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

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CORRECTED BRIEF OF CHRISTIAN LEGAL SOCIETY, AGUDATH ISRAEL OF AMERICA, BECKET FUND FOR RELIGIOUS LIBERTY, CENTER FOR PUBLIC JUSTICE, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, ISLAM AND RELIGIOUS FREEDOM ACTION TEAM OF THE RELIGIOUS FREEDOM INSTITUTE, JEWISH COALITION FOR RELIGIOUS LIBERTY, AND NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This brief addresses whether plaintiffs are prevailing parties under the Civil Rights Attorney's Fee Awards Act of 1976 when they obtain a preliminary injunction and defendants abandon further litigation, thereby accepting the preliminary injunction as dispositive.

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INTEREST OF *AMICI*

Amici are Christian, Jewish, Muslim, and secular not-for-profit organizations committed to religious liberty for all. Each of these *amici* engages in public education and advocacy and assists with litigation on behalf of religious liberty. Some of these *amici* have staff attorneys, or cooperating attorneys in private practice, who directly represent plaintiffs in litigation that heavily depends on potential fee awards under the statute at issue in this case. As described in Part V, the lead amicus has recently represented religious individuals or associations in cases directly implicating the question presented.[1]

The organizations joining in this brief are:

The Christian Legal Society, https://www.christianlegalsociety.org/,

Agudath Israel of America, https://agudah.org/,

The Becket Fund for Religious Liberty, https://www.becketlaw.org/,

The Center for Public Justice, https://cpjustice.org/, and its affiliate, the Institutional Religious Freedom Alliance, https://cpjustice.org/what-we-do/institutional-religious-freedom-alliance/,

The Islam and Religious Freedom Action Team of the Religious Freedom Institute, https://religiousfreedominstitute.org/islam-religious-freedom-action-team/,

[1] This brief was prepared and funded entirely by *amici* and their counsel. No counsel for a party authored this brief in whole or in part.

The Jewish Coalition for Religious Liberty, https://www.jcrl.org/, and

The National Association of Evangelicals, https://www.nae.org/.

SUMMARY OF ARGUMENT

I. Under the American Rule, "absent express statutory authorization to the contrary, each party to a lawsuit ordinarily shall bear its own attorney's fees." *City of Riverside v. Rivera*, 477 U.S. 561, 567 (1986). This Court has long recognized that the allocation of litigation costs is for legislative, and not judicial, determination.

II. The Civil Rights Attorney's Fees Awards Act of 1976, codified at 42 U.S.C. §1988(b), provides that legislative determination. The statute enumerates specific civil-rights statutes that allow plaintiffs to recover attorney's fees. Through the Fees Act, Congress identified important legislative priorities, including the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, and 42 U.S.C. §1983. And it identified private litigation as a principal means for their enforcement.

The American Rule and the Fees Act thus work together to implement congressional policy. The American Rule eliminates the fear that plaintiffs will be bankrupted by unsuccessfully suing to enforce their rights, and the Fees Act creates a fund from which prevailing plaintiffs can pay their attorneys.

Congress rightly determined that this approach is necessary for religious plaintiffs, who often lack financial means and often seek only injunctive relief.

The damages they sometimes seek are often modest, compensating intangible harms or the losses from a single wrongful transaction. Such litigation cannot support contingent-fee litigation on the usual model familiar from personal-injury litigation. But such litigation is necessary to ensure that individuals can freely exercise their religion without government interference.

III. Respondents obtained a preliminary injunction that materially altered the legal relationship of the parties. Petitioner acquiesced in that injunction by mooting the case. He chose to treat that preliminary injunction as dispositive and to concede—through his actions—that Respondents had prevailed. Petitioner could have attempted to overturn that injunction through continued litigation; he chose not to.

Unlike the cases on which Petitioner relies, Respondents personally and permanently benefited from enforceable judicial action. Under *Sole v. Wyner*, a plaintiff has not prevailed "if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded." 551 U.S. 74, 77 (2007). But here, none of the plaintiffs' success was undone. They left the courthouse victorious.

Defendants still have choices under *Sole*. If they believe the preliminary injunction can be undone, they can continue the litigation until "a dispositive adjudication on the merits," *id.*, or they can attempt to negotiate a settlement that does not provide for fees. But if a defendant has offered the best facts and arguments that it has and has evaluated its chance of succeeding if it continues to litigate, it may accept the preliminary injunction as dispositive and act to make

the case moot. This choice acknowledges that the plaintiff has prevailed.

IV. The Petitioner's proposed alternative would devastate civil-rights enforcement. A defendant could lose at every stage of the litigation—preliminary injunction (plus appeal, en banc, and certiorari petitions), even partially litigate about a permanent injunction (with appeal, etc.)—complying with the preliminary injunction throughout, and still leave plaintiffs not "prevailing" and plaintiffs' attorneys emptyhanded so long as it moots the case just short of final judgment. Only a foolish defendant would ever pay fees in an injunction case, and only a foolish plaintiff's attorney would ever take an injunction case.

V. The Federal Reporter is full of decisions where religious plaintiffs vindicated their rights with a preliminary injunction, and defendants acquiesced in that injunction by mooting the case. With recalcitrant government defendants, these cases can take years to litigate and thousands of attorneys' hours. Petitioner's proposed rule would make it economically foolish for plaintiff's counsel to take on one of these cases. That consequence would nullify Congress's considered judgment that private enforcement is an essential mechanism for specified statutes.

