No. 11-829

In the Supreme Court of the United States

THE HONORABLE DAVID J. KING, ET AL.,
Petitioners,

v.

KANSAS JUDICIAL WATCH, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a plaintiff obtains a preliminary injunction but the case is mooted prior to resolution of the plaintiff's claims for declaratory and permanent injunctive relief, is the plaintiff a "prevailing party" for purposes of 42 U.S.C. § 1988(b)?

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Petitioners respectfully request that the Court grant their petition for a writ of certiorari for three reasons. First, as the respondents' Brief in Opposition ("Opp.") makes clear, the parties are in general agreement with respect to (1) the facts of this case, Opp. 1-13, and (2) the *fact* that in *Sole v. Wyner*, 551 U.S. 74 (2007) this Court expressly reserved judgment on the question presented. Opp. 21 n. 22.

Second, the Circuits have divided on the question presented and it is likely, indeed probable, that at least the Third, the Fourth, and the Sixth Circuits would have decided the question differently than the Tenth Circuit did. *See* Petition for a Writ of Certiorari ("Pet.") 16-22; Brief *Amicus Curiae* for Michigan and 17 Other States ("Amicus") 6-7.

Third, on the merits, respondents tellingly do not even cite or mention the Court's most recent and relevant attorney's fee decisions until the final three pages of their brief. *See* Opp. 20-21 (finally citing and acknowledging *Sole v. Wyner*, *supra*, and *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001)). Contrary to respondents' views, however, *Buckhannon* and *Sole* are critical to resolving the question presented, and these cases point to a different conclusion than the one the Tenth Circuit reached.

For all of these reasons—as explained in the petition for a writ of certiorari, the state amicus brief, and this reply—this case merits the Court's plenary review.

REASONS FOR GRANTING THE WRIT

A. Respondents Concede, as They Must, That in *Sole v. Wyner*, 551 U.S. 74 (2007), the Court Reserved Decision on the Question this Case Cleanly Presents.

In *Sole v. Wyner*, 551 U.S. 74, 86 (2007), the Court "express[ed] no view on 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." Respondents thus concede that "[t]his Court's decision in *Sole* explicitly left unanswered the question presented here—a preliminary injunction that was not later undone on the merits." Opp. 21 n. 22. Thus, there is no dispute that the question reserved in *Sole v. Wyner* is squarely presented here.

Nor is there any doubt that the question presented arises frequently, as the many reported decisions addressing the question demonstrate. "The question raised here is of significance because liability for attorney's fees inflicts severe financial penalties." *Alioto v. Williams*, 450 U.S. 1012, 1013 (1981) (Rehnquist and White, JJ., dissenting from the denial of certiorari in a case involving an award of attorney's fees under §1988). Furthermore, the question is particularly important to the States and local governments because when awards of attorney's fees are not "authorized [by Congress], they amount to an unwarranted raid on the public fisc." Amicus 2.

Even before *Sole v. Wyner*, the Court and individual Justices recognized the difficulty of the question presented. *See Lewis v. Cont'l Bank Corp.*, 494 U.S.

472, 483 (1990) ("Whether Continental can be deemed a 'prevailing party' in the District Court, even though [the summary] judgment [in its favor] was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty"); *Alioto*, *supra*, at 1013 (Rehnquist and White, JJ., dissenting from the denial of certiorari) ("To treat respondents as 'prevailing parties under §1988 because they secured a preliminary injunction is to ignore the fact that petitioners exercised their right to appeal the entry of that order and the fact that the propriety of the injunction was being challenged on appeal at the time the case became moot and the appeal was dismissed. No permanent injunction ever issued and there has been no settlement or consent decree."); *Kay v. David Douglas Sch. Dist. No. 40*, 484 U.S. 740, 741 (1988) (White, J., dissenting from denial of certiorari) ("Arguably, respondents should not be forced to bear an award of fees where they have never been finally determined to have violated the Federal Constitution or laws and have steadfastly maintained the contrary position.")

This case cleanly presents the question on a well-developed record and in a posture that is quite common in the preliminary injunction context. Moreover, virtually all of the Circuits now have weighed in on (and struggled with) the question presented since the Court's decision in *Buckhannon*.

B. The Question Presented Arises Frequently, Is Important, and Has Divided the Circuits.

Respondents argue that there is no disagreement among the Circuits on the question presented, pointing

in particular to the Fifth Circuit's decision in *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008). *See* Opp. 14-15. In fact, however, *Dearmore* makes just the opposite point: "Without a Supreme Court decision on point, circuit courts considering this issue have announced fact-specific standards that are anything but uniform." *Dearmore*, 519 F.3d at 521; *id.* at 522 (discussing approaches utilized in the D.C., Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits); *see also Black Heritage Soc'y v. City of Houston*, No. 07-0052, 2008 WL 2769790, at *3 (S.D. Tex. July 11, 2008) ("lower courts have differed over whether, in the absence of a final decision on the merits, a preliminary injunction may warrant a fee award."); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 952 (D.C. Cir. 2005) (Henderson, J., dissenting) ("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.").

