No. 19-___

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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSEPH T. DETERS
Hamilton County
Prosecuting Attorney

ROGER E. FRIEDMANN
MICHAEL G. FLOREZ
Hamilton County
Prosecutor's Office
230 East Ninth Street
Suite 4000
Cincinnati, Ohio 45202
513-946-3025
roger.friedmann@hcpros.org

Counsel for Petitioner Hamilton County Prosecuting Attorney Joseph Deters

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
STEPHEN P. CARNEY
Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioattorneygeneral.gov

Counsel for Petitioner Dave Yost, Ohio Attorney General

QUESTIONS PRESENTED

1. Do abortion providers have Article III standing to assert the rights of their patients?

2. When, if ever, does a plaintiff who wins a preliminary injunction, but who never wins a final judgment on the merits, qualify as a "prevailing party" entitled to attorney's fees under 42 U.S.C. §1988?

LIST OF PARTIES

The petitioners are Dave Yost, the Attorney General of Ohio, and Joseph Deters, the Prosecuting Attorney of Hamilton County, Ohio. Attorney General Yost is automatically substituted for the former Attorney General, Mike DeWine, who was a party in the Sixth Circuit. *See* Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

The respondents are:

Planned Parenthood Southwest Ohio Region

Planned Parenthood of Greater Ohio

Preterm

Dr. Timothy Kress

The following entities and individuals were at one point identified as plaintiff-appellees on the Sixth Circuit's docket. But the court listed each as "terminated" before issuing the judgment under review:

Planned Parenthood Cincinnati Region

Planned Parenthood of Central Ohio

Dr. Laszlo Sogor

LIST OF RELATED CASES

1. *Planned Parenthood Cincinnati Region, et al. v. Taft*, No. 04-4371 (6th Cir.) (amended judgment entered April 13, 2006)
2. *Rogers, et al. v. Planned Parenthood Cincinnati Region, et al.*, No. 2008-1234 (Ohio) (judgment entered July 1, 2009)
3. *Planned Parenthood Southwest Ohio Region, et al. v. Strickland, et al.*, Nos. 06-4422/4423 (6th Cir.) (remanded without separate judgment August 6, 2009)
4. *Planned Parenthood Southwest Ohio Region v. DeWine, et al.*, No. 11-4062 (6th Cir.) (judgment entered October 2, 2012)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes, Rules, and Constitutional Provisions

INTRODUCTION

This case presents an opportunity to resolve a deeply entrenched circuit split regarding the meaning of a federal law. Section 1988 of Title 42 permits courts to award attorney's fees to "the prevailing party" in certain cases. In *Sole v. Wyner*, 551 U.S. 74 (2007), this Court held that prevailing-party status "does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Id.* at 83. In reaching this decision, the Court did not address "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." *Id.* at 86. The resolution of that question, the Court concluded, ought to await a case presenting it.

This is that case. The plaintiffs sued to enjoin, in all its applications, an Ohio law prohibiting off-label uses of a particular drug. They never won that relief. Instead, they won a narrow *preliminary* injunction permitting certain off-label uses that never did (and likely never could) arise. At the *permanent*-injunction stage, the parties vigorously disputed whether the plaintiffs were entitled even to the very-narrow relief they won at the preliminary-injunction stage.

No court ever resolved that dispute; no court ever issued a "final decision on the merits of" the plaintiffs' claim. *Id.* at 86. Why not? Because of the independent actions of a non-party: before the District Court could rule, the FDA mooted the case by changing the drug's label to include the formerly off-label use the plaintiffs sued for the right to prescribe.

Once the FDA acted, the plaintiffs dismissed their case, leaving Ohio's law intact. Then, the plaintiffs sought fees under §1988. According to them, the preliminary injunction justified a fee award notwithstanding the absence of a final judgment. The District Court and Sixth Circuit both agreed, and awarded the plaintiffs fees for their attorneys' work during the preliminary-injunction stage. This case therefore presents the very same question this Court left open in *Sole*: whether and when, "in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction" confers prevailing-party status. *Id.* at 86.

The Court should grant *certiorari* to answer that question. "Without a Supreme Court decision on point, circuit courts considering this issue have announced fact-specific standards that are anything but uniform." *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008). In the Third and Fourth Circuits, prevailing-party status requires *success* on the merits. *See Singer Mgmt Consultants v. Milgram*, 650 F.3d 223, 228–29 (3d Cir. 2011) (*en banc*); *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002). Since preliminary injunctions almost always rest on a finding of *likely* success, they almost never confer prevailing-party status. *See Singer*, 650 F.3d at 229; *Smyth*, 282 F.3d at 276–77 & n.9. In the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits, a preliminary injunction resting on a finding of likely success usually *does* confer prevailing-party status, even if the case ends before the court can issue a final judgment on the merits. *See Dearmore*, 519 F.3d at 524; *Higher Taste v. City of Tacoma*, 717 F.3d 712, 717 (9th Cir. 2013); *Kansas Judicial Watch v. Stout*, 653

F.3d 1230, 1232 (10th. Cir. 2011); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 947 (D.C. Cir. 2005). In the Seventh and Eighth Circuits, a preliminary injunction unaccompanied by a final judgment on the merits confers prevailing-party status only if it gives "substantive relief that is not defeasible by further proceedings." *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005); *accord N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006). Finally, in the Sixth Circuit, a preliminary injunction confers prevailing-party status only if the plaintiff wins relief that is either "irrevocable," *McQueary v. Conway*, 614 F.3d 591, 597 (6th Cir. 2010), or that lasts for a significant amount of time before the case becomes moot, Pet.App.14a.

