NO. 17-2270

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Federal Trade Commission and Commonwealth of Pennsylvania,

v.

***Penn State Hershey Medical Center and Pinnacle Health System*,**

Defendants-Appellees.

Commonwealth of Pennsylvania,
Appellant

Appeal from the Judgment of the United States
District Court for the Middle District of Pennsylvania
Entered May 11, 2017

BRIEF OF THE STATES OF WASHINGTON, DELAWARE, IOWA, IDAHO, MINNESOTA, NORTH DAKOTA, UTAH, LOUISIANA, NEW MEXICO, AND INDIANA AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

ROBERT W. FERGUSON
Attorney General of Washington

LUMINITA NODIT
Assistant Attorney General
800 5th Ave., Ste. 2000
Seattle, WA 98164
(206) 254-0568, luminitan@atg.wa.gov

ADDITIONAL COUNSEL

MATTHEW P. DENN
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801
(302) 577-8400

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319
(515) 281-5164

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P. O. Box 83720
Boise, ID 83720
(208) 334-2400

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Blvd.
St. Paul, MN 55155-1609
(651) 296-3353

WAYNE STENEHJEM
Attorney General
State of North Dakota
Gateway Professional Center
1050 E. Interstate Ave. Ste. 200
Bismarck, ND 58503-5574
(701) 328-2210

SEAN D. REYES
Attorney General
State of Utah
350 N. State Street, Ste. 230
Salt lake, UT 84114
(800) 244-4636

JEFF LANDRY
Attorney General
State of Louisiana
1885 North Third Street
Baton Rouge, LA 70802
(225) 326-6000

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 490-4060

CURTIS T. HILL, JR.
Attorney General of Indiana
Office of the Attorney General
200 West Washington Street,
Room 219
Indianapolis, IN 46204
(317) 232-6201

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I. STATEMENT OF INTEREST

Pursuant to Fed. R. App. P. 29(a), the States of Washington, Delaware, Iowa, Idaho, Minnesota, North Dakota, Utah, Louisiana, and New Mexico respectfully submit this amicus brief in support of the Commonwealth of Pennsylvania. The Attorneys General of these States, as the chief law enforcement officers of their States, are charged with the enforcement of federal and state antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. § 18. The States have a substantial interest in ensuring that the application of the antitrust laws is consistent with underlying congressional intent and sound public policy.

The States play an active role in investigating and challenging potentially anticompetitive mergers. The States often engage in lengthy and costly antitrust investigations, both independently and in conjunction with the federal antitrust agencies. The mandatory fee-shifting provisions of the Clayton Act are an important consideration for States—particularly States that rely on cost and fees recoveries—in evaluating whether investigation and possible antitrust litigation are feasible.

The District Court erred by denying an award of attorneys' fees after issuing a preliminary injunction. Decisions in the Third Circuit and in other

circuits support the award of attorneys' fees under Section 16 of the Clayton Act, 15 U.S.C. § 26, to a plaintiff that prevails on a preliminary injunction. That precedent should be applied here, where the merging parties abandoned their transaction as a direct result of the preliminary injunction obtained by Pennsylvania. The District Court's ruling denying Pennsylvania an award of attorneys' fees frustrates the intent of the Clayton Act's fee-shifting provision, and should be reversed.

II. SUMMARY OF ARGUMENT

The District Court's denial of attorneys' fees disregards the fee-shifting mandate in Section 16 of the Clayton Act (hereinafter "Section 16") and offends sound public policy. The ruling erroneously assumes that facially different standards in unrelated statutes have identical meaning. Section 16 includes a mandatory fee-shifting provision for a "substantially prevailing plaintiff," which is not the functional equivalent of the "prevailing party" language addressed by *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), and its progeny. This court should find that Section 16 confers substantially prevailing plaintiff status on a plaintiff who obtains a preliminary injunction that serves as a catalyst for a permanent

change in position by the opposing parties—abandonment of a proposed merger—even though no final judgment on the merits results.

III. ARGUMENT

A. Section 16's Substantially Prevailing Plaintiff Standard Is Not The Functional Equivalent Of The Prevailing Party Standard Addressed By *Buckhannon* And Its Progeny.

The Supreme Court in *Buckhannon* interpreted the meaning of the term "prevailing party" as used in the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12205, and the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. § 3613(c)(2), and considered the character of judicial relief that a party must receive to recover attorneys' fees under that standard. *Buckhannon*, 532 U.S. 598, 610. In that context, the Court considered the propriety of the "catalyst theory," under which a plaintiff is deemed a prevailing party where the pressure of a lawsuit alone brings about the result the plaintiff is seeking, despite the absence of a final judgment. *Id.* at 605.

The Supreme Court observed that Congress authorized attorneys' fees for prevailing parties in numerous fee-shifting statutes, including the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (hereinafter "Section

1988").[1] *Id*. at 603. The Court rejected the catalyst theory because it "allows an award where there is no judicially sanctioned change in the legal relationship of the parties" and "lacks the necessary judicial imprimatur." *Id*. at 605. Instead, the Court determined that the prevailing party standard is satisfied only if the plaintiff obtains a "'material alteration of the legal relationship of the parties,'" and that material alteration is "judicially sanctioned." *Id*. at 604-05 (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989)).

Recently, this court had the opportunity to evaluate the prevailing party standard as used in the attorneys' fee provision of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(3)(B)(i) (hereinafter "Section 1415"). *M.R. v. Ridley Sch. Dist.*, 868 F.3d 218 (3d Cir. 2017). There, the Court found Section 1415 to be consistent with other federal statutes using the term "prevailing party," such as Section 1988. *Id*. at 224. The Court's conclusion was consistent with the legislative history of the IDEA, which demonstrates that Congress intended the "prevailing party" language used in that statute to be interpreted consistent with other statutes that used the same

[1] The Court noted the standards used to interpret the term "prevailing party" under any given fee-shifting statute "are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party'." *Id.* at 603, n. 4 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983) (which considered the award of fees under § 1988)).

language. S. REP. NO. 99-112, AT 13 (1986). 99-112, AT 13 (1986) (stating that, by adding an attorneys' fees provision to the Education of the Handicapped Act (renamed the IDEA in 1990), it was the Senate Committee on Labor and Human Resources' intent that the term "'prevailing party' . . . be construed consistent[ly]" with *Hensley,* 461 U.S. at 440"). Congress thus intended the meaning of the "prevailing party" under Section 1988 to apply to IDEA.

Applying the prevailing party standard under *Buckhannon*, the Court held that "to 'prevail' under Section 1415 and other statutes with 'prevailing party' fee provisions, a party must obtain a 'material alteration of the legal relationship of the parties' that is 'judicially sanctioned'." *M.R.*, 868 F.3d at 224 (citing *Raab v. City of Ocean City, N.J.*, 833 F.3d 286, 292 (3d Cir. 2016)). "Importantly, a party achieves a 'material alteration' of the parties' legal relationship and 'prevail[s]' for attorneys' fees purposes only if he obtains relief that is "in some way merit[s]-based." *Id.* The Court treated preliminary injunctions as transient and incapable of providing final resolution of a dispute. "Fee-shifting under a 'prevailing party' statute is not appropriate, for example, when a plaintiff wins a preliminary injunction with respect to a particular request for relief but then loses on the merits of that request for relief." *Id*. (citing *Sole v. Wyner*, 551 U.S. 74, 86 (2007) ("A final decision on the merits denying permanent injunctive relief

ordinarily determines who prevails in . . . § 1988(b). A plaintiff who achieves a transient victory at the threshold of an action can gain no award . . . if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded.").

In contrast to the attorneys' fees language at issue in *Buckhannon* and *M.R.,* Section 16 provides for an award of attorneys' fees to a "substantially prevailing plaintiff." Section 16's award of fees is mandatory rather than discretionary. Section 16 provides:

> [A]ny person . . . shall be entitled to sue for and have *injunctive relief* . . . against threatened loss or damage by a violation of the antitrust laws . . . . In any action under this section in which the *plaintiff substantially prevails*, the court *shall* award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C. § 26 (emphasis added). Congress made the conscious decision to depart from the normative American rule requiring parties to bear their own fees and instead elected to provide for the mandatory award of attorneys' fees for actions pursued under Section 16. Congress' decision reflects a well-considered determination that mandatory fee awards are necessary to implement a broad public policy in favor of deterring antitrust violations and to encourage parties to initiate and pursue complex and resource-intensive investigations into anticompetitive conduct. H. R. REP. NO. 94-499, PT. 1, AT 19, 20 (1976).

