No. 19-677

IN THE

# Supreme Court of the United States

DAVID YOST, ET AL.,

*Petitioners*,

*v.*

PLANNED PARENTHOOD SOUTHWEST OHIO REGION, ET AL.,

*Respondents.*

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Respondents brought suit under 42 U.S.C. § 1983 to challenge a state statute and obtained a preliminary injunction based on a determination that they were likely to succeed on the merits of their claim. The injunction they obtained restrained enforcement of that statute for almost twelve years, at which point the federal government, a non-party, mooted the dispute. The question presented is whether the Sixth Circuit correctly affirmed the district court's determination that Respondents are eligible for costs and attorney's fees under 42 U.S.C. § 1988 for their work litigating the preliminary injunction.

## CORPORATE DISCLOSURE STATEMENT

Respondents Planned Parenthood of Southwest Ohio, Planned Parenthood of Greater Ohio, and Preterm are non-profit corporations and do not have parent corporations. No publicly held corporation owns ten percent or more of Planned Parenthood of Southwest Ohio's, Planned Parenthood of Greater Ohio's, or Preterm's stock.

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## INTRODUCTION

In 2004, Respondents filed suit challenging the constitutionality of an Ohio law. They obtained a preliminary injunction based on their likelihood of success on the merits. As a result of Respondents' efforts, the district court restrained enforcement of the law for twelve years, until the dispute was mooted by the federal government. Respondents subsequently sought to recover fees and costs for their work litigating the preliminary-injunction phase of the case. The Sixth Circuit affirmed the district court's determination that fees were warranted on these facts.

Petitioners attempt to manufacture a circuit split to challenge the district court's fact-specific determination that fees were warranted here, and they even try to use this fee dispute to reopen the merits of the case. This Court should reject both efforts.

*First*, there is no "entrenched" circuit split meriting this Court's review. Pet. 1. Courts in every circuit are willing to award fees when the plaintiff has secured a merits-based preliminary injunction and the case becomes moot before a final determination on the merits. A single circuit, the Fourth Circuit, arguably adopted a different approach in 2002, but its eighteen-year old decision rests on a since-abrogated approach to the preliminary-injunction inquiry. This case is also a poor vehicle to address the question presented, which is not nearly as important as Petitioners suggest it is.

*Second*, there is no reason to hold this case pending the Court's resolution of *June Medical Services*

*L.L.C. v. Russo* (Nos. 18-1323, 18-1460). Whatever *June Medical* says about third-party standing will not change Respondents' prevailing-party status. The underlying merits of the case are no longer on direct review. Petitioners cannot use this collateral fee dispute to reopen a closed question.

## STATEMENT OF THE CASE

### *Ohio Criminalizes The Most Common Protocol For Medically Terminating A Pregnancy*

In 2004, Ohio made it a felony for physicians to use the safest and most commonly used protocol for terminating a pregnancy using medications alone, even when that protocol was necessary to protect their patients' lives or health. Pet. App. 3a-4a. Under Ohio House Bill 126 (HB 126 or the Act), physicians were prohibited from prescribing the medication mifepristone to terminate a pregnancy after "the patient's 49th day of pregnancy," and from using any dosage indications or treatment protocols not "expressly approved by the FDA in the drug's final printed labeling." *Cordray v. Planned Parenthood Cincinnati Region*, 911 N.E.2d 871, 879 (Ohio 2009). HB 126 was a significant change from the evidence-based protocol in widespread use at the time.[1] This evidence-based protocol provided for use of mifepristone through the 63rd day of pregnancy, and at a lower dosage than indicated on the FDA label. Pet. App. 3a-4a.

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[1] Evidence-based, "off-label" protocols are a "standard medical practice" across the medical spectrum. Pet. App. 4a.

After HB 126 was signed into law, but before it went into effect, Respondents (plaintiffs below) filed suit challenging the constitutionality of HB 126. Pet. 4a-5a. Their complaint alleged four claims: the statute was unconstitutionally vague; it violated their patients' right to bodily autonomy; it imposed an undue burden on their patients' right to abortion; and it violated due process owing to the lack of any exception from compliance when necessary to protect a patient's life or health. Pet. App. 4a-5a.

### *Respondents Obtain And Maintain A Preliminary Injunction Based On Their Likelihood Of Success*

Respondents sought a preliminary injunction to prevent the law from going into effect. Respondents argued that the law imposed unconstitutional and dangerous limitations on physicians' discretion to use their best medical judgment to provide the safest and highest quality care to their patients, including by banning the protocol after 49 days of pregnancy (before many patients even know they are pregnant), and even banning its use when necessary to protect a patient's life or health. D.Ct. Dkt. 2 at 15-17.

In September 2004, the district court held a two-day preliminary injunction hearing with live witnesses, including physician experts. Pet. App. 5a; *Planned Parenthood Cincinnati Region v. Taft*, 337 F. Supp. 2d 1040, 1043, 1047 (S.D. Ohio 2004). The court preliminarily enjoined the entire Act based on its failure to include an exception where the Act would pose a threat to patients' health or lives. *Id.* at 1046-48.

"Plaintiffs have … shown a strong likelihood of success on the merits because it is highly unlikely that Defendants will be able to prove that there are no circumstances in which the Act's regulation of mifepristone would cause significant health risks." *Id.* at 1047. As a result, "Plaintiffs have a substantial likelihood of success on the merits that the Act violates the Due Process Clause and is unconstitutional." *Id.* The court went through the remaining factors for preliminary injunctive relief and concluded that, because the Act "threatens or impairs Plaintiffs' patients' constitutional right to Due Process," these factors were also met. *Id.* at 1047-48.