VI. Petitioner's rule would dramatically disrupt countless attorney-client relationships. Yet Petitioner is silent about the reliance interests that its legal revolution would upset. The proposed revolution is also undertheorized. How could a plaintiff challenging a temporary order or one-time future event ever "prevail"? And Petitioner's theory reaches far

beyond preliminary injunctions, but he does not discuss that reach.

Today, many people of faith can practice their religion only because they obtained enforceable judicial relief. But according to Petitioner, many of those believers still have not "prevailed." That construction has no basis in the Fees Act or in common sense.

ARGUMENT

Congress authorizes federal courts to award "the prevailing party … a reasonable attorney's fee as part of the costs" "[i]n any action or proceeding to enforce a provision" of enumerated civil-rights statutes, including "the Religious Freedom Restoration Act of 1993 [RFRA], [and] the Religious Land Use and Institutionalized Persons Act of 2000 [RLUIPA]." 42 U.S.C. §1988(b).

This Court has explained that a party has not "prevailed" just because a "lawsuit brought about a voluntary change in the defendant's conduct." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 600 (2001). Instead, a change must carry a "judicial imprimatur," with a plaintiff obtaining "a corresponding alteration in the legal relationship of the parties." *Id.*

But Petitioner's proposed interpretation would deprive plaintiffs of attorney's fees even when those parties *have* obtained a judicially enforceable court order (a preliminary injunction) that orders a defendant to cease its unlawful practice and induces the defendant to permanently do so. Such an order alters the legal relationship between the parties by making defendant subject to sanctions for contempt of court if

it disobeys the injunction—a legal relationship that did not exist before.

Petitioner's interpretation is at odds with statutory context, structure, and purpose, and is potentially devastating to civil-rights and civil-liberties litigants, including people of faith who may be unable to obtain attorneys to vindicate their rights and who will frequently be unable to offer those attorneys any meaningful compensation. A brief review of the law and policy of §1988(b) will help place this case in essential context.

I. The Civil Rights Attorney's Fees Awards Act of 1976 is an exercise of Congress's primary responsibility for the law of fee-shifting under the American Rule.

Congress, not the judiciary, is primarily responsible for the law of fee-shifting under the American Rule. That rule is best understood against the long Anglo-American tradition of statutory regulation of attorney's fees.

In England, the Statute of Gloucester, 6 EDW. I. c. 1 (1275), was the first statute that awarded plaintiffs costs, and "the whole law on the subject was based [on this Act] until 1875." Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929).[2]

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[2] That statute provided that in cases pursuant to certain listed writs, "whereas before time Damages were not taxed, but to the Value of the Issues of the Land; it is provided, that the Demandant may recover against the Tenant the Costs of his Writ purchased, together with the Damages abovesaid." Goodhart at 852 (quoting 6 EDW. I. c. 1 (1275)). This legislative approach of authorizing fees only for certain listed claims is the same approach that the American Congress used 700 years later

Almost all the colonies regulated attorney's fees by statute. These statutes governed "both the fees a lawyer could charge his client and those that could be recovered from a defeated adversary." John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 10-11 (1984).

This Court recognized the primacy of legislatures, not courts, in allocating costs and fees from the early days of the Republic. In *Arcambel v. Wiseman*, 3 U.S. 306 (1796), a plaintiff received $1,600 as attorney's fees in damages, so that he would be made whole after paying his attorney. The Court rejected that award, and entered a remittitur: "[t]he general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute." *Id.* at 306.

The Court eventually carved out a small number of exceptions. *See* DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES 925-28 (5th ed. 2019) (collecting exceptions to the American Rule). For instance, under the "common fund" exception, the Court relied on equitable precedent that it is unjust for one of many parties in a trust to solely bear the cost of litigation for all beneficiaries, concluding that all beneficiaries of the judgment must share in the cost of plaintiff's attorney's fees. *See Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527, 533 (1881). The common-fund exception does not involve fee-shifting. Common-fund plaintiffs do *not* recover fees from the defendant, but rather a pro rata share of fees

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in the statute at issue here. In both eras, the legislature decided which claims were appropriate for fee-shifting.

from fellow plaintiffs who benefited from the work of the first plaintiff's attorneys.

In the twentieth century, the lower federal courts developed a broader, more novel concept for awarding attorney's fees without statutory authorization: the private attorney-general theory. Under that theory, courts awarded fees against defendants if "plaintiffs have benefited their class and have effectuated a strong congressional policy." *Sims v. Amos*, 340 F.Supp. 691, 694 (M.D. Ala. 1972) (awarding fees to plaintiffs in legislative apportionment case), *aff'd mem.*, 409 U.S. 942 (1972).

Critics argued that this inquiry "requires a subjective evaluation on the part of a judge … to distinguish important rights from less important ones and thereby invites usurpation of the legislative function." Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 670 (1974).

This Court soon rejected this judicially created private attorney-general theory, reiterating the primacy of Congress in directing the law of fee-shifting. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). The Court denied attorney's fees to a prevailing plaintiff in a suit brought under two environmental statutes. The Court reasoned that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation." *Id.* at 247.

Congress immediately responded to *Alyeska* and provided that legislative guidance.

II. The American Rule, together with the Fees Act, makes it possible for private parties to enforce important legislative policies.

