No. 19-677

In the Supreme Court of the United States

DAVE YOST AND JOSEPH DETERS,

Petitioners,

v.

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, ET AL.,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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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?

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REPLY

In *Sole v. Wyner*, 551 U.S. 74 (2007), this Court left open 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" under 42 U.S.C. §1988. *Id.* at 86. In the years since, the circuits have developed their own tests for deciding how §1988 applies in these circumstances, arriving at various "fact-specific standards that are anything but uniform." *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008). And now, Ohio and nineteen other States have stressed the need to resolve this confusion. Pet.25–27; Br. of Georgia and *Amici* States 3–9, 13–17.

Parties that dispute the certworthiness of a question that this Court has expressly left open, that has divided the circuits, and that significantly affects the States, have a tough row to hoe. The plaintiffs have not hoed that row. The Court should grant *certiorari* to decide when, if ever, a party who wins a preliminary injunction without winning final judgment on the merits qualifies as a "prevailing party" entitled to fees under §1988. At the very least, the Court should hold this case for *Russo v. June Medical Services, L.L.C.*, Nos. 18-1323, 18-1460. The decision in that case may justify reversing, or granting, vacating, and remanding, this one.

I. The Court should hold this case pending the resolution of *June Medical*.

The plaintiffs in this case are all abortion providers who sued to enforce their patients' rights. They now seek fees in the same case. In *June Medical*, this Court will decide when, if ever, providers have

standing to assert the rights of their patients. Because the resolution of that question *could* bear on the plaintiffs' standing in this suit, the Court should hold this case for *June Medical*.

The plaintiffs deny that *June Medical* could affect this case. According to them, there is no chance *June Medical* will keep providers from bringing abortion challenges like the one here. BIO.32 n.10. But neither the plaintiffs nor Ohio knows what the Court will hold. The decision might affect the plaintiffs' standing. It might not. If it does, the Court can grant, vacate, and remand for the Sixth Circuit to address standing. If not, this is a clean vehicle for addressing the second question presented. Either way, it makes sense to wait for *June Medical*.

The plaintiffs also argue that Article III standing is irrelevant. According to them, entitlement to fees under §1988 is a "collateral" issue that federal courts can litigate even after determining that they lack Article III jurisdiction over the merits. BIO.27–32. That is wrong. Article III's "standing requirement" must be satisfied at every stage of litigation. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). A dispute over attorney's fees is just another stage of litigation. (The plaintiffs, for example, filed their fees motion in the very same case in which they sought relief on the merits—this is not a collateral action.) Thus, "an appellate court must vacate an award of attorney's fees if the district court did not have subject matter jurisdiction over the litigation." *Lynch v. Leis*, 382 F.3d 642, 648 (6th Cir. 2004) (internal quotation omitted); *accord Smith v. Brady*, 972 F.2d 1095, 1097 (9th Cir. 1992). So if *June Medical* says the plaintiffs lacked standing to sue, they have no standing to seek fees in the same

suit. At the very least, the question would be close enough to justify a remand for the Sixth Circuit to consider the matter in the first instance.

II. The Court should grant *certiorari* to resolve the circuit split over the second question presented.

If *June Medical* does not affect the plaintiffs' standing, this case offers an ideal vehicle for resolving an important question that divides the circuits: 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 §1988?

A. The circuits are split over the question presented.

The federal circuit courts admit that, with respect to the second question presented, they have "announced fact-specific standards that are anything but uniform." *Dearmore*, 519 F.3d at 521. The plaintiffs disagree. But their primary argument tackles a straw man. There is no split, they say, regarding the question whether "success in gaining a preliminary injunction," even "in the absence of a final decision on the merits," "may *sometimes* warrant an award" of attorney's fees. BIO.9 (quoting *Sole*, 551 U.S. at 86) (emphasis added). After all, *every* circuit confers prevailing-party status on at least *some* plaintiffs who win only a preliminary injunction. Because all circuits agree on that narrow point, the plaintiffs say, there is no disagreement worthy of review.