If nothing else, the Court should hold this case for *Gee v. June Medical Services, Inc.*, No. 18-1323. As the above suggests, this case implicates a circuit split that has nothing to do with abortion jurisprudence. But it just so happens that the plaintiffs are abortion providers who sued to enforce the abortion rights of their patients. Accordingly, this case gives rise to the same jurisdictional question that this Court agreed to hear in *June Medical*: whether abortion providers have Article III standing to challenge laws that allegedly threaten their patients' rights. If *June Medical* holds that the answer is no—or if the Court adopts a new approach for addressing the issue—then this Court should grant *certiorari*, vacate, and remand for further consideration in light of *June Medical*. If *June Medical* holds that abortion providers *do* have Article III standing, however, this is an ideal vehicle for resolving the circuit split regarding the meaning of §1988.

OPINIONS BELOW

The Sixth Circuit's opinion below is published at *Planned Parenthood Southwest Ohio Region v. DeWine*, 931 F.3d 530 (6th Cir. 2019), and reproduced at Pet.App.1a.

The Sixth Circuit's order denying rehearing and rehearing *en banc* is reproduced at Pet.App.52a, and available online at *Planned Parenthood Southwest Ohio Region v. DeWine*, No. 17-3866, 2019 U.S. App. LEXIS 26420 (6th Cir. Aug. 29, 2019).

The District Court's decision is reproduced at Pet.App.29a, and available online at *Planned Parenthood Southwest Ohio Region v. DeWine*, No. 1:04-cv-00493, 2017 U.S. Dist. LEXIS 113647 (S.D. Ohio July 21, 2017).

JURISDICTIONAL STATEMENT

If abortion providers have standing to sue to enforce the rights of their patients, the District Court had jurisdiction to hear this federal-question case under 28 U.S.C. §1331. The Sixth Circuit had jurisdiction under 28 U.S.C. §1291.

The Sixth Circuit issued its panel decision on July 25, 2019. On August 29, 2019, it denied rehearing *en banc*. The State timely filed this petition less than ninety days later. *See* Sup. Ct. Rule 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, §2, cl.1 of the Constitution provides:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United

> States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. §1988(b) (2012) provides:

(b) Attorney's fees.

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 of this title, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer

> shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

STATEMENT OF THE CASE

1. This case no longer has anything to do with abortion rights. But at first, it did. In 2004, the plaintiffs in this case—all of them abortion providers—sued under 42 U.S.C. §1983 to enjoin Ohio's Abortion Pill Law. *See* Ohio Rev. Code §2919.123. (Though the plaintiffs have included different providers at different points in this litigation, today they consist of three abortion-providing entities and one abortion doctor.) The challenged law forbids doctors from giving patients an abortion-inducing drug, RU-486, for off-label use. An off-label use is a non-FDA-approved use. The plaintiffs sought to enjoin the law in *all* of its applications based on four distinct legal theories. *First,* they argued that the law was unconstitutionally vague. *Second*, they argued the law violated the right to bodily integrity. *Third*, they claimed the law unduly burdened the right to an abortion. *Finally*, they argued the law violated the Constitution by failing to permit off-label uses when necessary to protect a mother's health or life.

At the preliminary-injunction stage, the District Court facially enjoined the entire law based exclusively on the health-or-life theory. But on appeal, the Sixth Circuit vacated that broad injunction. It held that, while the District Court had not abused its discretion in finding a likelihood of success on the health-or-life claim, the court should have enjoined the law's application *only* in circumstances (if any existed) where protecting the mother's health or life

required off-label use. *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 518 (6th Cir. 2006). This followed from *Ayotte v. Planned Parenthood*, 546 U.S. 320, 331 (2006), which "held that when an abortion statute lacks a constitutionally necessary health or life exception, a narrow injunction prohibiting only unconstitutional applications of the statute should be employed where such an approach is not contrary to legislative intent." *Taft*, 444 F.3d at 515–16 (citing *Ayotte*, 546 U.S. at 331).

Later-developed evidence failed to establish that RU-486 would *ever* have been necessary to protect a mother's health or life. Thus, while the plaintiffs sought to enjoin the law in all its applications, they walked away from the preliminary-injunction stage having won only a narrow injunction permitting off-label use in circumstances that never arose. With that pyrrhic victory in hand, the plaintiffs returned to the District Court.

The plaintiffs never won anything more. In the years that followed, the plaintiffs lost all three of their other claims—the vagueness, bodily-integrity, and undue-burden claims—on the merits. *See Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 494 (6th Cir. 2012). This left only the health-or-life claim. And when it came time to litigate the merits of that claim, the State argued that the Abortion Pill Law was constitutional even though it contained no *express* health-or-life exception. The State gave two reasons. First, it argued that the Constitution required no health-or-life exception because RU-486 was *never* necessary to protect a mother's health or life in Ohio. Second, the State argued that *if* the Constitution required such an exception, the state law would properly be interpreted as in-

cluding one implicitly. This second point followed from Ohio law's requirement that courts construe statutes to avoid unconstitutionality. *See, e.g.*, *State ex rel. King v. Rhodes*, 11 Ohio St. 2d 95, 101 (1967).

As late as 2016, the District Court had not yet addressed these arguments—it had not yet reached a final decision on the health-or-life claim. It never got a chance. The FDA mooted the case by changing RU-486's label to permit the formerly off-label uses over which the plaintiffs sued. Pet.App.9a. The plaintiffs responded by voluntarily dismissing the case. That dissolved the narrow preliminary injunction from almost twelve years earlier. With this, any dispute over the legality of Ohio's law drew to a close.

2. The dispute over fees, however, was just beginning. Federal law permits "the prevailing party" in a §1983 case to recover "a reasonable attorney's fee." 42 U.S.C. §1988. The plaintiffs sought fees for work performed through February 24, 2006—the date on which the Sixth Circuit issued its opinion narrowing the preliminary injunction. Pet.App.6a, 9a. The plaintiffs' fee request did not adjust for the narrowness of the relief they won. For example, they sought fees for the time spent unsuccessfully defending the trial court's facial injunction on appeal. In addition, the plaintiffs' fee request did not distinguish between work relating to the claims they lost completely and work relating to the health-or-life claim on which they won narrow preliminary relief.

