No. _____

In the
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, et al.,

Petitioners,

v.

NEW JERSEY THOROUGHBRED HORSEMEN'S ASSOCIATION, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2014, the district court entered a temporary restraining order (TRO) enjoining respondent from offering sports gambling pursuant to a new state law that purported to repeal longstanding prohibitions on such betting. That law was plainly invalid under Third Circuit precedent, yet respondent refused to put off its plans to introduce sports gambling by even a few weeks to allow the court to rule. Accordingly, the court granted the TRO and then entered a permanent injunction. Consistent with Federal Rule of Civil Procedure 65(c), the court required petitioners to post a bond to secure the TRO, but not the permanent injunction. That difference reflects the text and limited office of Rule 65(c). Nearly four years later, this Court reversed the Third Circuit precedent that bound the district court. Not content to declare victory, respondent demanded millions of dollars in damages on the theory that it was "wrongfully restrained" for 28 days by the 2014 TRO. The district court rejected that extraordinary request, both because the TRO was correct when issued, as underscored by the entry of a permanent injunction, and because damages would be inappropriate given that petitioners were merely vindicating their rights under then-extant law. The Third Circuit reversed on both grounds. The questions presented are:

1. Whether a party was "wrongfully enjoined" under Federal Rule of Civil Procedure 65(c) when the district court confirmed via the grant of a permanent injunction that its entry of a temporary restraining order was correct under then-applicable law.

2. Whether a district court retains its full equitable discretion to deny recovery on a Rule 65(c) injunction bond.

PARTIES TO THE PROCEEDING

Petitioners are the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball.

Respondent is the New Jersey Thoroughbred Horsemen's Association, Inc.

The following parties participated in this litigation at earlier stages, but are not parties to the proceedings relevant to this petition: the Governor of the State of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Judith A. Nason, Acting Director of the New Jersey Racing Commission; the New Jersey Sports and Exposition Authority; Stephen M. Sweeney, President of the New Jersey Senate; and Craig J. Coughlin, Speaker of the New Jersey General Assembly.

CORPORATE DISCLOSURE STATEMENT

No petitioner has a parent company, and no publicly held company owns 10% or more of any petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (D.N.J.):

- *Nat'l Collegiate Athletic Ass'n v. Christie*, No. 14-6450 (Nov. 16, 2018) (denying motion to recover on injunction bond)
- *Nat'l Collegiate Athletic Ass'n v. Christie*, No. 12-4947, 12-4947 (Nov. 21, 2014) (granting permanent injunction)
- *Nat'l Collegiate Athletic Ass'n v. Christie*, No. 12-4947 (Feb. 28, 2013) (granting permanent injunction)

United States Court of Appeals (3d Cir.):

- *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, No. 18-3550 (Sept. 24, 2019) (reversing denial of motion to recover on injunction bond)
- *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, Nos. 14-4546, 14-4568, 14-4569 (Aug. 9, 2016) (affirming permanent injunction)
- *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, Nos. 13-1713, 13-1714, 13-1715 (Sept. 17, 2013) (affirming permanent injunction)

Supreme Court of the United States:

- *N.J. Thoroughbred Horsemen's Ass'n, Inc. v. Nat'l Collegiate Athletic Ass'n*, No. 16-477 (May 14, 2018) (reversing permanent injunction)
- *Murphy v. Nat'l Collegiate Athletic Ass'n*, No. 16-476 (May 14, 2018) (reversing permanent injunction)
- *N.J. Thoroughbred Horsemen's Ass'n, Inc. v. Nat'l Collegiate Athletic Ass'n*, No. 13-979 (June 23, 2014) (denying certiorari)

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PETITION FOR WRIT OF CERTIORARI

Eight years ago, New Jersey embarked on a quest to eliminate a federal statute that prohibited it from authorizing sports gambling. Its first effort proved unsuccessful: After the state enacted a law that it conceded violated the Professional and Amateur Sports Protection Act (PASPA), both the district court and the Third Circuit rejected its argument that PASPA violates the commandeering doctrine, and this Court denied certiorari.

Undeterred, New Jersey enacted a new law in 2014 that it claimed managed to circumnavigate Third Circuit precedent and usher in sports gambling without violating PASPA. That dubious contention was never accepted by any of the four courts (including this Court) that considered it. But virtually as soon as the ink on that novel state law was dry, respondent—the New Jersey Thoroughbred Horsemen's Association (NJTHA)—announced its intent to introduce sports gambling into the state a mere *nine days* later. Petitioners—the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League, and the Office of the Commissioner of Baseball—thus were forced to seek a temporary restraining order (TRO) to prevent NJTHA from introducing state-sanctioned betting on petitioners' games before a court could even consider the legality of the new state law. And NJTHA refused to delay its plans long enough even to give the district court a meaningful chance to consider the question, thus forcing the court to decide in four days whether to grant temporary relief.

The court granted a two-week TRO, concluding that the law likely violated PASPA, a statute that it noted had just been held constitutional by the Third Circuit. Consistent with Federal Rule of Civil Procedure 65(c), which requires a party seeking a TRO or preliminary injunction to post a bond sufficient to cover any costs or damages of the restrained party should the court later conclude that its preliminary relief issued "wrongfully," Fed. R. Civ. P. 65(c), the court required petitioners to post a $1.7 million security bond, and another $1.7 million bond when it later extended the order two more weeks. After full briefing and argument, the court confirmed that the TRO was rightly issued, and entered a final judgment permanently enjoining the 2014 law. Consistent with the federal rules, no bond was required to accompany that permanent injunction.

Nearly four years later, after the Third Circuit confirmed that the district court's injunctive relief followed ineluctably from circuit precedent, this Court reversed the Third Circuit and accepted the state's commandeering argument, holding PASPA unconstitutional in a 6-3 decision. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018). Neither this Court nor any other, however, ever disagreed with the district court's conclusion that the 2014 law violated PASPA, which was the only issue before that court when it entered the TRO. Nor did this Court or any other ever suggest that the district court did anything wrong by temporarily restraining NJTHA from offering sports gambling pursuant to a state law that plainly violated a federal statute that was unquestionably constitutional under binding circuit precedent at the time. Indeed, no court has

ever suggested that the district court, bound by recently issued, on-point Third Circuit precedent, had any realistic choice but to grant both the TRO and the permanent injunction.