Moreover, as respondents recognize, the Fifth Circuit explicitly acknowledged that court's "disagreement" with "the Fourth Circuit," Opp. 15 (quoting *Dearmore*), and respondents themselves admit that the Fourth Circuit's decision in *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), is "often cited as critical of preliminary injunctions conveying prevailing party status…" Opp. 16.

1. Contrary to respondents' claims, it is probable that at least three circuits would decide the question presented differently than the Tenth Circuit did here. Respondents argue that the Fourth Circuit's approach "is not at odds with the result here or in other circuits," Opp. 16, because the Fourth Circuit in *Smyth*

v. Rivero "was referring to a 'modified' preliminary injunction inquiry" in denying an award of attorney's fees. Opp. 16. But the Fourth Circuit rejected an analysis for determining "prevailing party" status that would be based on an assessment of the reasons *why* a preliminary injunction was granted:

> Smyth and Montgomery contend that some preliminary injunctions are sufficiently based on the merits to serve as a basis for an award of attorney's fees to the recipient as a prevailing party. They would distinguish such injunctions from those ... which they argue did not address the merits, but [were] entered "merely to maintain the status quo." They contend the district court [here] did examine the merits of their case and reached a result favorable to them …. * * * [But we previously] consider[ed] the characteristics of a preliminary injunction that we believe make such an injunction an improper basis for the conclusion that a party has prevailed … (noting that the preliminary injunction hearing [in that prior case] involved, at the most, "a prognosis of probable or possible success…").

282 F.3d at 277-78 n. 9.

Thus, the Fourth Circuit rejected the Tenth Circuit's distinction between preliminary injunctions that "preserve the status quo" on the one hand, and those that rely on a determination of "probable success on the merits" on the other. As the Fifth Circuit expressly acknowledged in *Dearmore*, 519 F.3d at 526 n. 4, *Smyth v. Rivero* cannot be squared with such an approach. *See also* Amicus 6 ("Had this case been

decided in the Fourth Circuit, the result would very likely have been different.")

2. Tellingly, respondents offer no response to the point that the Sixth Circuit's skepticism about awarding fees for preliminary injunctions has resulted in a district court in that Circuit denying a fee request in a case involving constitutional challenges just like some of the claims at issue here. *See O'Neill v. Coughlan*, No. 1:04-1612, 2011 WL 1298098 (N.D. Ohio, Mar. 31, 2011) (candidate who obtained injunction against judicial canon during election was not a prevailing party when the Sixth Circuit later dissolved the injunction on the ground that the district court should have abstained from ruling at all in the case).

3. The Third Circuit also likely would decide this case differently than the Tenth Circuit. Respondents try to distinguish *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223 (3d Cir.) (en banc), *cert. denied sub nom. Live Gold Operations, Inc. v. Dow*, 132 S. Ct. 500 (2011), on the ground that *Milgram* involved a temporary restraining order rather than a preliminary injunction. But the *en banc* Third Circuit made clear that it was skeptical that any preliminary ruling could create "prevailing party" status, Pet. 19-21, and certainly lower courts have read *Milgram* as applying to cases involving a preliminary injunction. *See* Pet. 21 (citing *Higher Taste v. City of Tacoma*, No. 10-5252, 2011 WL 5864665, at *3 (W.D. Wash. Nov. 22, 2011)); *see also* Amicus 7 ("The Third Circuit likewise would probably have rejected the attorney-fee request here.")

4. More fundamentally, respondents do not—indeed cannot—point to a single "test" on which the Circuits

rely. Nor can respondents articulate a "test" at all for prevailing party status in this context. Although respondents quote both the Fifth Circuit and D.C. Circuit "tests," Opp. 14 and 15, those "tests" are not the same. Moreover, the Fifth Circuit's "test" includes the "catalyst" theory that *Buckhannon* rejects, *see* Opp. 14 (emphasis added) ("(3) that *causes* the defendant to moot the action"), and would not even apply here because a non-party—the Kansas Supreme Court—mooted the action. The D.C. Circuit's "test" would not be satisfied here, because that "test" purportedly requires a "judgment" in a plaintiff's favor, Opp. 15, and a preliminary injunction is not a "judgment." Perhaps the most thoughtful opinion in this area is the Sixth Circuit's decision in *McQueary v. Conway*, 614 F.3d 591 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 927 (2011), but even that court ultimately conceded—as respondents recognize—that "all of this leaves us with a contextual and case-specific inquiry, one that does not permit us to say that preliminary-injunction winners always are, or never are, 'prevailing parties.'" Opp. 17 (quoting *McQueary*, 614 F.3d at 601).