This Court has never addressed whether (or when) a party that wins a preliminary injunction, in the absence of a final judgment, is a "prevailing party" under §1988. *See Sole v. Wyner*, 551 U.S. 74, 86 (2007). But under Sixth Circuit precedent, a prelim-

inary injunction *can* confer prevailing-party status in these circumstances if the injunction creates a "material," "court-ordered" change in the legal relationship with the defendant that is "enduring" and "irrevocable." *McQueary v. Conway*, 614 F.3d 591, 597–98 (6th Cir. 2010) (quoting *Sole v. Wyner*, 551 U.S. 74, 82, 82 n.3, 86 (2007)). To illustrate, consider an organization that sues for the right to protest a particular event, wins a preliminary injunction, and protests the event. The end of the event moots the case, but the organization would still be a "prevailing party" under this approach. *Id*. at 599.

The State argued that the plaintiffs were not prevailing parties under this approach. For one thing, the relief they won was hardly "material": they secured an injunction that allowed the use of RU-486 *only* in circumstances that never arose. For another, the relief was neither "enduring" nor "irrevocable": had the FDA not acted, and had the State won on the merits, the injunction would have been revoked, leaving the plaintiffs with nothing. And *even if* the plaintiffs were "prevailing parties," the State argued, they were not entitled to fees for *all* of their work during the preliminary-injunction stage. Instead, the fees needed to be reduced to reflect the narrowness of the relief the plaintiffs won.

The District Court rejected these arguments and awarded the plaintiffs every penny they sought.

3. The Sixth Circuit affirmed. It explained that a plaintiff qualifies as a prevailing party under §1988 when it wins a "material alteration of the legal relationship of the parties in a manner which Congress sought to promote in" §1988. Pet.App.11a (quoting *Sole*, 551 U.S. at 82). Preliminary injunctions "usu-

ally [do] not" confer such material alterations. Pet.App.11a (quoting *McQueary*, 614 F.3d at 604). But there are exceptions. In particular, a party that wins a preliminary injunction, but whose case is mooted or otherwise ends before a final merits adjudication, might qualify as a prevailing party if: (1) it succeeds on a significant issue in the litigation; (2) the success is never "reversed, dissolved, or otherwise undone by the final decision in the same case"; and (3) the success rests, "at least in part, on the merits" of the plaintiff's claim. Pet.App.12a (quoting *Sole*, 551 U.S. at 83).

All parties agreed that the preliminary injunction in this case rested "at least in part" on the merits of the plaintiffs' health-or-life claim. Pet.App.12a. Thus, the plaintiffs' entitlement to fees turned on the remaining two factors. The Sixth Circuit held that both were satisfied. *First*, the court concluded that the plaintiffs satisfied the success-on-a-significant-issue requirement because the injunction they won "precluded enforcement of the statute in certain circumstances throughout almost 12 years of litigation." Pet.App.14a. *Second*, the court held that the decision had not been "reversed, dissolved, or otherwise undone" in the relevant sense. Pet.App.14a. The injunction, of course, had been dissolved when the plaintiffs dismissed their case. And in *Sole*, this Court held that parties may not claim prevailing-party status based upon a preliminary injunction that is "reversed, *dissolved*, or otherwise undone." 551 U.S. at 83 (emphasis added). But the Sixth Circuit concluded that a dissolution because of mootness did "not represent the kind of active, merits-based undoing" that *Sole* had in mind. Pet.App.14a.

In addition to affirming the plaintiffs' prevailing-party status, the Sixth Circuit held that the plaintiffs were indeed entitled to all of the fees they sought for the preliminary-injunction stage. The State had argued that the fee should be adjusted to account for the narrowness of the relief the plaintiffs won. The Sixth Circuit rejected that argument. It conceded that, under Supreme Court precedent, "the degree of success is a 'critical factor' in determining a fee award." Pet.App.22a (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)). But it concluded that the plaintiffs had already adjusted for the degree of success by seeking fees only for work performed during the preliminary-injunction stage. No "precedent," the Sixth Circuit concluded, required the District Court to go further by adjusting for the degree of success "*within* the" preliminary-injunction stage. Pet.App.23a. Additionally, the Sixth Circuit concluded that the plaintiffs had no obligation to seek fees for only those hours dedicated to the health-or-life claim on which they temporarily prevailed, since the "successful and unsuccessful claims" all "arose from a common core of facts." Pet.App.24a (quoting *Hensley*, 461 U.S. at 435).

4. After the Sixth Circuit denied the State's petition for *en banc* review, the State timely filed this petition for *certiorari*.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to resolve the question it left open in *Sole v. Wyner*: In what circumstances does a plaintiff who wins only a preliminary injunction, in the absence of a final judgment, qualify as a "prevailing party" for purposes of §1988? *See* 551 U.S. 74, 86 (2007). The "circuit

courts considering this issue have announced fact-specific standards that are anything but uniform." *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008). This sort of entrenched, multi-dimensional split calls out for the Court's involvement. That is especially true of this split, since fee awards against a state official tap into state budgets and thus implicate state sovereignty. When the circuits are split on an issue that touches the States' sovereign interests, this Court should weigh in.

I. This case presents the same standing question this Court granted *certiorari* to review in *Gee v. June Medical Services, LLC*, No. 18-1323.

