No. 11-829

In the Supreme Court of the United States

DAVID J. KING, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE KANSAS COMMISSION ON JUDICIAL QUALIFICATIONS, ET AL., PETITIONERS

v.

KANSAS JUDICIAL WATCH, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN AND 17 OTHER STATES FOR PETITIONERS

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QUESTION PRESENTED

When a plaintiff obtains a preliminary injunction but the case is mooted before final resolution of the plaintiff's claims, is the plaintiff a "prevailing party" entitled to attorney fees under 42 U.S.C. § 1988(b)?

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INTEREST OF *AMICI CURIAE*

The *amici* states and their local governments employ and indemnify millions of civil servants and law enforcement personnel who are subject to claims under federal civil rights laws. When plaintiffs file such claims, 42 U.S.C. § 1988 authorizes courts to award attorney fees to "prevailing parties." Congress "intended that the[se] 'fees, like other items of costs, will be collected [in some instances] from the State or local government (whether or not the agency or government is a named party)." S. REP. NO. 94-1011, at 5 (1976), U.S. CODE CONG. & ADMIN. NEWS 1976, at 5908, 5913. As a result, the *amici* states' "potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits." *Buckhannon Bd. & Care Home, Inc.* v. *W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608 (2001).

The *amici* states therefore have a substantial interest in ensuring that § 1988 attorney-fee awards are limited to those Congress expressly authorized. Unfortunately, the circuits currently hold disparate and conflicting views of what Congress intended by the term "prevailing party," revealing a misunderstanding regarding congressional intent. The result is that one state will pay fees in a situation where another state will not, solely because of the circuit where the state happens to be located. When this occurs, taxpayer monies earmarked for health, safety, and welfare purposes are diverted to plaintiffs when Congress never intended that result. The *amici* states seek to vindicate the proper interpretation of § 1988.

INTRODUCTION AND SUMMARY OF ARGUMENT

When authorized by Congress, attorney-fee awards serve the public's interest in the enforcement of civil-rights laws. When not so authorized, they amount to an unwarranted raid on the public fisc. In this case, the Tenth Circuit reversed the district court and awarded attorney fees to Plaintiffs for successfully obtaining a preliminary injunction that had been dissolved as moot. Because Plaintiffs never obtained final relief, they are not "prevailing parties" as 42 U.S.C. § 1988 requires. The Tenth Circuit's decision (and similar decisions from other circuits) misinterpret § 1988 at the expense of taxpayers. The Court should grant the petition and reverse.

Under the "American Rule," parties bear the cost of their respective counsel absent "explicit statutory authority." *Buckhannon*, 532 U.S. at 608. There is an exception for civil rights cases, but only for the "prevailing party," 42 U.S.C. § 1988, i.e., a plaintiff who has "prevailed" by proving that a defendant did in fact violate the plaintiff's civil rights.

Successfully obtaining a preliminary injunction is not the same as proving that a civil-rights violation has occurred. Such an injunctive order is, at best, a form of temporary relief premised on a court's *preliminary* determination based on "*probability* of success" on the merits and several other factors having nothing to do with whether a defendant actually violated a plaintiff's rights. Because a preliminary injunction does not reflect final resolution of any claim or dispute, it can never justify an award of § 1988 attorney fees.

The *amici* states respectfully request that the Court grant the petition and hold that a favorable preliminary injunction ruling, standing alone, does not qualify a plaintiff for "prevailing party" status under § 1988, because such a ruling does not establish a right to relief on the merits.

ARGUMENT

I. The petition should be granted to resolve Circuit disagreement over when, if ever, Congress intended attorney-fee awards for obtaining preliminary injunctive relief.

The question presented—whether § 1988 fees are authorized based solely on the issuance of a preliminary injunction—has proved difficult for the circuits to answer, leading to conflicting views about whether and when a party may be said to have "prevailed." *Dearmore* v. *City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008) ("[L]ower courts have had some difficulties in ascertaining what other forms of judicial action have the 'necessary judicial imprimatur' to create prevailing party status, particularly in the context of preliminary injunctions."). "Without a Supreme Court decision on point, circuit courts considering this issue have announced fact-specific standards that are anything but uniform." *Id*.; see also *Select Milk Producers*, *Inc.* v. *Johanns*, 400 F.3d 939, 952 (D.C. Cir. 2005) ("Whether a party can be a 'prevailing party' under a fee-shifting statute by obtaining preliminary injunctive relief is one that has divided the circuits—some say yes, some say no.") (Henderson, J., dissenting).

