No. 19-677

In The Supreme Court of the United States

DAVE YOST AND JOSEPH DETERS,

Petitioners,

v.

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF GEORGIA, ALABAMA, ALASKA, ARKANSAS, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, AND UTAH AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

This case is about how to interpret the term "prevailing parties," the statutory threshold for deciding when parties in certain civil rights lawsuits are eligible for attorney's fees. 42 U.S.C. § 1988. The States have obvious sovereign interests in the proper construction of this threshold because state officials are often defendants in these cases, and the States will inevitably pay any fee awards against them, which can easily reach six figures. At the least, the States need clear and predictable rules for when they may be exposed to such awards so they can structure their conduct—budgeting, litigation, and otherwise—accordingly.

Unfortunately, the circuit courts have not supplied clear or predictable rules for the particular question of fee eligibility this case presents: when can a preliminary injunction serve as the basis for attorney's fees if the party seeking them never wins a final merits ruling? This question often arises when a state takes steps that resolve the plaintiff's concerns—for example, amending a voter ID law or changing an enforcement policy—after a preliminary injunction is issued. If the state's actions will expose it to a substantial fee award, the state needs to know that in advance so it can make an informed decision whether to press on with the lawsuit. Without clear rules to guide that decision, the States are left to gamble with public money.

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[1] *Amici* have notified counsel for all parties of their intention to file this brief. Sup. Ct. Rules 37.2(a), 37.4.

The *amici* States therefore urge this Court to step in and clear up this question so States can make sound litigation and policy decisions on the public's behalf.

SUMMARY OF THE ARGUMENT

Ohio's petition identifies a recurring issue of great importance to the States. Under 42 U.S.C. § 1988 and a number of other federal statutes, plaintiffs regularly seek and courts impose substantial fee awards against state officials based on preliminary injunctions when a case ends without a merits judgment. Yet the circuit courts have not established clear or consistent standards for when, if ever, attorney's fees are authorized under these circumstances. Instead, the circuits apply amorphous, subjective tests that fall short of this Court's call for "ready administrability" in fee eligibility standards. These unstable tests impose needless costs on the States and their residents in the form of protracted secondary litigation over fees, uncertainty that complicates their litigation and policy decisions, and a perverse incentive to continue litigating cases to final judgment to avoid spending the public's money on attorney's fees.

Many circuits, including the Sixth Circuit here, allow fee awards to preliminary-injunction winners under circumstances that conflict with the plain language of § 1988 and this Court's precedents. Those precedents make clear that a party is not a "prevailing party" entitled to attorney's fees unless the party

secures relief that is both (1) court-ordered and (2) enduring. Cobbling together these requirements from a preliminary injunction (court-ordered, but not enduring) and nonjudicial circumstances that moot the case (perhaps enduring, but not court-ordered) is not good enough.

ARGUMENT

I. The second question presented is recurring and important to the States.

The petitioners' second question presented asks when, if ever, a plaintiff who wins a preliminary injunction but never a merits ruling is a "prevailing party" entitled to attorney's fees under 42 U.S.C. § 1988. This question is a recurring one because plaintiffs regularly seek attorney's fees in these circumstances, which mostly arise when the defendant's (or a third party's) actions resolve the plaintiff's concerns after a preliminary injunction is issued but before the court decides the merits of the case. And it is important for this Court to provide a clear answer to this question because the circuit courts have not: their tests for addressing fee eligibility in these circumstances are subjective and unpredictable. This imposes unnecessary costs on the States and their residents.

A. Plaintiffs regularly seek and courts impose substantial fee awards against state officials based on preliminary injunctions when cases end without a merits judgment in the plaintiff's favor.

The plaintiffs in this case failed to win a merits ruling on any of their claims against Ohio officials before the FDA's independent action gave them what they sought and mooted their case. Yet, because the district court had earlier issued a preliminary injunction based on one of the plaintiffs' four claims, the court deemed them "prevailing parties" under § 1988 and put Ohio on the hook for $382,529.98 in attorney's fees. *See Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 538 (6th Cir. 2012). The plaintiffs did not win their lawsuit, but Ohio can hardly be faulted for thinking it lost.

Unfortunately for the States, Ohio is not an outlier. Plaintiffs regularly seek and courts have been willing to impose substantial fee awards against state officials under § 1988 based on this same combination: a preliminary injunction, and a case that ends without the plaintiffs having won a merits judgment.