It is important to address one jurisdictional issue before proceeding further. This Court, in *Gee v. June Medical Services, Inc.*, No. 18-1323, granted *certiorari* to address the question whether abortion providers have standing to challenge laws that allegedly violate their patients' abortion rights. This case presents the same question. The plaintiffs are three abortion-providing entities and an abortion doctor. Every one of their claims—including the health-or-life claim on which the District Court awarded preliminary relief—asserted the rights of third-party patients. If the Court in *June Medical* holds that abortion providers have no standing to bring these claims, or if it adopts a new approach to addressing standing in these circumstances, then this Court should vacate the Sixth Circuit's decision and remand for further proceedings in light of *June Medical*. After all, if the plaintiffs lacked standing to pursue their claims, they necessarily lacked standing to seek fees based on their having done so. Thus, at the

very least, the Court should hold this case pending the resolution of *June Medical*.

II. This Court should grant *certiorari* to decide when, if ever, a plaintiff who wins a preliminary injunction, in the absence of a final decision on the merits of a claim for permanent-injunctive relief, qualifies as a "prevailing party" under §1988.

If this Court's decision in *June Medical* does not deprive the plaintiffs of standing to seek fees, then this presents an ideal vehicle for this Court to address a question that has divided the circuits. The question is this: When, if ever, in the absence of a final judgment, does a plaintiff who wins a preliminary injunction qualify as a "prevailing party" under §1988? The Court did not resolve this issue in *Sole*. 551 U.S. at 86. But it is now clear that the lower courts need an answer. This is the perfect case for providing one.

A. The circuit courts have answered the question presented in numerous, mutually inconsistent ways.

This case presents an entrenched circuit split that this Court should grant *certiorari* to resolve. Before getting to the split, however, it is helpful to consider the legal context in which the split arises.

That context begins with the principle that parties generally pay their own attorney's fees. *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001). Of course, this is just a default rule, which Congress can alter by statute. And so it has. The most prominent example is 42 U.S.C. §1988. Section 1988 permits

courts to award "the prevailing party" in a §1983 suit "a reasonable attorney's fee as part of the costs." §1988(b).

The term "prevailing party" encompasses only those parties who ultimately win merits-based relief: (1) in a judicial proceeding; and (2) at the litigation's end. That follows from this Court's decisions in *Buckhannon* and *Sole*.

In *Buckhannon*, this Court held that parties can "prevail" for purposes of §1988 only if they win court-ordered relief. The plaintiff in *Buckhannon* sued to enjoin a West Virginia law that allegedly contradicted federal law. 532 U.S. at 600–01. But before it could win any relief, the state legislature mooted the litigation by amending the state law. *Id.* at 601. The plaintiff argued that it was entitled to prevailing-party status under the so-called "catalyst theory." Under that theory, "a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 602. This Court rejected that theory as inconsistent with the prevailing-party requirement in §1988. After all, the catalyst theory would allow "an award where there [was] no judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. To be a prevailing party within the meaning of the fee-shifting statutes, the Court reasoned, a defendant's change in conduct must arise from "the necessary judicial *imprimatur*." *Id.*

Sole, for its part, clarified that the phrase "prevailing party" includes only those parties whose victories are not washed away on appeal or in later proceedings. The Court held that a plaintiff who obtained preliminary relief, but who ultimately lost on

the merits at the permanent-injunction stage, was not a prevailing party under §1988. 551 U.S. at 86. The plaintiff in *Sole* argued that the "two stages of the litigation" should be considered "as discrete episodes," and that a win at the first stage warranted attorney's fees for work performed during that stage. *Id.* at 77. The Court disagreed. Viewing the entire case as a whole, the Court ruled that "[a] plaintiff who achieves a transient victory at the threshold of an action can gain no award under that fee shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded." *Id.* at 78. Thus, "[p]revailing party status … does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Id.* at 83. In *Sole*, the statute the plaintiff had challenged "remained intact," meaning the plaintiff had "gained no enduring 'change in the legal relationship' between herself and the state officials she sued." *Id.* at 86 (alterations omitted) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)). Accordingly, the plaintiff did not qualify as a "prevailing party."

In sum, *Buckhannon* establishes that prevailing-party status requires court-ordered relief. And *Sole* establishes that no party who wins a preliminary injunction only to lose later on is a "prevailing party" under §1988. Yet these cases left open a related question: What happens when an initial victory that springs from a preliminary injunction does not stand at the litigation's end because the case ends for reasons unrelated to the merits? For example, what happens if the case becomes moot after the plaintiff wins a preliminary injunction but before the district

court can issue a final judgment on the merits? The *Sole* Court "express[ed] no view" on this. *Id.* at 86. Instead, it opted to leave for another day the question "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." *Id.*

The circuit courts have answered the question that *Sole* left open in (roughly speaking) three ways. Some hold that a party can win prevailing-party status only with a definitive, merits-based ruling. Under this approach, preliminary injunctions almost never confer prevailing-party status. Other courts hold that preliminary injunctions, in the absence of a final adjudication on the merits, *usually* confer prevailing-party status. A third group of courts have adopted an intermediate position, in which a preliminary injunction unaccompanied by a final merits ruling will confer prevailing-party status depending on the durability or irrevocability of the injunctive relief. But the courts within this group are divided among themselves. In two circuits, a preliminary injunction confers prevailing-party status only if it gives the plaintiff "irrevocable" relief. But in the Sixth Circuit, a preliminary injunction that confers *revocable* relief may confer prevailing-party status if it remains in effect for a long time.

This case presents the Court with a chance to resolve the confusion.

1. Preliminary relief almost never confers "prevailing party" status in the Third and Fourth Circuits.

The Third and Fourth Circuits set the highest bar for parties claiming prevailing-party status. In those

courts, a party qualifies as a "prevailing party" only if it wins relief in a "merits-based decision." *See Singer Mgmt Consultants v. Milgram*, 650 F.3d 223, 228–29 (3d Cir. 2011) (*en banc*); *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002). A decision is "merits-based," these courts say, only if it establishes that the plaintiff *has* (or at least *will*) prevail on the merits; a finding that the plaintiff will *likely* prevail on the merits does not suffice. *Singer*, 650 F.3d at 229; *Smyth v. Rivero*, 282 F.3d at 276. Since preliminary injunctions generally rest on a likelihood-of-success finding, this rule means preliminary relief will rarely confer prevailing-party status.