Some circuits hold that a preliminary injunction reflecting a merits-based decision on an issue involved in the case is sufficient to obtain fees. E.g., *Watson* v. *County of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002) ("A preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buchannon*"). Others require only substantive, indefeasible relief which is tantamount to final relief on the merits. E.g., *Dupuy* v. *Samuels*, 423 F.3d 714, 719 (7th Cir. 2005). Still others require a decision that is both merits-based and provides the plaintiff "irreversible" relief. E.g., *Select Milk Producers*, *Inc.* v. *Johanns*, 400 F.3d 939, 947–48 (D.C. Cir. 2005). And finally, some question whether preliminary injunctive relief should ever make the plaintiff a "prevailing party," regardless of how confident the trial court may be in the "probable success" of the plaintiff. E.g., *Smyth* v. *Rivero*, 282 F.3d 268, 277 (4th Cir. 2002) (explaining that the preliminary injunction framework "renders such relief an unhelpful guide to the legal determination of whether a party has prevailed"); *Singer Mgmt. Consultants*, *Inc.* v. *Milgram*, 650 F.3d 223 (3d Cir. 2011) ("[T]he 'merits' requirement is difficult to meet in the context of TROs and preliminary injunctions, as the plaintiff in those instances needs only to show a *likelihood* of success on the merits (that is, a reasonable chance, or probability, of winning) to be granted relief.").

Here, Plaintiffs obtained a preliminary injunction affording them interim relief from enforcement of certain clauses in the Kansas Code of Judicial Conduct (the "Code") during imminent judicial elections. Pet. App. 34a. The temporary relief provided by the preliminary injunction protected Plaintiffs during one

election cycle. The case continued after the elections, but while the preliminary injunction was on appeal, and before reaching a trial on the merits, the challenged provisions of the Code were repealed. The Tenth Circuit vacated the preliminary injunctive order, dismissed the interlocutory appeal of that order as moot, and remanded the case to the district court for dismissal. Pet. App. 167a.

Despite the fact that Plaintiffs never obtained a ruling that their rights had been violated (i.e., that they were entitled to judgment as a matter of law under 42 U.S.C. § 1983), Plaintiffs sought attorney fees as prevailing parties under § 1988. The district court denied Plaintiffs' request, explaining that although "plaintiffs succeeded in preserving the status quo—no disciplinary action for answering the questionnaire and for soliciting publicly-stated support—they did *not* succeed in obtaining relief on the merits." Pet. App. 32a. (emphasis added).

The district court emphasized that Plaintiffs "did not merely seek an injunction that allows them to answer and distribute the questionnaire and solicit publicly stated support in the 2006 primary election. They sought declarations that the judicial canons at issue were unconstitutional both on their face and as applied to the questionnaire and petitions, in 2006 and beyond." Pet. App. 32a. The district court concluded that the legal relationship between the parties was not materially altered by the preliminary injunction. Pet. App. 32a.

The Tenth Circuit reversed. Following its earlier precedents, the Tenth Circuit held that a preliminary injunction warrants an award of attorney fees if it "provides relief on the merits," i.e., "(a) affords relief sought in the plaintiff's complaint and (b) represents an unambiguous indication of probable success on the merits." Pet. App. 17a. Because the preliminary-injunctive order afforded Plaintiffs relief from enforcement of the Code until the Code was revised, and because the preliminary injunction was "clear about [Plaintiffs'] ultimate likelihood of success on the merits," the Tenth Circuit held that Plaintiffs were prevailing parties and therefore entitled to an award of attorney fees. Significant to the analysis below, the Tenth Circuit acknowledged that *if* the case had ultimately resulted in a final determination adverse to Plaintiffs, the preliminary injunction would *not* have warranted an attorney-fee award. Pet. App. 17a.