Take Georgia. In *Common Cause/Georgia v. Billups*, the district court issued a preliminary injunction against enforcement of a voter ID law. 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005). After Georgia enacted a new law that expanded the ways for voters to comply with the ID requirement, and after reviewing the new law on the merits, the court ultimately denied

permanent injunctive relief because Georgia's "compelling interest in preventing fraud in voting" outweighed any burden that the ID requirement might have on the right to vote. 504 F. Supp. 2d 1333, 1382 (N.D. Ga. 2007), *aff'd*, 554 F.3d 1340, 1355 (11th Cir. 2009). So the plaintiffs didn't just not win a merits judgment—they lost the case. Yet the State paid $112,235.03 in fees because the plaintiffs had obtained a preliminary injunction against the old law. 554 F.3d at 1356; No. 4:05-cv-0201-HLM, 2007 WL 9723985, at *22 (N.D. Ga. Dec. 27, 2007).

Another fee award is brewing in a pending Georgia elections case. In *Curling v. Raffensberger*, the plaintiffs challenged Georgia's use of certain electronic voting machines. 397 F. Supp. 3d 1334 (N.D. Ga. 2019). After the suit was filed, Georgia appropriated money for new voting machines (which are now purchased ready for use in the next elections). But the district court still issued a preliminary injunction prohibiting Georgia from using the old system in future elections—even though the State had already said it was not planning to do so—and directing the State to produce a backup plan in case the new system is not ready in time. *Id.* at 1410. Based entirely on that order, the plaintiffs have now sought $5,971,509.69 in attorney's fees, relying heavily on *Common Cause*. No. 1:17-cv-2989, ECF Nos. 595, 596, 629, 630 (N.D. Ga. 2017).

Other States, and their political subdivisions too, have paid large fee awards under the same basic set of circumstances:

- In *Kansas Judicial Watch v. Stout*, candidates for judicial office obtained a preliminary injunction preventing the Kansas Commission on Judicial Qualifications from disciplining them for responding to a candidate questionnaire. 653 F.3d 1230 (10th Cir. 2011). The Kansas Supreme Court revised the challenged canons before the district court decided the merits of the challenge. *Id.* at 1234. Kansas paid $151,470.08 in fees.

- In *People Against Police Violence v. City of Pittsburgh*, the plaintiffs challenged Pittsburgh's ordinance regulating parades and crowds in public forums. 520 F.3d 226, 230 (2008). The court preliminarily enjoined the ordinance, and the city immediately proposed a revised ordinance. *Id.* The parties never litigated the merits of the original ordinance, but the city still paid $103,718.89 in attorney's fees. *Id.*

- In *Watson v. County of Riverside*, the plaintiff sought and obtained a preliminary injunction preventing the county from introducing a police report in his administrative termination proceedings. 300 F.3d 1092, 1094 (9th Cir. 2002). The court later granted judgment for defendants on all claims except one—on which the court merely denied summary judgment—but because the administrative hearing was over, that claim was moot. *Id.* The county still paid $153,988.41 in fees, including fees for post-preliminary-injunction work, even though the plaintiff did not prevail on

the legal merits of any claim. *Id*. at 1095, 1097.

- In *American Broadcasting Companies, Inc. v. Ritchie*, the plaintiffs challenged a law that prohibited exit polling within 100 feet of a polling place. Civil No. 08-5285, 2011 WL 665858, at *1 (D. Minn. Feb. 14, 2011). The court issued a preliminary injunction against enforcement of statute for the 2008 election. After the 2008 election, Minnesota amended the law to permit exit polling. *Id.* at *3. Despite an absence of any merits ruling on the plaintiffs' claims, the state paid $148,375.27 in fees and expenses. *Id*. at *10.

And those are just § 1988 cases. The same "prevailing party" language under which courts have awarded attorney's fees in moot § 1983 cases based on preliminary injunctions appears in many other federal statutes that authorize fee-shifting. *See* 15 U.S.C. § 1117(a) (Lanham Act); 20 U.S.C. § 1415(i)(3)(B)(i) (Individuals with Disabilities Education Act); 42 U.S.C.A. § 2000e-5(k) (Civil Rights Act of 1964); 42 U.S.C. § 3613(c)(2) (Fair Housing Act); 42 U.S.C. § 12205 (Americans with Disabilities Act); 52 U.S.C. § 10310(e) (Voting Rights Act). Courts generally have applied these statutes in the same way:

- In *Douglas v. District of Columbia*, a plaintiff sued under the Individuals with Disabilities Education Act and obtained a preliminary injunction directing the public school to permit him to return to and complete a program for at-risk students. 67 F. Supp. 3d 36, 39 (D.D.C.