This Circuit has never addressed the "substantially prevailing plaintiff" standard under Section 16. When presented with this question, some lower courts have concluded, without further analysis, that the Supreme Court's interpretation of the "prevailing party" standard in *Buckhannon* should apply. *See*, *e.g.*, *Fed. Trade Comm'n v. Staples, Inc.*, 239 F. Supp. 3d 1, at 3 (D.D.C. 2017) (*Staples*) (*Buckhannon*'s rejection of the catalyst theory forecloses an award for fees under Section 16). Others, finding no precedent for applying the prevailing party standard in *Buckhannon* to Section 16, have interpreted the meaning of the word "substantial" consistent with the Supreme Court's analysis of the term "substantially justified" in *Pierce v. Underwood*, 487 U.S. 552, 564, (1988). *See*, *e.g.*, *ADT Security Services, Inc., v. Lisle-Woodridge Fire Prot. Dist.*, 86 F. Supp. 3d 857 (N.D. Ill., 2015) (noting that Section 16 inserts the modifier "substantially" before "prevails"). Consistent with *Pierce*,[2] the Court in *ADT* recognized that "substantially prevailing" should be construed

[2] The Supreme Court in *Pierce* explained the meaning of the term "substantially justified" found in the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), and chose the more lenient standard for the definition of substantial. *Pierce,* 487 U.S. at 565-566 ("as between the two commonly used connotations of the word "substantially," the one most naturally conveyed . . . is not "justified to a high degree," but rather "justified in substance or in the main") (citations omitted).

differently than the term "prevailing party." *Id*. at 866. The court ultimately awarded attorneys' fees under Section 16 and under Section 1988. *Id*.

The District Court erred in determining that the "substantially prevailing plaintiff" language under Section 16 is functionally equivalent to the "prevailing party" language used in discretionary federal fee-shifting statutes, such as Section 1988.[3] *See M.R.*, 868 F.3d at 224 (citing *Gomez-Perez v. Potter*, 553 U.S. 474, 481 (2008)). Section 16's fee-shifting provision is not the same as Section 1988 because the latter is a discretionary fee-shifting statute that awards fees to a "prevailing party." As noted in the legislative history of Section 1988, Congress specifically rejected a mandatory fee-shifting provision in that statute. *See* H. R. REP. NO. 94-1558, AT 3, 5, 8 (1976) (remarks of Rep. Drinan). Section 16, in contrast, is a mandatory directive to award attorneys' fees to a plaintiff which *substantially* prevails.

Conflating the substantially prevailing plaintiff standard with the prevailing party standard contravenes basic principles of statutory interpretation. When conducting statutory interpretation, the Supreme Court has cautioned

[3] Section 1988 provides that "in any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title . . . the court*, in its discretion, may allow the prevailing party*, . . .a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (emphasis added).

courts "'not to apply rules applicable under one statute to a different statute without careful and critical examination'." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 253-54 (2010) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)) (noting the distinct language in fee-shifting provisions of various federal statutes, such as "prevailing party," "substantially prevailing" party, "successful" litigant, or providing a court with "discretion" or authority to award fees where "appropriate"). Furthermore, in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), the Supreme Court noted that "*varying* standards as to the precise degree of success necessary for an award of fees" are contained in the more than one hundred fifty federal statutes awarding fees to "prevailing," "substantially prevailing," and "successful parties." *Id.* at 684 (emphasis added).

Courts are required "to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). It is not within any court's ambit to rewrite a plainly worded statutory enactment of Congress or to presume that Congress intended something other than that expressed by way of the plain language. *Id*. ("statutory construction must begin with the language employed by Congress"). Additionally, in cases involving the interpretation of attorneys' fees provisions, courts "must consider the practical consequences of withholding

[those] fees" and must be "'decidedly receptive' to remedies that are 'necessary or at least helpful to the accomplishment of the statutory purpose'." *M.R.*, 868 F.3d at 227.

Despite the difference in language between Section 16 and the federal fee-shifting statutes at issue in *Buckhannon*, the District Court applied the *Buckhannon* "prevailing party" standard to find that Pennsylvania was not a substantially prevailing plaintiff under Section 16.[4] This court, however, has already recognized the difference between the Clayton Act's mandatory fee award under Section 4 of the Clayton Act, 15 U.S.C. § 15 (hereinafter "Section 4")—and thus, by extension, Section 16—from Section 1988's permissive fee award provision:

> [A]lthough the standards for calculating attorneys' fees in antitrust and civil rights cases (and other statutory fee cases) may be interchangeable . . . the entitlement of a party to recover attorneys' fees is not necessarily identical in every context. For example, under section 1988 fee awards are discretionary but available to both plaintiffs and defendants, whereas under the Clayton Act fee awards are mandatory but available only to plaintiffs who prove an antitrust injury.

[4] The District Court relied on *ADT*, 86 F. Supp. 3d 857, an unreported decision, an Eleventh Circuit decision applying *Buckhannon* to a private contract, and the non-binding decision in *Fed. Trade Comm'n v. Staples, Inc.*, 239 F. Supp. 3d 1, at 3 (D.D.C. 2017). *Staples* addressed whether Pennsylvania was entitled to seek fees, and its dicta about the prevailing party standard is not controlling in this Circuit.

Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 418 (3rd Cir. 1993).

The Clayton Act itself contains different fee-shifting provisions for different type of lawsuits. Only one of the provisions allows for recovery of attorneys' fees as part of a treble damages award (Section 4), while the fee-shifting provisions in Section 16 (for a substantially prevailing plaintiff) and Section 4304 (for a substantially prevailing claimant) do not require a damages award for recovery of attorneys' fees. *See* 15 U.S.C. § 15(a); 15 U.S.C. § 26; 15 U.S.C. § 4304 (providing that any "substantially prevailing claimant under the antitrust laws" may be awarded attorneys' fees in a lawsuit based on a joint venture).

Additionally, when Congress, through passage of the Hart-Scott Rodino Antitrust Improvement Act of 1976, amended Section 16 by inserting the phrase "substantially prevailing plaintiff," it intended that attorneys' fees could be awarded absent adjudication on the merits of the lawsuit. *See Grumman Corp. v. LTV Corp.*, 533 F. Supp. 1385, 1388 (E.D.N.Y. 1982) (awarding a substantially prevailing plaintiff status to a plaintiff after it obtained only a preliminary injunction under Section 16). The Clayton's Act legislative history confirms this:

> [I]ndeed, the need for the awarding of attorneys' fees in § 16 injunction cases is greater than the need in § 4 treble damage cases.[5] In damage cases, a prevailing plaintiff recovers compensation, at least. In injunction cases, however, without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect. A prevailing plaintiff should not have to bear such an expense. Section 3(3) . . . is intended to reiterate congressional encouragement for private parties to bring and maintain meritorious antitrust injunction cases.

H. R. REP. NO. 94-499, PT. 1, AT 19, 20. The "substantially prevailing plaintiff" language in the amendment therefore results in a change that requires courts to use the catalyst theory to allow recovery of attorneys' fees under these sections by plaintiffs who do not win a damages award but who achieved success on other aspects of their claims. *See F. & M. Schaeffer Corp. v. C. Schmidt & Sons, Inc.*, 476 F. Supp. 203, 206-7 (S.D.N.Y. 1979) (construing 15 U.S.C. § 26).

These examples suggest that when Congress ties attorneys' fees to treble damages awards, it meant to exclude a catalyst theory of recovery. However, Congress has demonstrated that it understands and knows how to employ different standards for the award of attorneys' fees. *See, e.g.*, *Aetna Cas. & Sur. Co. v. Liebowitz*, 730 F.2d 905, 908-9 & n.3 (2d Cir. 1984) (citing various statutes in which "prevailing party" or similar terms are used as evidence that

[5] The reference to § 4 pertains to 15 U.S.C. § 15.

Congress is knowledgeable regarding how to permit the award of attorneys' fees to a plaintiff who does not litigate his claim through to trial).

The use of the "substantially prevailing plaintiff" language is consistent with the substantive purpose of Section 16, which is prospective in nature and requires less proof for plaintiffs to succeed on the merits of their claims. Unlike other fee-shifting provisions, Section 16 requires only "threatened loss or damage by a violation of the antitrust laws," 15 U.S.C. § 26, rather than any specific injury to "business or property." *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 131 (1969). "[I]t is the threat of harm, not actual injury, that justifies equitable relief." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 126 (1986) (holding that the standards for antitrust standing for damage claims and injunctions differ); *see also In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 13 (1st Cir. 2008) (finding the standing requirements for injunctive relief are less stringent than those under Section 4).

It is consistent with congressional intent that a fee-shifting provision in a statute that seeks to address threatened harm be interpreted to require a less exacting standard of proof than a provision that requires actual harm and injury. To hold otherwise would frustrate the purpose of Section 16 by disincetivizing

plaintiffs from bringing such cases until they suffered actual harm. Thus, in seeking to preclude imminent harm to competition, Section 16 permits *earlier* challenges to anticompetitive conduct, and a more lenient standard for relief. S*ee, e.g.*, *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404 (1st Cir. 1985) ("[p]lainly, Congress empowered a broader range of plaintiffs to bring § 16 actions because the standards to be met are less exacting than those under § 4); *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991) (section 16 invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of *threatened* injury).

In refusing to award Pennsylvania attorneys' fees, the District Court disregarded the plain language of Section 16 and congressional intent, which calls for a more lenient standard for relief under Section 16 than other discretionary fee-shifting statutes. Additionally, the District Court's denial of fees rests on the mistaken premise that the mandatory fee-shifting provision under Section 16 can be likened to the discretionary fee award permitted under Section 1988. This reasoning erroneously conflates the standard for the award of attorneys' fees in antitrust injunction cases and disregards Congress' intent to incentivize proactive antitrust enforcement.

B. A Preliminary Injunction Which Enjoins A Merger And Serves As A Catalyst For A Permanent Change In Position By The Opposing Party Confers A Substantially Prevailing Plaintiff Status, When, Due To Mootness By Abandonment Of A Merger, No Final Judgment On The Merits Results.