A. The American Rule protects civil-rights and civil-liberties plaintiffs from overwhelming liability for defendants' attorney's fees.

Congress responded to *Alyeska* with the Civil Rights Attorney's Fees Awards Act of 1976 (the Fees Act, or the Act), authorizing one-way fee-shifting in claims under certain listed statutes. The Act works hand in hand with the American Rule. The American Rule protects impecunious plaintiffs, as explained below, and also defers to Congress. Congress acted to facilitate litigation by such plaintiffs in cases it judged appropriate.

Under the American Rule, "absent express statutory authorization to the contrary, each party to a lawsuit ordinarily shall bear its own attorney's fees." *City of Riverside v. Rivera*, 477 U.S. 561, 567 (1986).

This rule avoids penalizing a party for merely being involved in litigation, reduces fee litigation that taxes judicial resources, and lessens the risk of fee liability that would discourage litigants with limited means. *See Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 718 (1967). "The fear of deterring litigation is the most important of these reasons." LAYCOCK & HASEN, REMEDIES, at 924.

Congress most commonly enacts one-way fee-shifting for civil-rights legislation, consumer-protection legislation, and labor and employment legislation. These laws protect plaintiffs who are generally of modest means against violations of law by defendants who generally have deeper pockets—sometimes

much deeper pockets. Compensating defendants' often highly paid counsel on an hourly or lodestar basis would frequently bankrupt individuals and small not-for-profit organizations, including small religious organizations like these *amici*. "These plaintiffs simply couldn't litigate if there were any substantial risk of liability for defendant's fees." *Id.*

B. The Fees Act enables plaintiffs to pay their own attorneys so that the enumerated statutes can be enforced.

1. Few of these plaintiffs could even pay their own attorneys without some sort of arrangement that makes payment contingent on winning. But in the civil-rights and civil-liberties cases covered by §1988(b), the relief sought is often an injunction, not damages. Even when damages are sought, they are often modest, compensating intangible harms or the losses from a single wrongful transaction. Such cases cannot support contingent-fee litigation on the usual model familiar from personal-injury litigation.

The prevailing plaintiff's right to recover attorney's fees under §1988(b) creates a fund out of which counsel can be paid. Without the statutory ability to recover fees, there would be no financial incentive for attorneys to represent plaintiffs seeking to vindicate violations of civil and constitutional rights that cause nonpecuniary or small-dollar injuries. *See Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts."). Our Constitution and laws recognize these injuries as

fundamental, despite their often being suffered in nonpecuniary contexts or in small transactions.

Among the small and often impecunious plaintiffs protected by §1988(b) are religious individuals and small religious organizations. *See, e.g.*, *FNU Tanzin v. Tanvir*, 592 U.S. 43 (2020) (individual plaintiffs); *Holt v. Hobbs*, 574 U.S. 352 (2015) (No. 13-6827) (individual plaintiff litigating *in forma pauperis*); *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (No. 03-9877) (same). According to the largest-scale empirical study, half of all religious congregations in the United States have 75 or fewer regular participants, and 50 or fewer regular adult participants. MARK CHAVES, CONGREGATIONS IN AMERICA 18-19 & Table 2.1 (2004). The median congregation has only $1,000 in a savings account, and a total annual budget of $56,000. *Id.* at 19-20. Such organizations cannot pay for expensive litigation, whether in 2004 (when the book appeared) or today. Even national organizations such as these *amici* generally operate on shoestring budgets and cannot afford to pay the hourly rates of American lawyers.

Congress's choice to provide fee-shifting, even against its own pecuniary interest in the case of statutes such as RFRA, which applies to the federal government, "increase[s] monitoring of agencies and private firms, deterrence of agency and private wrongdoing, and more complete compensation of injured parties." Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2074 (1993).

2. Another reason Congress has enacted one-way fee-shifting is a policy judgment that private enforcement will often be more effective than government enforcement. *Cf.* S. Rep. No. 94-1011 at 2 (1976) ("All of

these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.").

Unlike with government attorneys, the profit motive incentivizes private attorneys to find, take, and win meritorious cases. The affected parties often have greater information available to them than do public enforcers—an especially important factor for religious organizations and individuals with unfamiliar beliefs and practices. *See* F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521-22 (1945). And private parties, unlike government actors, need not worry about the political implications of pursuing their cases, or the allocation of human capital to other legislative or executive priorities. *See* John Greil, *The Unfranchised Competitor Doctrine*, 66 VILL. L. REV. 357, 407-08 (2021). Lawyers in private practice are not dependent on often inadequate legislative appropriations, and private enforcement does not require expansion of government bureaucracies.

3. Before 1976, Congress had enacted fee-shifting provisions for particular statutes, one statute at a time. The Fees Act was Congress's "first bill ever passed dealing solely with the question of attorney's fees." Mary Frances Derfner, *The Civil Rights Attorney's Fees Awards Act of 1976*, in PUBLIC INTEREST PRACTICE AND FEE AWARDS 23 (Herbert B. Newberg ed., 1980). The bill that became the Act was originally

drafted in May 1975, less than a month after *Alyeska* was decided. *Id.* at 14 n.4.[3]

The Act, codified at 42 U.S.C. §1988(b), enumerates specific statutes that allow plaintiffs to recover attorney's fees. The Act's rationale was unambiguous: fee awards were "an essential remedy" for the listed civil-rights and civil-liberties statutes. S. Rep. No. 94-1011 at 2 (1976).

