No. 23-621

In the Supreme Court of the United States

GERALD F. LACKEY, IN HIS OFFICIAL CAPACITY AS THE COMMISSIONER OF THE VIRGINIA DEPARTMENT OF MOTOR VEHICLES,
Petitioner,

v.

DAMIAN STINNIE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICUS CURIAE* UNIVERSITY OF FLORIDA BOARD OF TRUSTEES SUPPORTING PETITIONER AND REVERSAL

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QUESTIONS PRESENTED

1. Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988.

2. Whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under 42 U.S.C. § 1988.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The University of Florida is a public research university located in Gainesville, Florida, enrolling more than 55,000 students. "Its mission is to offer broad-based, inclusive public education, leading edge research, and service to the citizens of Florida, the nation and the world." UF Reg. 1.0001(1).[2] Under state law, UF is classified as a "preeminent state research university" based on performance standards set by the Florida Legislature in § 1001.7065, Fla. Stat., and achieved by UF. *Amicus curiae* University of Florida Board of Trustees "is the University's legal entity and sets policy and provides governance for the University pursuant to its powers as established by the Florida Board of Governors and applicable law." UF Reg. 1.0001(2).

UF has a strong interest in this case and in the answer to the question whether a plaintiff who obtains a form of preliminary relief but no ultimate success on the merits is a prevailing party entitled to attorney's fees. UF offers this *amicus* brief to share with the Court its experiences in two cases—one of which is still pending and will be affected by the outcome of this case—in which courts ordered UF to pay substantial, six-figure attorney's fees awards to plaintiffs whose only claim to prevailing party status was based on

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution toward the brief's preparation or submission.

[2] Univ. of Fla., Reg. 1.0001 (2012), https://policy.ufl.edu/regulation/1-0001/.

their having obtained temporary injunctive relief that dissolved or was vacated after the cases became moot on appeal. *See Beta Upsilon Chi v. Machen*, No. 1:07-cv-00135 (N.D. Fla.), *appeal of denial of preliminary injunction dismissed on mootness grounds*, 586 F.3d 908 (11th Cir. 2009; *Austin v. Univ. of Fla. Bd. of Trustees*, No. 1:21-cv-184 (N.D. Fla.), *appeal of preliminary injunction dismissed as moot and injunction vacated*, No. 22-10448-GG (11th Cir.); *appeal of attorney's fees award pending*, No. 23-13754 (11th Cir.).

In both *Beta Upsilon Chi* (or *BYX*) and *Austin* federal courts ordered UF to pay hundreds of thousands of dollars in attorney's fees to plaintiffs who did not obtain a final judgment or any permanent relief in their favor. The plaintiffs in *BYX* were awarded more than $235,000 in fees for work in the district court based on the Eleventh Circuit's issuance of a one-line order granting an injunction pending appeal of a ruling denying a preliminary injunction, even though the injunction pending appeal dissolved when the appeal was dismissed and even though the plaintiffs had no litigation success in the district court.

Ten years after the sizable fee award in *BYX*, the preliminary injunction-based fee award in *Austin* was even larger—more than $372,000. UF has appealed that fee award, and its appeal has been stayed pending this Court's resolution of this case.

SUMMARY OF ARGUMENT

In the Eleventh Circuit, a plaintiff becomes a prevailing party entitled to attorney's fees under statutes such as 42 U.S.C. § 1988 by obtaining a preliminary injunction "on the merits"—a misnomer since preliminary relief requires only a likelihood of future success on the merits. That the preliminary injunction is later undone due to mootness (i.e., the district court's lack of Article III jurisdiction) does not undo the plaintiff's prevailing party status under Eleventh Circuit case law.

In two lawsuits, UF has been ordered to pay six-figure attorney fees awards to plaintiffs who obtained preliminary relief (in one case an injunction pending appeal; in the other, a preliminary injunction) but obtained no relief on the merits, let alone enduring relief of that kind. Both suits became moot and were dismissed for that reason. Nevertheless, the plaintiffs were held to be "prevailing parties" entitled to fees.

ARGUMENT

I. In the Eleventh Circuit, a Plaintiff Who Obtains Preliminary Relief But Whose Case Is Dismissed for Mootness Is a "Prevailing Party" for Attorney's Fees Purposes.