Buckhannon did not address the substantially prevailing plaintiff standard under Section 16 of the Clayton Act, and *Buckhannon*'s rejection of the catalyst theory as a basis for recovery does not extend automatically to every fee-shifting provision. Assuming *arguendo* that Buckhannon's rejection of the catalyst theory applies, the District Court failed to acknowledge that *Buckhannon* is distinguishable.

1. *Buckhannon* Did Not Address The Substantially Prevailing Plaintiff Standard And Its Rejection Of The Catalyst Theory Does Not Extend To Every Fee Shifting Provision.

This Court should reject a *per se* rule that preliminary injunctive relief can never satisfy the substantially prevailing plaintiff standard of Section 16. Nothing in *Buckhannon* compels this result, and, as explained below, it would conflict with several of this Court's decisions. Under Section 16, Pennsylvania became a substantially prevailing plaintiff (and thus entitled to a fee award) when the court granted the motion for a preliminary injunction that caused the Defendants to abandon the merger.

As explained above, *Buckhannon's* "prevailing party" standard should not be applied in the context of a preliminary injunction issued pursuant to Section 16. Instead, this Court should adopt the approach of *Grumman Corp. v. LTV Corp.,* where the court held that "[a] decision following a trial on the merits is not a condition precedent to a Section 16 award since the phrase 'substantially prevails' contemplates and is sensibly construed to accommodate something short of a final judgment on the merits." *Grumman*, 533 F. Supp. at 1387. Other courts have reached similar conclusions. *See*, *e.g.*, *Aetna Cas. & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 912 (E.D.N.Y. 1983), *aff'd,* 730 F.2d 905 (2d Cir. 1984) (citing *Grumman,* 533 F. Supp. at 1385; *Harnischfeger Corp. v. Paccar, Inc.*, 503 F. Supp. 102, 104-05 (E.D. Wis. 1980); *F. & M. Schaefer*, 476 F. Supp. at 206-07) (listing instances where "a plaintiff who had obtained preliminary injunctive relief was found to have 'substantially prevailed' within the meaning of § 16").

Post *Buckhannon*, courts have also taken a case-by-case approach in analyzing fee-shifting statutes, focusing on congressional intent and the statutory language in the various fee-shifting provisions when applying *Buckhannon* to "prevailing party" provisions or relying on *Buckhannon* to reject the catalyst theory as a basis for recovery. *See, e.g.*, *Union of Needletrades, Indus. & Textile*

Emp.'s, AFL-CIO, CLC v. INS, 336 F.3d 200, 207 (2d Cir. 2003) (stating that *Buckhannon*'s rejection of the catalyst theory does not extend to each and every fee-shifting provision); *Roberson v. Giuliani*, 346 F.3d 75, 79 n.3 (2d Cir. 2003) (noting that *Buckhannon* concerned different fee-shifting provisions); *Perez-Arellano v. Smith*, 279 F.3d 791, 794 (9th Cir. 2002) ("the same words in different statutes may have different meanings if a different intention of Congress is manifest in the purpose, history, and overall design or context of the statute"). Thus, the District Court erred when it assumed that *Buckhannon* automatically applies to every fee-shifting provision.

2. The Catalyst Theory Rejected In *Buckhannon* Does Not Extend Automatically To Preliminary Injunctive Relief Under Section 16 Which Provides Plaintiff With The Relief Sought

This Court has not addressed whether the catalyst theory, rejected in *Buckhannon,* is still a viable basis to recover a fee award under Section 16 of the Clayton Act. However, this Court has made clear that, post-*Buckhannon*, the catalyst theory remains a viable principle in certain circumstances. *See Templin v. Blue Cross*, 785 F.3d 861 (3d Cir. 2015). *Templin* addressed whether the catalyst theory permits an award of attorneys' fees under the Employee Retirement Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1461. Following *Hardt*, 560 U.S. 242, this Court held the defendant's voluntary agreement to pay

interest was sufficient to entitle the plaintiff to an award of attorneys' fees, and that voluntary payment constituted a degree of success on the merits. *Id. Templin* forecloses a complete rejection of the catalyst theory in this Circuit.

Even if *Buckhannon* were applied to Section 16, the plain language and the congressional intent in enacting Section 16, and persuasive precedent from other circuits, justifies carving out a preliminary injunction exception to *Buckhannon's* rejection of the catalyst theory. *Buckhannon* is also easily distinguishable for this reason as well.

In *Buckhannon,* a West Virginia state law required residents in group homes be capable of self-preservation in case of a fire. *Buckhannon*, 532 U.S. at 603. The state fire marshal inspected a series of assisted living residences operated by Buckhannon Board and Care Home, Inc. and ordered them to close because the residents, many of which were elderly or disabled, were not capable of saving themselves in the event of fire. *Id*. The corporation sued for declaratory judgment that the "self-preservation" requirement violated the FHAA and ADA. *Id*. During the pendency of the lawsuit, the West Virginia legislature voted to eliminate the "self-preservation" requirement. *Id.*

In contrast to *Buckhannon*, which involved the actions of a third-party to moot the plaintiff's lawsuit, here the *Defendants themselves* have mooted the

action by abandoning the merger in direct response to the preliminary injunction. Additionally, while the *Buckhannon* Court found a *lack* of judicial action, the preliminary injunction in this case effected a specific material change in the legal relationship of the parties: it prevented the Defendants from moving forward with their transaction. *Cf. Buckhannon*, 532 U.S. at 605.

After this Court issued the preliminary injunction, the only action the Defendants took was to abandon the merger. Unlike *Sole v. Wyner*, 551 U.S. at 86, where the preliminary injunction was later dissolved, or cases like *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223 (3d Cir. 2011) (en banc), where the interim relief was obtained on a fast track, there was sufficient judicial involvement at the preliminary injunction stage in the District Court and on appeal to address *Buckhannon's* requirement that there be judicially-sanctioned conduct. *See Singer,* 650 F.3d at 229 (plaintiff was not a prevailing party eligible for § 1988 attorney's fees where district court granted temporary restraining order the day after suit was filed, but three weeks later denied preliminary injunction because defendant's change in position mooted the action).

Additionally, the facts and the procedure in *Buckhannon* are the polar opposite of what happened in this case. The preliminary injunction here prevented the parties from closing their transaction—there was nothing

"voluntary" about the Defendants' change in conduct.[6] More importantly, the Defendants abandoned the transaction as a result of and in response to the order of the preliminary injunction, which mooted the case. Where a plaintiff prevails on a preliminary injunction, and the defendants choose to abandon the merger, and the change in their behavior follows that judicial ruling, the change in behavior is not "voluntary" as understood by the "catalyst theory" set forth in *Buckhannon. See Sw. Marine, Inc. v. Campbell Indus.*, 732 F. 2d 744 (9th Cir. 1984) (finding that an award of attorneys' fees is essential to enforcement and that allowing a defendant to avoid attorneys' fees by taking voluntary action to moot the controversy would defeat legislative intent).

Furthermore, the Defendants' change in conduct here has the "judicial *imprimatur*" that was missing from the rejected "catalyst theory" in *Buckhannon*. *Buckhannon,* 532 U.S. at 605, 610. In such situations "[t]he relief . . . ultimately won," a preliminary injunction, "was specifically the relief . . . requested" notwithstanding the subsequent "voluntary" mooting of the case. *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528-29 (D.C. Cir. 1999) (awarding fees to prevailing plaintiffs after a successful

[6] *Fed. Trade Comm'n v. Penn State Hershey Med. Center*, 838 F.3d 327, 353 (3d Cir. 2016).

challenge by preliminary injunction to initiative governing campaign contributions, and rejecting argument that government's mooting of the case by repealing the initiative in response to preliminary injunction precluded the fee award). *See also Palmetto Props., Inc. v. Cty. of DuPage*, 375 F.3d 542, 551 (7th Cir. 2004) (plaintiffs entitled to fees after entry of preliminary injunction enjoining enforcement of statute that was later repealed before final judgment was entered).

The issuance of a preliminary injunction in this case satisfies *Buckhannon's* requirement of judicial action. The District Court's preliminary injunction materially altered the legal relationship of the parties; indeed, Defendants admit that they changed course to comply with the injunction.

3. The Preliminary Injunction Issued Confers Pennsylvania Substantially Prevailing Plaintiff Status

Preliminary injunctions are a critical tool used by the Federal Trade Commission ("FTC") and the state enforcers. Due to the complexity and resources required to litigate antitrust merger challenges, a preliminary injunction often is the only effective relief that the antitrust enforcers may obtain, as it is common for merging parties to elect to abandon a merger transaction after a preliminary injunction is entered, mooting the need for a final judgment on the merits. This case presents exactly this scenario: a final judgment on the merits

was impossible to achieve due to the abandonment of the merger, an event beyond plaintiffs' control.