Nonetheless, NJTHA now seeks to capitalize on its remarkably aggressive tactics, insisting that it is entitled to recover millions of dollars from petitioners for damages it purportedly suffered during the four weeks the TRO was in effect—all because this Court later invalidated the law that gave petitioners the right to seek that relief. More remarkable still, the Third Circuit viewed itself as having no choice, in light of this Court's ultimate holding in *Murphy*, but to conclude that NJTHA was "wrongfully" restrained. Never mind that the district court had no real alternative but to enter the TRO, and never mind that full deliberations led the district court to confirm its TRO and enter a permanent injunction. The Third Circuit majority held that the ultimate result in *Murphy ipso facto* meant that NJTHA was wrongfully enjoined for four weeks nearly four years earlier. Adding insult to injury, the majority then concluded that the district court lacked discretion to determine that the intervening change in the law counseled against awarding NJTHA damages since petitioners were just exercising rights that Congress had given them.

That decision is profoundly wrong and conflicts with decisions from other courts on multiple levels. As Judge Porter recognized in dissent, Rule 65(c) exists for a very specific reason: to provide security against the possibility that a movant may prompt a court to mistakenly grant temporary relief in the haste of

preliminary proceedings. It is not an insurance policy against subsequent changes in the law that make a perfectly correct TRO "wrongful" with the benefit of 20/20 hindsight. That limited office is readily apparent from the fact that the rule requires a bond *only* for a TRO or preliminary injunction—not for a permanent injunction. If the rules guaranteed a party rightfully enjoined at the time a means to obtain damages if the law changed on appeal, then the bond requirement would apply *a fortiori* to permanent injunctions. After all, the TRO kept NJTHA sidelined for four weeks, while the permanent injunction, affirmed twice by the Third Circuit, kept it sidelined for nearly four years. That differential treatment is fully explained by the important, but limited, role of Rule 65(c).

Moreover, if the rule really did provide insurance against subsequent changes in the law, then it would be particularly important for district courts to retain broad discretion to determine whether circumstances warranted against permitting recovery, like in cases where the court had no choice based on clear circuit precedent but to enter the TRO. Penalizing parties for seeking temporary injunctive relief that they had a legal right to seek based on extant precedent creates terrible incentives for our judicial system. A party with a clear legal entitlement to stop conduct causing it irreparable injury should not have to weigh the possibility that it might face millions of dollars in damages at the end of the litigation should the law that gives it that right be declared invalid. The decision below is wrong, and the incentives it creates are untenable. This Court should grant review.

OPINIONS BELOW

The Third Circuit's opinion is reported at 939 F.3d 597 and reproduced at App.1-31. The district court's opinion is unreported but available at 2018 WL 6026816 and reproduced at App.34-45.

JURISDICTION

The Third Circuit issued its opinion on September 24, 2019, and denied a timely petition for rehearing en banc on December 10, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

RULE INVOLVED

Rule 65(c) of the Federal Rules of Civil Procedure provides in pertinent part:

> The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

There is no comparable provision for permanent injunctions.

STATEMENT OF THE CASE

A. Factual Background

1. In 1992, Congress enacted PASPA, 28 U.S.C. §3701 *et seq.*, "to prohibit sports gambling under State law," Pub. L. No. 102-559, §474, 106 Stat. 4227, 4227 (1992). PASPA made it "unlawful" for a state to "authorize by law or compact … a lottery, sweepstakes, or other betting, gambling, or wagering scheme based … on" competitive sporting events. 28 U.S.C. §3702(1). PASPA also made it "unlawful" for a

"person to sponsor, operate, advertise, or promote" any such sports gambling "pursuant to the law or compact of a government entity." *Id.* §3702(2).

To accommodate the reliance interests of certain states, PASPA exempted authorized sports gambling already in operation before its enactment. *Id.* §3704(a)(1)-(2). PASPA also included a provision allowing New Jersey to authorize sports gambling in Atlantic City within one year of PASPA's effective date. *Id.* §3704(a)(3). New Jersey did not avail itself of that option, and instead left in place its preexisting prohibitions on sports gambling. Two decades later, however, New Jersey had a change of heart. In 2012, the legislature enacted a law that authorized Atlantic City casinos and horse racetracks throughout the state to offer sports gambling. N.J. Stat. Ann. §5:12A-1, *et seq.* (West 2012). New Jersey made no pretense that this law complied with PASPA, but instead openly invited its challenge so it could attack PASPA's constitutionality. As then-Governor Christie put it, "if someone wants to stop us, then they'll have to take action to try to stop us." JA118, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, Nos. 13-1713, 13-1714, 13-1715 (3d Cir.).

2. Petitioners responded by invoking their rights under PASPA to bring suit against various New Jersey officials to enjoin this blatant violation of PASPA. 28 U.S.C. §3703. NJTHA intervened in that litigation based on its desire to offer sports gambling at Monmouth Park Racetrack. App.4. The defendants conceded that the 2012 law violated PASPA but contended, *inter alia*, that PASPA was

unconstitutional because it violated the anti-commandeering principle. App.4.

The district court rejected that argument, and the Third Circuit affirmed and upheld the district court's judgment enjoining New Jersey from enforcing the 2012 law. *Nat'l Collegiate Athletic Ass'n v. Christie*, 926 F. Supp. 2d 551 (D.N.J.), *aff'd*, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013). The defendants (including respondent) sought this Court's review, but the Court denied certiorari in June 2014. *N.J. Thoroughbred Horsemen's Ass'n, Inc. v. Nat'l Collegiate Athletic Ass'n*, 573 U.S. 931 (2014); *Christie v. Nat'l Collegiate Athletic Ass'n*, 573 U.S. 931 (2014).