The Third Circuit's *en banc* decision in *Singer* shows how the rule works in practice. The plaintiff in that case, a concert promoter, sued to enjoin New Jersey from enforcing its "Truth in Music Act" to regulate the promoter's marketing of an upcoming show. 650 F.3d at 225. The district court concluded that the promoter had established "a likelihood of success on the merits," and entered a temporary restraining order. *Id.* at 226. After the promoter held its show, New Jersey effectively mooted the case by changing its position in the litigation, interpreting the Truth in Music Act to permit marketing like that the promoter had used. *Id.* at 227. The district court declined to award any fees, and the *en banc* Third Circuit affirmed. The court held that a party qualifies as a "prevailing party" only if it wins a decision *on the merits*. *Id.* at 228–29. The court then explained that "the '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." *Id.* at 229. And because the promoter won a temporary restraining order based on a *likelihood*-of-success finding, it did not qualify as a "prevailing party." *Id.* at 230.

The Fourth Circuit in *Smyth* reached the same holding for the same reasons in a similar context. It held that, because a court can issue a preliminary injunction based on the plaintiff's likelihood of success, injunctions issued in cases that never yield a final judgment rarely, if ever, constitute "an 'enforceable judgment[] on the merits' or something akin to one for prevailing party purposes." 282 F.3d at 277 (alteration in original) (quoting *Buckhannon*, 532 U.S. at 604). On that basis, it held that plaintiffs who had won a preliminary injunction of a later-abandoned federal policy were not entitled to fees. *Id.*

Under the rule in the Third and Fourth Circuits, the plaintiffs in this case do not qualify as prevailing parties. The District Court awarded them preliminary relief because it found a "strong likelihood of success on the merits." *See Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 517 (6th Cir. 2006). But no court ever found that the plaintiffs in fact had, or would, prevail on the merits. Indeed, it is doubtful they would have. At the time the FDA's action mooted the case, Ohio had advanced serious arguments that even the narrow relief the plaintiffs won at the preliminary-injunction stage was improper. *See above* 7. In sum, the preliminary injunction the plaintiffs won was not "an 'enforceable judgment[] on the merits' or something akin to one for prevailing party purposes." *Smyth*, 282 F.3d at 277 (alteration in original) (quoting *Buckhannon*, 532 U.S. at 604). Had this case been litigated in the

Third or Fourth Circuits, the plaintiffs here would not have won any fees.

2. A plaintiff who wins a preliminary injunction, in the absence of a final adjudication of a claim for permanent-injunctive relief, almost always qualifies as a "prevailing party" in the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits.

At the other end of the spectrum, the Fifth, Ninth, Eleventh, and D.C. Circuits have adopted rules under which a preliminary injunction almost always confers prevailing-party status, as long as it is not reversed, dissolved, or otherwise undone on the merits.

In the Fifth Circuit, a plaintiff qualifies as a "prevailing party" under §1988 if it wins a preliminary injunction "based upon an unambiguous indication of probable success on the merits," and if that injunction "causes the defendant to moot the action." *Dearmore*, 519 F.3d at 524. Of course, almost *every* preliminary injunction "is based upon an unambiguous indication of probable success on the merits." *Id.* Indeed, the Fifth Circuit has held that a "party seeking a preliminary injunction generally must show [] a substantial likelihood of success on the merits." *Brock Servs., L.L.C. v. Rogillio*, 936 F.3d 290, 296 (5th Cir. 2019). Thus, any preliminary-injunction order finding that the plaintiff made such a showing confers prevailing-party status, at least in cases where *the defendant* moots the case before the court can finally adjudicate the merits.

The Ninth, Tenth, and Eleventh Circuits have similar rules, though apparently without any requirement that the mootness result from the defendant's actions. In the Ninth Circuit, a "preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*." *Watson v. Cty. of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002). Applying that rule, the Ninth Circuit has upheld fee awards to plaintiffs who, after winning a preliminary injunction, settled their cases or saw their cases go moot. *Higher Taste v. City of Tacoma*, 717 F.3d 712, 717 (9th Cir. 2013); *Watson*, 300 F.3d at 1096. In the Tenth Circuit, a preliminary injunction based on a finding that the plaintiff is "substantially likely to succeed on the merits" confers prevailing-party status even if "the actions of third parties moot[] the case" before final judgment. *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1232 (10th. Cir. 2011). And in the Eleventh Circuit, "a preliminary injunction on the merits … entitles one to prevailing party status and an award of attorney's fees," without regard to whether the case progresses to a judgment on the merits. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009) (alteration original) (quoting *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987)). Thus, a party that succeeds in preliminarily enjoining the enforcement of a state law qualifies as a "prevailing party" even if the state legislature repeals the challenged law before final judgment. *Id.*

The D.C. Circuit takes effectively the same approach, but states it differently. In that circuit, only "concrete and irreversible" preliminary relief will confer prevailing-party status. *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 947 (D.C. Cir.

2005). But the court has held that parties win concrete-and-irreversible relief when they win a preliminary injunction in a case that is mooted before the courts can issue a final adjudication on the merits. *Id.*; *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528 (1999). The D.C. Circuit *does not* apply this rule in cases mooted by a change in circumstances that unwinds or reverses any previously secured relief. For example, a plaintiff who wins a preliminary injunction stopping a defendant from collecting a registration fee is not a prevailing party if, before there is a final judgment, Congress amends the relevant law to allow the fee's collection. *Thomas v. NSF*, 330 F.3d 486, 493–94 (D.C. Cir. 2003). But aside from cases where parties are judicially or legislatively deprived of the relief they won at the preliminary-injunction stage, a preliminary injunction confers prevailing-party status.