Had this case been decided in the Fourth Circuit, the result would very likely have been different. See *Smyth* v. *Rivero*, 282 F.3d 268, 277 (4th Cir. 2002). As in this case, the plaintiffs in *Smyth* sought a permanent injunction against enforcement of a paternity-identification policy and secured a preliminary injunction granting the same relief, based in part on a finding that the policy "contradicted the plain language of then-applicable federal regulations." 282 F.3d at 271–72. When the policy was modified, the case was dismissed as moot. *Id*. at 273. On appeal, the Fourth Circuit reversed the fee award, holding that these facts were insufficient to make the plaintiffs prevailing parties. *Id*. at 277 ("The interplay of the[] equitable and legal considerations and the less stringent assessment of the merits of claims that are

part of the preliminary injunction context belie the assertion that the district court's decision to grant a preliminary injunction was an 'enforceable judgment[ ] on the merits' or something akin to one for prevailing party purposes.") (citation omitted).

The Third Circuit likewise would probably have rejected the attorney-fee request here. See *Singer Mgmt. Consultants, Inc.* v. *Milgram*, 650 F.3d 223 (3d Cir. 2011). In *Singer*, the plaintiffs brought a claim to enjoin enforcement of a New Jersey law and obtained this relief through a temporary restraining order based on a "likelihood of success on the merits in this particular case." 650 F.3d at 225–26. When the state capitulated at the preliminary-injunction hearing, the TRO was vacated and the case dismissed as moot. *Id.* at 226–27. The Third Circuit held that the TRO was insufficient to warrant an award of attorney fees. *Id.* at 230–31 ("There was no determination on the merits in this case because the State mooted the case at the preliminary injunction hearing by agreeing with [the plaintiff's] position").

The disparity in the circuits' application of § 1988's "prevailing party" standard detrimentally affects the *amici* states. Some circuits will grant attorney-fee awards under § 1988 based on a preliminary injunction as being adequate to establish a prevailing party, see, e.g., *Watson*, 300 F.3d at 1096, whereas other circuits, such as the Third and Fourth, rightly acknowledge that more is required. Whether a state will be subject to attorney fees should not depend on the circuit where the state is located. The Court should grant the petition to create uniformity among the circuits.

II. A preliminary injunction does not establish that a plaintiff is a "prevailing party" under 42 U.S.C. § 1988.

A. At best, a preliminary injunction demonstrates that a plaintiff might be the "prevailing party" in a lawsuit, not that the plaintiff has prevailed.

In the Tenth Circuit, as in other circuits, preliminary injunctive relief may be granted if the movant establishes four elements: (1) the movant is substantially likely to succeed on the merits; (2) the movant will suffer irreparable harm without the injunction; (3) the injury to the movant outweighs whatever damage the injunction may cause the opposing party; and (4) the injunction will not harm the public interest. *Schrier* v. *Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005). By and large, the circuits treat these factors as interrelating on a "sliding scale," balancing against each other. See, e.g., *Ty, Inc.* v. *Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). So if a plaintiff demonstrates that the last three factors weigh in its favor, it need only show "questions going to the merits so serious, substantial, difficult and doubtful as to make them *a fair ground for litigation and thus for more deliberative investigation*." *Lundgrin* v. *Claytor*, 619 F.2d 61, 63 (10th Cir. 1980) (emphasis added). Other circuits take a similar approach, e.g., *Serono Labs., Inc.* v. *Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998), and "[t]his Court has never rejected that formulation." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 51 (2008) (Breyer, J., concurring in part and dissenting in part).

"At the most, a party seeking a preliminary injunction may have to demonstrate 'a "strong showing of likelihood of success" or a "substantial likelihood of success" by "clear and convincing evidence" in order to obtain relief.'" *Smyth*, 282 F.3d at 276 (quoting *MicroStrategy*, *Inc.* v. *Mororola*, *Inc.*, 245 F.3d 335, 339 (4th Cir. 2001)). When a district court determines that such a showing has been made, this "is best understood as a prediction of a probable, but necessarily uncertain, outcome." *Id.* But "the merits inquiry in the preliminary injunction context is necessarily abbreviated." *Smyth*, 282 F.3d at 276 (internal citations omitted). After all, the purpose of a preliminary injunction is not to make a final determination on the merits of the plaintiff's claims. Rather, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas* v. *Camenisch*, 451 U.S. 390, 395 (1981).