2014). Because the plaintiff was allowed to return to school, the case was mooted before any merits decision. But the district court ordered the school system to pay $17,009.62 in fees under 20 U.S.C. § 1415(i)(3)(B)(i). *Id.* at 39, 44.

- In *Tri-City Community Action Program, Inc., v. City of Malden*, the plaintiffs wished to retrofit a house to bring it into compliance with the ADA. 680 F. Supp. 2d 306, 308 (D. Mass. 2010). They sought and obtained a preliminary injunction preventing the city from interfering. *Id*. at 310. The construction ended, mooting the suit, before any further litigation occurred. *Id*. at 310–11. The City paid $49,999 in fees under 42 U.S.C. § 3613(c)(2). *Id.* at 317.

- And in *Davis v. Perry*, the plaintiffs challenged a redistricting plan adopted by the Texas legislature. 991 F. Supp. 2d 809, 815 (W.D. Tex. 2014). The court enjoined the plan because it had not been precleared under the Voting Rights Act, and the court issued its own interim plan for the 2012 election. *Id*. at 816. After preclearance was denied by a different district court, the Texas Legislature passed a new plan, which mirrored the court's interim plan, mooting the case. *Id.* at 818. The district court ordered Texas to pay $363,378.43 under § 1988 and § 10310(e) because the plaintiffs obtained "judicially sanctioned interim relief." *Davis v. Abbott*, 781 F.3d 207, 213 (5th Cir. 2015). This time, however, the court of appeals reversed the fee award. *Id.* at 215 (holding that the plaintiffs were not prevailing parties because the preliminary relief did not arise

from a prediction of future success on the merits).

In short: what happened to Ohio happens a lot.

B. The circuit courts have failed to establish a clear and consistent test for when a preliminary injunction supports a fee award in a case that ends without a merits judgment.

Because this question of fee eligibility for preliminary-injunction winners is a recurring one, it stands to reason that the rule for deciding it, like standards for fee eligibility in general, should be clear and easy to administer. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 610 (2001). But most circuit courts have not provided such a rule. In addition to coming up with a number of different and often conflicting formulations of a rule to govern fee eligibility (as the petition demonstrates), circuit courts have mostly chosen amorphous, fact-specific rules over bright lines. *See Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008) ("[C]ircuit courts considering this issue have announced fact-specific standards that are anything but uniform.").

Just two circuit courts have established a bright-line rule to govern the fee-eligibility question presented here. In the Third and Fourth Circuits, a plaintiff who wins a preliminary injunction is not a "prevailing party" on that basis alone because the plaintiff has not won anything on the merits. *See Singer Mgmt.*

Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011) (en banc); *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002).[2]

Other circuits' rules are messier.

Start with the Sixth Circuit, whose test is especially hard to pin down (as the Ohio officials found in this case). A principal circuit case considering the question of fees for preliminary-injunction winners in detail never articulated a test, instead just describing the inquiry as "contextual and case-specific." *McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir. 2010). And the panel below embraced the amorphous nature of that standard in affirming the district court's decision to award fees, deeming it sufficient that the preliminary injunction amounted to success on a "significant issue" that "achieved some benefit" and conferred a "lasting change" in the parties' legal relationship. *Planned Parenthood Sw. Ohio Region v. Dewine*, 931 F.3d 530, 542 (6th Cir. 2019). It is not clear from the decision below how "significant" the issue won must be, or how much the plaintiff must "benefit" from it, or how long of a change in legal relationship is "lasting" enough to meet this standard.

The Eighth Circuit also injects needless subjectivity into this inquiry. Its test puts dispositive weight on whether a preliminary injunction "merely maintains

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[2] Even the Third Circuit left room for uncertainty, however. In *Singer*, that court described a different case as "that rare situation where a merits-based determination is made at the injunction stage" and thus *did* support a fee award. 650 F.3d at 229.

the status quo." *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006). But that question appears to turn not simply on whether the preliminary injunction preserved the existing state of affairs, but rather on a subjective determination of how "thorough[ly]" the district court considered the merits of the claim at issue in granting the injunction. *Compare N. Cheyenne Tribe*, 433 F.3d at 1086 (denying fee award after defendants' voluntary action mooted the case because, although the preliminary-injunction order addressed likelihood of success on the merits, it "did not discuss whether those claims would entitle the Tribes to final relief on the merits against the Secretary") *with Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903, 910 (8th Cir. 2012) (granting fee award based on preliminary injunction that prevented new rock-quarry regulations from going into effect because the order "engaged in a thorough analysis of the probability that Rogers Groups would succeed on the merits of its claim"—even though that injunction just maintained the real-world status quo).