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nations's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

Ibid.

The Act also eliminated "anomalous gaps" in the post-*Alyeska* landscape. *Id.* at 4. For instance, the Senate Report noted that "fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968 [because expressly authorized by 42 U.S.C. §3613(c)(2)], but not in the same suit brought under 42 U.S.C. § 1982, a Reconstruction Act protecting the same rights," but not mentioning fees. *Id.* To avoid creating new gaps, the original list of statutes in §1988(b) has repeatedly been expanded, as with the addition of RFRA in 1993,

[3] For a recounting of the drafting history of the Act, see Derfner at 24-32.

see 107 STAT. 1488, §4, and RLUIPA in 2000, *see* 114 STAT. 803, §4(d).

Just as this Court honored and enforced congressional policy in *Alyeska*, before Congress thought to authorize fee awards for many of these statutes, so it must honor and enforce congressional policy now, when Congress has expressly authorized fees and found them to be an "essential remedy."

This is the "statutory context" that must "inform" the meaning of "prevailing party" under the Act. *Gallardo By & Through Vassallo v. Marstiller*, 596 U.S. 420, 430 (2022).

III. Plaintiffs that obtain a preliminary injunction have materially altered the legal relationship of the parties, and are prevailing parties if the defendant acquiesces in the preliminary injunction so that it effectively ends the case.

A. Unlike the cases on which Petitioner relies, Respondents benefited from a court-ordered change in Petitioner's behavior.

"The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989). In this case, Respondents legally altered the relationship of the parties by obtaining a preliminary injunction, requiring Petitioner to change his behavior or face contempt proceedings. To fully spell out the alteration of the legal relationship: Petitioner was not subject to contempt proceedings before the preliminary injunction; after the preliminary injunction, he was. That Petitioner recognized

this and permanently changed his behavior reinforces the reality that Respondents prevailed.

This posture—enforceable judicial action not overturned by further litigation—sets this case apart from Petitioner's preferred precedents.

First, Respondents personally and permanently benefited from the judicial action.

That distinguishes this case from *Hewitt v. Helms*, where the lawsuit ultimately led to prison reform, but the plaintiff did not benefit from the reforms because "[b]efore any decision was rendered, [he] was released from prison on parole." 482 U.S. 755, 757 (1987); *cf.* Pet. Br. at 20. The plaintiff in *Hewitt* "obtained *no relief*. … *No injunction* or declaratory judgment was entered in his favor." 482 U.S. at 760 (emphasis added). "The most that he obtained" was a denial of defendants' motion to dismiss. *Id.* Here, by contrast, Respondents obtained affirmative relief in the form of a preliminary injunction that turned out to be dispositive.

Second, Respondents' actions are not merely "a voluntary change in the defendant's conduct." *Contra* Pet. Br. at 20 (quoting *Buckhannon Bd. & Care Home,* 532 U.S. at 601).

In *Buckhannon*, the legislature responded to the *lawsuit*—not to a court order—by repealing the challenged law. 532 U.S. at 609. As in *Hewitt*, the plaintiffs never obtained an injunction that altered the legal relationship between the parties. If the present case looked like *Buckhannon*, then the statutory change would have occurred before any injunction was issued. But that is not what happened. Instead, Petitioner litigated, and Petitioner lost.

Third, Respondents obtained affirmative relief: an enforceable injunction. By contrast, the plaintiffs in *Hanrahan v. Hampton* did not "prevail," because they merely obtained an appellate reversal of a directed verdict. 446 U.S. 754, 758 (1980); *contra* Pet. Br. at 21. They were thus "in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict" in the trial court. *Hanrahan*, 446 U.S. at 758-59. Here, Respondents did not merely survive a motion to dismiss or a motion for summary judgment. They obtained a court order, enforceable against defendants had defendants failed to comply.

B. Unlike the plaintiffs in *Sole v. Wyner*, Respondents obtained judicial relief that turned out to be dispositive.

1. Most important, plaintiffs obtained vastly more than did the plaintiffs in *Sole v. Wyner*, 551 U.S. 74 (2007), on which Petitioner principally relies. The Court in *Sole* unambiguously stated what it was deciding:

> This case presents a sole question: Does a plaintiff who gains a preliminary injunction after an abbreviated hearing, *but is denied a permanent injunction after a dispositive adjudication on the merits*, qualify as a "prevailing party" within the compass of § 1988(b)? … 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 77 (emphasis added).

Petitioner's brief never quotes any of the key phrases from the language we have italicized. Neither does the United States, nor any of the other *amicus* briefs supporting Petitioner. They cannot quote that language, because they have no answer to it. Petitioner's brief discusses characteristics of preliminary injunctions in the abstract. It says little or nothing about the particular preliminary injunctions in *Sole* and in this case. Petitioner relies on a stylized version of *Sole* that has little connection to the judgment the Court actually rendered in *Sole*.

Unlike defendants in *Sole*, Petitioner did not continue litigating to any adjudication of the merits more "dispositive" than the preliminary injunction. Unlike in *Sole*, no court ever "denied a permanent injunction." Unlike in *Sole*, Respondents' "initial success" was final success; it was never "undone." Unlike in *Sole*, Respondents here achieved permanent success, not "transient" success.