Under 42 U.S.C. § 1988(b), a court may award an attorney's fee to "the prevailing party." This Court has explained that a litigant prevails by obtaining court-ordered relief on the merits. *See Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail."). The question presented here is whether a

plaintiff who obtains preliminary relief, but later has his suit dismissed because of mootness, is a prevailing party eligible for fees under fee-shifting statutes such as § 1988.

UF has litigated fee requests within the Eleventh Circuit, where the Court of Appeals for that circuit has long held that "a preliminary injunction on the merits, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney's fees." *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987).

The Eleventh Circuit reaffirmed the rule of *Taylor* in *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009). *See id.* at 1356 ("We have stated that 'a preliminary injunction on the merits … entitles one to prevailing party status and an award of attorney's fees.'") (quoting *Taylor*, 810 F.2d at 1558) (ellipses in *Billups*). Despite this Court's intervening decision in *Sole v. Wyner*, 551 U.S. 74 (2007), the Eleventh Circuit declared in *Billups* that *Taylor* "remains good law." *Billups*, 554 F.3d at 1356.

The Eleventh Circuit adhered to that view even though two years earlier in *Sole* this Court had explained that "[p]revailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Sole*, 551 U.S. at 83.

After *Billups*, the Eleventh Circuit extended the *Taylor* rule from preliminary injunctions to TROs—temporary restraining orders: "We find no basis for distinguishing between preliminary injunctions—which may confer prevailing party status under our

precedent—and the temporary restraining order here." *Common Cause Georgia v. Georgia*, 17 F.4th 102, 107 (11th Cir. 2021). Thus, in the Eleventh Circuit, "[t]he award of fees under § 1988 is not thwarted solely because it stemmed from a temporary restraining order." *Id.*[3]

Although the Eleventh Circuit has said that a preliminary injunction must be "on the merits" to confer prevailing party status, the qualifier "on the merits" does little to cabin the category of injunctions leading to fees. In *Taylor*, the court distinguished "a preliminary injunction on the merits, *as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo* …." *Taylor*, 810 F.2d at 1558 (emphasis added). In the eyes of the Eleventh Circuit, every preliminary injunction is an injunction "on the merits" if it grants relief based in part on consideration of the expected or predicted likelihood of plaintiff's eventual success on the merits at the end of the case or if the relief alters the status quo in some way.

In practice, the Eleventh Circuit views preliminary injunctions (and TROs) "on the merits" as no different than permanent injunctions for purposes of attorney's fees awards. Yet seeing things that way "improperly equates 'likelihood of success' with 'success.'" *University of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981). A preliminary injunction requires likely merits success whereas a permanent injunction requires "actual success." *Amoco Prod. Co. v. Village*

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[3] The court in *Common Cause Georgia* upheld as reasonable the district court's award of $161,682 in attorney's fees to the recipient of the TRO. 17 F.4th at 106–09.

of Gambell, 480 U.S. 531, 546 n.12 (1987). The difference is material and important. Attorney's fees should go to prevailing parties, not to pre-prevailing parties.

Equating preliminary injunctions with permanent injunctions also "ignores the significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394. Often "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Id.* at 395. And whether it alters or merely preserves the status quo, "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.*

This Court made similar observations in *Sole*. "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. "The foundation for that assessment will be more or less secure depending on the thoroughness of the exploration undertaken by the parties and the court." *Id.* "In some cases, the proceedings prior to a grant of temporary relief are searching; in others, little time and resources are spent on the threshold contest." *Id.*

The only notable exception to the *Taylor* line of fee-favoring decisions in the Eleventh Circuit is *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982). In *Busbee* the plaintiffs obtained a preliminary injunction from the district court but while their case was on appeal this Court "handed down two opinions that effectively rejected the position that the [plaintiffs] had

successfully advanced in the district court." *Id.* at 1377. The Eleventh Circuit held that the district court had erred in awarding fees based on the preliminary injunction because plaintiffs' "successes were merely temporary, and any benefit flowing from their successes in the district court was awarded under a mistake of law." *Id.* at 1381. *Busbee* thus holds that a preliminary injunction does not a prevailing party make if controlling authority from a higher court shows that the injunction was based on legal error.[4]

II. The Plaintiffs in *BYX* Received Prevailing Party Attorney's Fees Based on an Eleventh Circuit Motions Panel's One-Line Order Granting Injunctive Relief Pending Appeal.