To the extent this Court views the injunction as interim relief, this Court has found that even interim relief may confer prevailing party status under Section 1988 and the IDEA's Section 1415. In *H.E. v. Walter D. Palmer Leadership Learning Partners Charter Sch.*, 873 F.3d 406, 407-08, 413 (3d Cir. 2017), for example, the Court reversed the denial of attorney's fees to parents who received only interlocutory procedural relief, holding the denial was contrary to *M.R,* and *Bagby v. Beal*, 606 F.2d 411 (3d Cir. 1979)). In *M.R.,* 868 F.3d at 225, the Court found that the district court erred by concluding the reimbursement award at issue was a temporary form of relief to be treated the same as the forward-looking and injunctive IDEA "stay-put" relief in *John T.* and *J.O.*[7]; this Court awarded fees notwithstanding the interim nature of that

[7] In *M.R.*, this Court explained that in *John T.* and *J.O.*, the forward-looking injunctive orders relating to temporary and preliminary relief were not merits-based and thus could not confer "prevailing party" status under Section 1415. *Id.* at 224 (citing *John T. ex rel. Paul T. v. Del. Cty. Intermediate Unit*, 318 F.3d 545, 558-60 (3d Cir. 2003) (a preliminary injunction to preserve supplemental services previously provided by a school district, *Id*. at 549-50, and a contempt order aimed at ensuring the school district's compliance with the preliminary injunction, *id.* at 551, 554), and *J.O. ex rel. C.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 267, 273-74 (3d Cir. 2002)) (an order requiring a child's temporary reinstatement to public school after the school district had requested home-schooling).

relief and the fact that plaintiff was ultimately denied permanent relief regarding his educational placement. In *Bagby,* 606 F.2d at 415, the court awarded fees under Section 1988 to a plaintiff who was afforded a due process hearing, although she did not ultimately prevail at the hearing. In *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 229 (3rd 2008) (*PAPV*), the plaintiffs challenged the constitutionality of the City of Pittsburg's ordinance that required groups to prepay police protection costs before they could receive a permit for a rally. The Court awarded fees under Section 1988(b), finding the "case involves appropriate circumstances" where a preliminary injunction can "render a party 'prevailing'." *Id*. at 232-33.[8]

After considering "'the importance Congress attached' to the IDEA's procedural safeguards," the Court in *H.E.* found that plaintiffs vindicated their right to an IDEA procedural due process hearing by obtaining permanent relief that cannot be nullified later, and is not "temporary forward-looking injunctive

[8] The Court noted that "stay put" orders which merely serve to maintain the status quo do not afford meaningful relief on the merits of the underlying claims and will not suffice to establish a prevailing party status. *Id*. at 232-33 (citing *John T.,* 318 F.3d at 558, 559; *J.O.,* 287 F.3d at 273-74). The court in *Douglas v. D.C.*, 67 F. Supp. 3d 36, 42 (D.D.C. 2014), in a case addressing IDEA, noted that *PAPV*, by relying on *John T.* and *J.O,* imposed restrictions above and beyond *Buckhannon,* barring the recovery of attorneys' fees for any "interim" relief that does not "resolve any merits-based issue in [the plaintiff's] favor." *Douglas*, 67 F. Supp. 3d at 41-42 (the decision in *J.O.* "presents IDEA claimants with a hurdle unidentified in *Buckhannon*").

relief." *H.E.*, 873 F.3d at 413 (citing *M.R.*, 868 F.3d at 230); *cf. J.O. ex rel. C.O. v. Orange Twp. Bd. of Educ.*, 287 F.3d 267, 273-74 (3d Cir. 2002). Additionally, while addressing Section 1415, in a matter of first impression, this court in *M.R.* found support in the text of the IDEA, precedent from this court, and persuasive precedent in other Circuits to hold that the interim relief awarded is merits-based and confers "prevailing party" status. *M.R.*, 868 F.3d at 225. The Court also recited its holding in *PAPV* that the injunction afforded the plaintiffs "lasting relief on the merits of their claims," that plaintiffs were "prevailing parties" under Section 1988 since the injunction had granted "what they sought on an enduring basis," and that its temporary nature was "only in the sense that it did not apply to the city's later-revised ordinance, which had remedied the preexisting constitutional defects." *Id*. at 226 (citing *PAPV*, 520 F.3d at 229-30, 234). The Court in *M.R.* agreed that parents are eligible for attorneys' fees if, after unsuccessfully challenging a school district's proposed educational placement for their child, they later obtain a court order requiring the school district to reimburse them for the costs of the child's "stay put" placement—the "then-current educational placement," in which the IDEA permitted the child to remain while administrative and judicial proceedings were pending. *Id*. at 220.

Although not addressing the substantially prevailing plaintiff status under Section 16, these two recent decisions are instructive. The legislative history in the IDEA is clear that Congress intended to apply the *Buckhannon* prevailing party standard to the fee award provision in the IDEA. S. REP. NO. 99-112, AT 13 (1986). 99-112, AT 13. The court in *M.R.*, however, held:

> These child- and parent-friendly goals are not a reason for us to interpret "prevailing party" under the IDEA any differently than we would under other statutes, *Buckhannon*, 532 U.S. at 610, . . . ; *John T.*, 318 F.3d at 558, but, in considering the statutory context, we must consider the practical consequences of withholding attorneys' fees in cases like this one.
>
> . . . .courts are "decidedly receptive" to remedies that are "necessary or at least helpful to the accomplishment of the statutory purpose."

M.R., 868 F.3d at 227. Accordingly, given the legislative history of Section 16, congressional intent and the statutory context of the Clayton Act, this Court should find that interim relief, such as a preliminary injunction under the Clayton Act, can be an example of a merit-based determination. *See Singer Mgmt.*, 650 F.3d at 229 (finding the injunction issued in *PAPV* was "an example of that rare situation where a merits-based determination is made at the injunction stage.").

As noted in *PAPV*, several circuits have held, or reaffirmed after *Buckhannon*, that "fee awards may be predicated on success achieved in preliminary injunctions even if the case never proceeds to a final judgment on

the merits." *PAPV*, 520 F.3d at 232, 234 & n.4 (citing *Select Milk Producers*, 400 F.3d 939, 947 (D.C. Cir. 2005) (*Buckhannon* does not endorse a *per se* rule, rather it permits, under appropriate circumstances, a preliminary injunction resulting in a court-ordered change in the legal relationship between the parties to make the plaintiff a "prevailing party" under a fee-shifting statute like the Equal Access to Justice Act); *Dupuy v. Samuels*, 423 F.3d 714, 723 (7th Cir. 2005) (rejecting a *per se* rule that a preliminary injunction can never serve as a predicate for an interim fee award); *Dubuc v. Green Oak Twp.*, 312 F.3d 736, 753-54 (6th Cir. 2002); *Watson v. Cty. of Riverside*, 300 F.3d 1092, 1095-96 (9th Cir. 2002) (a plaintiff who succeeds in obtaining a preliminary injunction can be deemed a "prevailing party" for purposes of 42 U.S.C. § 1988 even though he or she did not recover other relief sought in the lawsuit and even if the underlying case becomes moot).

Additionally, several courts have permitted prevailing party status to vest upon the entry of interim injunctive or other relief that produces, as in this matter, some of the ultimate relief sought. For example, the D.C. District Court has recognized that, under certain circumstances, prevailing-party status may result from a favorable jurisdictional ruling, a grant of preliminary injunction, or even a judicially-sanctioned stipulation. *See*, *e.g.*, *Douglas v. D.C.*, 67 F. Supp. 3d 36,

42 (D.D.C. 2014) (citing *D.C. v. Jeppsen ex rel. Jeppsen*, 514 F.3d 1287, 1290 (D.C. Cir. 2008); *Select Milk Producers,* 400 F.3d at 945; *see also Carbonell v. I.N.S.*, 429 F.3d 894, 895-96, 899 (9th Cir. 2005)). Additionally, in *Richard S. v. Department of Developmental Services of State of California*, 317 F.3d 1080, 1089 (9th Cir. 2003), the court held that a plaintiff who obtains a preliminary injunction is a prevailing party for purposes of Section 1988 even if the underlying case becomes moot and even though the plaintiff does not recover other relief sought in the lawsuit. These decisions supporting the finding that Pennsylvania substantially prevailed here because it obtained precisely the relief it sought—an injunction preventing the merger from closing, which ultimately caused the Defendants to voluntarily abandon it.

Although this Court may have intended for the preliminary injunction to be temporary, pending an adjudication on the merits by the FTC, that temporary status of the preliminary injunctive relief shifted to a permanent status when the Defendants abandoned the merger, after the preliminary injunction issued. Pennsylvania obtained more than just "some relief," as this Court required in *M.R.*, and there was sufficient judicial involvement by the District Court and this Court at the preliminary injunction stage. Given Defendants' admitted compliance with the preliminary injunction, this Court should find that

Pennsylvania was a substantially prevailing plaintiff under Section 16 because it secured a change in actual circumstances as a result of a judicial determination. This holding complies not only with the holding of *Buckhannon,* but also with principles of fundamental fairness. Conditioning fees on a "final judgment on the merits" would be unjust, contrary to the plain language of and congressional intent behind Section 16, and in disagreement with this Court's precedent and persuasive precedent from other jurisdictions, which have allowed an award of fees after obtaining interim relief such as a preliminary injunction. Pennsylvania should not be foreclosed from receiving its fees.

IV. CONCLUSION

For the foregoing reasons, the States respectfully urge this Court to reverse the District Court's denial of Pennsylvania's request for attorneys' fees.

RESPECTFULLY SUBMITTED this 18th day of December, 2017.