Petitioner does quote the phrase "on the merits" from *Sole*, Pet. Br. 2, but he inverts what *Sole* actually said. Petitioner writes as though *Sole* said that a plaintiff who obtains a preliminary injunction is not a prevailing party *unless plaintiff* later and further prevails on the merits at final judgment. But what *Sole* actually said is that a plaintiff who obtains a preliminary injunction is not a prevailing party *if defendant* later prevails on the merits at final judgment, so that plaintiff's "initial success is undone and she leaves the courthouse emptyhanded." 551 U.S. at 77.

Earlier cases using the phrase "on the merits" did not address the issue presented here. None of those cases involved a plaintiff who had obtained a

preliminary injunction that defendant had accepted as dispositive.

And long ago this Court unanimously rejected Petitioner's claim that no plaintiff can be a prevailing party without first obtaining a final judgment on the merits. A consent decree makes plaintiff a prevailing party even though it contains not even a preliminary determination of the merits. *Maher v. Gagne*, 448 U.S. 122 (1980). "Nothing in the language of §1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129. "I agree with this conclusion" that "the award of attorney's fees under §1988 does not require an adjudication on the merits of the constitutional claims." *Id.* at 134 (Powell, J., concurring in the judgment).

2. The litigation leading to a preliminary injunction was much more extensive in this case than in *Sole*. In *Sole*, plaintiffs filed the complaint on Day 1, the court granted the preliminary injunction on Day 2, the event protected by the preliminary injunction occurred on Day 3, and the preliminary injunction then expired by its own terms. *Sole*, 551 U.S. at 84.

Here, there were two years of litigation under a complaint that was dismissed without prejudice. Jt. App. 1-20 (docket entries), 351 (District Court opinion). Both sides no doubt learned much from that phase of the litigation. Plaintiffs filed an amended complaint on September 11, 2018. *Id.* at 71, 121 (showing the date). Both sides filed extensive briefs. *Id.* at 124-71. The Court conducted a preliminary-injunction hearing with live witness testimony and oral argument. *Id.* at 172-349. And on December 21, it granted the preliminary injunction with an opinion

that fills thirty pages in the Joint Appendix. *Id.* at 350-79.

3. But the Court need not consider these kinds of details. It need not devise a line-drawing rule about how much consideration of a motion for preliminary injunction makes the resulting preliminary injunction sufficiently authoritative to support an award of attorney's fees. It can just let defendants decide.

If a defendant believes that a preliminary-injunction decision leaves more to be litigated, it can simply continue the litigation. It can move for summary judgment, or demand a trial and require plaintiff to move forward with the motion for a permanent injunction. It can attempt to reverse the initial result in "a dispositive adjudication on the merits," as in *Sole*, 551 U.S. at 77. Or if it has sufficient remaining arguments to give it any bargaining leverage, it can attempt to negotiate a settlement that is not embodied in a consent decree and does not include attorney's fees.

But a defendant may know that it has offered all or most of the facts and argument that it has. Defendant may know that it has lost, that the small odds of success in continued litigation are not worth the expense, and that it has little or nothing left with which to bargain. Then it can accept the preliminary injunction as dispositive and act to make the case moot.

The court need not evaluate defendant's reasoning or how much it litigated the preliminary injunction. All the court needs to know is defendant's final decision. When defendant surrenders after the preliminary injunction, it acknowledges defeat and makes the preliminary injunction dispositive and effectively

final. It acknowledges, implicitly but unambiguously, that plaintiff has prevailed. That is what happened here.

IV. It would frustrate the policy of the Act to preclude attorney's fees to plaintiffs who have obtained a preliminary injunction that defendant accepts as effectively dispositive.

A. Under Petitioner's theory, defendants can litigate a preliminary injunction to the limits permitted by the Federal Rules, exhaust all their arguments of both law and fact, lose on every significant issue—and still not lose. Look at this case, where Petitioner dragged Respondents through more than two years of litigation and a trip to the Court of Appeals before Respondents obtained a preliminary injunction granting the very relief they sought, with an opinion that was so well grounded that Petitioner chose not to appeal. Yet Petitioner claims that he still hasn't lost.

Under Petitioner's proposed rule, only a foolish or profligate defendant's counsel, having reviewed the District Court's legal analysis finding government action unlawful, would proceed to a settlement or final decree that requires paying plaintiffs' attorney's fees. Instead, a simple mootness procedure saves thousands or occasionally millions of dollars.

For defendants, the economically rational course will be to vigorously litigate any motion for preliminary injunction, get an effective ruling on the law, and then moot the case if the ruling goes against them. Heads defendants win; tails the plaintiffs' lawyers lose and go unpaid. The lengths to which this strategy could be pursued are illustrated in the cases reviewed in Parts V and VI of this brief. *See also* Joseph C.

Davis & Nicholas R. Reaves, *The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine*, 129 YALE L.J.F. 325, 329-31 (2019) (surveying strategic mooting in religious prisoner cases).

Potential plaintiff's lawyers will soon get the message. Either never take a case that depends on fees under §1988(b), or if you do, never move for a preliminary injunction. Leave your potential client unrepresented, or accept the case but let the client suffer continuing irreparable injury, unable to exercise his asserted constitutional rights, while defendant drags out the case and delays final judgment as long as possible. Otherwise, even if you win for your client, you will leave the case with nothing after the defendant fully litigates the issues at the preliminary injunction stage, loses, and then moots the case.