The term "prevailing party" connotes something much more than "likely to succeed" or "a fair ground for litigation" and further "investigation." The term "has traditionally . . . meant the party that wins the suit or obtains a finding (or an admission) of liability." *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring). As explained below, such an understanding of the phrase "prevailing party" is consistent with the legislative history of the Civil Rights Attorney Fees Act of 1976 and this Court's jurisprudence.

B. Congress intended to award fees only to plaintiffs who vindicate civil rights through a final determination of their substantial rights, not a preliminary injunctive order.

The question of whether preliminary injunctive relief can warrant a fees award is first and foremost a question of statutory interpretation. The inquiry requires discerning Congressional intent regarding the phrase "prevailing party." Section 1988(b) states, in relevant part:

> In any action or proceeding to enforce a provision of [various civil rights acts, including § 1983] 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. . .

It is important to distinguish among the ways that a party might be said to "prevail" during the course of litigation. A party may prevail, for instance, because "his adversary dies before the suit comes to judgment" or because "the other side ceases (for whatever reason) its offensive conduct." *Buckhannon*, 532 U.S. at 615 (Scalia, J., concurring). But these situations are not the sense in which Congress used the term "prevail" here; the party must prevail in an "action or proceeding."

The issue then becomes whether a plaintiff prevails in an "action or proceeding" by obtaining a preliminary injunctive order. In one sense, the action or proceeding is the lawsuit as a whole. But see *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989) (allowing an award of fees when plaintiff prevailed on

some claims but not others). In another sense, it may be one of a series of anticipated engagements between the parties, with the preliminary injunction providing relief only on the initial engagement. But see *Sole* v. *Wyner*, 551 U.S. 74, 84 (2007) (holding that a request for attorney fees were "premature" where "the provisional relief granted terminated only the parties' opening engagement" but the litigation continued to "definitively resolve the controversy").

As the text itself is ambiguous, it is appropriate to consider the legislative history of the Civil Rights Attorney's Fees Act of 1976. *Barnhill* v. *Johnson*, 503 U.S. 393, 401 (1992) ("appeals to statutory history are well taken only to resolve 'statutory ambiguity'"); *Wis. Pub. Intervenor* v. *Mortier*, 501 U.S. 597, 610 n.4 (1991) ("As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it."). Indeed, this Court has turned to the very same legislative history to interpret the term "prevailing party" in other contexts. E.g., *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980) (whether the term "prevailing party" includes a party that prevails through a settlement rather than through litigation); *Hanrahan* v. *Hampton*, 446 U.S. 754, 757–58 (1980) (whether the term "prevailing party" includes a party who prevails on appeal in reversing the trial court's order of directed verdict).

"The congressional Committee Reports described what were considered to be appropriate circumstances for such an award by reference to two cases—*Bradley* v. *Richmond School Board*, 416 U.S. 696 . . . (1974), and *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 . . .

(1970)." *Hanrahan*, 446 U.S. at 757. *Bradley* was a school desegregation case, in which the district court awarded attorney fees for successfully obtaining an order for a "noninterim desegregation plan," even though the litigation was ongoing as to other school systems. 416 U.S. at 704–05. This Court affirmed the interim award of attorney fees, explaining that "[a] district court must have discretion to award fees and costs incident to the final disposition of interim matters." *Id*. at 723. *Mills* was a stockholder action to set aside a corporate merger, where the district court entered partial summary judgment on one of three counts. 396 U.S. at 378–79. On interlocutory appeal, this Court affirmed the partial judgment and concluded that plaintiffs were entitled to attorney fees even though they had yet to be granted any relief because they "established their cause of action." *Id*. at 389.

Critically, "[i]n each of [these] cases the party to whom fees were awarded *had established the liability of the opposing party*, although final remedial orders had not been entered." *Hanrahan*, 446 U.S. at 757. This Court observed that a *final*, *merits* determination was essential to "prevailing party" status:

> Congress intended to permit the interim award of counsel fees only when a party has prevailed *on the merits* of at least some of his claims. For only in that event has there been *a determination of the "substantial rights of the parties,"* which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney.