Other circuits introduce uncertainty into their tests by asking whether the preliminary injunction was based on an "unambiguous indication of probable success on the merits" as opposed to reasoning less related to the merits. *Dearmore*, 519 F.3d at 524; *Kan. Judicial Watch*, 653 F.3d at 1239 (same); *see also*, *e.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 948 (D.C. Cir. 2005) (affirming fee award to a preliminary-injunction winner and emphasizing that the "Milk Producers secured a preliminary injunction in this case largely

because their likelihood of success on the merits was never seriously in doubt"). Even putting aside the obvious problem of how to deal with opaque or cursory preliminary-injunction orders, that "is it enough on the merits" line is especially troublesome to find with any certainty. Courts employ a "bewildering variety of formulations" to decide whether the likelihood of success on the merits is high enough to secure a preliminary injunction, 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.3 (3d ed. 2019) (listing fourteen different articulations), and many allow the requisite likelihood of success to increase or decrease on a sliding scale depending on the strength of the other preliminary-injunction factors. *See*, *e.g.*, *Hoosier Energy Rural Elec. Co-op. v. John Hancock Life Ins. Co*., 582 F.3d 721, 725 (7th Cir. 2009) ("How strong a claim on the merits is enough depends on the balance of harms: the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief."); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317–18 (D.C.Cir.1998) (discussing the four factors that a court must balance on a sliding scale in considering a request for a preliminary injunction); *see also Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017); *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 36–38 & n.5 (2d Cir. 2010). Deciding whether the district court examined the merits "serious[ly]" enough is a fraught endeavor given this landscape, and a particularly "unstable threshold to fee eligibility." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989).

In addition to the fuzzy "is it enough on the merits" inquiry, at least the Fifth Circuit has added into its test the knotty question whether the preliminary injunction also "cause[d] the defendant to moot the action." *Dearmore*, 519 F.3d at 524. That question pushes courts not only to assess motives and mental states of government officials, but also to make a subjective judgment about just how strong the causative link between the injunction and the mooting action has to be. Did the defendants moot the action *because* they were enjoined, or for some other reason, or for a combination of reasons? If the latter, which reason did they care about most? Hardly the stuff of "ready administrability." *Buckhannon*, 532 U.S. at 610; *Garland*, 489 U.S. at 791 (rejecting "central issue" test for "prevailing party" question because "[b]y focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer," since it "appears to depend largely on the mental state of the parties").

The circuit courts are not just deeply divided over the question of when preliminary-injunction winners are "prevailing parties"—they are also fashioning messy and difficult tests for answering the question that often apply in unpredictable ways.

C. Messy tests for fee eligibility impose needless costs on states and their residents.

The circuit courts' amorphous, unpredictable tests are not just trouble for district and circuit courts trying

to apply them; they are also costly in a number of ways for states and their officials.

First, these tests impose the same obvious costs as any "unstable threshold[s] to fee eligibility": a second major litigation when the case was supposed to be all but over. *Garland*, 489 U.S. at 791. Time and again this Court has rejected complicated rules for fee eligibility to avoid subjecting parties to the needless costs in time and resources of litigating over fees. The Court rejected the "central issue" test for just this reason. *Id.* ("Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension.") Same with the "catalyst theory" tossed away in *Buckhannon*, 532 U.S. at 609 (rejecting the theory because it required a "highly factbound" and "nuanced 'three thresholds test' ").