In the *BYX* case, the plaintiffs were held to be prevailing parties entitled to attorney's fees based not on a preliminary injunction—the *BYX* plaintiffs never obtained one—but because they obtained from an Eleventh Circuit motions panel an injunction pending appeal of the district court's denial of plaintiffs' motion for a preliminary injunction. That injunction pending appeal came in the form of a one-line, non-binding, unpublished order, and the injunction dissolved when the merits panel dismissed the appeal for mootness. Thus, the plaintiffs obtained no lasting court-ordered relief. Nevertheless, they were judged to be prevailing

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[4] The dissenting opinion in *Taylor* read *Busbee* more broadly to hold that "a plaintiff is not a prevailing party when it obtains initial relief in the district court which is later vacated," *Taylor*, 810 F.2d at 1561 (Anderson, J., dissenting), but the majority opinion read *Busbee* more narrowly to require not just vacatur but a "mistake of law" to prevent a preliminary injunction-based fee award. *See Taylor*, 810 F.2d at 1559 n.9.

parties and collected more than $235,000 in attorney's fees. The only court-ordered relief the plaintiffs ever obtained was the injunction pending appeal it received from the Eleventh Circuit motions panel.

UF recognizes hundreds of student groups, which are known as registered student organizations or RSOs. One of the requirements of registration is that the student group must agree that it will not discriminate on various bases such as race, sex, and religion, among others. In the *BYX* case, a student group—a Christian fraternity called Beta Upsilon Chi or BYX—was denied RSO status "because of its refusal to adhere to UF's nondiscrimination policy." *Beta Upsilon Chi v. Machen*, 586 F.3d 908, 910 (11th Cir. 2009)). BYX had sought to limit its membership to Christian students, which violated the University's nondiscrimination policy at that time, *id.* at 912.

BYX brought an action against UF officials under 42 U.S.C. § 1983 "claiming that UF, by requiring it to comply with the nondiscrimination policy as a condition of recognition, had infringed its First and Fourteenth Amendment rights of association, freedom of speech, and free exercise of religion." 586 F.3d at 910. BYX then "moved the district court to enter a preliminary injunction forcing the University to recognize it as a registered student organization." *Id*.

The district court denied the motion. *Beta Upsilon Chi v. Machen*, 559 F. Supp. 2d 1274 (N.D. Fla. 2008). The court held that that BYX had not "demonstrated a violation of its constitutional rights" and did "not have a substantial likelihood of success on the merits of its claim." *Id*. at 1280.

BYX appealed and moved the district court for an injunction pending appeal, which the court denied. *Beta Upsilon Chi v. Machen*, No. 1:07-cv-00135-SPM, 2008 WL 2561972 (N.D. Fla. June 23, 2008). The court explained that "[t]here is no substantial likelihood that the actions of the Defendants have violated federal law." *Id*. at *1. Also, "[e]njoining enforcement of the Defendants' non-discrimination policy as applied to Plaintiffs is not consistent with the public interest in protecting all students from religious discrimination." *Id*. And "[b]ecause the beginning of the school year is months away, Plaintiffs will suffer no irreparable harm if this motion for injunction is denied." *Id*.

BYX then sought an injunction pending appeal from the Eleventh Circuit. A motions panel granted the request in a one-line, unpublished, non-binding[5] order that read: "Appellants' 'Time Sensitive Motion for Injunction Pending Appeal …' is GRANTED." Order, *Beta Upsilon Chi v. Machen*, No. 08-13332-EE (11th Cir. July 30, 2008). Based on the motions panel's order, UF temporarily registered BYX as an RSO.

No opinion or explanation accompanied the order. While the Federal Rules of Civil Procedures require "[e]very order granting an injunction" to "state the reasons why it issued," Fed. R. Civ. P. 65(d)(1)(A), that rule applies only to district courts, and there is no

[5] Then, as now, a motions panel's ruling "is not binding upon the panel to which the appeal is assigned on the merits." 11th Cir. R. 27-1(g).

similar rule in the Federal Rules of Appellate Procedure.[6]

After the grant of the injunction pending appeal, but while the appeal itself was still pending, the case became moot. UF modified its policy with respect to religious student organizations such as BYX to permit them to register as RSOs. Under the modified policy—which remains UF's policy today[7]—an RSO whose primary purpose is religious may limit membership or leadership positions to students who share the organization's religious beliefs. *See Beta Upsilon Chi*, 586 F.3d at 915. Following the change in policy, UF registered BYX as an RSO.