Id. at 758 (emphasis added).

Given the legislative history, preliminary injunctions fall outside the scope of what Congress contemplated when it enacted § 1988. None of the cases or scenarios in the legislative history describes a party receiving attorney fees based solely on the grant of a preliminary injunction. Moreover, the Senate Report contemplates that an interim order—which is exactly what a *preliminary* injunctive order is—would result in an award of attorney fees *only* when it definitively establishes liability. S. REP. NO. 94-1011, at 4 (1976), U.S. CODE CONG. & ADMIN. NEWS 1976, at 5908, 5912. A preliminary injunction cannot do so.

This conclusion makes sense in light of the Act's purposes. Without a final order, it is at least uncertain whether the plaintiff has truly vindicated a congressional policy of highest priority. Congress intended this determination to be made only after the court has conducted its "deliberative investigation," see *Smyth*, 282 F.3d at 276, to ensure that the plaintiff has played its proper role as a "private attorney general."

C. This Court's prior decisions indicate that finality is a *sine qua non* of prevailing-party status.

The conclusion that Congress intended a final determination of the parties' substantial rights before awarding attorney fees is consistent with earlier decisions of this Court. The Tenth Circuit's holding in this case is not.

In *Texas State Teachers Association* v. *Garland Independent School District*, 489 U.S. 782 (1989), the Fifth Circuit denied the plaintiffs' request for attorney fees because they did not prevail on the "central issue"

in the case. This Court rejected that theory with reasoning equally applicable here:

> In discussing the availability of fees *pendent lite* under § 1988, we have indicated that such awards are proper [only] where a party "has established his entitlement to some relief *on the merits of his claims*, either in the trial court or on appeal." . . . Congress cannot have meant "prevailing party" status to depend entirely on the timing of a request for fees.

Id. at 790–91, quoting *Hanrahan*, 446 U.S. at 757 (emphasis added). In other words, a plaintiff must "point to a *resolution of the dispute* which changes the legal relationship between itself and the defendant." *Id*. at 792 (emphasis added). And the Court's later decisions in *Buckhannon* and *Sole* leave little doubt that to resolve a dispute means to obtain a final judicial disposition of a given claim.

Buckhannon involved the question of whether the "catalyst theory" could justify an award of attorney fees when the case has been mooted by the opposing party ceasing its offensive conduct. 532 U.S. at 601–02. The Court concluded it could not, holding that the change in the parties' legal relationship must carry the requisite judicial *imprimatur*, i.e., must be judicially sanctioned, not merely voluntary. *Id*. at 605. The Court emphasized that the state's repeal of the offensive statutory provision did not carry the requisite judicial *imprimatur* so as to make Buckhannon a "prevailing party." Thus, *Buckhannon* narrowed the term "resolve" to mean obtaining a judicial decree that changes the legal relationship of the parties.

Six years later, this Court narrowed the potential meaning of the term "dispute." In *Sole*, the Court held that the plaintiff was not a "prevailing party," even though Wyner obtained all the relief she initially contemplated at the outset of the lawsuit with the requisite judicial *imprimatur*. 551 U.S. at 86. The district court entered a preliminary injunction against enforcing a rule requiring bathing suits at a state park and permitting Wyner to create anti-war artwork consisting of "nude individuals assembled into a peace sign." *Id*. at 78. The injunctive order required a screen to protect those who did not want to see the display. *Id*. at 79–80. But after the display, the district court denied Wyner a permanent injunction to repeat the display because of the participants' deliberate failure to remain behind the screen. *Id*. at 80. The district court nevertheless awarded attorney fees to Wyner for her success at the preliminary-injunction phase.

This Court held that Wyner was not entitled to attorney fees. Having failed to obtain an "enduring 'change in the legal relationship' between [Wyner] and the state officials she sued," Wyner had not succeeded in resolving the dispute in her favor. *Id*. at 86 (quoting *Garland*, 489 U.S. at 792). The preliminary injunctive order was but a "fleeting success" which "did not establish that she prevailed on the gravamen of her plea for injunctive relief." *Id*. at 83. The preliminary injunction's "tentative character, in view of the continuation of the litigation to definitively resolve the controversy, *would have made a fee request at the initial stage premature*." *Id*. at 84 (emphasis added). This reasoning makes the importance of a final determination of liability readily apparent, for without it, a controversy is never definitively resolved.