Second, these tests frustrate the States' ability to make informed litigation and policy decisions on behalf of their residents. When deciding whether and how to defend against a lawsuit, a state must balance a number of competing interests, including defending duly enacted laws, implementing effective policies, safeguarding its citizens' rights, and protecting the public fisc. *See*, *e.g.*, *In re Witness Before Special Grand Jury 2000-2*, 288 F.3d 289, 293 (7th Cir. 2002) (explaining that government lawyers have ethical duties to protect the public interest and the public fisc); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public*

Interest?, 41 B.C. L. Rev. 789, 789 (2000). The state's exposure to attorney's fees is an important variable in that calculus, and it ought to be a controllable one: the state should remain exposed to a costly fee award only so long as it continues the litigation, since fees are usually allowed only if the plaintiff actually wins the case. But the circuit courts' tests replace this modicum of control with uncertainty because they sometimes allow fee awards even when a state decides to *stop* litigating—for instance, because changing a law would better serve the public interest—after a preliminary injunction is entered. And worse, unlike before the preliminary injunction, the state can no longer assess its exposure to a fee award simply by evaluating the merits of the claims against it. Instead, it must try to predict the outcome of a subjective, "context-specific," and inconsistently applied legal test to figure out whether amending a law or changing a policy will also subject the state to a six-figure fee award.

Finally, in addition to needlessly complicating the States' litigation and policy decisions, most of the circuits' tests distort the States' incentives in making those decisions. *See Evans v. Jeff D.*, 475 U.S. 717, 734–35 (1986) (explaining that uncertainty regarding fee exposure often prevents settlement, especially in § 1983 litigation, where the fee awards often represent "the most significant liability in the case") (citation omitted). The specter of high fee awards is usually a disincentive to litigate: all else equal, rational parties will try to avoid paying attorney's fees of six or seven figures, and the surest way to avoid that is to resolve

the dispute before either party wins the case (and thus can be called a "prevailing party"). *See id.* at 733 (explaining that settlement is often in the best interests of both plaintiffs and defendants because it offers cost certainty and ensures relief "at an earlier date without the burdens, stress, and time of litigation") (quoting *Marek v. Chesny*, 473 U.S. 1, 10 (1985)). And states should be especially averse to spending the public's money on such fees instead of for the public good.

But that incentive is reversed by unpredictable rules that can result in fee awards to a preliminary-injunction winner. *Id.* at 736–37 (predicting that "parties to a significant number of civil rights cases will refuse to settle if liability for attorney's fees remains open, thereby . . . unnecessarily[] burdening the judicial system, and disserving civil rights litigants"). Under the shadow of such rules, the logical move for states that wish to avoid spending the public's money on large fee awards is to litigate cases to the hilt rather than explore other options that might better serve the public interest. *See Buckhannon*, 532 U.S. at 608 (explaining that a defendant may be deterred from "altering its conduct," especially if the conduct "may not be illegal," if doing so will result in a fee award). After all, under these rules, the States' alternatives to continuing to litigate—for example, amending a challenged law or regulation, reversing a challenged action, or declining to enforce a challenged policy—could actually lock in a substantial fee award against them. *See*, *e.g.*, *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 717–18 (9th Cir. 2013) (affirming a fee award because the

city's compromise solution with the plaintiffs "transformed what had been temporary relief capable of being undone . . . into a lasting alteration of the parties' legal relationship"); *Dearmore*, 519 F.3d at 526 (holding that the plaintiff was a prevailing party, despite not obtaining a final judgment, because the city amended the ordinance rather than litigating to finality); *People Against Police Violence*, 520 F.3d at 233 (same).

Consider, for example, how *Common Cause* and *Curling* have the potential to shape Georgia's response to future § 1983 suits. In *Common Cause*, the court issued a preliminary injunction against enforcement of Georgia's voter ID law. 554 F.3d at 1340. In response, Georgia enacted a new voter ID law, and it ultimately defended the law successfully because the court found that the State's interest in preventing voter fraud outweighed any burden on voters. *Id.* at 1348. Given the district court's finding, Georgia might well have prevailed on the merits had it defended the original law, too. But because Georgia chose a legislative solution instead, it was rewarded with a $112,235.03 bill for attorney's fees. And in *Curling*, Georgia took legislative action even before a preliminary injunction was issued. 397 F. Supp. 3d at 1334. Yet the court still issued a preliminary injunction, and the plaintiffs now seek close to $6 million in fees on that basis. If Georgia is ultimately ordered to pay that massive award (or even a significant portion of it), the lesson is doubly clear: even if the public interest might otherwise be best served by a legislative fix, Georgia should litigate to the bitter end if it wants to protect the public fisc.