Although further proceedings limited the scope of the preliminary injunction, the Sixth Circuit confirmed that the preliminary injunction rested on Respondents' "strong likelihood of succeeding on the merits of their claim that the Act is unconstitutional because it lacks a health or life exception." *Planned Parenthood Cincinnati Region v. Taft*, 444 F.3d 502, 518 (6th Cir. 2006). The Sixth Circuit kept in place a preliminary injunction that allowed Respondents to provide mifepristone where necessary for a patient's health or life. *Id.* at 517.

Over the next ten years, litigation continued, including two rounds of summary-judgment proceedings, an appeal to the Sixth Circuit on summary judgment, a certification to the Ohio Supreme Court on the meaning of the Act, and Petitioners' unsuccessful motion to dismiss the life-or-health-exception claim. Pet. App. 6a-9a. At no point during these proceedings did the district court or Sixth Circuit ever hold that Respondents had not prevailed or could not

prevail on the merits of their life-or-health-exception claim. To the contrary, on appeal from the summary-judgment ruling, the Sixth Circuit explicitly reaffirmed that the preliminary injunction remained in place: "[T]he preliminary injunction that we affirmed in part remains in force as per our previous opinion." *Planned Parenthood Sw. Ohio Region v. Strickland*, 331 F. App'x 387, 388 (6th Cir. 2009) (emphasis altered).

That preliminary injunction was not limited to "circumstances that never arose," as Petitioners contend. Pet. 7. The district court twice recognized "that there are women who have medical conditions that render surgical abortion riskier than the evidence-based protocol for medical abortion" prohibited by the Act, *Taft*, 337 F. Supp. 2d at 1047, and that "the articulated circumstances are not hypothetical, as [Respondents] have alleged and the record includes testimony that they have patients with the specified conditions," D.Ct. Dkt. 197 at 10. That latter ruling, from 2014, was from the court's denial of Petitioners' motion to dismiss the life-or-health-exception claim. This ruling was the last to address the viability of the life-or-health-exception claim, and Petitioners have no basis to contradict the court's conclusion.

### *The FDA Moots The Action After The Preliminary Injunction Had Remained In Place For Years*

In March 2016, the FDA revised the label for mifepristone. Pet. App. 9a. The revised label endorsed the very evidence-based protocol that Respondents

sued to be able to provide. *Id*. Since HB 126's limitations on the use of mifepristone were tied to the FDA label, the FDA label change meant that Ohio law no longer prohibited Respondents from using their preferred protocol through 63 days of pregnancy, and thus mooted the ban on using mifepristone before 63 days when it would be necessary to protect a patient's life or health.

In May 2016, the district court granted the parties' joint motion to dismiss the case without prejudice as moot due to the FDA label change. Pet. App. 9a. At no point did the court issue any order revoking or vacating the preliminary injunction. Pet. App. 14a.

### *The Lower Courts Deem Respondents Eligible For Fees Based On Their Success At The Preliminary Injunction Stage*

Respondents had moved for attorney's fees back in 2006, but that request was stayed pending the case's resolution. Pet. App. 6a-7a. After the case was mooted, Respondents amended and supplemented their fee application, moving for fees based solely on their work through the first appeal of the preliminary injunction (through February 2006). Pet. App. 9a.

The district court, which presided over the case throughout its entire trajectory—from its filing in 2004 until the parties stipulated to its dismissal in 2016—granted the motion. Pet. App. 29a-51a. The court held that Respondents qualified as prevailing parties under 42 U.S.C. § 1988(b) because the preliminary injunction they obtained was "the type of substantive, 'lasting change in the legal relationship

between the parties' that warrants fees under § 1988." Pet. App. 40a (quoting *McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir. 2010)). The preliminary injunction "prohibited application of the Act to the extent that it did not provide an exception for the health or life of the woman." *Id.* And that injunction was "expressly affirmed by the Sixth Circuit"—*twice*. *Id.* The court also determined that the requested amount of fees was reasonable, rejecting Ohio's argument that the amount should be reduced due to the Respondents' degree of success: Respondents were "successful in convincing the Court to enjoin enforcement of the Act to the extent that its application was unconstitutional." Pet. App. 51a.

The Sixth Circuit affirmed the fee award. Pet. App. 1a-28a. It concluded that Respondents satisfied the key requirements for prevailing-party status, namely, that the injunction was based on the merits and materially altered the legal relationship between the parties in an enduring way. Pet. App. 3a, 11a-14a.

First, the court explained that Respondents "easily me[t] … [the] requirement" that the preliminary injunction "'represents an unambiguous indication of probable success on the merits.'" Pet. App. 12a-13a (quoting *Dubuc v. Green Oak Twp.*, 312 F.3d 736, 753 (6th Cir. 2002)). Indeed, the point was undisputed and had been repeatedly confirmed by the Sixth Circuit. Pet. App. 12a.

Second, the Sixth Circuit determined that the preliminary injunction materially altered the legal relationship between the parties. Pet. App. 14a, 19a.

The relief obtained "never expired and was not 'reversed, dissolved, or otherwise undone by the final decision in the same case.'" Pet. App. 14a (quoting *Sole v. Wyner*, 551 U.S. 74, 83 (2007)). In other words, and just as other circuits have found, the mooting of a case "does not represent the kind of active, merits-based undoing the Supreme Court referred to in *Sole*." *Id.* (citing *Watson v. Cty. of Riverside*, 300 F.3d 1092, 1096 (9th Cir. 2002); *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1240 (10th Cir. 2011)). The relief the injunction afforded Respondents was also meaningful, lasting, and nothing like the "ephemeral" relief at issue in *Sole*. Pet. App 14a. As the court explained, "[b]efore Planned Parenthood's lawsuit, Ohio law prohibited physicians from providing medically-induced abortion[s] in accordance with the most-up-to-date research and highest standards of medical care." Pet. App. 19a. Because of the preliminary injunction, physicians could follow the protocol during the twelve years it was in effect when necessary for their patients' life or health, relief that endures on account of the mootness. Pet. App. 14a, 19a.