D. The Tenth Circuit's decision is contrary to what Congress intended under § 1988, as interpreted by *Garland*, *Buckhannon*, and *Sole*.

As the district court explained in denying Plaintiffs' fee request here:

> Plaintiffs did not merely seek an injunction that allows them to answer and distribute the questionnaire and solicit publicly-stated support in the 2006 primary election. They sought declarations that the judicial canons at issue were unconstitutional both on their face and as applied to the questionnaire and petitions, in 2006 and beyond.

Pet. App. 32a. The Tenth Circuit misunderstood the district court's rationale to be that Plaintiffs had to prevail on all primary claims. Pet. App. 19a–20a. But the district court's opinion discussed *Sole* extensively, and the district court was simply drawing a parallel: Just as Wyner received injunctive relief but "did not establish that she prevailed on the gravamen of her plea," Plaintiffs here obtained a preliminary injunction but never obtained a final determination on the constitutional claims supporting that interim injunction. Thus, the parties' controversy, though it resulted in a temporary injunction, was not definitively resolved .

Though this Court in *Sole* left open the possibility that a preliminary injunction might confer prevailing-party status if not superseded by an adverse merits decision, the outcome and reasoning in *Buckhannon* and *Sole* so narrow the meaning of "resolution of the

dispute," that together these two cases essentially foreclose that option. As *Sole* demonstrates, the "dispute" is not the question of whether a preliminary injunction should be granted. The dispute is the gravamen of a claim—the charge that defendants violated Plaintiffs' civil rights. Otherwise, *Sole* should have been entitled to her attorney fees, regardless of how the court ruled on the question of future injunctive relief for future displays of her "artwork." This tack is consistent with the legislative purpose of the act, which is not simply for a plaintiff to get its way, but for civil rights to be vindicated by showing a right "to some relief on the merits." *Hanrahan*, 446 U.S. at 754.

Moreover, preliminary injunctions, even when vacated as moot rather than meritless, do not amount to an "enduring" change in the parties' legal relationship. See *Sole*, 551 U.S. at 86. They instead result in the order being vacated and the case dismissed, which forecloses the final judicial resolution of the dispute that *Garland* and *Buckhannon* require. *Buckhannon*, 532 U.S. at 604–05. Even if the reason the preliminary injunction was vacated is because the defendant (or in this case, the Kansas Supreme Court) voluntarily gave the relief plaintiff requested, *Buckhannon* holds that such facts are insufficient to justify an award of attorney fees. *Id.* at 605.

Finally, if the plaintiff is a "prevailing party" as a result of the preliminary injunction, then he should receive an interim fee award when the order is entered. See *Hanrahan*, 446 U.S. at 757. But because of this Court's holding in *Sole*, the district court cannot know whether the plaintiff has actually prevailed or should receive an award until the claim on which the

underlying claim has been resolved. Thus, a request for fees filed when the preliminary-injunctive order is entered must be denied, see e.g., *Dupuy*, 423 F.3d at 722 (holding the preliminary-injunctive order was not "sufficiently 'concrete and irreversible'" to justify an interim fee award), while the same request filed later, after the case becomes moot, would be granted. "Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees." *Garland*, 489 U.S. at 791. Either the plaintiffs are a "prevailing party" when the order is entered or they are not; dismissing the case as moot should not logically make any difference.

In reality, a preliminary injunction—however probable the success on the merits—can never be an occasion for an award because the procedure is not designed to "establish[] the liability of the opposing party." See *Hanrahan*, 446 U.S. at 757. The court's analysis in granting a preliminary injunction only requires a finding of "probable success" (at best), which "by no means represents a determination that the claim in question will or ought to ultimately succeed; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction." *Smyth*, 282 F. 3d at 276. Further, the uncertainty and tentativeness created by the "probable success" standard is only compounded by the presence of the other three factors—irreparable harm, balance of harms, and public interest—which are to be balanced with the likelihood of success determination. *Id.* at 276–77. "While this framework may be well suited to reconciling the practical, equitable, and legal concerns that face a court determining whether to grant a party interim relief, it

renders such relief an unhelpful guide to the legal determination of whether a party has prevailed." *Id*. at 277 (internal citations omitted).