ROBERT W. FERGUSON
Attorney General of Washington

By: /s/ *Luminita Nodit*
LUMINITA NODIT
WSBA No. 50972
Assistant Attorney General
800 5th Ave., Ste. 2000
Seattle, WA 98164
(206) 254-0568; luminitan@atg.wa.gov

MATTHEW P. DENN
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801
(302) 577-8400

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319
(515) 281-5164

LAWRENCE G. WASDEN
Attorney General
State of Idaho
P. O. Box 83720
Boise, ID 83720
(208) 334-2400

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Blvd.
St. Paul, MN 55155-1609
(651) 296-3353

WAYNE STENEHJEM
Attorney General
tate of North Dakota
Gateway Professional Center
1050 E. Interstate Ave. Ste. 200
Bismarck, ND 58503-5574
(701) 328-2210

SEAN D. REYES
Attorney General
State of Utah
350 N. State Street, Ste. 230
Salt lake, UT 84114
(800) 244-4636

JEFF LANDRY
Attorney General
State of Louisiana
1885 North Third Street
Baton Rouge, LA 70802
(225) 326-6000

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, NM 87501
(505) 490-4060

CURTIS T. HILL, JR.
Attorney General of Indiana
Office of the Attorney General
200 West Washington St., Rm. 219
Indianapolis, IN 46204
(317) 232-6201

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the attached brief was produced in Times New Roman (a proportionately-spaced typeface), has a typeface 14 points and contains 5783 words.

CERTIFICATE OF IDENTITY BETWEEN ELECTRONIC AND PAPER COPIES

I certify that, pursuant to Third Circuit Local Rule 31.1(c), that the text of the electronic brief filed with the Court is identical to the text in the paper copies.

CERTIFICATE OF VIRUS SCAN

I certify, pursuant to Third Circuit Local Rule 31.1(c), that a virus detection program, Antimalware Client Version: 4.10.14393.1613, has been run on this file and that no virus was detected.

CERTIFICATE OF BAR MEMBERSHIP

I certify, pursuant to Third Circuit Local Rule 28.3(d), that I was admitted to the Bar of the United States Courts of Appeals for the Third Circuit on October 17, 2017, and I remain a member in good standing of the Bar of this Court.

Dated: December 18, 2017 By: /s/ Luminita Nodit
Luminita Nodit

NO. 17-2270

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Federal Trade Commission and Commonwealth of Pennsylvania,

v.

Penn State Hershey Medical Center and Pinnacle Health System,

Defendants-Appellees.

Commonwealth of Pennsylvania,
Appellant

Appeal from the Judgment of the United States
District Court for the Middle District of Pennsylvania
Entered May 11, 2017

ADDENDUM TO AMICUS BRIEF OF THE STATES OF WASHINGTON, DELAWARE, IOWA, IDAHO, MINNESOTA, NORTH DAKOTA, UTAH, LOUISIANA, NEW MEXICO, AND INDIANA AS AMICUS CURIAE IN SUPPORT OF THE APPELLANTS

ROBERT W. FERGUSON
Attorney General of Washington

LUMINITA NODIT
Assistant Attorney General
800 5th Ave., Ste. 2000
Seattle, WA 98164
(206) 254-0568, luminitan@atg.wa.gov

I. AMENDED STATEMENT OF INTEREST

Pursuant to Fed. R. App. P. 29(a), the States of Washington, Delaware, Iowa, Idaho, Minnesota, North Dakota, Utah, Louisiana, New Mexico, and Indiana respectfully submit this amicus brief in support of the Commonwealth of Pennsylvania. The Attorneys General of these States, as the chief law enforcement officers of their States, are charged with the enforcement of federal and state antitrust laws, including Section 7 of the Clayton Act, 15 U.S.C. § 18. The States have a substantial interest in ensuring that the application of the antitrust laws is consistent with underlying congressional intent and sound public policy.

The States play an active role in investigating and challenging potentially anticompetitive mergers. The States often engage in lengthy and costly antitrust investigations, both independently and in conjunction with the federal antitrust agencies. The mandatory fee-shifting provisions of the Clayton Act are an important consideration for States—particularly States that rely on cost and fees recoveries—in evaluating whether investigation and possible antitrust litigation are feasible.

The District Court erred by denying an award of attorneys' fees after issuing a preliminary injunction. Decisions in the Third Circuit and in other

circuits support the award of attorneys' fees under Section 16 of the Clayton Act, 15 U.S.C. § 26, to a plaintiff that prevails on a preliminary injunction. That precedent should be applied here, where the merging parties abandoned their transaction as a direct result of the preliminary injunction obtained by Pennsylvania. The District Court's ruling denying Pennsylvania an award of attorneys' fees frustrates the intent of the Clayton Act's fee-shifting provision, and should be reversed.

RESPECTFULLY SUBMITTED this 19th day of December, 2017.

ROBERT W. FERGUSON
Attorney General of Washington

By: /s/ *Luminita Nodit*
LUMINITA NODIT
WSBA No. 50972
Assistant Attorney General
800 5th Ave., Ste. 2000
Seattle, WA 98164
(206) 254-0568; luminitan@atg.wa.gov

CERTICATE OF SERVICE

I hereby certify that on December 18, 2017, I filed the foregoing document with the Clerk of the Court via the Case Management and Electronic Case Filing (CM/ECF) system, which will send a notice of electronic filing to all counsel of record.

ROBERT W. FERGUSON
Attorney General of Washington

By: /s/ *Luminita Nodit*
LUMINITA NODIT
WSBA No. 50972
Assistant Attorney General
800 5th Ave., Ste. 2000
Seattle, WA 98164
(206) 254-0568
luminitan@atg.wa.gov

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APPENDIX VOL. I

ROBERT W. FERGUSON
Attorney General of Washington

LUMINITA NODIT
Assistant Attorney General
800 5th Ave., Ste. 2000
Seattle, WA 98164
(206) 254-0568, luminitan@atg.wa.gov

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94TH CONGRESS } HOUSE OF REPRESENTATIVES } REPORT
2d Session } } No. 94–1558

THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976

SEPTEMBER 15, 1976.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DRINAN, from the Committee on the Judiciary, submitted the following

REPORT

[Including cost estimate of the Congressional Budget Office]

[To accompany H.R. 15460]

The Committee on the Judiciary, to whom was referred the bill (H.R. 15460) to allow the awarding of attorney's fees in certain civil rights cases, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, authorizes the courts to award reasonable attorney fees to the prevailing party in suits instituted under certain civil rights acts. Under existing law, some civil rights statutes contain counsel fee provisions, while others do not. In order to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights, it is necessary to add an attorney fee authorization to those civil rights acts which do not presently contain such a provision.

The effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens. Although some agencies of the United States have civil rights responsibilities, their authority and resources are limited. In many instances where these laws are violated, it is necessary for the citizen to initiate court action to correct the illegality. Unless the judicial remedy is full and complete, it will remain a meaningless right. Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts. In authorizing an award of reasonable attorney's fees, H.R. 15460 is designed to give such persons effective access to the judicial process where their grievances can be resolved according to law.

57–006

STATEMENT

A. NEED FOR THE LEGISLATION

In *Alyeska Pipeline Service Corp* v. *Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court held that federal courts do not have the power to award attorney's fees to a prevailing party unless an Act of Congress expressly authorizes it.[1] In the *Alyeska* case, the plaintiffs sought to prevent the construction of the Alaskan pipeline because of the damage it would cause to the environment. Although the plaintiffs succeeded in the early stages of the litigation, Congress later overturned that result by legislation permitting the construction of the pipeline. Nonetheless the lower federal courts awarded the plaintiffs their attorney's fees because of the service they had performed in the public interest. The Supreme Court reversed that award on the basis of the "American Rule": that each litigant, victorious or otherwise, must pay for its own attorney.

Although the *Alyeska* case involved only environmental concerns, the decision barred attorney fee awards in a wide range of cases, including civil rights. In fact the Supreme Court, in footnote 46 of the *Alyeska* opinion, expressly disapproved a number of lower court decisions involving civil rights which had awarded fees without statutory authorization. Prior to *Alyeska*, such courts had allowed fees on the theory that civil rights plaintiffs act as "private attorneys general" in eliminating discriminatory practices adversely affecting all citizens, white and non-white. In 1968, the Supreme Court had approved the "private attorney general" theory when it gave a generous construction to the attorney fee provision in Title II of the Civil Rights Act of 1964. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).[2] The Court stated:

> If (the plaintiff) obtains an injunction, he does so not for himself alone but also as a "private attorney general," vindicating a policy that Congress considered of the highest importance. *Id.* at 402.

However, the Court in *Alyeska* rejected the application of that theory to the award of counsel fees in the absence of statutory authorization. It expressly reaffirmed, however, its holding in *Newman* that, in civil rights cases where counsel fees are allowed by Congress, "the award should be made to the successful plaintiff absent exceptional circumstances." *Alyeska* case, *supra* at 262.

In the hearings conducted by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, the testimony indicated that civil rights litigants were suffering very severe hardships because of the *Alyeska* decision. Thousands of dollars in fees were automatically lost in the immediate wake of the decision. Representatives of the Lawyers Committee for Civil Rights Under Law, the Council

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[1] The Court in *Alyeska* recognized three very narrow exceptions to the rule: (1) where a "common fund" is involved; (2) where the litigant's conduct is vexatious, harassing, or in bad faith; and (3) where a court order is willfully disobeyed.