Under the rules in these courts, the plaintiffs here would have been entitled to attorney's fees, since they won a preliminary injunction based on a likelihood-of-success-finding and the case was mooted before final judgment. The only possible exception is the Fifth Circuit; insofar as that court applies its rule only in cases where the preliminary injunction "causes *the defendant* to moot the action," *Dearmore*, 519 F.3d at 524 (emphasis added), the plaintiffs would not be entitled to fees in this case, since the case was mooted by the actions of a non-party.

3. The Sixth, Seventh, and Eighth Circuits have adopted intermediate positions.

Finally, three circuits have adopted intermediate approaches, in which a preliminary injunction in the

absence of a final judgment on the merits may confer prevailing-party status depending on (among other things) the enduring character of the relief conferred. But the circuits within this final group differ among themselves; the Seventh and Eighth Circuits define "prevailing party" more strictly than the Sixth Circuit.

Seventh and Eighth Circuits. In both the Seventh and Eighth Circuits, a preliminary injunction confers prevailing-party status *only if* the injunction results in "substantive relief that is not defeasible by further proceedings," *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005) (citation omitted). Thus, a preliminary injunction must confer "irreversible" relief to confer prevailing-party status. *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006).

Under this rule, parties that win preliminary injunctions qualify as prevailing parties if the injunctions give them everything they want and their cases are mooted as a result. Take, for example, a party that sues for the right to protest a particular event, and who wins a preliminary injunction allowing it to do so. Once the event concludes, the case is moot. But because the plaintiff received everything it asked for—because it won "substantive relief that is not defeasible by further proceedings," *Dupuy*, 423 F.3d at 719—it qualifies as a "prevailing party" notwithstanding the absence of a final judgment. *See Young v. City of Chicago*, 202 F.3d 1000, 1000–01 (7th Cir. 2000) (*per curiam*).

On the other hand, "temporary relief that merely maintains the status quo does not confer prevailing party status." *N. Cheyene*, 433 F.3d at 1086. For example, a party that wins a preliminary injunction

halting the government's construction of a shooting range, but whose case is mooted by the government's later decision not to build the shooting range, is not a "prevailing party." *Id.* In a case like that, the injunction would preserve the *status quo*, but would not confer irreversible relief—if the case had not become moot, the plaintiff might have lost on the merits and left court emptyhanded.

Applying that approach to this case, the plaintiffs here are not entitled to attorney's fees. The relief they won—a court order entitling them to use RU-486 in certain off-label applications—was neither indefeasible nor irreversible. *Dupuy*, 423 F.3d at 719; *N. Cheyenne*, 433 F.3d at 1085–86. To the contrary, if the case had been allowed to proceed to final judgment, the courts could have denied the plaintiffs' request for a permanent injunction. Therefore, this is not a case in which the preliminary injunction itself gave the plaintiffs all the relief they sought.

The Sixth Circuit. In the Sixth Circuit, "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under § 1988." *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010). But sometimes, it does. For example, a preliminary injunction confers prevailing-party status if it creates a "material" change in the legal relationship between the parties that is "enduring" and "irrevocable." *Id.* at 597, 598 (quoting *Sole*, 551 U.S. at 82, 86). Thus, as in the Seventh and Eighth Circuits, a preliminary injunction confers "prevailing party" status if "the claimant receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time." *Id.* at 599. For example, if "protestors seek an injunction to exercise their First Amendment rights at a

specific time and place—say to demonstrate at a Saturday parade—a preliminary injunction will give them all the court-ordered relief they need and the end of the parade will moot the case." *Id.* at 601. In such circumstances, the protestors qualify as prevailing parties. Similarly, couples who sue for an injunction requiring the issuance of marriage licenses, and who obtain licenses after winning a preliminary injunction, qualify as prevailing parties even though the licenses' issuance moots the case before final judgment. *See Miller v. Caudill*, 936 F.3d 442, 449 (6th Cir. 2019).

If this were the only category of cases in which the Sixth Circuit allowed a preliminary injunction to confer prevailing-party status, the plaintiffs would not have won fees. After all, the relief the plaintiffs won was in no sense "irrevocable." To the contrary, and as just explained, the relief would have been revoked had Ohio won on the merits at the permanent-injunction stage.

The plaintiffs won attorney's fees anyway, because the Sixth Circuit, in its decision below, expanded the category of cases in which plaintiffs are eligible for attorney's fees. Specifically, it held that a preliminary injunction that lasts for many years before the case is mooted is sufficiently "enduring" to confer prevailing-party status, even if the relief is not truly "irrevocable." Pet.App.14a. Indeed, the panel below did not even use the word "irrevocable." Instead, it stressed that the preliminary injunction remained in effect for twelve years, and that the FDA's actions meant the plaintiffs never had to abide by the Abortion Pill Law's restrictions on their preferred off-label uses of RU-486. Pet.App.14a.

The panel gave no guidance regarding how long is long enough to confer prevailing-party status. For example, would a single year suffice? Five? Ten? Whatever the answer, the panel's opinion does establish that, at some point, relief is sufficiently "enduring" that it confers prevailing-party status without regard to its revocability. This focus on the length of time the injunction was in place, rather than its irrevocability, distinguishes the Sixth Circuit's approach from that of the Seventh and Eighth Circuits. Indeed, no other circuit determines prevailing-party status by considering the length of time a preliminary injunction was in effect.