5. Ultimately, respondents' assertions that the "Circuits are neither conflicted nor confounded" because they apply "long-understood general principles for prevailing party status", and do so "consistently and appropriately," Opp. 18-19, do not withstand even cursory scrutiny. Indeed, these contentions fly in the face of explicit observations and statements by the Circuits themselves. Furthermore, respondents are unable even to articulate the alleged "long-understood general principles for prevailing party status" in the context of preliminary injunctions. Instead, respondents effectively confirm what petitioners' petition demonstrates: the question presented has

resulted in confusion and disarray in the Circuits, and there is no single or meaningful "test" for determining prevailing party status in this context.[1]

C. The Tenth Circuit's Decision Is Contrary to *Buckhannon* and *Sole*.

As explained in the petition, Pet. 22-28, the Tenth Circuit's decision in this case suffers from at least two flaws on the merits. Respondents do not even address those flaws, much less disprove them. Instead, respondents act as though the only case that matters here is *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989). See Opp. 19-22 (citing, mentioning or quoting "*TSTA*" at least eight times, while mentioning or citing *Buckhannon* and *Sole* only three and two times, respectively). But respondents have it backwards: the question presented has everything to do with *Buckhannon* and *Sole*, and essentially nothing to do with *Texas State Teachers Ass'n*.

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[1] In the not unrelated, but different context of statutes that authorize an award of attorney's fees in "appropriate" circumstances, *see generally Hardt v. Reliance Std. Life Ins. Co.*, 130 S. Ct. 2149, 2156-57 (2010) (discussing the standards utilized in a variety of federal fee-shifting statutes), there is a petition pending before the Court in which an *amicus curiae* argues as follows: "Virtually every circuit has a different approach or rationale that cannot be reconciled with the other circuits. These approaches run the gamut from either prohibiting or mandating attorney's fees in such cases to case-by-case determinations…." *See* Brief of Amicus Curiae Pacific Legal Foundation in support of petitioners at 4, *Marina Point Dev. Co. v. Ctr. for Biological Diversity*, No. 11-782 (U.S. Jan. 19, 2012).

1. As the Federal Circuit has correctly observed, "*Buckhannon* does not allow a court to take what would otherwise be a 'catalyst theory' case and convert it…into a case where the plaintiff is nevertheless accorded 'prevailing party' status." *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1027 (Fed. Cir. 2005). But that is in part what the Tenth Circuit did here, and in part what the respondents argue when they assert that a preliminary injunction that does not itself even constitute a "judgment" suffices to confer prevailing party status. The problem is that, as Judge Henderson put it, the "words 'preliminary' and 'prevailing' are not ones that fit easily together." *Select Milk Producers*, 400 F.3d at 962 (Henderson, J., dissenting).

In this case, no one disputes that the respondents obtained a preliminary injunction that included some consideration of the merits, but respondents expressly concede that they sought substantially more relief than a preliminary injunction in this case, *see* Opp. 3 n. 5 ("'the district court denied consolidation, noting that Respondents sought relief beyond 'the injunctive relief sought in the preliminary and permanent injunctions'"). Further, respondents acknowledge that petitioners may have had substantial arguments on the merits of most, if not all, of the challenged judicial canons. Opp. 7 ("Petitioners argued that they were likely to succeed on appeal with respect to the pledges and promises and commits clauses because the caselaw was in flux on canons of that type").

Thus, at most, respondents' suit was a "catalyst" for amendments to the Kansas judicial canons by an entity (the Kansas Supreme Court) that is not a party to this case. As a result, the District Court correctly

held that respondents were not "prevailing parties" in the sense required by §1988(b).

2. Even though respondents had some "success" (a preliminary injunction) on some of their claims, they were not "prevailing parties." To the contrary, *Buckhannon* and *Sole* make clear that the "success" which makes a plaintiff a prevailing party—even when only obtained on "any significant issue" and "achieving some of the benefit sought," the *TSTA* standard—has to be enshrined in a *final judgment or its equivalent*, such as a consent decree.

Thus, contrary to respondents' argument and the Tenth Circuit's apparent view, the District Court did not misapply the *TSTA* standard. The District Court did not hold that respondents had to win on all of their "primary" claims in order to be prevailing parties. Instead, by analogy to *Sole v. Wyner*, the court merely recognized that respondents had never obtained a final determination or judgment in their favor on the merits of their constitutional claims. *See* Amicus 8 ("At best, a preliminary injunction demonstrates that a plaintiff might be the 'prevailing party' in a lawsuit, not that the plaintiff has prevailed"); *id*. at 16.

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The petition and the state amicus brief amply demonstrate that the question presented arises frequently and is important to all levels of government. Moreover, the Circuits have struggled with how to answer the question presented, and their decisions are neither consistent nor effective in defining the law that governs the question. This case cleanly presents the question on a full and undisputed record, and almost

all of the Circuits now have taken a stab at the question presented since the Court's decision in *Buckhannon*, making this an appropriate vehicle and time for plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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