The Sixth Circuit also concluded that the district court did not abuse its discretion in calculating the amount of fees. Pet. App. 20a-28a.

Petitioners sought rehearing en banc, which the Sixth Circuit denied without requesting a response or vote. Pet. App. 52a-53a.

## REASONS FOR DENYING CERTIORARI

### I. The Question Presented Does Not Warrant Review.

The circuits are not divided on the question *Sole* left open, nor are they divided in how they approach the determination of prevailing-party status. At most, there is one circuit outlier, but it is already coming into alignment. The circuits' common approach comes straight from this Court's precedents, and the Sixth Circuit correctly applied those precedents to the facts of this idiosyncratic case. That approach preserves the balance of interests and incentives Congress and this Court have already created. And even if the question were otherwise worthy of review, this case is a poor vehicle.

#### A. There is no circuit split that merits this Court's attention.

In *Sole*, this Court did not address the question, "whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees." 551 U.S. at 86. The circuits have not divided over the answer: Courts in every circuit to have addressed the question say, "yes."[2]

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[2] *Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997); *People Against Police Violence v. City of Pittsburgh* (*PAPV*), 520 F.3d 226, 228-29, 233-34 (3d Cir. 2008); *Veasey v. Wilkins*, 158 F. Supp. 3d 466, 470 (E.D.N.C. 2016); *Dearmore v. City of Garland*,

Not even courts in the Fourth Circuit—which Petitioners cast as the stingiest—categorically refuse to confer prevailing-party status on party that wins a preliminary injunction before the case is mooted, as Petitioners themselves recognize. Pet. 16-17 (describing the Fourth and Third Circuits as "*almost* never" awarding fees) (emphasis added); *infra* 18-20. Nor does any circuit automatically confer prevailing-party status just because a party receives any kind of preliminary injunction before the case becomes moot. *See McQueary*, 614 F.3d at 601 (observing that "[n]o court to our knowledge holds that the victors of such holding-pattern [status-quo] injunctions and nothing more automatically receive fees"); *Kansas Judicial Watch*, 653 F.3d at 1237 ("We do not mean to suggest, of course, that every preliminary injunction will necessarily render the recipient a 'prevailing party.'").

Instead, courts across the circuits follow the same fact-intensive approach, awarding fees to a party that secures a preliminary injunction before the case becomes moot when the injunction (1) rests on a clear determination relating to the merits, and (2) alters

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519 F.3d 517, 524-26 (5th Cir. 2008); *McQueary v. Conway*, 614 F.3d 591, 601 (6th Cir. 2010); *Dupuy v. Samuels*, 423 F.3d 714, 723 & n.4 (7th Cir. 2005); *Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903, 909-11 (8th Cir. 2012); *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 716-17 (9th Cir. 2013); *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1238-40 (10th Cir. 2011); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1355-56 (11th Cir. 2009); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 942 (D.C. Cir. 2005); *see also Race v. Toledo-Davila*, 291 F.3d 857, 859 (1st Cir. 2002) (recognizing that "an individual may be entitled to attorney's fees without having obtained a favorable final judgment following a full trial on the merits").

the legal relationship between the parties in an enduring manner—i.e., it cannot be unwound in further proceedings in the same case. *See* Amicus Br. 4-9 (describing courts in the First, Third, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits as awarding fees "under the same basic set of circumstances"). Any difference in specific outcomes or the overall incidence of fee awards results not from courts adhering to different legal standards, but from courts applying the same standard in a "contextual, case-specific" way. Pet. App. 3a.[3]

It is therefore no surprise that this Court has repeatedly declined to grant petitions asking whether and when a party that obtains only a preliminary injunction is a prevailing party. *See, e.g.*, *Davis v. Abbott*, 136 S. Ct. 534 (2015) (No. 15-46); *King v. Kan. Judicial Watch*, 565 U.S. 1246 (2012) (No. 11-829); *Live Gold Operations, Inc. v. Dow*, 565 U.S. 977 (2011) (No. 11-211); *Conway v. McQueary*, 562 U.S. 1137 (2011) (No. 10-569). Nothing in the Petition suggests a split has emerged or expanded since those petitions were denied.

**1.** To begin, Petitioners correctly recognize that the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits all confer prevailing party status where the plaintiff

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[3] Petitioners criticize the circuits for having "announced fact-specific standards that are anything but uniform." Pet. 2 (quoting *Dearmore*, 519 F.3d at 521). The first part is correct in the sense that courts look closely at the facts at hand, but the second is not. As Petitioners acknowledge, courts can take "effectively the same approach" to the prevailing-party determination even if they "state[] it differently." Pet. 20. That is true across the circuits.

secures a preliminary injunction based on a clear determination of likely success on the merits and mootness prevents the injunction from being undone on the merits. Pet. 19-21; *see also* Amicus Br. 11 (aligning the Fifth, Tenth, and D.C. Circuits), 19 (aligning the Ninth, Eleventh, and Fifth Circuits); *see supra* 9 n.2 (citing cases). Courts in the First and Second Circuits follow the same approach. *See Haley*, 106 F.3d at 483, *cited with approval in Higher Taste*, 717 F.3d at 717, *and Dearmore*, 519 F.3d at 525; *Tri-City Cmty. Action Program, Inc. v. City of Malden*, 680 F. Supp. 2d 306, 311-15 (D. Mass. 2010) (fees under the Fair Housing Act Amendments, relying on decisions from the Third, Fifth, Ninth, and D.C. Circuits). As Petitioners recognize, Respondents qualify as prevailing parties on the standard these circuits apply. Pet. 21.