3. Undeterred, in 2014, New Jersey enacted a new law that purported to repeal all of the state's prohibitions on sports gambling to the extent they applied to Atlantic City casinos and horse racetracks throughout the state, and claimed that it hence managed to legalize sports gambling without violating PASPA. App.5. Within hours of the law's signing, NJTHA announced its intent to begin offering sports gambling at Monmouth Park a mere *nine days* later. App.5. Petitioners thus were forced to file suit again, this time against both state officials and NJTHA, and to seek a TRO. App.5. Notwithstanding the serious doubts about the compatibility of the 2014 law with the recently upheld PASPA, NJTHA refused to delay its plans to implement sports betting by even a few days. The district court was thus left with only four days to decide whether to issue temporary relief to prevent NJTHA from beginning to take bets on petitioners' sporting events. App.5.

In an oral opinion, the court issued a TRO. Because the Third Circuit had already definitively concluded that PASPA is constitutional, the court focused solely on the statutory question of whether the 2014 law violated PASPA. App.37-38; *see also* CA3.JA58 ("The Third Circuit has already confirmed the constitutionality of PASPA."). The court concluded that the law likely did so, and therefore granted petitioners' request for a 14-day TRO while the parties provided further briefing and argument on whether a preliminary or permanent injunction should issue. App.38. Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, the court ordered petitioners to post a $1.7 million security bond, and subsequently ordered them to post an additional $1.7 million after extending the TRO two more weeks. App.38.

At the end of that four-week period, the court issued a final judgment affirming its initial conclusions in full. *Nat'l Collegiate Athletic Ass'n v. Christie*, 61 F. Supp. 3d 488 (D.N.J. 2014). The court again "confined its analysis to 'the novel issue of whether the 2014 ... Law, which purport[ed] to *partially* repeal New Jersey legislation' effectively amounted to an authorization of sports betting in violation of PASPA." App.38-39. With the benefit of full deliberation, the court again concluded that the answer was yes, and that the 2014 law was "invalid as preempted by PASPA." App.6. The court therefore permanently enjoined the state defendants from enforcing the law, and permanently enjoined NJTHA from offering sports gambling pursuant to it.

4. A panel of the Third Circuit affirmed, first reiterating that it was "the law of the Circuit" that "PASPA is constitutional and does not violate the anti-commandeering doctrine," and then concluding that the 2014 law violated PASPA. *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 799 F.3d 259, 263 (3d Cir. 2015). The Third Circuit then heard the case en banc, and in a 9-3 decision, the en banc court likewise affirmed. *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 832 F.3d 389 (3d Cir. 2015) (en banc). In reaching its result, the en banc majority agreed with the district court and the panel that, "[w]hile artfully couched in terms of a repealer," the 2014 law "violates PASPA because it authorizes by law sports gambling." *Id.* at 396-97. The majority also reiterated its view "that PASPA does not commandeer the states." *Id.* at 401.

Respondent and the state parties sought this Court's review again, and this time the Court granted certiorari. *Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (2017). In May 2018—nearly four years after the district court issued its four-week TRO—the Court issued its decision. The Court agreed with the district court and the Third Circuit that, "[w]hen a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity" within the meaning of PASPA. *Murphy*, 138 S. Ct. at 1474. But the Court concluded that PASPA violates the anti-commandeering principle and is hence unconstitutional. *Id.* at 1478.

B. Proceedings Below

1. Soon after this Court's decision, NJTHA filed a motion in the district court seeking to recover against

the $3.4 million injunction bond for damages allegedly sustained during the 28-day period in 2014 during which the TRO was in effect. App.8. NJTHA acknowledged that the bond covered only that 28-day period, and hence provided no security against any alleged damages it may have sustained after the district court entered its permanent injunction. But it also claimed that it was entitled to another $140 million in damages purportedly suffered after the permanent injunction took effect, on the theory that petitioners acted in "bad faith" by invoking their rights under PASPA to try to prevent the harms that Congress enacted the statute to quell. ECF 80-1 at 34-36.

After bifurcating the two requests, the district court denied the motion for recovery on the injunction bond. App.43.[1] The court first held that NJTHA had not been "wrongfully enjoined" under Rule 65(c). App.43. As the court explained, it "issued the bond to assure the interim holding that the 2014 Repealer Law was an authorization in violation of a previously-affirmed constitutional statute." App.42-43. And that holding was never reversed—not by the district court in its final judgment, not by the Third Circuit, and not by this Court. App.42-43. The court therefore concluded: "That PASPA's constitutionality was [subsequently] introduced on appeal does not convert the bond, which assured that the 2014 Repealer Law amounted to an authorization, into a bond that

[1] While NJTHA never renewed its request for $140 million in "bad faith" damages, it tried to resuscitate that issue before the Third Circuit, but the Third Circuit declined to reach it since the district court never did. App.8 n.5, 10 n.6.

assured any and all possibilities" or "equate to [NJTHA] being wrongfully enjoined." App.43.

The court further concluded that, even if NJTHA were "wrongfully enjoined," it would find "good cause … to deny NJTHA damages arising under the injunction bond." App.43. As the court noted, other courts have concluded that "a change in the law may be 'a legitimate consideration' … to examine in determining whether to award injunction damages to a prevailing party." App.44. Because the law "clearly favored" petitioners when the court granted the TRO, the court concluded that "it would be unreasonable … to allow NJTHA to recover under the injunction bond in light of [petitioners'] correct interpretation that the 2014 Repealer Law authorized sports betting in violation of the governing law at that time." App.44.

2. NJTHA appealed, and a divided Third Circuit reversed. App.23. According to the majority, the relevant question is not whether NJTHA was "wrongfully enjoined" via TRO as judged from the perspective of the district court after it had the benefit of full deliberation and entered a permanent injunction to the same effect, but "whether the defendant was wrongfully enjoined given what we know today." App.15 n.9. Thus, in the majority's view, because this Court "ultimately held" PASPA unconstitutional, NJTHA "had a right to conduct sports gambling all along" and "should be able to call on the bond." App.18.