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The above illustrates the need for this Court to answer the question it left open in *Sole*. Indeed, the confusion is even worse than the foregoing suggests, because the circuit courts sometimes struggle to apply the tests they have adopted. For example, while the Eighth Circuit has held that a *status-quo* preserving injunction does not confer prevailing-party status, it has nonetheless found prevailing-party status based on an injunction that did nothing more than preserve the *status quo* (the court's contrary claims notwithstanding). *Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903, 911 (8th Cir. 2012). The lower courts need help. So do the parties subject to these rules. Only this Court can bring the needed clarity, and assure consistency across the country.

B. The circuit split is important.

"One of this Court's primary functions is to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 408 (2018) (Thomas,

J., dissenting from denial of *certiorari*) (alteration in original) (quoting Sup. Ct. Rule 10(a)). This case checks both boxes. The discussion above establishes the conflict among the circuits. The circuits even acknowledge the split, confessing to having "announced fact-specific standards that are anything but uniform." *Dearmore*, 519 F.3d at 521.

The issue is also "important." Sup. Ct. Rule 10(a). For one thing, it arises every single time a plaintiff seeks fees after winning only a preliminary injunction. Further, other statutes—including the Americans with Disabilities Act and the Lanham Act—use the very same "prevailing party" language. *See* 42 U.S.C. §12205; *Sinapi v. R.I. Bd. of Bar Exam'rs*, 910 F.3d 544, 551–52 (1st Cir. 2018); 15 U.S.C. §1117(a); *Lorillard Tobacco Co. v. Engide*, 611 F.3d 1209, 1214–17 (10th Cir. 2010). Thus, the Court's ruling in this case is likely to have effects even beyond the context of §1988.

The issue is all the more important because fee awards are often imposed against the States themselves, and thus implicate concerns with state sovereignty. Though States may not be sued under §1983, *Quern v. Jordan*, 440 U.S. 332, 341 (1979), their officials can be—and often are. In those cases, any fee awards are inevitably paid by the States themselves. Why does that matter? Because the States have a sovereign interest in their own funds. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011). It follows that decisions imposing fee awards against state officers significantly affect state sovereignty. And questions that affect state sovereignty are especially worthy of review. For example, the impact of habeas relief on state sovereignty explains this Court's practice of regularly summarily revers-

ing factbound misapplications of habeas law. *See, e.g.*, *Shoop v. Hill*, 139 S. Ct. 504, 505 (2019) (*per curiam*); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2557 (2018) (*per curiam*). That practice is appropriate because erroneous awards of habeas relief "intrude[] on state sovereignty" to an unusual degree. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). So do court orders, like those issued under §1988, that even indirectly require the States to expend money.

To be clear, Ohio is not challenging the constitutionality of fee awards against state officers. It is arguing, however, that because federal courts issue orders that intrude upon the States' sovereign interests, this Court should at least make sure those orders are being issued in compliance with federal law.

C. This is an ideal vehicle for addressing the question presented.

Unless this Court holds in *June Medical* that abortion providers lack standing to defend the rights of their patients, this case presents an ideal vehicle for addressing the question presented. That is so for three reasons.

1. As an initial matter, this case squarely presents the split. The *only* remaining question (aside from standing) is whether the preliminary injunction that the plaintiffs won conferred prevailing-party status. Everyone agrees that the case is now moot. And since the plaintiffs' merits arguments have no bearing on the debate over §1988's meaning, the Court can resolve this case without regard to abortion jurisprudence. On top of that, Ohio preserved its challenge to the fee award. This case thus presents a clean vehicle for addressing the question left open in *Sole*: "whether, in the absence of a final de-

cision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." 551 U.S. at 86.

2. Additionally, this case is an attractive vehicle because the Sixth Circuit erred when it determined that the plaintiffs were prevailing parties based on the now-dissolved preliminary injunction.

The "touchstone of the prevailing party inquiry," is "the material alteration of the legal relationship of the parties." *Sole*, 551 U.S. at 82 (quoting *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)). The alteration must be "enduring," in the sense of "*permanently* giving [the] plaintiff the real-world outcome it sought." *Id.* at 82 n.3 & 86. A temporary or "ephemeral" change will not do. *Id.* at 86.

Applied here, these principles establish that the plaintiffs are *not* eligible for fees. They won only a preliminary injunction. And that injunction was in no sense "enduring" or "irrevocable"—it would have been revoked had the State prevailed at the permanent-injunction stage. If the State had prevailed at that stage, then the plaintiffs would unambiguously *not* have qualified as prevailing parties; *Sole* held that a party who wins a preliminary injunction, but who is later "denied a permanent injunction after a dispositive adjudication on the merits," does not "qualify as a 'prevailing party' within the compass of §1988(b)." *Id.* at 77. It follows that the plaintiffs were not prevailing parties the instant before the FDA, a third party, took an action that mooted the case. And it makes little sense to suggest that the FDA's action changed anything relevant to §1988.

How could it be that, by denying the State a chance to prevail in "a dispositive adjudication on the merits," *id.*, an out-of-court action by a non-party transformed the plaintiffs into prevailing parties?

The facts of this case illustrate the wisdom of the approach adopted by the Third and Fourth Circuits, under which preliminary injunctions that rest on likelihood-of-success findings do not confer prevailing party status. *Singer*, 650 F.3d at 229; *Smyth v. Rivero*, 282 F.3d at 276. "At the preliminary injunction stage, the court is called upon to assess the *probability* of the plaintiff's ultimate success on the merits." *Sole*, 551 U.S. at 84 (emphasis added). But a finding of *likely* success always remains subject to reevaluation during "a dispositive adjudication on the merits." *Id.* at 77. Until the plaintiff prevails in such an adjudication, it should not be deemed a prevailing party, because no court has adjudged anyone the winner. That approach, applied here, would rightly prevent the plaintiffs from claiming attorney's fees despite their never having obtained a court order ruling for them on the merits.