Petitioners and amici States suggest that the Fifth Circuit's approach differs from the others because it supposedly requires the defendant to have mooted the action in order for the plaintiff to be eligible for fees. Pet. 19-20; Amicus Br. 13. Not so. *Dearmore* made clear that its test, which includes an inquiry into the defendant's role in mooting the case, was "only applicable in the limited factual circumstances" presented there, where the defendant (and not a third party) had indeed caused the mootness. 519 F.3d at 526 n.4. The Fifth Circuit expressly stated that its approach in that case "does not signal any disagreement with the approaches" of the other circuits it aligned itself with—the Third, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits—all of which impose no requirement that the defendant moot the case. *Id.*; *see id.* at 521-22. That makes sense, for what matters is not whether a defendant or

some other third-party moots the case but that the *plaintiff* is not responsible for the mootness.

**2.** Petitioners next claim that the Seventh, Eighth, and Sixth Circuits have adopted a distinct and "intermediate" approach where a preliminary injunction confers prevailing-party status only if the preliminary relief has an "enduring character." Pet. 21-22. But the Seventh, Eighth, and Sixth Circuits do not diverge from the circuit consensus, either.

**a.** Petitioners first argue that the Seventh and Eighth Circuits differ from the rest because they use the terms "indefeasible" or "irreversible" to describe the nature of the preliminary relief that must be awarded. Pet. 23. Even Petitioners acknowledge, however, that other circuits, including the D.C. and Sixth Circuits, ask whether the preliminary relief is "irreversible" or "irrevocable." Pet. 20 (quoting *Select Milk Producers*, 400 F.3d at 947); Pet. 23 (quoting *McQueary*, 614 F.3d at 597). Petitioners are also wrong that the Sixth Circuit has "expanded the category of cases in which plaintiffs are eligible for attorney's fees" by asking whether the relief was "last[ing]" or "enduring." Pet. 24, 16.

Whether courts are using the words "indefeasible," "irrevocable," "enduring," or "lasting," they are all asking the same central question: Can the relief secured by the preliminary injunction be "undone by a final decision in the same case"? *Sole*, 551 U.S. at 83 (preliminary relief was "fleeting" because it was later undone on the merits); *see* Pet. 22 (describing the Seventh Circuit as asking whether "the injunction results in 'substantive relief that is not defeasible *by further*

*proceedings*'" (quoting *Dupuy*, 423 F.3d at 719) (emphasis added)); Pet. 29 (describing the Seventh and Eighth Circuits as characterizing relief as "enduring" when "it is incapable of being unwound in later proceedings"). And when a case becomes moot, the preliminary relief cannot be unwound in any further merits proceedings because there are no such proceedings. *See Higher Taste*, 717 F.3d at 717-18 ("mootness provided assurance … that the plaintiff's initial victory was enduring rather than ephemeral"; "[i]t transformed what had been temporary relief capable of being undone (had the case been litigated to final judgment) into a lasting alteration of the parties' legal relationship"; noting that cases from the Second, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuit are in accord). The amici States are right: "Ohio is not an outlier." Amicus Br. 4.

**b.** Petitioners' contention that the Eighth Circuit diverges from the other circuits by refusing to award fees for "status quo" injunctions rests on a misunderstanding of the standard the circuits apply. The "status quo" language Petitioners pluck from *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006), does not signal an intra-circuit split or distinguish the Eighth Circuit from the other circuits. *Contra* Pet. 22-23, 25. When the Eighth Circuit speaks of the "status quo," it is not talking about the *effect* of the preliminary injunction on the ground but rather *why* the court issued it: "Status quo" preliminary injunctions are those the court grants based on the risk of irreparable harm rather than a clear assessment of the likelihood of success on the merits. *Rogers Group*, 683 F.3d at 910 (relying on *Northern Cheyenne*). Other circuits use "status quo" in the same

way to identify preliminary injunctions that are not based on a thorough analysis of the merits and so do not confer prevailing party status.[4]

**c.** Any remaining doubt about whether the Sixth, Seventh, and Eighth Circuits align with the broader circuit consensus is dispelled by the circuits' express recognition that they are in accord. *See, e.g.*, *Dupuy*, 423 F.3d at 723 n.4 (the Seventh Circuit noting that its approach "is hardly an outlier among the federal circuit courts" and that "several of our sister circuits" follow a similar approach, citing the D.C. Circuit's *Select Milk Producers* decision, the Eleventh Circuit's decision in *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551 (11th Cir. 1987), and the Ninth Circuit's decision in *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002)); *Higher Taste*, 717 F.3d at 717 (citing with

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[4] *See, e.g.*, *McQueary*, 614 F.3d at 600 ("[S]tay-put or-status quo injunctions" "have nothing to do with the merits, offering no insight into whether one party or the other will prevail at the end of the case."), *quoted in Rogers Group*, 683 F.3d at 910; *Dupuy*, 423 F.3d at 723 n.4 (noting the absence of a conflict with the Eleventh Circuit's view that fees are appropriate where the preliminary injunction does not "merely maintain[] the status quo" but instead rests on a merits determination); *Dearmore*, 519 F.3d at 524-25 (For prevailing party status, plaintiff must win a preliminary injunction "based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in favor of the plaintiff"; citing cases from the Second, Sixth, and Eleventh Circuits.); *John T. ex rel. Paul T. v. Del. Cty. Intermediate Unit*, 318 F.3d 545, 558-59 (3d Cir. 2003) (No fees awarded in IDEA case where preliminary injunction was not "merits-based" but instead "was designed to maintain the status quo during the course of proceedings.").

approval the Eighth Circuit's *Northern Cheyenne* decision, the Seventh Circuit's decision in *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000), and the Sixth Circuit's decision in *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 620 (6th Cir. 2007)). Unsurprisingly, then, even the amici States agree that the Eighth and Sixth Circuits fall in line with the other circuits (amici do not address the Seventh Circuit). *See* Amicus Br. 7, 10-12, 19. There is no difference between the approaches of these circuits and the rest.