The majority next rejected the district court's conclusion that it had discretion to deny NJTHA's motion. App.18-23. The majority noted that some—but not all—circuits "have held that there is a

rebuttable presumption that a wrongfully enjoined party is entitled to recover provable damages up to the bond amount." App.18. The court opted to align itself with those circuits, expressly rejecting the contrary approach endorsed by the Fifth Circuit, under which "[t]he awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction." App.20. The majority then faulted the district court for "fail[ing] to apply the presumption," and further rejected the notion that the "change in law" this Court's decision effected was a sufficient reason to deny recovery. App.21-22. The majority therefore held that NJTHA "is entitled to recover provable damages up to the bond amount." App.23.

Judge Porter dissented. App.24. He first observed that this Court had invalidated PASPA "on constitutional grounds, but the temporary restraining order was not based on PASPA's constitutionality." App.24. Instead, the district court granted that order because New Jersey's 2014 law violated PASPA—and this Court "agreed with the District Court on that statutory question." App.24, 28-29.

Judge Porter next rejected the proposition that this Court's "decision holding PASPA unconstitutional necessarily means that NJTHA was wrongfully enjoined under the PASPA-based TRO issued four years earlier." App.24. As he explained, Rule 65(c) "protects the enjoined party 'if it turns out that the order issued was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation.'" App.30. Here, the district court "engaged in just that full deliberation" and concluded that the immediate relief it had temporarily provided

not only was appropriate, but should be made permanent. App.30. Judge Porter also found no "support for holding that a party was wrongfully enjoined when the District Court faithfully followed our precedent." App.31.

3. The Third Circuit denied rehearing en banc.

REASONS FOR GRANTING THE PETITION

According to the decision below, NJTHA may recover potentially millions of dollars in damages because the district court entered a TRO that was effectively foreordained by the law and facts available to that court both when it entered the TRO and after full deliberation persuaded it to enter a permanent injunction. Indeed, it is no exaggeration to say that the district court had no choice but to enter the TRO given the immediate irreparable injury NJTHA threatened to inflict and the binding law the court was obligated to apply. Nonetheless, the decision below holds that the invalidation of a federal statute by this Court four years later means both that NJTHA was wrongfully enjoined in 2014 and that the district court in 2020 has no discretion to do anything other than force petitioners to pay damages for invoking their rights under a federal statute that had just been held constitutional. That result is fundamentally inconsistent with the limited, but important, office of Rule 65(c) and decades of cases correctly applying it.

As numerous courts (including this one) have long recognized, a Rule 65(c) injunction bond is not designed to serve as security against the risk that a district court's final judgment may be reversed. It instead secures only against the risk that *the district court itself* may, upon full and final consideration of

the merits, conclude that its view of the merits at the preliminary stage was mistaken. That is clear from the simple fact that neither Rule 65(c) nor any equivalent rule *applies to permanent injunctions*. It instead requires a movant to post a bond only upon issuance of a preliminary injunction or TRO. If respondent was injured by the preliminary injunction, it was injured many times over by the permanent injunction. The reason Rule 65(c) protects against the former and not the latter is simple. It is a conscious effort to provide special security when a movant obtains relief under circumstances that, owing to a condensed time frame, an incomplete record, and a less demanding standard, carry a greater risk of mistake. But where the district court reached the same result after full deliberation and could have reached no other result under then-extant law, the defendant is not entitled to damages for the preliminary relief just because the permanent relief is later reversed on appeal based on a change in the underlying law.

Consistent with that understanding, courts have repeatedly recognized that whether a party was "wrongfully enjoined" within the meaning of Rule 65(c) depends on whether the court that issued the preliminary relief changes its mind based upon a full and final consideration of the merits—not on whether a reviewing court later reverses the issuing court's final decision. That is the only way to make sense of the regime Rule 65(c) creates, as a rule that requires only sufficient security to cover the period during which temporary or preliminary relief is in place would be a patently inept means of trying to insure against the risk of appellate reversal of the final

decision on the merits. By concluding that NJTHA was "wrongfully enjoined" because this Court, years later, reversed the binding Third Circuit precedent that the district court faithfully applied, the decision below radically departs from that understanding and produces a result at odds with Rule 65(c)'s text and purpose.

The decision below also joins the wrong side of a circuit split about the scope of a district court's discretion to deny recovery on a Rule 65(c) bond. If the Third Circuit were correct that the "wrongfully enjoined" question must be answered with the benefit of 20/20 hindsight, then it would seem imperative that courts possess broad discretion to decline to award damages on a bond. In a case like this, where circuit precedent was clear, and the district court was all but obligated to enter a TRO, it makes no sense for that same court to have to later penalize petitioners for exercising the rights Congress gave them. The Fifth Circuit acknowledges that district courts have discretion not to award damages in such circumstances. And the district court here followed the Fifth Circuit and concluded that it would not award damages even if NJTHA had been wrongfully enjoined since the TRO was plainly appropriate under binding circuit precedent at the time. But the Third Circuit rejected the Fifth Circuit's view and joined several of its sister circuits in concluding that Rule 65(c) contains an "implicit presumption" that district courts *must* award recovery on a bond—a presumption that, in its view, is not overcome even when the only thing that could be said to have made temporary relief "wrongful" is a change in the law that post-dated it by years.

Taken together, these two holdings depart from decisions of other courts on highly consequential issues that impact virtually any litigation in which preliminary relief may be sought—which is to say virtually any litigation. They produce results at odds with basic fairness and the narrow purpose of Rule 65(c) and create terrible incentives. If a party faces a clear threat of irreparable injury and has a clear right to relief under existing law, then there is no sound basis for discouraging it from seeking a TRO by making it an insurer against the risk that its legal right may be eliminated during the course of the litigation. The law does not do that in the context of permanent injunctions, and Rule 65(c) protects only against a different risk—namely, that truncated procedures will allow a movant to "wrongfully obtain" preliminary relief when it could not obtain a permanent injunction upon full deliberation.