The Eleventh Circuit held that these developments mooted the case. *See id.* at 918.[8] Accordingly, it dismissed the appeal as moot and directed the district court on remand to dismiss the case as moot, which it did. In other words, both the Eleventh Circuit and the

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[6] The panel that heard oral argument in the appeal later stated in its opinion that the motions panel had "issued the injunction after considering four factors: (1) whether the movant was likely to prevail on the merits of its appeal; (2) whether, if the injunction did not issue, the movant would suffer irreparable harm; (3) whether, if the injunction issued, any other party would suffer substantial harm; and (4) whether an injunction would serve the public interest." *Beta Upsilon Chi*, 586 F.3d at 914 n.9. But none of that could be gleaned from the motions panel's one-line order granting an injunction pending appeal.

[7] *See* Univ. of Fla., *Student Organization Resource Guide* 15 (updated Dec. 2023), https://tinyurl.com/mw9ucz27 ("*UF Guide*").

[8] Seeking to prevent dismissal of its appeal, the student group argued that UF changed its policy "as a ploy to avoid an adverse ruling, and UF may reinstate its former policy." *Beta Upsilon Chi*, 586 F.3d at 917. But the court saw no "evidence to support this position" and rejected the argument as "speculation." *Id.*

district court ended the litigation by dismissing for lack of jurisdiction—mootness being a jurisdictional issue—without reaching the merits.[9]

The case's end did not end the case, however, as protracted litigation over attorney's fees then began. Although it took less than two years to litigate the underlying case and appeal, it took another six years—and three more trips to the Eleventh Circuit—to resolve the fee litigation. *But cf. Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation."); *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 207 (2016) (noting that this is an "oft-stated concern" of the Court).

Claiming prevailing party status, BYX moved the district court to tax costs and to award attorney's fees under 42 U.S.C. § 1988. The court denied the motions, reasoning that "Plaintiffs are not prevailing parties entitled to costs, as the Court denied Plaintiffs' Motion for Preliminary Injunction, and this matter has been dismissed as moot, with Plaintiffs obtaining no relief on the merits." *Beta Upsilon Chi v. Machen*, No. 1:07-cv-00135-SPM/GRJ, 2010 WL 5174352, at *1 (N.D. Fla. Dec. 15, 2010); *see also* Order, *Beta Upsilon Chi*, No. 1:07-cv-00135-SPM/GRJ (N.D. Fla. Mar. 4, 2011),

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[9] Because of the appeal's mootness, the Eleventh Circuit did not resolve the merits of BYX's challenge to UF's former nondiscrimination policy. This Court, however, considered the merits of a similar challenge in *Christian Legal Society Chapter of` University of California v. Martinez*, 561 U.S. 661 (2010). In *Martinez*, this Court upheld against constitutional challenge a nondiscrimination policy similar to UF's pre-2009 policy.

ECF No. 259 (denying attorney's fees motion for the same reasons).

The Eleventh Circuit disagreed. It held that BYX had prevailing party status because of the injunction pending appeal. Noting that "an administrative panel of this court had granted [relief], in the form of an injunction pending appeal," it ruled that "Appellants are prevailing parties under § 1988 and, thus, are entitled to a reasonable attorney's fee." *Beta Upsilon Chi v. Machen*, 446 F. App'x 192, 193 (11th Cir. 2011).

The Eleventh Circuit having decided that BYX was the prevailing party, the district court on remand had to determine the extent of the fees to which BYX was entitled. It decided that "Plaintiffs are entitled to reasonable attorney's fees for the work performed in this Court on the motion for an injunction pending appeal" but denied BYX's request for "attorney's fees for all of the work performed in this Court." Order at 2, *Beta Upsilon Chi v. Machen*, No. 1:07-cv-00135-SPM/GRJ (N.D. Fla. July 24, 2012), ECF No. 320. The district court's decision that BYX should be compensated for the work in that court on its motion for injunction pending appeal, and only that work, seemed entirely proper, given that the Eleventh Circuit had taken the same approach in ruling on BYX's application for appellate attorney's fees.[10]

[10] BYX asked the Eleventh Circuit for $123,823 in appellate fees for all of its work in that court. But the Eleventh Circuit awarded fees only "for work performed in this Court on [BYX's] motion for injunction pending appeal" and not "otherwise." Order at 2, *Beta Upsilon Chi v. Machen*, No. 08-13332-EE (11th Cir. Aug. 26, 2010). The parties agreed that BYX should receive a fee

The Eleventh Circuit again disagreed. In a second decision on appeal in the fee litigation, it held that "the appropriate award should include other work performed by Appellants in the district court which was reasonably related to, and reasonably contributed to, the success achieved—i.e., the grant of the injunction pending appeal." *Beta Upsilon Chi v. Machen*, 522 F. App'x 471, 472 (11th Cir. 2013). Another remand and another round of briefing in the district court followed.