**d.** Instead, it is Petitioners who advance a new test that no circuit has adopted. In deciding whether the preliminary relief is irrevocable, courts do not play out the counterfactual Petitioners set up: If the case had not been mooted, would the relief have endured? Pet. 23, 28. If courts asked that question, they would never award fees in cases of mootness, because it is always true that had the case not become moot, the preliminary injunction would have been undone if defendants later prevailed on the merits.

The proper inquiry, and the one that all of the circuits undertake, looks to the actual facts in the litigation, asking, can the relief secured by the preliminary injunction be undone by further proceedings "in the same case"? *Sole*, 551 U.S. at 83. When the case becomes moot, the answer to this question is "no," whether mootness arises because of "the passage of time"—i.e., the protest or parade at issue happens—"or other circumstances beyond the parties' control"—i.e., the legislature changes the law, or, as here, a third-party administrative agency to which the state has tied its law alters its position. *Higher Taste*, 717

F.3d at 717; *see, e.g.*, *Young*, 202 F.3d at 1000-01 (protest takes place); *Common Cause/Georgia*, 554 F.3d at 1356 (law changes); *Kansas Judicial Watch*, 653 F.3d 1230 (rule change); Pet. App. 9a (agency shift in position).[5]

**3.** Finally, Petitioners are wrong to say that the Third and Fourth Circuits have split off from the others.

**a.** Petitioners' characterization of the Third Circuit's approach relies solely on *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 230 n.4 (3d Cir. 2011) (en banc). *See* Pet. 17-18. But *Singer* itself expressly recognizes that preliminary, merits-based relief can qualify for prevailing party status:

> [W]e do not mean to 'cast[] doubt' on the 'well-supported legal proposition' that, in some cases, interim injunctive relief may be sufficient to warrant attorney's fees. We agree that 'interim relief remains a proper basis for an award of attorney's fees when that relief is based on a determination of the merits of the plaintiff's claims.'

*Singer*, 650 F.3d at 230 n.4; *see also* Amicus Br. 10 n.2 (acknowledging as much). *Singer* held the plaintiff there was not a prevailing party because the judicial

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[5] Even if Petitioners' characterization of what qualifies as "irrevocable" relief were accurate, Respondents would meet it. For the twelve years while the preliminary injunction was in place, Respondents were allowed to provide abortions to patients whose lives or health required use of the evidence-based protocol. That relief is "irreversible" in every sense of the word.

relief at issue—a TRO—"was not merits-based," with the district judge explicitly recognizing that he would "resolve the merits" of the case "at a later date." 650 F.3d at 230 & n.3.

*Singer* distinguished (and preserved) the Third Circuit's earlier ruling in *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 233 (3d Cir. 2008) (*PAPV*), that "where a merits-based determination is made at the [preliminary] injunction stage," the award of fees is appropriate. *Singer*, 650 F.3d at 229-30. *PAPV* saw itself as in accord with the other circuits, including the Sixth, Seventh, Ninth, and D.C. Circuits. *See* 520 F.3d at 234. And since *Singer*, the Third Circuit has reaffirmed—as the other circuits have—that "temporary relief may support § 1988 fees, even if the prevailing party does not obtain a final judgment in its favor." *Nat'l Amusements Inc. v. Borough of Palmyra*, 716 F.3d 57, 64 (3d Cir. 2013); *see, e.g.*, *Sixth Angel Shepherd Rescue, Inc. v. Bengal*, No. CIV.A. 10-1733, 2013 WL 5309269, at *3 (E.D. Pa. Sept. 23, 2013) (awarding fees because, "[i]n granting Plaintiffs' motion for a preliminary injunction, this Court made a merits-based determination that entitles Plaintiffs to attorney's fees"), *aff'd*, 620 F. App'x 146 (3d Cir. 2015). Respondents would be prevailing parties in the Third Circuit because the preliminary injunction here rested on an unambiguous merits determination. Pet. App. 12a-13a, 14a. Indeed, Petitioners did not dispute below that the decision was merits-based. Pet. App. 12a.

**b.** The Fourth Circuit is the "only one arguably dissenting Court of Appeals." *PAPV*, 520 F.3d at 233 n.4 (citing *Smyth v. Rivero*, 282 F.3d 268, 276-77 (4th

Cir. 2002)). But it has only "apparently" adopted a divergent approach. *Select Milk Producers*, 400 F.3d at 946. In actuality, courts in the Fourth Circuit follow the other circuits.

*Smyth*, which appears to foreclose prevailing-party status where the plaintiff secures only a preliminary injunction, hinged on the Fourth Circuit's since-abrogated approach to granting preliminary injunctions. *Smyth*'s statement that the "merits inquiry in the preliminary injunction context is necessarily abbreviated," 282 F.3d at 276, was based on the Fourth Circuit's then-governing approach to preliminary injunctions that "virtually eliminate[d] altogether the inquiry into the likelihood of success on the merits" by making "the balance of equities … largely determinative of the appropriateness of an injunction." *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 868 (4th Cir. 2001) (Luttig, J., concurring); *see, e.g.*, *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359, 363 (4th Cir. 1991) (holding that courts should consider the merits only if the balancing of hardships favors the plaintiff, and even then ask only whether the plaintiff has raised "grave or serious questions" about the merits). This Court's decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), abrogated the Fourth Circuit's approach. *See Henderson ex rel. NLRB v. Bluefield Hosp. Co.*, 902 F.3d 432, 438 n.* (4th Cir. 2018); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009) ("Because of its differences with the *Winter* test, the … balance-of-hardship test may no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit"), *vacated on other grounds*, 559 U.S. 1089 (2010).