There is no better illustration of the unfairness of the Third Circuit's misguided approach than this case. NJTHA has a bond to seek recovery against only because it refused to hold off even a few weeks on beginning to offer sports gambling—even though (as every court agreed) the state law pursuant to which it planned to do so was a blatant violation of a federal statute that the Third Circuit had held constitutional a mere year earlier. In other words, the TRO bond exists only because NJTHA insisted on breaking what was then the law, and because petitioners exercised the right Congress had given them to enforce what was then the law. The Third Circuit's view that Rule 65(c) not only permits, but *compels* recovery nonetheless, is a sure sign that something has gone awry. This Court should grant certiorari and confirm

that Rule 65(c) neither contemplates nor tolerates that result.

I. The Third Circuit's Conclusion That The District Court "Wrongfully Enjoined" NJTHA Conflicts With The Plain Meaning Of Rule 65(c) And Cases Correctly Applying It.

1. Rule 65(c) provides that a district "court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). Text, context, and purpose confirm that a party is "wrongfully enjoined or restrained" within the meaning Rule 65(c) only if, after a full opportunity to evaluate the governing law and facts without the pressures and less rigorous standard associated with preliminary proceedings, the district court could not justify issuing permanent relief. Contrary to the decision below, a party is not "wrongfully enjoined" when a district court had no reasonable alternative to entering relief under the applicable law, just because a higher court reverses the district court's final determination on the merits years later based on intervening changes in the law.

As when interpreting a statute, the starting point in interpreting the Federal Rules of Civil Procedure is their text, which this Court gives its "plain meaning." *Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 123 (1989). The first and most obvious indication that Rule 65(c) is focused on the particular risks attendant to awards of *preliminary* relief is the fact that the rule applies *only* to a "preliminary injunction" or a

"temporary restraining order." Fed. R. Civ. P. 65(c). There is no comparable rule (or statute) that requires the movant to post "security" to obtain a *permanent* injunction, or to provide more security if temporary relief is made permanent. In both the legal and the temporal sense, then, the "security" a Rule 65(c) bond provides is security against the risk that a district court's *preliminary* determination may prove incorrect vis-à-vis its final one—not the risk that a district court's *final* judgment may be reversed based on subsequent developments on appeal.

That specific focus on special security for preliminary relief makes eminent sense. For one thing, such relief typically comes when "the parties generally will [not] have had the benefit … of a full opportunity to present their cases." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981). A court often considers requests for preliminary injunctions in "haste," with "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.* at 395. Indeed, in extreme circumstances, a court may enter a TRO *ex parte*, without even hearing from the other side. *See* Fed. R. Civ. P. 65(b). Under those circumstances, it makes sense to demand special protection to ensure that the movant is not telling only half the story. Moreover, unlike a permanent injunction, a TRO or "preliminary injunction may be granted on a mere probability of success on the merits." *Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring).

Taking into consideration the heightened risk of error that these factors create, "the policy of the Rule 65 security bond [is] to protect defendants from the

consequences of temporary restraining orders granted without opportunity for full deliberation of the merits of a dispute." *Camenisch*, 451 U.S. at 397. In exchange for obtaining relief on an expedited basis, with less proof, and under a relaxed standard, the movant must "demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully." *Edgar*, 457 U.S. at 649 (Stevens, J., concurring). In short, "[t]he requirement of security is rooted in the belief that a defendant deserves protection against a court order granted without the full deliberation a trial offers." *Camenisch*, 451 U.S. at 397.

Given the narrow and specific purpose a Rule 65(c) bond serves, it necessarily follows that a party is not "wrongfully enjoined or restrained" within the meaning of Rule 65(c), and hence able to try to recover against that bond, unless "'it turns out that the order issued was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation.'" App.30. That standard is readily satisfied if, for instance, a movant obtains an *ex parte* TRO by failing to bring to the court's attention material law or facts that later persuade the court that its initial view was wrong. But it is not satisfied simply because a higher court later disagrees with the district court's full and final consideration of the merits.

In determining whether the non-movant was wrongfully enjoined, moreover, it is critical to judge the matter from the law applicable in the district court

at the time of the permanent injunction. Certainly in a case such as this, where the court had no choice but to enter a TRO and a permanent injunction based on governing circuit law, it makes no sense to conclude that the defendant was wrongfully enjoined in 2014 based on a Supreme Court decision issued in 2018 reversing that circuit precedent. The point of Rule 65(c) is to "compensate the defendant, in the event he prevails on the merits, for the harm [caused by] an injunction entered *before the final decision*" of the district court. *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512, 516 (7th Cir. 2002) (emphasis added). The bond protects against the risk of rashly entered TROs and preliminary injunctions; it does not insure against changes in the law.

2. Applying those principles, the district court plainly did not "wrongfully enjoin" NJTHA when it entered its TRO. Far from concluding that its temporary relief proved mistaken after considering full briefing and argument, the court affirmed its initial rulings and entered a permanent injunction. Indeed, neither the TRO determination nor the permanent injunction was even a close call based on the law the court had no choice but to apply. Thus, the sole risk Rule 65(c) and its bond guard against—*i.e.*, the risk that a "temporary restraining order[] granted without opportunity for full deliberation of the merits" may prove incorrect, *Camenisch*, 451 U.S. at 397—never came to pass. To the extent the TRO could in hindsight be said to have been "mistaken," that is only on account of this Court's later reversal of the Third Circuit precedent that the district court was bound to follow. It may be that this Court's decision set forth the proper understanding of what the law always was,

but that does not change the reality that the district court was powerless to anticipate this Court's decision. Judged from the only law that applied when NJTHA was restrained and then permanently enjoined, it cannot be said that it was "wrongfully restrained."

The Third Circuit's contrary conclusion is deeply flawed. According to the majority, "a party is wrongfully enjoined when it turns out that that party had a right all along to do what it was enjoined from doing." App.11. Thus, in its view, "to focus on whether a TRO was wrongfully issued [at the time] misses the mark"; the "relevant question …. is whether the defendant was wrongfully enjoined given what we know today." App.15 & n.9. As Judge Porter explained in dissent, that post hoc, 20/20-hindsight approach is utterly "out of step with Rule 65's function," which is to "protect[] the enjoined party 'if it turns out that the order issued was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation.'" App.30.