This argument fails because Ohio asked this Court to review, in addition to the question of *whether* plaintiffs who win only a preliminary injunction

are sometimes entitled to fees, the question of "*[w]hen*" such plaintiffs are entitled to fees. Pet.i (emphasis added). In other words, Ohio's petition asks this Court to answer the following question: In what circumstances do plaintiffs who win a preliminary injunction, but whose cases are mooted before final judgment, qualify as "prevailing parties"? That question has split the circuits. Pet.16–25. Indeed, this very case proves the existence of a split because this very case would have come out differently in different circuits.

1. Majority view. In the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits, a plaintiff who wins a preliminary injunction based on a showing of likely success on the merits, and whose case is mooted before final judgment, qualifies as a "prevailing party" entitled to attorney's fees under §1988. *Dearmore*, 519 F.3d at 524, *Watson v. Cty. of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002); *Kan. 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). All sides agree that the plaintiffs are prevailing parties under that test. *See* Pet.19–21; BIO.11–13. (The plaintiffs say the First and Second Circuits apply the same test. If that is true, the split is even more entrenched than Ohio's petition suggests.)

2. Third and Fourth Circuits. In contrast, the plaintiffs would not qualify as prevailing parties in the Third or Fourth Circuits.

The Third and Fourth Circuits confer prevailing-party status only on parties who win a preliminary injunction in a "merits-based decision." *Singer Mgmt*

Consultants v. Milgram, 650 F.3d 223, 228–29 (3d Cir. 2011) (*en banc*); *accord Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002). Both circuits set a high bar for what counts as a merits-based decision. It is not enough for the injunction to rest on a finding of *likely* success on the merits. Instead, the injunction must rest on a determination that the plaintiff has succeeded, or will certainly succeed, on the merits. *Singer*, 650 F.3d at 229; *Smyth*, 282 F.3d at 276.

The plaintiffs are not "prevailing parties" under this standard. As Ohio's *certiorari* petition explained, the plaintiffs won a narrow injunction permitting them to administer an abortion drug *only* in cases where doing so was necessary to save a patient's health or life. The Sixth Circuit approved of this narrow injunction based on its determination that the plaintiffs had a "strong likelihood of success on the merits." *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 517 (6th Cir. 2006). But no court ever said that the plaintiffs had won or would win on the merits. (Nor is there good reason to think the plaintiffs would have prevailed on the merits. The record contained no evidence, aside from the District Court's *ipse dixit*, that the drug would *ever* be necessary to save anyone's life or health. And regardless, the law could be read to contain an implicit health-or-life exception. *See* Pet.7–8.) Because the narrow injunction that the plaintiffs won rested on a finding of likely success, not actual success, the plaintiffs would not have won fees in the Third or Fourth Circuits.

The plaintiffs disagree, but their arguments ignore the way in which the Third and Fourth Circuits apply their standards. For example, the plaintiffs say they won merits-based relief, just as *Singer* and

Smyth require, because the Sixth Circuit found that they would likely prevail on the merits. BIO.17–20. But that is not what "merits-based" means in the Third and Fourth Circuits. Again, a decision is sufficiently "merits-based" only if it rests on a determination of actual or certain merits-based success; a likelihood of success on the merits is not enough. *Singer*, 650 F.3d at 229; *Smyth*, 282 F.3d at 276.

The plaintiffs mistakenly, but not surprisingly, resist this conclusion. With respect to the Third Circuit, they point to three other cases that, according to them, show that the *en banc* court in *Singer* did not mean what it said. BIO.18. One of those cases is a panel decision that *predates* the *en banc* decision in *Singer*. *See People Against Police Violence v. City of Pittsburgh ("PAPV")*, 520 F.3d 226, 233–34 (3d Cir. 2008). Anyway, *Singer* characterized *PAPV* as resting on a finding of *actual*, rather than likely, success on the merits. 650 F.3d at 229–30. So, at least in the view of the *en banc* court, the cases are perfectly consistent. It is thus hardly surprising that *Singer* declined to overrule *PAPV*. BIO.18.