Accordingly, and since *Winter*, courts in the Fourth Circuit have recognized that *Smyth* no longer controls and have granted prevailing-party status to plaintiffs that received a preliminary injunction based on their likelihood of success on the merits before the case became moot. *E.g.*, *Veasey v. Wilkins*, 158 F. Supp. 3d 466, 469-70 (E.D.N.C. 2016); *Messmer v. Harrison*, No. 5:15-CV-97-BO, 2016 WL 316811, at *2 (E.D.N.C. Jan. 26, 2016). (Defendants in neither case appealed.)

And even were *Smyth* good law, the Fourth Circuit's approach there would still not bar fee eligibility here, where the district court conducted a thorough (not "abbreviated") review of the merits at the preliminary-injunction stage and unambiguously determined that Respondents were likely to succeed (a point the Sixth Circuit repeatedly confirmed). *Supra* 3-5.

In short, there is no "entrenched, multi-dimensional split" on the question presented. Pet. 12. At most, there is one outlier that is already coming into alignment. Only if the Fourth Circuit were to reaffirm *Smyth* (despite the abrogation of its preliminary-injunction standard and the circuit consensus) might the question presented merit review. At minimum, therefore, further percolation is warranted.

### B. The decision below is correct.

This Court's review is further unwarranted because the Sixth Circuit has adopted the right test—

the same one the other circuits use—and it applied it correctly to the facts of this case.

The Sixth Circuit's test follows directly from this Court's precedents, which make clear that "[a] plaintiff 'prevails,' ... 'when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Lefemine v. Wideman*, 568 U.S. 1, 4 (2012) (per curiam) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). It is undisputed that the preliminary injunction here rested on a clear finding that Respondents were likely to succeed on the merits. Pet. App. 12a; Pet. 10. That relief also materially altered the legal relationship between the parties in an enduring way. Respondents sought to prevent enforcement of the statute in circumstances where the mifepristone restriction would endanger a patient's life or health and they received that relief—the restriction never went into effect under those circumstances, not during the twelve years the preliminary injunction was in place, and not even after the case became moot. *Contra* Pet. 29-30. And so the restriction Respondents challenged does not "remain[] in effect," even if the law, now utterly transformed, is still formally on the books. Amicus Br. 19.[6]

[6] Amici further suggest (at 19) that the relief was not "*court-ordered*" because it resulted from the FDA's change in protocol. But the district court first enjoined enforcement of the law and there can be no doubt that such an order is "judicially sanctioned" relief. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

To the extent Petitioners seek a *per se* rule that automatically denies prevailing-party status in the absence of a final, favorable merits determination (Pet. 29), this Court should not adopt it. A *per se* rule is not required by this Court's precedents, as even the amici States acknowledge. Amicus Br. 20. And in fact, it is precluded by *Buckhannon*, which recognizes that a party can qualify as prevailing even when a case ends with a consent decree—that is, without a final adjudication on the merits. 532 U.S. at 604. Neither do policy considerations counsel in favor of a categorical rule. *See infra* 23-25.

### C. This case is a poor vehicle.

Even if the circuits were divided and the decision below wrong, this idiosyncratic case is a poor vehicle for addressing the question presented because it is atypical in three ways.

First, the injunction here was never officially dissolved: "[T]he court never issued a formal order revoking or vacating the injunction." Pet. App. 14a. As a result, this is not a case where the preliminary injunction was ever actually undone, even on mootness grounds.

Second, a third party, not the state defendant, mooted the case, which was only possible because Ohio outsourced a key aspect of the law to a federal actor. The case therefore does not implicate the amici States' chief concern that the circuits' consensus approach prevents them from controlling whether they will be liable for fees when they lose at the prelimi-

nary-injunction stage. Amicus Br. 1, 14-16. Petitioners in this case did not decide to strategically capitulate; rather, the case effectively ended when the FDA changed the mifepristone label.

Finally, Respondents were protected from the law's unconstitutional enforcement for twelve years before the case become moot. Most cases do not take nearly so long to resolve. This is not a case, then, where preliminary relief was only "ephemeral" or "transient," and the case against prevailing-party status based solely on such fleeting relief may be stronger. *Sole*, 551 U.S. at 86, 78.

**D. The question is not important.**

This case is not nearly as important as Petitioners and their amici make it out to be, for the circuits' shared approach does not give rise to any meaningful practical problems, and Congress has already abrogated the States' sovereign immunity from fee awards like these. Pet. 26-27, 30; Amicus Br. 1, 13-17.

**1.** As to the States' policy concerns, the prevailing approach does not prevent state defendants from taking strategic action to avert fee awards. *Contra* Amicus Br. 1, 13-17. States can still preempt fee awards by voluntarily changing their ways before the court enters a preliminary injunction. In that situation, the change would "lack[] the necessary judicial imprimatur" this Court requires and plaintiffs would not be eligible for fees. *Buckhannon*, 532 U.S. at 605; *id.* at 601, 605 (no fees where state defendants voluntarily stayed enforcement and the legislature changed the law).

The amici States further object that the circuits' "messy" approach denies them needed clarity about their exposure to fee awards. Amicus Br. 13-17. But unless this Court adopts a categorical rule—which the amici States do not ask this Court to do, Amicus Br. 20-21, and which is at odds with the Court's precedents, *supra* 22—the state defendants will never have total assurance about fees.

