gun-confiscation-in-her-own-words> [<https://perma.cc/A7W9-QTTG>].

⁹⁷ Transcript of Oral Argument, *supra* note 95, at 13.

⁹⁸ 145 S. Ct. 2332 (2025).

⁹⁹ Transcript of Oral Argument at 173, *Mahmoud*, 145 S. Ct. 2332 (No. 24-297), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/24-297_p8ko.pdf [<https://perma.cc/P4ZM-EGJ2>]; see also Grace Deng, *A Clash Over Local Control in the Race to Run Washington’s Public Schools*, WASH. STATE STANDARD (Oct. 14, 2024, at 04:01 ET), <https://washingtonstatestandard.com/2024/10/14/the-clash-over-local-control-in-the-race-to-run-washingtons-public-schools> [<https://perma.cc/5YY3-MK9U>].

One might think a cross-ideological appeal should have particular force in a case like *Lackey* involving indeterminate law and policy.¹⁰⁰ As the majority itself recognized,¹⁰¹ existing precedent left the Justices free to choose among the circuits' approaches or create a new rule, as the Court ultimately did.¹⁰² The weight of circuit precedent was also not on the majority's side — the Court's chosen categorical bar repudiated every circuit to consider the issue.¹⁰³ Nor was the categorical bar plausibly compelled by policy concerns. Judicial economy and efficiency, raised in briefing and at oral argument, fell on both sides. The Commissioner's oral advocate maligned the drivers' position as "judicially inefficient."¹⁰⁴ She suggested that the drivers' position would incentivize defendants to freeze rather than abandon challenged rules and would result in additional time-consuming fee litigation.¹⁰⁵ But the Commissioner's proposed rule raised the specter both of defendants using mootness strategically to deny fees to plaintiffs as soon as it appears that they will lose on the merits and plaintiffs pursuing inefficient litigation. "[T]he facts of this very case," Justice Jackson observed,¹⁰⁶ demonstrated that the categorical rule's incentive for defendants strategically to moot cases pending against them was not "speculative," as the Government charged.¹⁰⁷ And as Chief Justice Roberts observed in oral argument, under the Commissioner's categorical rule, a party who obtains a preliminary injunction but incurs significant attorney's fees "ha[s] an incentive to go forward for a permanent injunction" so long as they can satisfy standing and mootness requirements.¹⁰⁸ Judicial economy and other practical consequences thus did not compel the conservatives' preferred rule.

Facing legal indeterminacy, the countervailing weight of circuit precedent, and equivocal policy considerations, the conservative Justices might have been relatively more receptive to the argument that the categorical bar could harm not just traditional civil rights plaintiffs but also conservative plaintiffs. And unlike the gun-seizing Democratic President bogeyman offered in Justice Sotomayor's *CASA* hypothetical, real-life conservative plaintiffs who were hoping for attorney's fees had cases pending in lower courts as the Court considered *Lackey* — as

¹⁰⁰ See Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 71 (2005) ("[W]hen the legal materials aren't so strong — when they don't point to a clear answer and leave room for discretionary judgment — the competition is won by the justice's underlying preferences and views of the world.")

¹⁰¹ *Lackey*, 145 S. Ct. at 669.

¹⁰² See *id.*

¹⁰³ *Id.* at 675 & n.3 (Jackson, J., dissenting) (collecting cases).

¹⁰⁴ Transcript of Oral Argument, *supra* note 8, at 90.

¹⁰⁵ *Id.* at 21, 90.

¹⁰⁶ *Lackey*, 145 S. Ct. at 680 (Jackson, J., dissenting).

¹⁰⁷ See Transcript of Oral Argument, *supra* note 8, at 48.

¹⁰⁸ *Id.* at 20–21.

Justice Kagan hinted during oral argument.¹⁰⁹ And yet, Justice Jackson not only failed to rally a single conservative but also lost Justice Kagan to the majority. That failure under conditions of legal indeterminacy and policy ambivalence casts doubt on cross-ideological appeals' persuasive power before this Court.¹¹⁰

Justice Jackson's cross-ideological appeals proved prescient: The first court to wield *Lackey* as a bar to an attorney's fee award did so against a church's objection to COVID-19 restrictions.¹¹¹ And prescience, like the rhetorical force of highlighting hypocrisy or perceived bias, is not nothing. But liberal Justices looking to seize upon cross-ideological appeals as a *persuasive* tactic should temper their expectations.

¹⁰⁹ See, e.g., *Maryville Baptist Church v. Beshear*, 132 F.4th 453, 456 (6th Cir. 2025) (relying on *Lackey* to deny attorney's fees to a church that obtained a later mooted injunction against COVID-19 restrictions); see also Transcript of Oral Argument, *supra* note 8, at 37 (Justice Kagan referencing cases where plaintiffs sought and earned injunctions against COVID-19 restrictions that were subsequently abandoned).

¹¹⁰ How this conclusion bears on judicial legitimacy is an open question. Indeed, Professor Richard Re has argued persuasively elsewhere in this Issue that judges *should* buck their partisan inclinations, at least under some models of judicial legitimacy. See Richard M. Re, *The Supreme Court, 2024 Term — Foreword: To a Conservative Warren Court*, 139 HARV. L. REV. 1, 47 (2025).

¹¹¹ See *Maryville Baptist Church*, 132 F.4th at 456.