A preliminary injunction often ends the case. Defendant may see the writing on the wall—or in the court's opinion—and end the unlawful practice. The preliminary injunction may also force the government to try an accommodation or program it had previously resisted, and then realize that the sky does not fall with those changes in place.

B. This Court has observed that the risk of two-way fee-shifting would "discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). But Petitioner's rule is worse in one important way: even with an airtight claim, attorneys may avoid a case where getting paid is mostly or entirely in defendant's hands. "The strongest cases are less attractive, because defendant is more likely to change its illegal

practice without a formal settlement." LAYCOCK & HASEN, REMEDIES, at 936 (citing a study of *Buckhannon*'s effects in Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. REV. 1087 (2007)).

Albiston and Neilsen note how *Buckhannon* can disincentivize defendants from early settlement and delay providing any relief, because defendants can always avoid the risk of paying a larger fee award, or any fees at all, by surrendering later. Albiston & Nielson at 1109. Or they can play it the other way, forcing plaintiffs to trade away complete relief to obtain partial compensation for their attorneys. *Buckhannon* thus interacts with *Evans v. Jeff D*, 475 U.S. 717 (1986), on waiving fees in settlement negotiations, to further increase defendants' leverage. The Court should not extend *Buckhannon* to bar fees even when defendant accepts the practical finality of a preliminary injunction.

C. In the Fees Act, Congress authorized attorney's fees to enable law enforcement through private litigation. "Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights…." *Evans*, 475 U.S. at 731. Petitioner's theory of prevailing plaintiffs therefore not only finds no basis in the statutory text; it also undermines the purpose and structure of the statute. *Cf. MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228-29 (1994) (rejecting proposed meaning of "modify" that would undermine statutory structure and context).

"It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but

from their regard to their own interest." ADAM SMITH, THE WEALTH OF NATIONS 11 (Laurence Dickey ed. 1993) (1776). Congress understood that the same goes for many attorneys vindicating civil and constitutional rights. And even those attorneys with altruistic motivations must still earn a living and support their families.

V. Religious individuals and organizations will be particularly harmed by Petitioner's rule.

People of faith depend on their constitutional and statutory rights to freely exercise their religion. Congress recognized the importance of private enforcement of these rights by including 42 U.S.C. §1983 (the vehicle for enforcing free-exercise rights against state and local governments) in the Fees Act and later, by amending the Act to include RFRA and RLUIPA. Indeed, given the almost infinite variety of religious practices in our nation, along with government officials' frequent unfamiliarity with minority faiths, and their occasional hostility to traditional faiths, it is hard to imagine public enforcement ever sufficing to protect religious liberty for all.

Often, the governmental barrier to religious exercise is unnecessary and easy to remedy, but unless remedied, completely destructive of a particular religious practice. Removing those obstacles can be expensive and resource intensive. A few examples may help.

These examples also reveal the error in Petitioner's suggestion that the impact of his rule would be minimal because strategic mooting "will typically be impracticable." Pet. Br. at 51. Mooting *this* case required legislation, but that is not the norm. Very

often, the challenged rule or practice is local not statewide; is based on a regulation, not a statute; or is merely an administrative practice not even embodied in a regulation.

A. Guaranteeing student free exercise and free religious speech

Petitioner's rule would directly affect *amicus* Christian Legal Society. Student chapters of CLS have been parties in litigation, *e.g. Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010), and CLS staff serve as co-counsel assisting other attorneys in protecting students' rights to religious liberty.

In San Jose, California, Pioneer High School derecognized the student chapter of the Fellowship of Christian Athletes, which eliminated funding opportunities and priority access to campus meeting spaces, because the group set creed and conduct standards for student leaders of the club. *Amicus* CLS served as co-counsel for the plaintiffs. The District Court denied a preliminary injunction, and the Ninth Circuit reversed, holding that the school selectively enforced its non-discrimination policy in violation of the Equal Access Act and the First Amendment. *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075 (9th Cir. 2022).

The school successfully petitioned for rehearing en banc. 59 F.4th 997 (9th Cir. 2023) (vacating the panel opinion). But then the en banc court also reversed the District Court's denial of the preliminary injunction, finding likely violations of the Free Exercise and Free Speech Clauses and of the Equal Access Act. 82 F.4th 664, 696 (9th Cir. 2023) (en banc). On remand, the school district settled, agreeing to a consent judgment

and payment of a portion of plaintiffs' attorney's fees and costs. *See* Revised Consented Entry of Judgment and Permanent Injunction, *Sinclair v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 4:20-cv-2798, ECF No. 237 (N.D. Cal., May 6, 2024).

This peripatetic journey just to secure the rights of a high-school student group was arduous and expensive. The school district ultimately agreed to pay $5.8 million in attorney's fees and expenses. Steve West, *Settlement confirms Fellowship of Christian Athletes students' right to choose leaders*, WORLD (May 7, 2024), https://wng.org/roundups/settlement-confirms-fellowship-of-christian-athletes-students-right-to-choose-leaders-1715108675 [https://perma.cc/95L3-P76J].

But if Petitioner's rule became the law of the land, plaintiffs might never have recovered fees at all. The school district could have simply allowed the student group to operate and thereby have mooted the case. And it could do that after it had forced plaintiffs' attorneys to invest thousands of hours in the case, litigating through rehearing en banc in the Court of Appeals.