[2] In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Supreme Court applied the "private attorney general" theory in according broad "standing" to persons injured by discriminatory housing practices under the Federal Fair Housing Act, 42 U.S.C. 3601–3619.

for Public Interest Law, the American Bar Association Special Committee on Public Interest Practice, and witnesses practicing in the field testified to the devastating impact of the case on litigation in the civil rights area. Surveys disclosed that such plaintiffs were the hardest hit by the decision.[3] The Committee also received evidence that private lawyers were refusing to take certain types of civil rights cases because the civil rights bar, already short of resources, could not afford to do so. Because of the compelling need demonstrated by the testimony, the Committee decided to report a bill allowing fees to prevailing parties in certain civil rights cases.

It should be noted that the United States Code presently contains over fifty provisions for attorney fees in a wide variety of statutes. See Appendix A. In the past few years, the Congress has approved such allowances in the areas of antitrust, equal credit, freedom of information, voting rights, and consumer product safety. Although the recently enacted civil rights statutes contain provisions permitting the award of counsel fees, a number of the older statutes do not. It is to these provisions that much of the testimony was directed.

B. HISTORY OF H.R. 15460

At the time of the Subcomittee hearings on October 6 and 8, and Dec. 3, 1975, three bills were pending which dealt expressly with counsel fees in civil rights cases: H.R. 7828 (same as H.R. 8220); H.R. 7969 (same as H.R. 8742); and H.R. 9552. H.R. 7828 and H.R. 9552 would allow attorney fees to be awarded in cases brought under specific provisions of the United States Code, while H.R. 7969 would permit such awards in any case involving civil or constitutional rights, no matter what the source of the claim. H.R. 7828 was stated in mandatory terms; H.R. 9552 and H.R. 7969 allowed discretionary awards. The Justice Department, through its representative, Assistant Attorney General Rex Lee of the Civil Division, expressed its support of H.R. 9552. Hearings held in 1973 by the Senate Judiciary Subcommittee on the Representation of Citizen Interests also highlighted the need of the public for legal assistance in this and other areas.

In August, 1976, the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice concluded that a bill to allow counsel fees in certain civil rights cases should be reported favorably in view of the pressing need. On August 26, 1976, the Subcommittee approved H.R. 9552 with an amendment in the nature of a substitute because it was similar to S. 2278, which had cleared the Senate Judiciary Committee and was awaiting action by the full Senate. The amendment in the nature of a substitute sought to conform H.R. 9552 technically to S. 2278; no substantive changes were made. It was then reported unanimously by the Subcommittee.

On September 2, 1976, the full Committee approved H.R. 9552, as amended, with an amendment offered by Congresswoman Holtzman and accepted by the Committee. That amendment added title IX of Public Law 92–318 to the substantive provisions under which successful litigants could be awarded counsel fees. The Committee then

[3] See, *Balancing the Scales of Justice: Financing Public Interest Law in America* (Council for Public Interest Law, 1976), pp. 238, 364, D–2).

ordered that a clean bill be reported to the House. H.R. 15460, the clean bill, was introduced on September 8 and approved pro forma by the Committee on September 9, 1976.[4]

C. SCOPE OF THE BILL

H.R. 15460, the Civil Rights Attorney's Fees Awards Act of 1976, would amend Section 722 (42 U.S.C. 1988) of the Revised Statutes to allow the award of fees in certain civil rights cases.[5] It would apply to actions brought under seven specific sections of the United States Code.[6] Those provisions are: Section 1981, 1982, 1983, 1985, 1986, and 2000d et seq. of Title 42; and Section 1681 et seq. of Title 20. See Appendix B for full texts. The affected sections of Title 42 generally prohibit denial of civil and constitutional rights in a variety of areas, while the referenced sections of Title 20 deal with discrimination on account of sex, blindness, or visual impairment in certain education programs and activities.[7]

More specifically, Section 1981 is frequently used to challenge employment discrimination based on race or color. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975).[8] Under that section the Supreme Court recently held that whites as well as blacks could bring suit alleging racially discriminatory employment practices. *McDonald* v. *Santa Fe Trail Transportation Co.*, ——— U.S. ———, 96 S. Ct. 2574 (1976). Section 1981 has also been cited to attack exclusionary admissions policies at recreational facilities. *Tillman* v. *Wheaton-Haven Recreation Ass'n, Inc.*, 410 U.S. 431 (1973). Section 1982 is regularly used to attack discrimination in property transactions, such as the purchase of a home. *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968).[9]

Section 1983 is utilized to challenge official discrimination, such as racial segregation imposed by law. *Brown* v. *Board of Education*, 347 U.S. 483 (1954). It is ironic that, in the landmark *Brown* case challenging school segregation, the plaintiffs could not recover their attorney's fees, despite the significance of the ruling to eliminate officially

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[4] Apart from the addition of Title IX of Public Law 92–318, the only difference between H.R. 9552 and the clean bill (H.R. 15460) are technical, not affecting the substance, made on advice of the House Parliamentarian and staff and legislative counsel.

[5] The bill amends the Revised Statutes rather than the United States Code because Title 42 is not codified, and thus is not "the law of the United States."

[6] In accordance with applicable decisions of the Supreme Court, the bill is intended to apply to all cases pending on the date of enactment as well as all future cases. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974).

[7] To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. *Morales* v. *Haines*, 486 F. 2d 880 (7th Cir. 1973). In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constittuional claim is dispositive. *Hagans* v. *Lavine*, 415 U.S. 528 (1974). In such cases, if the claim for which fees may be awarded meets the "substantiality" test, *see Hagans* v. *Lavine*, *supra*; *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a "common nucleus of operative fact." *United Mine Workers* v. *Gibbs*, *supra* at 725.

[8] With respect to the relationship between Section 1981 and Title VII of the Civil Rights Act of 1964, the House Committee on Education and Labor has noted that "the remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive." H.R. Rept. No. 92–238, p. 19 (92nd Cong. 1st Sess. 1971). That view was adopted by the Supreme Court in *Johnson* v. *Railway Express Agency*, *supra*.

[9] As with Section 1981 and Title VII, Section 1982 and Title VIII of the Civil Rights Act of 1968 are complementary remedies, with similarities and differences in coverage and enforcement mechanism. See *Jones* v. *Mayer Co.*, *supra*.

imposed segregation. Section 1983 has also been employed to challenge unlawful official action in non-racial matters. For example, in *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663 (1966), indigent plaintiffs successfully challenged as unconstitutional the imposition of a poll tax in state and local elections. In *Monroe* v. *Pape*, 365 U.S. 167 (1961), a private citizen sought damages against local officials for an unconstitutional search of a private residence. See also *Elrod* v. *Burns*, —— U.S. ——, 96 S. Ct. 2673 (June 28, 1976) (discrimination on account of political affiliation in public employment); *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975) (terms and conditions of institutional confinement).

Section 1985 and 1986 are used to challenge conspiracies, either public or private, to deprive individuals of the equal protection of the laws. See *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971). The bill also covers suits brought under Title IX of Public Law 92–318, the Education Amendments of 1972, 20 U.S.C. 1681–1686. Title IX forbids specific kinds of discrimination on account of sex, blindness, or visual impairment in certain federally assisted programs and activities relating to education. Finally H.R. 15460 would also apply to actions arising under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d–2000d–6.[10]

Title VI prohibits the discriminatory use of Federal funds, requiring recipients to administer such assistance without regard to race, color, or national origin. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Hills* v. *Gautreaux*, —— U.S. ——, 96 S. Ct. 1538 (April 20, 1976); *Adams* v. *Richardson*, 480 F. 2d 1159 (D.C. Cir. 1973); *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967); *Laufman* v. *Oakley Building and Loan Co.*, 408 F. Supp. 489 (S.D. Ohio 1976).

D. DESCRIPTION OF H.R. 15460

As noted earlier, the United States Code presently contains over fifty provisions for the awarding of attorney fees in particular cases. They may be placed generally into four categories: (1) mandatory awards only for a prevailing plaintiff; (2) mandatory awards for any prevailing party; (3) discretionary awards for a prevailing plaintiff; and (4) discretionary awards for any prevailing party. Existing statutes allowing fees in certain civil rights cases generally fall into the fourth category. Keeping with that pattern, H.R. 15460 tracks the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964,[11] and Section 402 of the Voting Rights Act Amendments of 1975.[12] The substantive section of H.R. 15460 reads as follows:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[10] Title VI of the Civil Rights Act of 1964 is the only substantive title of that Act which does not contain a provision for attorney fees.
[11] 42 U.S.C. 2000a–3(b) (Title II); 42 U.S.C. 2000e–5(k) (Title VII).
[12] 42 U.S.C. 1973(e) (Section 402).

The three key features of this attorney's fee provision are: (1) that awards may be made to any "prevailing party"; (2) that fees are to be allowed in the discretion of the court; and (3) that awards are to be "reasonable". Because other statutes follow this approach, the courts are familiar with these terms and in fact have reviewed, examined, and interpreted them at some length.

1. Prevailing party

Under H.R. 15460, either a prevailing plaintiff or a prevailing defendant is eligible to receive an award of fees. Congress has not always been that generous. In about two-thirds of the existing statutes, such as the Clayton Act and the Packers and Stockyards Act, only prevailing plaintiffs may recover their counsel fees.[13] This bill follows the more modest approach of other civil rights acts.