In concluding otherwise, the majority emphasized Rule 65(c)'s "use of a past tense verb phrase"—*i.e.*, "found to have been"—and extrapolated from this language "that we look back at the propriety of the injunction from the vantage point of the conclusion of the litigation." App.14-15. But the much more sensible explanation for why Rule 65(c) uses the past tense is because it is designed to measure the district court's *temporary* decision against its later *final* one. That limited degree of hindsight accounts for the specific risk that truncated and sometimes *ex parte* proceedings could produce a wrongful TRO or preliminary injunction. The Third Circuit's broader

scope of hindsight is incompatible with the critical fact that Rule 65(c) applies to TROs and preliminary injunctive relief and not permanent injunctions.

The Third Circuit's rule also has the bizarre effect of allowing a defendant's ability to recover damages attributable to a subsequently reversed *permanent* injunction to turn on the happenstance of whether that permanent injunction was preceded by a *preliminary* one—a happenstance that, as this case well illustrates, will often depend not on the plaintiff's legal position, but on how aggressive a litigating strategy the defendant presses. Here, for instance, had NJTHA not insisted on trying to offer sports gambling a mere nine days after New Jersey enacted its dubious 2014 "repealer" in violation of PASPA, and instead agreed to give the district court a decent interval to resolve the merits of petitioners' claims, there never would have been a need for a TRO, and hence never would have been a Rule 65(c) bond for NJTHA to try to recover against. That just underscores that Rule 65(c) cannot sensibly be understood as an effort to provide security against reversal on appeal, for no rational body would adopt such a patently ineffective means of trying to accomplish that objective.

3. While the majority tried to find support for its decision in cases from the First, Second, Eighth, and Ninth Circuits, none of those decisions embraced the view that the "wrongful[ness]" of preliminary relief turns on the state of the law after a higher court reversal of the relevant law. *See* App.11 (citing *Glob. NAPs, Inc. v. Verizon New Eng., Inc.*, 489 F.3d 13, 22 (1st Cir. 2007); *Slidell, Inc. v. Millennium Inorganic*

Chems., Inc., 460 F.3d 1047, 1059 (8th Cir. 2006); *Nintendo of Am., Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1036 (9th Cir. 1994); *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054 (2d Cir. 1990)). Instead, each underscores that the appropriate comparison is between the issuing court's preliminary determination and its final one.

Take, for instance, the Ninth Circuit's decision in *Nintendo*. The majority emphasized that the court there deemed a preliminary injunction "wrongful" based in part on defenses that the defendant "introduced … at trial that it had not asserted at the preliminary injunction stage." App.16. But the court invoked those defenses in explaining why *the district court* reversed itself and vacated its preliminary injunction. *See* 16 F.3d at 1036. It was the fact the defendant ultimately "prevailed in the underlying litigation" in the district court that led the Ninth Circuit to conclude that it had been "wrongfully enjoined." *Id.* at 1036. The Eighth Circuit's decision in *Slidell* likewise emphasized that whether a party was "wrongfully enjoined" turns on whether the party that procured the preliminary injunction "prevails on the merits" in the district court. 460 F.3d at 1059.

The Second Circuit's decision in *Blumenthal* follows the same reasoning. The court did not focus on *its own* resolution of the merits, let alone on Supreme Court reversal. 910 F.2d at 1054. It focused on the merits determination of the ultimate fact finder—there, the arbitration panel to whom the case went after the district court issued its preliminary injunction. *Id.* The Second Circuit found that the defendant had been wrongfully enjoined only because

that body reached "the ultimate decision on the merits after a full hearing" that "the injunction should not have issued in the first instance." *Id.* And while the First Circuit relied on its own resolution of the merits to find that a party was "wrongfully enjoined" in *Global NAPs*, that was because it was addressing an injunction pending appeal that had been issued by the First Circuit itself. 489 F.3d at 15, 23.

In short, notwithstanding the occasional loose language, courts have repeatedly recognized that what matters under Rule 65(c) is whether the fully deliberative proceedings that follow the issuance of temporary relief prove the issuing court's initial instinct incorrect. And with good reason, as Rule 65(c) does not exist to secure a defendant against the risk that the district court's final merits decision will be reversed by a higher court—particularly where, as here, that reversal is based on intervening changes in the law. Whatever the merits of such a rigorous conception of retroactivity in determining whether a court's actions were "wrongful" in other contexts, it is an exceedingly poor fit in the context of the important but limited office of Rule 65(c). And it is particularly perverse to conclude that a defendant was "wrongfully enjoined" in 2014 and should be able to recover potentially millions of dollars when the district court had no choice under then-applicable law and was powerless to anticipate a 2018 Supreme Court decision reversing the Third Circuit precedent that bound it back in 2014.

II. The Third Circuit's Conclusion That Rule 65(c) Creates An "Implied Presumption" Of Recovery Again Departs From The Rule's Plain Meaning And Deepens A Circuit Split.

Adding insult to injury, the Third Circuit joined the wrong side of a circuit split in concluding that the district court lacked discretion under Rule 65(c) to deny recovery on the injunction bond. As this case powerfully illustrates, if it is really the case that the "wrongfully enjoined" question must be assessed with 20/20 hindsight, then there must be some discretion for cases where the plaintiffs were just exercising rights that then-extant law clearly gave them, and the district court had no choice under then-extant law but to grant relief. The notion that Rule 65(c) simultaneously renders virtually any vacated injunction "wrongful" and deprives courts of their traditional discretion essentially guarantees recovery in inequitable circumstances. That rule not only is wrong, but would create perverse incentives. A party that is entitled to a TRO under then-extant law should not be penalized for obtaining that relief because that law later changed. If Congress had amended PASPA to make it inapplicable to racetracks and purported to change that law retroactively, it would be wholly inequitable to award damages for a validly obtained TRO. It makes no more sense to make damages mandatory when the change in the law comes via appellate reversal.