That is not a problem: As the amici States show, even in the current climate, they are able to make sensible decisions about whether to continue or abandon litigation, presumably because other interests outweigh their fear of fees. *E.g.*, Amicus Br. 4-5 (discussing voting-rights cases where the state altered its laws or practices after the entry of a preliminary injunction). In other words, even though it is already true that state defendants might be on the hook for fees, they do not "litigate cases to the hilt rather than explore other options that might better serve the public." Amicus Br. 16. That makes sense. Mooting the case means that any fee award will be limited to the work done on the preliminary injunction, which in the typical case will be modest.[7] Pressing ahead "to the hilt," on the other hand, wastes additional litigation resources and risks incurring a much larger fee award should the state defendants ultimately lose at the end of the case. Moreover, if states are that concerned about fees for the preliminary injunction stage, they are free to negotiate with plaintiffs to get agreement

[7] The amici States point (at 5) to one unusually large fee request. But it is just that—a request—and one the district court may very well deny or dramatically reduce.

to lower or even forego their fees in exchange for the state providing the plaintiffs with their desired relief.

The circuits' shared approach is not messy, in any event. It is "contextual [and] case-specific," Pet. App. 3a, but that is not a problem for litigants (and judges) who are steeped in the case. It is not hard for state defendants to discern if they will be liable for fees if the case moots out. *Contra* Amicus Br. 14-15. All they have to do is ask, does the preliminary injunction decision unambiguously conclude that the plaintiffs are likely to succeed on the merits and would mooting the case mean the plaintiffs have received at least some what they set out to achieve? None of this involves mind-reading. *Contra* Amicus Br. 13. It involves plain reading—of the complaint and of the preliminary injunction decision.

What is more, the question presented arises too infrequently to meaningfully affect the public fisc. *Contra* Amicus Br. 2. It arises only when the plaintiffs have secured a preliminary injunction but the case becomes moot before a final determination on the merits. When the preliminary injunction is undone on the merits, *Sole*, 551 U.S. at 83, or when the plaintiff secures relief in the absence of "judicially sanctioned" relief (e.g., voluntary compliance before a preliminary injunction, or private settlement without a preliminary injunction), the plaintiff does not qualify as a prevailing party. *Buckhannon*, 532 U.S. at 605.

Finally, the amici States' focus on their own incentives (at 2, 15-16) ignores the important incentives on the other side, and indeed the very purpose of § 1988: "The function of an award of attorney's fees

[under § 1988(b)] is to encourage the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of competent counsel." *City of Riverside v. Rivera*, 477 U.S. 561, 578 (1986). Allowing defendants to preempt fee awards by strategically capitulating after court-ordered relief makes clear they are going to lose will discourage plaintiffs from bringing meritorious civil-rights suits.

**2.** Petitioners further contend that the decision below merits review because it "touches the States' sovereign interests." Pet. 12; *see* Pet. 26-27. That, of course, could be said of any fee dispute involving a state actor. More to the point, Congress has already made clear that civil-rights plaintiffs may recover fees from state officials, sovereign immunity notwithstanding. *See Hensley v. Eckerhart*, 461 U.S. 424, 446 n.7 (1983) (Brennan, J., concurring in part and dissenting in part) ("Congress's imposition of liability for attorney's fees under § 1988 also represents a decision to abrogate the sovereign immunity of the States in order to accomplish the purposes of the Fourteenth Amendment.").

Although Petitioners apparently acknowledge Congress's authority to allow the award of fees against states officers (Pet. 27), they nonetheless double down on the immunity argument, contending that the amount of fees they must pay here makes this "an especially egregious interference with state sovereignty." Pet. 30. That Petitioners are unhappy with the *amount* of fees they must pay does not make the question presented any more important or worthy of

review. *Contra* Pet. 30-33. As this Court has emphasized, the district court retains considerable discretion in determining the amount of fees due to both its "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley*, 461 U.S. at 437. Petitioners' complaints in this regard are entirely separate from and not encompassed within the question presented, which addresses only Respondents' *eligibility* for fees. Nor do Petitioners claim that any dispute about the amount of fees implicates a division of authority. They merely object to the fact-bound and routine exercise of the district court's discretion to determine what amount of fees is reasonable.[8]

## II. The Decision Below Does Not Present The Standing Question Asserted In The Petition.

In an effort to persuade the Court to hold this case pending the outcome in *June Medical*, Petitioners purport to present an additional question regarding Respondents' initial standing to bring the claims underlying the fee award. But that question is not remotely presented by the decision Petitioners ask this Court to review. *See* Pet. 4 (identifying the opinions

[8] Petitioners are also wrong that the fee award should have been adjusted downward because the preliminary injunction authorized Respondents to provide care "in circumstances that never arose." Pet. 32; *see also* Pet. 31. As discussed *supra* 5, Petitioners have no support for this factual assertion: The district court found (on multiple occasions) that this relief was necessary to protect the life and health of Respondents' actual patients.

below). To the contrary, any question regarding Respondents' standing was mooted nearly four years ago when the district court dismissed Respondents' claims per the parties' agreement. Pet. App. 9a.

Petitioners nonetheless claim that if *June Medical* determines that physicians lack third-party standing to bring claims under § 1983, that would mean Respondents are not entitled to recover fees. Pet. 12. Petitioners cite no legal authority for this proposition because there is none.

The only live question here is whether Respondents are prevailing parties eligible to recover fees for the preliminary injunction that they obtained in 2004—based on the law that existed at that time. Petitioners cannot use this fee dispute to extend the timeframe during which they benefit from new Supreme Court rulings on third-party standing. That is true as a matter of principles this Court has already set forth. And the Sixth Circuit's precedent confirms that even an adverse outcome in *June Medical* will not lead the Sixth Circuit to reconsider its decision.

**1.** Petitioners ignore numerous bedrock principles from this Court making clear that *June Medical* cannot have any impact on Respondents' eligibility for fees.