This time, with the case now assigned to a different district judge, the court awarded Plaintiffs $235,278 in fees for virtually all of the work they performed in that court. *See Beta Upsilon Chi v. Machen*, No. 1:07-cv-00135-MW-GRJ, 2014 WL 4928902, at *8 (N.D. Fla. Oct. 1, 2014). Plaintiffs received that handsome sum even though the only success they enjoyed was the temporary, unexplained, and non-binding injunction pending appeal, and even though the litigation had ended with the Eleventh Circuit and the district court dismissing for lack of jurisdiction brought about by mootness.

In a third and final appeal over BYX's attorney's fees—the only one of the three appeals brought by UF rather than BYX—the Eleventh Circuit upheld the $235,278 award, ending the fee litigation eight years after BYX commenced the underlying action. *Beta Upsilon Chi v. Machen*, 601 F. App'x 917 (11th Cir. 2015).

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of $7,081 for that limited work, and the district court awarded that sum.

III. In Pending Litigation, the District Court in *Austin* Awarded Fees in a Case in Which It Granted a Preliminary Injunction That Was Vacated on Appeal and in Which It Never Had Jurisdiction.

The *Austin* case, which is currently on appeal to the Eleventh Circuit, involves an attorney's fee award in a thrice-moot lawsuit. The sole relief that plaintiffs obtained was an *ultra vires* preliminary injunction that dissolved after the plaintiffs finally conceded that their case was moot. Thus, the plaintiffs obtained no lasting court-ordered relief. And since the preliminary injunction was entered in the absence of an Article III case or controversy, the district court lacked jurisdiction to grant either its ephemeral preliminary injunction or the more than $372,000 in attorney's fees that the district court awarded.

Florida law requires each state university to have a conflicts policy for its faculty. § 1012.977(1), Fla. Stat. UF's conflicts policy, which was negotiated with the faculty union, required its faculty to disclose and seek approval for outside activities that might create an actual or apparent conflict of commitment or of interest. The policy expressly included expert witness work. Yet several UF faculty members defied this policy and began working as expert witnesses *against* the State of Florida without seeking prior approval.[11] Long after their work began, the faculty members sought UF's approval. Although UF initially denied

[11] The faculty members submitted expert reports and testified in a lawsuit challenging Florida's election law known as SB90, styled *League of Women Voters of Florida, Inc. v. Lee*, Nos. 4:21-cv-00186-MW-MAF et al. (N.D. Fla.).

those belated requests, UF subsequently reversed its decision, granted the faculty members' requests, and announced the creation of a task force to revise UF's conflicts policy. After UF granted the requests and made the announcement about the task force, the faculty members filed suit against UF over the conflicts policy that was then under revision, and under which they had been granted leave to work as expert witnesses.

This new lawsuit was assigned to the same district judge who was overseeing the case in which the faculty plaintiffs were offering expert testimony. In that case, an Eleventh Circuit panel stayed the district court's injunction holding that Florida's voting laws were unconstitutional. *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022). Then on the merits, a second panel vacated most of the injunction as based on clearly erroneous findings of fact and misapplications of settled law. *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905 (11th Cir. 2023). The challenged provisions of SB90 were "unremarkable, race-neutral policies designed to bolster election security, maintain order at the polls, and ensure that voter registration forms are delivered on time." *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 81 F.4th 1328, 1332 (11th Cir. 2023) (Pryor, C.J., respecting the denial of rehearing en banc).

The *Austin* faculty lawsuit was moot on arrival. Before the suit was even filed, the faculty members' requests had already been granted.[12] Then, within

[12] As this Court has held, "the mootness exception for disputes capable of repetition yet evading review … will not revive a

weeks of the suit's filing, UF's conflicts policy was revised to accept the task force's recommendations. That new policy was never applied to the faculty member plaintiffs. The case was again moot. The district court, however, disagreed and denied UF's motion to dismiss. Instead, the district court granted the faculty members a preliminary injunction. *Austin v. Univ. of Fla. Bd. of Trustees,* 580 F. Supp. 3d 1137 (N.D. Fla. 2022). UF appealed the preliminary injunction to the Eleventh Circuit. While the appeal was pending, UF revised its conflicts policy once again.