If a plaintiff desires an early resolution of the controversy on the merits, there are procedural mechanisms available to accomplish that result, such as moving for summary judgment or permanent injunctive relief rather than preliminary relief. By choosing to request preliminary relief in the first instance, a plaintiff runs the risk of obtaining a preliminary ruling rather than a merits ruling, even if the plaintiff later tries to consolidate the preliminary injunction hearing with trial on the merits by filing an appropriate motion under Rule 65. Tellingly, the district court here denied Plaintiffs' request under Rule 65, noting that the court *had not definitively resolved the merits of Plaintiffs' claims* with the preliminary injunctive order. Pet. App. 32a. The Tenth Circuit erred in treating the preliminary order as if it were a final merits decision.

III. Any extra-statutory exception for outlying cases should be limited to preliminary injunctions that irreversibly resolve a dispute over an imminent, isolated event.

Even circuits that have announced great skepticism about the availability of attorney fees in the absence of a merits ruling have shied from a hard-and-fast rule that a preliminary injunction never justifies a fee award. E.g., *Dupuy*, 423 F.3d at 723. The concern focuses on situations where the entire controversy pivots on an imminent, isolated event, one that will dissipate too quickly for a trial on the merits. See, e.g.,

Young v. *City of Chicago*, 202 F.3d 1000 (7th Cir. 2000) (preliminary injunction to protest at the Democratic National Convention which became moot when the event ended). The intuition is that one has "prevailed" if the preliminary injunction affords relief and the victory becomes indefeasible by reason of mootness. But that intuition is wrong.

As an initial matter, there is no need for the Court to even address such a hypothetical situation here. The district court recognized that Plaintiffs ultimately desired merits rulings, not just a preliminary ruling, and because of intervening circumstances, the case's merits were never decided. Pet. App. 32a. A definitive ruling with respect to the circumstances presented in *Young* should be reserved for a case that actually presents those facts.

More important, such an exception is inconsistent with the reality that a plaintiff is the master of its case, free to seek a merits ruling in the first instance rather than preliminary injunctive relief. Incursions on the public fisc to pay attorney fees are not authorized just because the passage of time makes it no longer worthwhile or proper to determine a controversy's actual merits. *Buckhannon*, 532 U.S. at 605. This Court should grant the petition and clarify that a final judgment is required to award fees under § 1988.

If the Court is nonetheless inclined to depart from the statutory meaning of "prevailing party" and judicially create an equitable exception to the "American Rule," it should limit that exception to those rare instances represented by *Young*, 202 F.3d 1000. Then, the preliminary injunction can be said to afford "concrete and irreversible" relief, amounting to a final

resolution of the dispute, though not definitively on the merits of it. See, e.g., *Dupuy*, 423 F.3d at 722 (preliminary injunctive order was not "sufficiently 'concrete and irreversible'" to justify an interim fee award).

In *Young*, the plaintiffs alleged that the city of Chicago had violated their First Amendment rights by establishing a security perimeter to exclude protestors from the Democratic National Convention. 202 F.3d 1000. The plaintiffs obtained a preliminary injunction, but the convention was over and the case moot even before the city appealed, as the plaintiffs' claims related only to that imminent, isolated event. *Id.*; see also *McQueary* v. *Conway*, 614 F.3d 591, 599 (6th Cir. 2010) (contending that a fast-and-hard approach would "fail to account for fact patterns in which the claimant receives everything it asked for in the lawsuit, and all that moots the case is the court-ordered success and the passage of time.").

Such a rule would not allow an award of attorney fees here. Neither Plaintiffs nor Defendants anticipated that the lawsuit would end once the 2006 elections were over. Rather, Plaintiffs "sought declarations that the judicial canons at issue were unconstitutional both on their face and as applied to the questionnaire and petitions, in 2006 *and beyond*." Pet. App. 32a. (emphasis added). Unlike the situation in *Young*, the parties could reasonably expect a "full opportunity to present their case" after the preliminary injunction hearing and the 2006 elections. Pet. App. 91a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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