Even if the Court is unwilling to go that far, it should at least hold that preliminary injunctions must be truly irrevocable to confer prevailing-party status. Even under that more permissive rule, which resembles the rule applied in the Seventh and Eighth Circuits, the plaintiffs would not be entitled to fees. Relief is not "enduring"—it does not "*permanently* giv[e]" the "plaintiff the real-world outcome" sought—unless it is incapable of being unwound in later proceedings. *Id.* at 82 n.3 & 86. The plaintiffs here never won court-ordered relief permanently giving them what they wanted. To the contrary, the only court-ordered relief they won conferred temporary

relief pending a full merits adjudication. As such, they were not prevailing parties.

3. Another appealing reason to take this case—though not a separate question presented—is that the Sixth Circuit's decision represents an especially egregious interference with state sovereignty. That is so because the panel affirmed the District Court's order awarding attorney's fees even for work done on claims the plaintiffs lost, and without adjusting at all for the exceptionally narrow scope of the relief won.

Section 1988 permits "reasonable" fee awards. §1988(b). The reasonableness inquiry includes both a "lodestar" amount and a degree-of-success factor. "[T]he 'lodestar' amount … is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 551 (6th Cir. 2008) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). But "[t]he product of reasonable hours times a reasonable rate does not end the inquiry." *Hensley*, 461 U.S. at 434. In cases where the plaintiff achieves partial or limited success, the "most critical factor is the degree of success obtained." *Id.* at 436. Awarding the full lodestar amount in those circumstances can lead to an "excessive" award. *Id.* As a result, even though a trial court has discretion in determining what constitutes a "reasonable" fee award, it abuses its discretion when it fails to assure a reasonable relationship between the fee awarded and the success obtained. *See id.* at 437

Here, the plaintiffs sued to permanently enjoin the *entire* Abortion Pill Law in all of its applications. They won almost nothing. By the end of the case, the plaintiffs had lost three of their four claims outright,

on the merits. *See above* 7. And with respect to the fourth claim—the one based on the Abortion Pill Law's lack of an express health-or-life exception—the plaintiffs won only a narrow preliminary injunction entitling them to use RU-486 in circumstances that *never* arose in fact, and that likely could not have arisen even in theory. Nonetheless, the plaintiffs sought reimbursement for the hours spent during the entire preliminary-injunction stage of litigation. That means the plaintiffs sought reimbursement for research and writing relating to distinct legal claims that they lost, and for the work they put into *unsuccessfully* defending the District Court's broad, facial injunction on appeal. Given the narrow "degree of success" that the plaintiffs achieved during the preliminary-injunction stage, it was not "reasonable" to award the plaintiffs relief for all the hours their attorneys worked during that stage.

Notwithstanding all this, the Sixth Circuit affirmed the District Court's order granting the plaintiffs all the fees they sought for the preliminary-injunction stage. Pet.App.20a–26a. The Sixth Circuit tried to justify this decision by appealing to the scope of the plaintiffs' fee request. Specifically, it concluded that, since the plaintiffs sought fees only for work done during the preliminary-injunction stage, the plaintiffs already "accounted for and divided out work done on the claim on which [they] prevailed—the health-and-life-exception claim—and distinguished it from the hours counsel expended on the remaining unsuccessful claims." Pet.App.24a; *accord* Pet.App.24a–25a.

This argument has at least two fatal flaws. First, it is factually inaccurate. The plaintiffs performed work during the preliminary-injunction stage even

on the claims they lost. The Sixth Circuit tried to get around this by noting that all four claims arose "from a 'common core of facts.'" Pet.App.24a (quoting *Hensley*, 461 U.S. at 435–37). But that too is false: the facts and law relevant to the health-or-life claim had no bearing on the vagueness, undue-burden, and bodily-integrity claims that the plaintiffs lost. The health-or-life claim turned entirely on whether the Constitution required the Abortion Pill Law to contain a health-or-life exception, and whether the law contained such an exception. None of that mattered to the plaintiffs' other claims.

The second problem with the argument is legal: even ignoring the award of fees for work done on losing theories, the courts below erred by failing to adjust the fee award downward to account for the insignificance of the relief the plaintiffs won. Again, the plaintiffs won a narrow injunction allowing them to administer RU-486 in circumstances that never arose. Neither of the courts below accounted for the insignificance of that relief. They conflated the question of *whether* the plaintiffs prevailed with the question of *the degree to which* they prevailed. *Hensley* requires courts to ask the second question in deciding whether a fee award is reasonable. 461 U.S. at 436–37.

In sum, the Sixth Circuit's decision awards the plaintiffs fees for the many hours their attorneys spent during the preliminary-injunction stage—even though many of those hours were spent on losing claims, and even though the relief secured by all this work amounted to almost nothing. That is absurd. The petitioners are not seeking review on the question whether the Sixth Circuit erred by affirming the unadjusted fee award. But reversal on the question

presented would have the happy side effect of undoing an indefensibly high award.

CONCLUSION

The Court should grant the petition for *certiorari* and reverse.

JOSEPH T. DETERS
Hamilton County
Prosecuting Attorney

ROGER E. FRIEDMANN
MICHAEL G. FLOREZ
Hamilton County Prosecutor's Office
230 East Ninth Street
Suite 4000
Cincinnati, Ohio 45202
513-946-3025
roger.friedmann@hcpros.org

Counsel for Petitioner Hamilton County Prosecuting Attorney Joseph Deters

DAVE YOST
Ohio Attorney General

BENJAMIN M. FLOWERS*
**Counsel of Record*
Ohio Solicitor General
STEPHEN P. CARNEY
Deputy Solicitor General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
benjamin.flowers@ohioattorneygeneral.gov

Counsel for Petitioner Dave Yost, Ohio Attorney General

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