The other two cases are equally irrelevant. One is an unpublished district court case that awarded fees where the plaintiffs apparently demonstrated *actual* success. *See Sixth Angel Shepherd Rescude, Inc. v. Bengal*, No. CIV.A. 10-1733, 2013 U.S. Dist. LEXIS 135385, at *7 (E.D. Pa. Sept. 23, 2013) (defendants "unquestionably deprived Plaintiffs of their right in their property" without "lawful justification") (internal quotation marks omitted). The other case *denied* attorney's fees where the plaintiff ultimately lost on the merits. *Nat'l Amusements, Inc. v. Borough of Palmyra*, 716 F.3d 57, 60 (3d Cir. 2013). Thus, neither case suggests that a preliminary in-

junction that rests on likely success, rather than actual success, can confer prevailing-party status.

The plaintiffs' attempt to recast the Fourth Circuit's test fares no better. The plaintiffs claim that, in the Fourth Circuit, a preliminary-injunction decision *can* confer prevailing-party status even when it rests on a finding of likely success rather than actual or certain success. BIO.19–20. The trouble with this characterization is that the reasoning in *Smyth* refutes it. *Smyth* noted that a preliminary injunction may rest on "a strong showing of likelihood of success," or even a "substantial likelihood of success [established] by clear and convincing evidence." 282 F.3d at 276 (internal quotation omitted). But *Smyth* went on to hold that *even that* lofty showing would be insufficiently merits-based to confer prevailing-party status. *Id*. It is hard to imagine how the decision could have been any clearer that preliminary injunctions resting on a finding of likely success, rather than certain success, are incapable of conferring prevailing-party status.

The plaintiffs next insist that *Smyth* grew out of the Fourth Circuit's now-outdated practice of awarding preliminary injunctions without finding even a likelihood of success. BIO.19–20. All *Smyth* means, they say, is that preliminary injunctions awarded without regard to the merits cannot confer prevailing-party status. But again, that characterization is impossible to square with *Smyth*'s just-discussed reasoning, which held that preliminary injunctions that *do* rest on likely success are insufficiently merits-based. 282 F.3d at 276. Anyway, even if *Smyth* grew out of a now-outdated doctrine, it remains good law in the Fourth Circuit—even the plaintiffs silently concede *Smyth* has never been overruled. BIO.20.

3. Sixth, Seventh, and Eighth Circuits. Three circuits—the Sixth, Seventh, and Eighth—assess prevailing-party status by asking (among other things) whether the preliminary injunction the plaintiff won was enduring or irrevocable. But they approach the question differently. Thus, while the plaintiffs would not qualify as prevailing parties in the Seventh or Eighth Circuits, they were found to be prevailing parties in the Sixth Circuit below.

In both the Seventh and Eighth Circuits, a preliminary injunction must be sufficiently permanent, despite its "preliminary" nature, to confer prevailing-party status. The Eighth Circuit finds prevailing-party status based on preliminary injunctions only when the plaintiff won "irreversible" relief. *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006). The Seventh Circuit finds prevailing-party status in these circumstances only if the preliminary injunction conferred "substantive relief that [was] not defeasible by further proceedings." *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005) (internal quotation omitted); s*ee also Young v. City of Chicago*, 202 F.3d 1000, 1000–01 (7th Cir. 2000) (*per curiam*). Both standards are satisfied when the preliminary injunction gives the moving party everything it wants and, as a result, moots the case. Take, for example, the case of a plaintiff who sues for a preliminary injunction allowing him to protest a particular event. Once the event happens, the plaintiff has won everything he wanted and the case becomes moot. In those circumstances, the relief is "irreversible" because it is no longer possible to deny the plaintiff anything he asked for.