1. "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944). This context is no exception: Courts of equity traditionally had broad authority to relieve a party from an injunction bond "whenever in the course of the proceedings it appears that it would be inequitable or oppressive to continue [it]." *Russell v. Farley*, 105 U.S. 433, 442 (1881). After all, "the power to impose a condition implies the power to relieve from it." *Id.*

"When district courts are properly acting as courts of equity, they have discretion unless a statute clearly provides otherwise." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001). That principle suffices to resolve the question presented here, as nothing in Rule 65(c) deprives district courts of their traditional equitable discretion with respect to recovery on an injunction bond. The text of Rule 65(c) states that a court may not "issue" preliminary relief unless the movant "gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). But strikingly absent from that text is any restriction on the district court's discretion to deny recovery on that bond. The plain text of Rule 65(c) therefore leaves the decision whether to grant recovery on an injunction bond where it has always lain: in the district court's sound discretion.

Comparison to other federal rules reinforces that conclusion. Consider Rule 54(d). Unlike Rule 65(c), Rule 54(d)(1) expressly addresses recovery of costs after final judgment, providing that, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—*should*

be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1) (emphasis added). Notwithstanding that emphatic language, moreover, this Court has held that "the decision whether to award costs" under Rule 54(d)(1) *still* "ultimately lies within the sound discretion of the district court." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 377 (2013). If even an instruction that a court "should" do something does not impinge upon its traditional discretion to do otherwise, certainly the absence of any instruction altogether cannot do the trick.

2. Consistent with that understanding, the Fifth Circuit has long held that a district court retains full discretion to deny recovery on an injunction bond. The court first reached that conclusion in *H&R Block, Inc. v. McCaslin*, 541 F.2d 1098 (5th Cir. 1976) (per curiam), a case in which the district court entered a preliminary injunction but later "reversed [its] initial determination." *Id.* at 1099. The district court nonetheless concluded that it would "discharge" the plaintiff "from its liability on the injunction bond," as it "had sued in good faith" and did not act "maliciously" or "without probable cause." *Id.* The Fifth Circuit affirmed, reasoning that "[t]he awarding of damages pursuant to an injunction bond rests in the sound discretion of the court's equity jurisdiction," and that "it was certainly not an abuse of discretion for the judge to find the suit had been brought in good faith," or that any losses attributable to the preliminary injunction were "not unfair in the circumstances presented." *Id.* at 1099-1100.

Several other circuits, however, have expressly rejected the Fifth Circuit's approach. In the earliest of

those cases, Judge Posner concluded for the Seventh Circuit that Rule 65(c) embodies an "implicit presumption" that a district court should award damages to a "wrongfully enjoined" party. *Coyne-Delany Co. v. Capital Dev. Bd. of Ill.*, 717 F.2d 385, 391-92 (1983). The court therefore expressly disapproved of the Fifth Circuit's more "open-ended" approach. *Id.* at 391. In doing so, the court acknowledged that "[t]he court is not told in so many words" by Rule 65(c) "to order the applicant to pay the wrongfully enjoined party's damages," *id.*, but nonetheless determined that courts should award such damages unless there is a "good reason" not to, *id.* at 392. As examples, the court suggested a situation where "the defendant had failed to mitigate damages," or there was a "change in the applicable law after the preliminary injunction was issued." *Id.* at 392-93. Since then, four circuits have embraced that implicit "rebuttable presumption." *See Nokia Corp. v. InterDigital, Inc.*, 645 F.3d 553, 558 (2d Cir. 2011); *Glob. NAPs*, 498 F.3d at 23; *Nintendo*, 16 F.3d at 1036; *Nat'l Kidney Patients Ass'n v. Sullivan,* 958 F.2d 1127, 1134 (D.C. Cir. 1992); *cf. Zenith Radio Corp. v. United States*, 823 F.2d 518, 521 (Fed. Cir. 1987) (highlighting circuit split).

Meanwhile, other courts have managed to straddle the divide. Remarkably, that includes the Seventh Circuit, which subsequently aligned itself with the Fifth Circuit's *H&R Block* decision—in a unanimous decision that Judge Posner joined. *See Henco, Inc. v. Brown*, 904 F.2d 11 (7th Cir. 1990). There, the court took the position that "[a]ny award of damages on an injunction bond rests in the sound discretion of the district court's equity jurisdiction."

Id. at 13 n.2 (citing *Russell*, 105 U.S. at 441-42; *H&R Block*, 541 F.2d at 1099). And while the Eleventh Circuit has acknowledged that it is bound by the Fifth Circuit's pre-division decision in *H&R Block*, it has purported to adopt the *Coyne-Delany* view anyway, *see State of Ala. ex rel. Siegelman v. EPA*, 925 F.2d 385, 389-90 (11th Cir. 1991), but then reverted back to the *H&R Block* view in more recent cases, *see City of Riviera Beach v. Lozman*, 672 F. App'x 892, 895 (11th Cir. 2016); *Milan Exp., Inc. v. Averitt Exp., Inc.*, 208 F.3d 975, 980 (11th Cir. 2000).

The Tenth Circuit has waffled too. Early on, it concluded that "the discretion of the trial court to refuse to award damages on an injunction bond … has been largely circumscribed since the existence of Rule 65(c)." *Atomic Oil Co. of Okl. v. Bardahl Oil Co.*, 419 F.2d 1097, 1100 (10th Cir. 1969). Later, however, it held that the decision whether to award damages, and the extent thereof, is in the discretion of the district court and is "based upon considerations of equity and justice." *State of Kan. ex rel. Stephan v. Adams*, 705 F.2d 1267, 1269 (10th Cir. 1983). The court recently forthrightly acknowledged that these two approaches clearly "conflict," but deemed itself bound to follow the earlier one. *Front Range Equine Rescue v. Vilsack*, 844 F.3d 1230, 1233 (10th Cir. 2017).