It should be noted that when the Justice Department testified in support of H.R. 9552, the precedessor to H.R. 15460, it suggested an amendment to allow recovery only to prevailing plaintiffs. Assistant Attorney General Lee thought the phrase "prevailing party" might have a "chilling effect" on civil rights plaintiffs, discouraging them from initiating law suits. The Committee was very concerned with the potential impact such a phrase might have on persons seeking to vindicate these important rights under Federal law. In light of existing case law under similar provisions, however, the Committee concluded that the application of current standards to this bill will significantly reduce the potentially adverse affect on the victims of unlawful conduct who seek to assert their federal claims.

On two occasions, the Supreme Court has addressed the question of the proper standard for allowing fees in civil rights cases. In *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam), a case involving racial discrimination in a place of public accommodation, the Court held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."

Five years later, the Court applied the same standard to the attorney's fee provision contained in Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. 1617. *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973) (per curiam). The rationale of the rule rests upon the recognition that nearly all plaintiffs in these suits are disadvantaged persons who are the victims of unlawful discrimination or unconstitutional conduct. It would be unfair to impose upon them the additional burden of counsel fees when they seek to invoke the jurisdiction of the federal courts. "If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Newman* v. *Piggie Park Enterprises, Inc.*, *supra* at 402.

Consistent with this rationale, the courts have developed a different standard for awarding fees to prevailing defendants because they do "not appear before the court cloaked in a mantle of public interest." *United States Steel Corp.* v. *United States*, 519 F.2d 359, 364 (3rd Cir. 1975). As noted earlier such litigants may, in proper circum-

[13] 15 U.S.C. 15 (Clayton Act); 7 U.S.C. 210(f) (Packers and Stockyards Act).

stances, recover their counsel fees under H.R. 15460. To avoid the potential "chilling effect" noted by the Justice Department and to advance the public interest articulated by the Supreme Court, however, the courts have developed another test for awarding fees to prevailing defendants. Under the case law, such an award may be made only if the action is vexatious and frivolous, or if the plaintiff has instituted it solely "to harass or embarrass" the defendant. *United States Steel Corp.* v. *United States*, *supra* at 364. If the plaintiff is "motivated by malice and vindictiveness," then the court may award counsel fees to the prevailing defendant. *Carrion* v. *Yeshiva University*, 535 F.2d 722 (2d Cir. 1976). Thus if the action is not brought in bad faith, such fees should not be allowed. See, *Wright* v. *Stone Container Corp.* 524 F.2d 1058 (8th Cir. 1975); see also *Richardson* v. *Hotel Corp of America*, 332 F. Supp. 519 (E.D.La. 1971), *aff'd without published opinion*, 468 F.24 951 (5th Cir. 1972). This standard will not deter plaintiffs from seeking relief under these statutes, and yet will prevent their being used for clearly unwarranted harassment purposes.

With respect to the awarding of fees to prevailing defendants, it should further be noted that governmental officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460. See, *e.g.*, *Brown* v. *Board of Education*, *supra*; *Gautreaux* v. *Hills*, *supra; O'Connor* v. *Donaldson*, *supra.* Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. Applying the same standard of recovery to such defendants would further widen the gap between citizens and government officials and would exacerbate the inequality of litigating strength. The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.[14]

The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. *Incarcerated Men of Allen County* v. *Fair*, 507 F.2d 281 (6th Cir. 1974); *Parker* v. *Matthews*, 411 F. Supp. 1059 (D.D.C. 1976); *Aspira of New York, Inc.*, v. *Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975). A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed. *E.g.*, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), *cert denied*, 409 U.S. 982 (1972): see also *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Evers* v. *Dwyer*, 358 U.S. 202 (1958).

A prevailing defendant may also recover its fees when the plaintiff seeks and obtains a voluntary dismissal of a groundless complaint,

[14] Of course, the 11th Amendment is not a bar to the awarding of counsel fees against state governments. *Fitzpatrick* v. *Bitzer*, ——U.S.——, 96 S.Ct. 2666 (June 28, 1976).

Corcoran v. *Columbia Broadcasting System*, 121 F.2d 575 (9th Cir. 1941), as long as the other factors, noted earlier, governing awards to defendants are met. Finally the courts have also awarded counsel fees to a plaintiff who successfully concludes a class action suit even though that individual was not granted any relief. *Parham* v. *Southwestern Bell Telephone Co.*, *supra*; *Reed* v. *Arlington Hotel Co., Inc.*, 476 F.2d 721 (8th Cir. 1973).

Furthermore, the word "prevailing" is not intended to require the entry of a *final* order before fees may be recovered. "A district court must have discretion to award fees and costs incident to the final disposition of interim matters." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 723 (1974); see also *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Such awards pendente lite are particularly important in protracted litigation, where it is difficult to predicate with any certainty the date upon which a final order will be entered. While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidelines. "(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees. . . ." *Bradley* v. *Richmond School Board*, *supra* at 722 n. 28.

2. Judicial discretion

The second key feature of the bill is its mandate that fees are only to be allowed in the discretion of the court. Congress has passed many statutes *requiring* that fees be awarded to a prevailing party.[15] Again the Committee adopted a more moderate approach here by leaving the matter to the discretion of the judge, guided of course by the case law interpreting similar attorney's fee provisions. This approach was supported by the Justice Department on Dec. 31, 1975. The Committee intends that, at a minimum, existing judicial standards, to which ample reference is made in this report, should guide the courts in construing H.R. 15460.

3. Reasonable fees

The third principal element of the bill is that the prevailing party is entitled to "reasonable" counsel fees. The courts have enumerated a number of factors in determining the reasonableness of awards under similarly worded attorney's fee provisions. In *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for example, the court listed twelve factors to be considered, including the time and labor required, the novelty and difficulty of the questions involved, the skill needed to present the case, the customary fee for similar work, and the amount received in damages, if any. *Accord*: *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974); see also *United States Steel Corp.* v. *United States*, *supra*.

Of course, it should be noted that the mere recovery of damages should not preclude the awarding of counsel fees.[16] Under the anti-

[15] E.g., 7 U.S.C. 499g(b) (Perishable Agricultural Commodities Act); 15 U.S.C. 1640(a) (Truth-in-Lending Act); 46 U.S.C. 1277 (Merchant Marine Act of 1936); 47 U.S.C. 206 (Communications Act of 1934).

[16] Similarly, a prevailing party is entitled to counsel fees even if represented by an organization or if the party is itself an organization. *Incarcerated Men of Allen County* v. *Fair*, *supra*; *Torres* v. *Sachs*, 69 F.R.D. 343 (S.D.N.Y. 1975), aff'd. —— F.2d —— (2d Cir., June 25, 1976); *Fairley* v. *Patterson*, 493 F2d 598 (5th Cir. 1974).

trust laws, for example, a plaintiff may recover treble damages and still the court is required to award attorney fees. The same principle should apply here as civil rights plaintiffs should not be singled out for different and less favorable treatment. Furthermore, while damages are theoretically available under the statutes covered by H.R. 15460, it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy.[17] Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected. To be sure, in a large number of cases brought under the provisions covered by H.R. 15460, only injunctive relief is sought, and prevailing plaintiffs should ordinarily recover their counsel fees. *Newman* v. *Piggie Park Enterprises, Inc., supra; Northcross* v. *Memphis Board of Education, supra.*

The application of these standards will insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights, while avoiding windfalls to attorneys. The effect of H.R. 15460 will be to promote the enforcement of the Federal civil rights acts, as Congress intended, and to achieve uniformity in those statutes and justice for all citizens.

Oversight

Oversight of the administration of justice in the federal court system is the responsibility of the Committee on the Judiciary. The hearings on October 6 and 8 and Dec. 3, 1975, focused on specific pending legislation. However, they did have an oversight purpose, as well, since the impact of the Supreme Court's *Alyeska* decision on the public and the related issue of equal access to the courts were subjects of the hearing.

Committe Vote

H.R. 15460 was reported favorably by a voice vote of the Committee on September 9, 1976. Twenty-seven members of the Committee were present.

Statement of the Committe on Government Operations

No statement has been received on the legislation from the House Committee on Government Operations.

Statement of the Congrssional Budget Office

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee estimates there will be no cost to the federal government.

[17] *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Pierson* v. *Ray,* 386 U.S. 547 (1967).

CONGRESS OF THE UNITED STATES,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., September 7, 1976.

Hon. PETER W. RODINO,
Chairman, Committee on the Judiciary, U.S. House of Represenatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed the Civil Rights Attorney's Fees Award Act of 1976, a bill to award attorney's fees to prevailing parties in civil rights suits to enforce Sections 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes, Title IX of P.L. 92–318 or Title VI of the Civil Rights Act of 1964.

Based on this review, it appears that no additional cost to the government would be incurred as a result of enactment of this bill.

Sincerely,

ALICE M.RIVLIN,
Director.

INFLATIONARY IMPACT STATEMENT

The legislation will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

SECTION-BY-SECTION ANALYSIS

Section 1

Section 1 merely recites the short title of the legislation, "The Civil Rights Attorney's Fees Awards Act of 1976".