Part of the fee petition might have been saved by a damage claim in the case, but plaintiffs still would not have been prevailing parties with respect to the part of the litigation devoted to the injunction claim. Separating damages hours from injunction hours would have complicated the fee litigation and weakened plaintiffs' bargaining position in any attempt to settle the fee litigation. And often there will be no plausible damage claim to help salvage a fee petition.

Bargaining under the shadow of Petitioner's rule, only a foolish government defendant would agree to a consent decree. That would either include plaintiff's fees or entitle plaintiffs to prevailing-party status. The cheaper and more strategic option is to fully litigate the legal issues in a preliminary-injunction posture, and then if defendants lose, moot the case.

B. Ensuring access to a sacred river

At a sacred bend in the San Antonio River, two members of the Native American Church could not perform important religious ceremonies because city officials had fenced off the area. *See Perez v. City of San Antonio*, 98 F.4th 586, 595 (5th Cir. 2024). Plaintiffs sued and obtained a preliminary injunction that prohibited the City from blocking access for religious ceremonies and required the City to remove a hanging branch that endangered visitors, or so the City said. *Id.* With the only alleged danger (the hanging branch) gone, the City removed the fencing around the area.

On appeal, the Fifth Circuit found that the issue of access was moot—but again, it was moot only *because of the enforceable judicial intervention*. The City had refused to grant access before the lawsuit was filed, refused to grant access on a prior emergency motion for a temporary restraining order, and appealed the District Court's preliminary injunction granting access (dropping that issue on appeal only after plaintiffs filed their merits brief). *See Perez v. City of San Antonio*, No. 23-50746, ECF No. 146 (5th Cir. Nov. 21, 2023) (motion for partial dismissal of appeal). That is not what "voluntary" action looks like.

But under Petitioner's rule, a government has chance after chance to seek a win, before mooting the case after a defeat that it accepts as final. The government could file a motion to reconsider in the District Court, then appeal the preliminary injunction to the Court of Appeals (perhaps with a motion to stay the preliminary injunction pending appeal), lose at the Court of Appeals, see how an en banc petition and even a cert petition turn out, losing at every step but also driving up costs for the plaintiff and plaintiff's attorneys, and then moot the case—all without ever turning plaintiff into a "prevailing party."

C. Protecting Easter worship

In April 2020, worshipers celebrated an Easter service at Maryville Baptist Church in Kentucky. State officials responded by notifying the attendees "of future 'enforcement measures,' including misdemeanor charges" for violating COVID-19 restrictions on gathering and travel. *Roberts v. Neace*, 65 F.4th 280, 283 (6th Cir. 2023) (*Roberts II*). The congregants sued under the First Amendment and obtained a preliminary injunction covering part of their claim. On appeal, plaintiffs obtained a much broader preliminary injunction that prohibited defendants from banning services at their church. *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (per curiam). The regulations likely violated the Free Exercise Clause, because they contained "four pages of exceptions." *Id.* at 413. After a partial voluntary dismissal and a legislative change limiting state executive power, the case was moot. *Roberts II*, 65 F.4th at 283.

Chief Judge Sutton held that the plaintiffs were prevailing parties under §1988(b). "A defendant may not fairly claim that he voluntarily amended his

behavior *after* a court enjoins his old ways." 65 F.4th at 285. "Once a plaintiff earns 'some relief,' … he steps outside *Buckhannon*'s domain." *Id.* (quoting 532 U.S. at 603). The plaintiffs had obtained "a material, court-ordered change" that "stopped the Governor from enforcing his orders and allowed congregants to act in ways that he had previously resisted." *Id.* at 284 (citation omitted). This meant that plaintiffs prevailed and were entitled to attorney's fees.

Under Petitioner's rule, plaintiffs' attorneys would have come up empty. They would have no incentive to take on the next religious-liberty plaintiff in need of their services.

D. Preserving home prayer meetings

This Court may recall the in-home Bible studies and prayer meetings protected in *Tandon v. Newsom*, 593 U.S. 61, 62 (2021) (per curiam). This is another case in which a preliminary injunction turned out to be dispositive. And it illustrates an important point about challenges to short-term or interim measures that are likely unconstitutional.

In *Tandon*, the plaintiffs filed an emergency application for relief in this Court on April 2, 2021; the defendants responded by "chang[ing] the challenged policy shortly after this application was filed" so that the policy would expire on April 15, 2021. *Id.* This Court held that the case was not moot, because state officials with a "track record of moving the goalposts retain authority to reinstate those heightened restrictions at any time." *Id.* at 64 (internal quotation marks omitted). And the Court held that plaintiffs were "entitled to an injunction pending appeal." *Id.*

On remand to the District Court, the parties agreed to a permanent injunction and an award of attorney's fees. *See Tandon v. Newsom*, No. 5:20-cv-07108, ECF Nos. 73-75 (N.D. Cal. 2021).

But under Petitioner's rule, even an order for relief in this Court would not have made plaintiffs prevailing parties, and a settlement negotiation following this Court's order would have been unlikely. California had many ways to moot the case. It could have ended its Covid restrictions, exempted religious worship, or exempted a narrow class of home worshipers drafted to include plaintiffs.