At that point, the faculty finally conceded that the case was moot. The Eleventh Circuit dismissed the appeal as moot, vacated the preliminary injunction, and directed the district court to dismiss the case as moot. *Austin v. Univ. of Fla. Bd. of Trustees*, No. 22-10448-GG, 2023 WL 5051221, at *1 (11th Cir. Mar. 20, 2023). The Eleventh Circuit's dismissal order did not say whether the case had become moot when the faculty filed suit after their requests were granted, whether it was when UF's conflicts policy was changed before any substantive action took place in the case, or whether it was only when UF changed its conflicts policy a second time.

On remand, the vacated preliminary injunction in a thrice-moot case was nevertheless sufficient for the district court to determine that the faculty member plaintiffs were prevailing parties and to award them $372,219 in attorney fees. *See Austin*, No. 1:21-cv-00184-MW/HTC, 2023 WL 7932471 (N.D. Fla. May 24,

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dispute which became moot *before* the action commenced." *Renne v. Geary*, 501 U.S. 312, 320 (1991) (emphasis added).

2023); *Austin*, No. 1:21-cv-00184-MW/HTC, 2023 WL 7932477 (N.D. Fla. Nov. 9, 2023).

In awarding fees to the faculty members, the district court applied the Eleventh Circuit's rule that "even when an injunction has been entered in the plaintiff's favor but the case is later mooted by the defendant's conduct, the plaintiff is entitled to 'prevailing party' status for purposes of determining entitlement to attorneys' fees." *Austin*, 2023 WL 7932471, at *3 (citing *Beta Upsilon Chi v. Machen*, 446 F. App'x 192 (11th Cir. 2011)). Although the district court agreed that, for a plaintiff to become a prevailing party, she must have achieved *enduring* relief, the court "disagree[d] that [its] now-vacated preliminary injunction afforded Plaintiffs no 'enduring' relief." *Id.* at *6. In the court's view, the fact that its preliminary injunction was in effect for 14 months "qualified as enduring." *Id.*

Under cases such as *Sole v. Wyner*[13] and *Rhodes v. Stewart*,[14] a plaintiff cannot be a prevailing party under 42 U.S.C. § 1988 without a court-sanctioned and

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[13] *See Sole*, 551 U.S. at 86 (explaining that plaintiff Wyner was not a prevailing party because she "gained no enduring change in the legal relationship between herself and the state officials she sued") (cleaned up).

[14] In *Rhodes v. Stewart*, 488 U.S. 1 (1988), this Court held that two prisoner plaintiffs who obtained a favorable judgment in a moot case—one plaintiff died and the other was released from prison before the judgment—were not prevailing parties. "The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever." *Id.* at 4. And, "[i]n the absence of relief, a party cannot meet the threshold requirement of § 1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees." *Id.*

enduring material alteration of the parties' legal relationship. No such change occurred in *Austin* because no case or controversy ever existed to permit any attorney fee award, let alone such a large one. No case or controversy existed when the faculty member plaintiffs filed suit after UF granted their requests. No case or controversy existed when the district court allowed them to maintain their suit against a revised policy that had never been applied against them. No case or controversy existed when UF changed its policy for a second time. And because no case or controversy existed during any phase of the litigation, the court's preliminary injunction afforded no relief to the professors and was *ultra vires* and outside the Article III judicial power.

UF appealed the district court's attorney fee award to the Eleventh Circuit. After UF filed its brief, but before the faculty member plaintiffs filed theirs, this Court granted certiorari in this case. The Eleventh Circuit has stayed *Austin* pending the resolution of this case.

This Court should resolve this case by holding that a plaintiff who obtains a preliminary injunction that is later vacated on mootness grounds is a not a prevailing party for purposes of fee-shifting statutes such as § 1988. Such a holding would resolve not only this case but *Austin* as well.

CONCLUSION

For the foregoing reasons, as well as those stated by petitioner and his other *amici*, the judgment of the Court of Appeals in this case should be reversed.

Respectfully submitted,

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