Section 2

Section 2 amends section 722 (42 U.S.C. 1988) of the Revised Statutes by adding at the end of that section the following language:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, 1981 of the Revised Statutes, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailig party, other than the United States, a reasonable attorney's fee as part of the costs.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 722 OF THE REVISED STATUTES

SEC. 722. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindi-

cation, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. *In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92–318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.*

APPENDIX A[1]

FEDERAL STATUTES AUTHORIZING THE AWARD OF ATTORNEY FEES

1. Federal Contested Election Act, 2 U.S.C. 396.
2. Freedom of Information Act, 5 U.S.C. 552(a)(4)(E).
3. Privacy Act, 5 U.S.C. 552a(g)(3)(B).
4. Federal Employment Compensation For Work Injuries, 5 U.S.C. 8127.
5. Packers and Stockyards Act, 7 U.S.C. 210(f).
6. Perishable Agricultural Commodities Act, 7 U.S.C. 499g (b), (c).
7. Agricultural Unfair Trade Practices Act, 7 U.S.C. 2305 (a), (c).
8. Plant Variety Act, 7 U.S.C. 2565.
9. Bankruptcy Act, 11 U.S.C. 104(a)(1).
10. Railroad Reorganization Act of 1935, 11 U.S.C. 205(c)(12).
11. Corporate Reorganization Act, 11 U.S.C. 641, 642, 643, and 644.
12. Federal Credit Union Act, 12 U.S.C. 1786(O).
13. Bank Holding Company Act, 12 U.S.C. 1975.
14. Clayton Act, 15 U.S.C. 15.
15. Unfair Competition Act (FTC), 15 U.S.C. 72.
16. Securities Act of 1933, 15 U.S.C. 77k(e).
17. Trust Indenture Act, 15 U.S.C. 77www(a).
18. Securities Exchange Act of 1934, 15 U.S.C. 78i(e), 78r(a).
19. Jewelers Hall-Mark Act, 15 U.S.C. 298 (b), (c) and (d).
20. Truth-in-Lending Act (Fair Credit Billing Amendments), 15 U.S.C. 1640(a).
21. Fair Credit Reporting Act, 15 U.S.C. 1681(n).
22. Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 1918(a), 1989(a)(2).
23. Consumer Product Safety Act, 15 U.S.C. 2072, 2073.
24. Federal Trade Improvements Act (Amendments), 15 U.S.C. 2310(a)(5)(d)(2).
25. Copyright Act, 17 U.S.C. 1116.
26. Organized Crime Control Act of 1970, 18 U.S.C. 1964(c).
27. Education Amendments of 1972, 20 U.S.C. 1617.
28. Mexican American Treaty Act of 1950, 22 U.S.C. 277d–21.
29. International Claim Settlement Act, 22 U.S.C. 1623(f).
30. Federal Tort Claim Act, 28 U.S.C. 2678.
31. Norris-LaGuardia Act, 29 U.S.C. 107.
32. Fair Labor Standards Act, 29 U.S.C. 216(b).
33. Employees Retirement Income Security Act, 29 U.S.C. 1132(g).
34. Labor Management Reporting and Disclosure Act, 29 U.S.C. 431(c), 501(b).
35. Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. 928.

[1] This list is compiled from information submitted to the Subcommittee by the Council for Public Interest La wand the Attorneys' Fee Project of the Lawyers' Committee for Civil Rights Under Law.

36. Water Pollution Prevention and Control Act, 33 U.S.C. 1365(d).
37. Ocean Dumping Act, 33 U.S.C. 1415(g)(4).
38. Deepwater Ports Act of 1974, 33 U.S.C. 1515.
39. Patent Infringement Act, 35 U.S.C. 285.
40. Servicemen's Group Life Insurance Act, 38 U.S.C. 784(g).
41. Servicemen's Readjustment Act, 38 U.S.C. 1822(b).
42. Veterans Benefit Act, 38 U.S.C. 3404(c).
43. Safe Drinking Water Act, 42 U.S.C. 300j–8(d).
44. Social Security Act (Amendments of 1965), 42 U.S.C. 406(b).
45. Clean Air Act (Amendments of 1970), 42 U.S.C. 1857h–2.
46. Civil Rights Act of 1964, Title II, 42 U.S.C. 2000a–3(b).
47. Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e–5(k).
48. Legal Services Corporation Act, 42 U.S.C. 2996e(f).
49. Fair Housing Act of 1968, 42 U.S.C. 3612(c).
50. Noise Control Act of 1972, 42 U.S.C. 4911(d).
51. Railway Labor Act, 45 U.S.C. 153(p).
52. Merchant Marine Act of 1936, 46 U.S.C. 1227.
53. Communications Act of 1934, 47 U.S.C. 206.
54. Interstate Commerce Act, 49 U.S.C. 8, 16(2), 908(b), 908(e), and 1017(b)(2).

APPENDIX B

STATUTES COVERED OR AMENDED BY H.R. 15460

1. Revised Statutes § 1977 (42 U.S.C. § 1981).

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

R.S. § 1977.

2. Revised Statutes § 1978 (42 U.S.C. § 1982).

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

R.S. § 1978.

3. Revised Statutes § 1979 (42 U.S.C. § 1983).

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

4. Revised Statutes § 1980 (42 U.S.C. § 1985).

§ 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two of more persons in any State of Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one of more of the conspirators.

R.S. § 1980.

5. Revised Statutes § 198 (42 U.S.C. § 1986).

§ 1986. Same; action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and

any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

R.S. § 1981.

6. Revised Statutes § 722 (42 U.S.C. § 1988).

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

R.S. § 722.

7. Title IX of Public Law 92-318 (20 U.S.C. § 1681-1686), as amended.

§ 1681. Sex—Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

Classes of Educational Institutions Subject to Prohibition

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

Educational Institutions Commencing Planned Change in Admissions

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change

which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

Educational institutions of religious organizations with contrary religious tenets

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

Educational institutions training individuals for military services or merchant marine

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

Public educational institutions with traditional and continuing admissions policy

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex; and

Social fraternities or sororities; voluntary youth service organizations

(6) This section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison

with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided.* That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Educational Institution Defined

(c) For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such terms means each such school, college, or department.

§ 1682. Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Public Law 92–318, Title IX, § 902, June 23, 1972, 86 Stat. 374.

§ 1683. Judicial review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that Title.

Public Law 92–318, Title IX, § 903, June 23, 1972, 86 Stat. 374.

§ 1684. Blindness or visual impairment; prohibition against discriminaton

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

Public Law 92–318, Title IX, § 904, June 23, 1972, 86 Stat. 375.

§ 1685. Authorty under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

Public Law 92–318, Title IX, § 905, June 23, 1972, 86 Stat. 375.

§ 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

Public Law 92–318, Title IX, § 907, June 23, 1972, 86 Stat. 375.

8. Title VI of the Civil Rights Act of 1964 (Publ. L. 88–352, as amended), (42 U.S.C. 2000d through d–6).

SUBCHAPTER V.—FEDERALLY ASSISTED PROGRAMS

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (Pub. L. 88–352, title VI, § 601, July 2, 1964, 78 Stat. 252.)

§ 2000d–1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to congressional committees; effective date of administrative action

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report. (Pub. L. 88–352, title VI, § 602, July 2, 1964, 78 Stat. 252.)

§ 2000d–2. Judicial review; Administrative Procedure Act.

Any department or agency action taken pursuant to section 2000d–1 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 2000d–1 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 1009 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section. (Pub. L. 88–352, title VI, § 603, July 2, 1964, 78 Stat. 253.)

§ 2000d–3. Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency or labor organization except where a primary objective of the Federal financial assistance is to provide employment. (Pub. L. 88–352, title VI, § 604, July 2, 1964, 78 Stat. 253.)

§ 2000d–4. Federal authority and financial assistance to programs or activities by way of contract of insurance or guaranty

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty. (Pub. L. 88–352, title VI, § 605, July 2, 1964, 78 Stat. 253.)

§ 2000–5. Prohibited deferral of action on applications by local educational agencies seeking federal funds for alleged noncompliance with Civil Rights Act.

The Commissioner of Education shall not defer action or order action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of this subchapter for more than sixty days after notice is given to such local agency of such deferral unless such local agency is given the opportunity for a hearing as provided in section 2000d–1 of this title, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing unless there has been an express finding on the record of such hearing that such local educational agency has failed to comply with the provisions of this subchapter: *Provided*, That, for the purpose of determining whether a local educational agency is in compliance with this subchapter, compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be deemed to be in compliance with this subchapter, insofar as the matters covered in the order or judgment are concerned. (Pub. L. 89–750, title I, § 182, Nov. 3, 1966, 80 Stat. 1209; Pub. L. 90–247, title I, § 112, Jan. 2, 1968, 81 Stat. 787).

§ 2000d–6. Policy of United States as to application of nondiscrimination provisions in schools of local educational agencies

(a) Declaration of uniform policy.

It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and

section 182 of the Elementary and Secondary Education Amendments of 1966 dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied uniformly in all regions of the United States whatever the origin or cause of such segregation.

(b) Nature of uniformity

Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.

(c) Prohibition of construction for diminution of obligation for enforcement or compliance with nondiscrimination requirements

Nothing in this section shall be construed to diminish the obligation of responsible officials to enforce or comply with such guidelines and criteria in order to eliminate discrimination in federally assisted programs and activities as required by title VI of the Civil Rights Act of 1964.

(d) Additional funds

It is the sense of the Congress that the Department of Justice and the Department of Health, Education, and Welfare should request such additional funds as may be necessary to apply the policy set forth in this section throughout the United States. (Pub. L. 91–230, § 2, Apr. 13, 1970, 84 Stat. 121.)

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