Under Petitioner's rule, it is hard to imagine how *any* challenge to a temporary measure could result in a prevailing plaintiff. *Cf. Kendall v. Doster*, 144 S. Ct. 481 (2023) (RFRA-based preliminary injunction against temporary vaccine mandate vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)). Under Petitioner's rule, plaintiffs will be "entitled to relief" by the courts, *Tandon*, 593 U.S. at 64, will obtain that relief from the courts, and still not be considered "prevailing parties" within the meaning of the Fees Act, because defendant can always abandon its challenged measure without further litigation. That is not the best reading of the statute.

VI. Petitioner's proposed rule is undertheorized and does not grapple with the significant reliance interests at issue.

A. All eleven circuits that have considered Petitioner's proposed rule have rejected it. *See* Pet. App. 19a (collecting cases). Adopting it would upset the civil-rights and civil-liberties landscape of Ameri-

can litigation. Yet Petitioner's brief is mostly silent on this upheaval.

Adopting Petitioner's rule would cause hardship to countless parties that have structured their decisions on the current state of the law. What will happen to plaintiffs, who may be years into a case, if their counsel must withdraw out of newly created economic necessity? "The need to take account of reliance interests forces a justice to think carefully about whether she is sure enough about her rationale for overruling to pay the cost of upsetting institutional investment in the prior approach." Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722 (2013). But Petitioner offers this Court no guidance about those costs.

Petitioner's rule is also undertheorized. For instance, how can a plaintiff ever "prevail" when the challenged action is a temporary order or one-time future event? Is every case—even where plaintiffs receive complete relief through a preliminary injunction—subject to defendant's unilateral power to accept the preliminary injunction as dispositive without making plaintiff a prevailing party? Are many such cases going to result in expensive *Munsingwear* briefing on appeal, unnecessarily taxing the parties and the courts? "[P]etitioners' strategy for dealing with the confusion is not to offer a theory for rationalizing this body of law." *Haaland v. Brackeen*, 599 U.S. 255, 279 (2023). It is just to pretend that these theoretical gaps do not exist and hope that no one notices.

B. Moreover, nothing in Petitioner's theory is limited to preliminary injunctions. If defendants are free to moot a case at any time before a final judgment is entered on the merits, they can lose on a motion for

permanent injunction and then moot the case before that injunction is formally entered as a final judgment. They can moot the case even after finally and authoritatively losing in this Court.

In *Fulton v. City of Philadelphia*, 593 U.S. 522, 543 (2021), this Court held that the City's rule "cannot survive strict scrutiny, and violates the First Amendment." In *Trinity Lutheran Church v. Comer*, 582 U.S. 449, 467 (2017), the Court held that the State's rule "is odious to our Constitution all the same, and cannot stand." These opinions unambiguously decided the two cases. Yet *Fulton* merely reviewed decisions refusing a preliminary injunction, and *Trinity* reviewed decisions granting a motion to dismiss. Under Petitioner's theory, neither plaintiff had prevailed.

For such an example where the fee issue was litigated, *see McDonald v. City of Chicago*, 646 F.3d 992 (7th Cir. 2011). The District Court had dismissed the complaint on defendants' motion, the Court of Appeals affirmed, and this Court reversed with an opinion resolving the only seriously disputed issue in the case. 561 U.S. 742 (2010) (holding that the Second Amendment applies to the states). Chicago repealed its challenged ordinance four days later; the other defendant soon followed. 646 F.3d at 993. Both ordinances were repealed even before this Court issued its mandate on July 30, and more than a month before the Court of Appeals remanded the case to the District Court.

The District Court dismissed the case as moot, and both defendants then argued that the mootness holding meant that plaintiffs had not prevailed. Chief

Judge Easterbrook, writing for the Court of Appeals, sensibly rejected that argument:

> Whether the second amendment applies to the states and subsidiary units of government was *the* issue in this litigation. … This litigation was over except for the entry of an injunction by the district court. Chicago and Oak Park capitulated, which made the exercise unnecessary. … If a favorable decision of the Supreme Court does not count as "the necessary judicial *imprimatur*" on the plaintiffs' position (*Buckhannon,* 532 U.S. at 605, 121 S.Ct. 1835), what would?

Id. at 994.

Here, Petitioner "capitulated" after losing in a well-reasoned opinion on a motion for preliminary injunction. Under Petitioner's formalistic approach, that preliminary injunction granted far more relief than this Court's opinion in *McDonald*, which merely "remanded for further proceedings." 561 U.S. at 791. But what should matter in either procedural posture is that plaintiffs had so clearly won that defendants finally and authoritatively capitulated.

* * *

People of faith need attorneys to vindicate their rights. Their cases generally do not demand money, but only the ability to exercise their religion, which they deem infinitely more valuable. Many will lack the means to pay an attorney out of pocket. Congress recognized all of this, which is why §1988(b) enumerates RFRA, RLUIPA, and §1983 as statutes Congress wants privately enforced. California's faith-based student groups and in-home worshipers,

Texas's indigenous worshipers, and Kentucky's Easter worshipers could practice their religion only because they obtained enforceable judicial relief. But according to Petitioner, they still did not "prevail." That construction has no basis in statutory text or in common sense.

CONCLUSION

The Court should affirm the judgment below and hold that a defendant's permanent compliance with an enforceable judicial order makes the plaintiff a prevailing party under the Fees Act.

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