II. The circuit courts are applying tests for fee eligibility that conflict with this Court's precedents.

Section 1988 authorizes courts to allow a reasonable attorney's fee to a "prevailing party" in civil rights actions. That term of art imposes a pair of basic requirements for fee eligibility. First, the party must have won a "court-ordered 'change in the legal relationship between'" the parties. *Buckhannon*, 532 U.S. at 604 (quoting *Garland*, 489 U.S. at 792) (cleaned up). Thus, *Buckhannon* rejected the circuit courts' "catalyst theory" of fee eligibility, under which they had allowed a fee award "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601. Second, that requisite court-ordered change in legal relationship must be "enduring," in the sense that the ordered relief lives on after the case is closed. *Sole v. Wyner*, 551 U.S. 74, 86 (2007). Thus, *Sole* held that winning a preliminary injunction against enforcement of a state rule against nudity in state parks did not make the plaintiff a prevailing party because by the end of the case, she had lost on the merits and the challenged rule remained in place. *Id.* In short, a "prevailing party" is one who, at the end of the day, wins the lawsuit: the party gets a desired *court-ordered* and *enduring* change in the legal relationship between the parties.

The decision below departed from this straightforward test. As the petitioners explained, the plaintiffs' only court-ordered relief was not *enduring*, because at the end of the case, their preliminary injunction

against the challenged Ohio law was dissolved and that law remains in effect. Pet. 10. And the real-world outcome that mooted the lawsuit was not *court-ordered*, because it was brought about by the FDA's action. Pet. App. 9a. *Sole* and *Buckhannon* respectively held that neither of these circumstances is enough to make someone a "prevailing party." *See Sole*, 551 U.S. at 86 (holding that the plaintiff's "initial victory was ephemeral" because "[a]t the end of the fray," the law remained intact, and so she had "gained no enduring" relief); *Buckhannon*, 532 U.S. at 605 ("Never have we awarded attorney's fees for a 'nonjudicial alteration of actual circumstances.'") (citation omitted). Cobbling together the combination—a preliminary injunction that does not provide enduring relief, and a desired outcome that did not come from a court order—as a recipe for attorney's fees conflicts with those clear holdings.

Other circuit courts addressing fee awards for preliminary-injunction winners have made the same mistake. *See Higher Taste*, 717 F.3d at 718 (allowing fee award to preliminary-injunction winner because a settlement between the parties was "enduring" relief); *Common Cause*, 554 F.3d at 1356 (affirming a fee award because the preliminary injunction was dissolved when Georgia "repealed the enjoined statute," not "by any judicial decision"). The Fifth Circuit even appears to have revived the circuits' old catalyst theory by declaring a party eligible for a fee award if it wins a preliminary injunction "that *causes the defendant* to

moot the action" by giving the plaintiffs the relief they sought in the lawsuit. *Dearmore*, 519 F.3d at 524 (emphasis added); *see also Buckhannon*, 532 U.S. at 601 (defining the "catalyst" theory as permitting recovery if the plaintiff "achieve[d] the desired result because the lawsuit brought about a voluntary change in the defendant's conduct"). Just like the catalyst theory *Buckhannon* rejected, this test expressly allows fees because the plaintiff's lawsuit brought about nonjudicial relief. *See id.* at 605 ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.").

This is not to say this Court's current precedents leave no opening for a preliminary injunction to ever serve as the basis for attorney's fees. *See Sole*, 551 U.S. at 86 (leaving open whether "in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees"). A preliminary injunction that itself moots the suit by providing the enduring relief the plaintiff sought—for instance, by permitting a plaintiff to hold a parade, which is all the plaintiff sought from a lawsuit—presents a harder question. But consistent with the plain language of § 1988, the Court's precedents always require a plaintiff to win (1) court-ordered (2) enduring relief to be a "prevailing party." *Buckhannon*, 532 U.S. at 605–06 (explaining that the "plain language of the

statutes" forbids awarding "attorney's fees for a nonjudicial 'alteration of actual circumstances' ") (citation omitted); *Garland*, 489 U.S. at 792 (holding that the "ordinary" meaning of § 1988 means that the plaintiff prevails only if it can "point to a resolution of the dispute which changes the legal relationship between itself and the defendant"); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.") (citation omitted). Allowing fee awards when a preliminary injunction order does not fit that bill exceeds the authority granted to courts under that statute.

CONCLUSION

The circuit courts have acknowledged a deep and persistent conflict of authority on the question whether a plaintiff who wins a preliminary injunction but never a merits judgment can seek attorney's fees from state officials under § 1988. The States urge this Court to provide a clear rule that governs in that recurring scenario so they can make sound litigation and policy decisions on behalf of their residents.

Respectfully submitted,

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