First, new legal rules announced by the Supreme Court apply to cases "still open on direct review." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). But in a litigation over attorney's fees, the underlying merits of the case are no longer on direct review. This Court's precedent makes clear that "[a]ttorney's fee

determinations … are 'collateral to the main cause of action' and 'uniquely separable from the cause of action to be proved at trial.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 277 (1994); *see also Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 ("[W]e think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain.").

Second, a party cannot use a collateral attack, such as litigation over attorney's fees, to apply a change in law to a case that is no longer on direct review. "New legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). This rule applies even when the subsequent change in law impacts the court's jurisdiction in the now-final original suit. "A party that has had an opportunity to litigate" a jurisdictional question cannot "reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *see also Swift & Co. v. United States*, 276 U.S. 311, 325-26 (1928) (lower court's purported error in determining that there was a case or controversy under Article III not "open to attack" on a collateral motion to vacate a consent decree).

**2.** In light of these principles, the Sixth Circuit has already held that a change in law that occurs while an attorney's fees determination—but not the

merits—is on direct review does not alter the party's prevailing status.

In *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County*, 421 F.3d 417, 418-19 (6th Cir. 2005), the plaintiff had successfully enjoined a city law because its judicial review of licensing decisions for sexually-oriented businesses was constitutionally inadequate. While the attorney's fees award was on appeal, this Court decided a case that purportedly "eviscerat[ed]" the basis for the underlying injunction by coming to the contrary conclusion when reviewing the constitutionality of a similar law. *Id.* at 420. The city argued this decision "stripped [the plaintiff] of its status as a 'prevailing party.'" *Id.*

The Sixth Circuit disagreed. At the time the new Supreme Court decision was announced, the fee dispute was the only issue still on "direct review" under *Harper*, 509 U.S. 86, and the new decision did not announce any new rules with respect to eligibility for fees. *Deja Vu*, 421 F.3d at 420-21. Since the plaintiff had already prevailed on its underlying claim under § 1983, "it [wa]s therefore entitled to 'prevailing party' status despite any later changes in the law as announced by the Supreme Court." *Id.* at 421. Nonprevailing parties cannot "artificially extend the time that they are beneficiaries of new Supreme Court rulings" by filing an "appeal from a fee award to which the prevailing party is entitled." *Id.*

**3.** Nor does a subsequent change in law constitute the type of "special circumstance[]," *Hensley*, 461 U.S. at 446 (Brennan, J., concurring in part and dissenting part), warranting the denial of fees. This inquiry looks

to whether, *at the time that the merits of the case were being litigated*, special circumstances existed that place the case into the exceedingly "narrow" category of cases[9] where fees are not appropriate. *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980) (availability of an agency attorney to present case instead of private counsel was not a "special circumstance" depriving a prevailing party of a fee award); *see also Hescott v. City of Saginaw*, 757 F.3d 518, 525-26 (6th Cir. 2014) (the "good faith" of a city's unconstitutional actions "before or during this litigation" did not qualify as a "special circumstance" warranting denial of fees).

As in *Deja Vu*, no "special circumstances" exist here that would call for adopting "a sort of revisionist history that would cause counsel's services, which were compensable when rendered, to be made non-compensable because of a later [legal] development." 421 F.3d at 422-23. Sixth Circuit law is clear that "later developments in the law, which would prevent a party from prevailing if case were re-litigated at [the] time of [a] fees determination, are not special circumstances" warranting the denial of fees. *McQueary*, 614 F.3d at 604 (describing *Deja Vu*).

That is all the more true here, where Petitioners explicitly conceded below that "physicians in many

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[9] Indeed, it is "extremely rare" to deny fees based on special circumstances. *Saint John's Organic Farm v. Gem Cty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1064 (9th Cir. 2009). The Sixth Circuit, for example, has "never (to [its] knowledge) found a 'special circumstance' justifying the denial of fees." *McQueary*, 614 F.3d at 604.

cases involving abortion regulation are, in fact, the best advocates of the patient's rights and the proper proponents of third party standing of these patients' alleged rights." D.Ct. Dkt. 13 at 11. This, therefore, is *not* a situation where *June Medical* could indicate that the position Petitioners previously advanced (and lost on) was actually legally correct. To the contrary, in the proceedings below, Petitioners never argued that physicians lacked third-party standing—instead, they explicitly agreed that physicians should be able to bring claims on behalf of their patients. There are simply no "special circumstances" present to justify setting aside this fee award.[10]

**4.** *June Medical*, therefore, will have no impact on this case. Respondents' standing to bring claims on behalf of their patients under § 1983 is no longer an issue on direct review in this case. Moreover, the fact that a new legal rule in *June Medical* might relate to third-party standing to bring the underlying claims is of no moment. Third-party standing is a prudential requirement, not an Article III requirement, *see Craig v. Boren*, 429 U.S. 190, 193 (1976), but even if it were not, this Court's precedents make clear that collateral

[10] Moreover, the arguments advanced in *June Medical* about the purported conflict of interest between physicians providing abortions and their patients regarding a law requiring local hospital admitting privileges have no application here. *See* Brief for Respondent/Cross Petitioner at 41-47, *June Medical* (Nos. 18-1323 & 18-1460). The injunction Respondents obtained applied only when use of the off-label protocol was necessary to protect the patient's life or health. There could be no conflict of interest in these circumstances.

attacks on prior jurisdictional rulings are impermissible. *See supra* 29.

And this conclusion makes practical sense. When a court is deciding if somebody qualifies as a prevailing party, the court asks whether there was a merits-based decision that altered the legal relationship between the parties. The court does not ask, if the law had been different at the time the merits were assessed, would the party still have won?

There is thus no basis for holding this petition pending the outcome in *June Medical*—it cannot have any impact on this case.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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