3. Here, the Third Circuit joined the courts that have followed *Coyne-Delany* and refused to "adopt the approach espoused by the Fifth Circuit in *H&R Block*." App.20. That conclusion not only deepened the circuit split, but proved dispositive. Unlike the Third Circuit, the district court concluded that "[it] has unquestioned power in an appropriate case … not to award damages

on an injunction bond even though the grant of the injunction was reversed." App.45. Thus, even assuming it had wrongfully enjoined NJTHA, the court concluded that it would exercise that discretion to deny recovery on the bond. App.43. As it explained, "the law as it existed in 2014 clearly favored [petitioners], and it would be unreasonable for the Court to allow NJTHA to recover under the injunction bond in light of [petitioners'] correct interpretation that the 2014 Repealer Law authorized sports betting in violation of the governing law at that time." App.44.

The Third Circuit did not reverse that conclusion as an abuse of discretion. It reversed on the ground that the decision to deny recovery did not lie in the district court's "sound discretion." App.20-21. Instead, in its view, the court's discretion was confined to the circumstances identified in *Coyne-Delany*. App.21-22. Accordingly, because petitioners had "not claimed that NJTHA has failed to mitigate its damages or that the bond amount is unreasonable," the court concluded that the district court had no discretion to exercise. App.22. Remarkably, it even concluded that the "change in the state of the law" factor articulated in *Coyne-Delany* was not satisfied. App.22. In its view, the only changes in the law that matter are those that occur outside the litigation at hand. Thus, the Third Circuit posited that the district court *would* have had discretion to deny recovery if some *other* litigant had convinced this Court to strike down PASPA while this case was pending. But it concluded that a change in the law procured by the enjoined party does not count. App.22-23.

That the Third Circuit reversed the district court based on factors that appear nowhere in Rule 65(c) is an obvious sign that its analysis is flawed. Given the principle that courts retain their full equitable discretion unless a statute or rule says otherwise, the very idea that Rule 65(c) contains an "implicit presumption" that a court must grant recovery is deeply flawed. Moreover, the notion that Rule 65(c) is intended to punish plaintiffs with millions of dollars in damages merely because they sought, in good faith, to enforce their rights under a federal law deemed perfectly constitutional under then-binding precedent only further divorces the rule from "the policy considerations behind the injunction bond." *Camenisch*, 451 U.S. at 397. Even accepting the premise that a party can be deemed "wrongfully enjoined" based on subsequent changes in the law, to award recovery on a bond against a party that was just exercising rights Congress gave it would in no way "protect defendants from the consequences of temporary restraining orders granted without opportunity for full deliberation of the merits of a dispute." *Id.* All it would do is deter plaintiffs from exercising their rights under existing law to secure preliminary relief, lest that be used to extract damages from them should the law change before the litigation concludes.

Indeed, even in circumstances where a "right" applies retroactively, it does not follow that the right-holder is entitled to his preferred "remedy." *See, e.g.*, *Davis v. United States*, 564 U.S. 229, 243 (2011) ("Retroactive application does not … determine what 'appropriate remedy' (if any) the defendant should obtain."); *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S.

167, 169 (1990) (plurality op.) ("this Court has never equated its retroactivity principles with remedial principles"). "[R]eliance interests" are still "entitled to consideration in determining the nature of the remedy." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991). Under Rule 65(c) and the traditional equity powers that it does not disturb, district courts should have even broader authority to accommodate such interests (and others) and deny recovery on injunction bonds in cases involving changes in the law.

In short, the Third Circuit's decision is doubly wrong. The district court did not "wrongfully enjoin" NJTHA under Rule 65(c) by issuing a TRO that it vindicated after full and final consideration of the merits. But even if it did, the court nonetheless acted well within its broad discretion in concluding that it would deny recovery on the bond anyway. The Third Circuit's contrary decision defies the text of Rule 65(c), the purposes behind it, and other decisions interpreting it.

III. This Case Is An Optimal Vehicle For Resolving The Highly Consequential Questions Presented.

The scope for mischief in the rule adopted below is considerable. "[A]lmost any activity one can imagine is potentially subject to legal restraint through preliminary proceedings." Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 Stan. L. Rev. 381, 383 (2005). In federal court, those proceedings are governed by Rule 65, and Rule 65(c) requires every court that issues a

preliminary injunction or TRO to at least consider requiring an injunction bond with a positive dollar value. It is not uncommon for courts to set those bonds at extraordinarily high sums. *See* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure §2954 n.15 (1995) (discussing $400 million injunction bond). Questions surrounding Rule 65(c) and injunction bonds thus frequently recur in all manner of legal contexts, and given the amount of money hanging in the balance, clarity regarding the rule's meaning is vitally important.

Nonetheless, "courts have clearly struggled with what is meant by 'wrongfully enjoined.'" *Pamperin, Inc. v. Plass*, No. 5:08-CV-227-C, 2009 WL 10677695, at *1 (N.D. Tex. Mar. 31, 2009). And they have clearly struggled with the scope of district courts' discretion to deny recovery to "wrongfully enjoined" parties, as evidenced by the longstanding and acknowledged circuit split on that issue. This case allows the Court to provide clarity on both issues—and to do so in a context where the Court is already familiar with the contours of the litigation and the reversal of the Third Circuit precedent that bound the district court when it entered its TRO in 2014. The parties vigorously litigated the meaning of Rule 65(c), the district court reached alternative holdings on both issues, and the Third Circuit reversed on both issues. And it is hard to imagine a better set of facts for resolving both questions presented than a case in which the purportedly "wrongful" TRO was the product of binding circuit precedent that this Court later reversed.

It is also hard to imagine a case that better illustrates just how "out of step" the Third Circuit's approach is "with Rule 65's function." App.30. Under the Third Circuit's logic, a district court could preliminarily enjoin a defendant who brazenly violates a statute that this Court has held constitutional for a century, yet if this Court were to take the extraordinary step of overruling that precedent years after the preliminary injunction issued, the district court would have no choice but to grant the party recovery for losses attributable to its own intransigence—and at the expense of the party that sought to enforce its then-clear legal rights, no less. In other words, under the decision below, Rule 65(c) manages to perversely incentivize parties to rush to break settled law while simultaneously discouraging parties from enforcing it. That is manifestly not the function an injunction bond is intended to serve. That the Third Circuit could conclude otherwise is a sure sign that this Court's intervention is sorely needed.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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