The Seventh and Eighth Circuits would not have found the plaintiffs to be prevailing parties. The pre-

liminary relief the plaintiffs won—a court order allowing the use of RU-486 in certain off-label applications—was reversible. In other words, the plaintiffs were not given everything they sought. After all, Ohio could have—and is confident that it *would have*—won on the merits had the case not been mooted. And if Ohio had won on the merits, the plaintiffs (unlike the hypothetical protestor who already protested his event) would have left court emptyhanded. Relief like this is reversible, not irreversible, and thus insufficient to confer prevailing-party status in the Seventh and Eighth Circuits.

The plaintiffs dispute this. According to them, the preliminary relief they won became "irreversible," *N. Cheyenne*, 433 F.3d at 1086, and was no longer "defeasible," *Dupuy*, 423 F.3d at 719, once the case went moot. Once the case became moot, the plaintiffs argue, "the preliminary relief" could not be "unwound in any further merits proceedings because there [were] no such proceedings." BIO.l4.

That argument misconstrues what the Seventh and Eighth Circuits mean by "irreversible" and "not defeasible." The question is not whether the past relief can be unwound *in the case in which it was awarded*. After all, mootness, by definition, keeps courts from reversing previously conferred relief. If the Seventh and Eighth Circuits understood mootness to make relief irreversible, then the "irreversible" requirement would be satisfied in every case where it applied—it would be superfluous. What the Seventh and Eighth Circuits mean by "irreversible" and "not defeasible" is this: the plaintiff already won everything it sought, and so the plaintiff could not be denied what it wanted even if the case were allowed to proceed. *See, e.g.*, *N. Cheyenne*, 433 F.3d at 1086;

Dupuy, 423 F.3d at 723; *Young*, 202 F.3d at 1000. The plaintiffs in this case did not win everything they sought—they never won a permanent injunction of Ohio's law—and so the relief was not "irreversible" in the relevant sense.

In the Sixth Circuit, as in the Seventh and Eighth Circuits, a party that wins only a preliminary injunction may win prevailing-party status if it "receives everything it asked for in the lawsuit, and all that moots the case is court-ordered success and the passage of time." *McQueary v. Conway*, 614 F.3d 591, 599 (6th Cir. 2010). But unlike in the Seventh and Eighth Circuits, a party may be deemed to have received "everything it asked for" whenever the injunction remained in effect for a very long time—even if the relief conferred was not truly irrevocable. On that basis, the Sixth Circuit held that the plaintiffs were entitled to fees in this case. Pet.App.14a.

*

Because this case would come out differently in different circuits, and because almost every circuit has already weighed in, this case presents an opportunity to resolve an entrenched, multi-circuit split.

B. This is a good vehicle for deciding an important question.

Two of the plaintiffs' other arguments deserve responses.

First, the plaintiffs say this is a bad vehicle for addressing the question presented because the District Court "never issued a formal order revoking or vacating the injunction." BIO.22 (quoting Pet.App.14a). So what? The plaintiffs' voluntary dismissal automatically restored the *status quo*, re-

lieving the State of any obligation to follow the preliminary injunction. *See* 8 Moore's Federal Practice §§ 41.33–.34, 41.40; *Nelson v. Napolitano*, 657 F.3d 586, 587–88 (7th Cir. 2011). Regardless, even if such zombie preliminary injunctions existed—even if there were injunctions that, while nominally in effect, remained unenforceable and immune from challenge—the case would still present the question of when, if ever, a plaintiff who wins a preliminary injunction, but who never wins a final judgment on the merits, qualifies as a prevailing party.

Finally, the plaintiffs suggest the question presented is not that important to the States, since they can just settle suits against them and negotiate down any fee award. BIO.24–25. But as the nineteen *amici* States explained, the pressure to settle is one of the things that makes this case important. Br. of Georgia and *Amici* States 14–17. The uncertainty over the meaning of "prevailing party" can cause States to settle even in cases where they are correct as a matter of law, since defending the sovereign's acts may not be worth the potential cost of doing so.

CONCLUSION

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

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