No. ______

IN THE

Supreme Court of the United States

TRE HARGETT, ET AL.,

Petitioners,

v.

TENNESSEE STATE CONFERENCE OF THE NAACP, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

JONATHAN SKRMETTI
Attorney General

ANDRÉE S. BLUMSTEIN
Solicitor General

ZACHARY T. HINKLE
Associate Solicitor General

J. MATTHEW RICE
Special Assistant to the Solicitor General
Counsel of Record

GABRIEL KRIMM
Assistant Solicitor General

State of Tennessee
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Matt.Rice@ag.tn.gov

Counsel for Petitioners

QUESTION PRESENTED

When, if ever, does a party who obtains a preliminary injunction, but never secures a final merits determination, qualify as a "prevailing party" eligible for attorney's fees under 42 U.S.C. § 1988?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners (defendants-appellants below) are Tre Hargett, in his official capacity as Tennessee's Secretary of State; Mark Goins, in his official capacity as Tennessee's Coordinator of Elections; the Tennessee State Election Commission; and Donna Barrett, Judy Blackburn, Mike McDonald, Gregory Duckett, Jimmy Eldridge, Tom Wheeler, and Kent Younce, each in his or her official capacity as a member of the Tennessee State Election Commission.

Former Commissioner Jimmy Wallace, in his official capacity as a member of the Tennessee State Election Commission, was also a defendant-appellee below, but he retired in 2021. He is thus no longer a party to these proceedings.

Respondents (plaintiffs-appellees below) are the Tennessee State Conference of the NAACP; Democracy Nashville-Democratic Communities; the Equity Alliance; the Andrew Goodman Foundation; the League of Women Voters of Tennessee; the League of Women Voters of Tennessee Education Fund; the American Muslim Advisory Council; the Mid-South Peace & Justice Center; the Memphis Central Labor Council; Rock the Vote; and Headcount.

RELATED PROCEEDINGS

Tennessee State Conf. of NAACP v. Hargett, No. 21-6024 (6th Cir.) (opinion and judgment issued Nov. 16, 2022)

Tennessee State Conf. of NAACP v. Hargett, No. 3:19-cv-365 (M.D. Tenn.) (stipulation and order of voluntary dismissal without prejudice issued Oct. 26, 2020)

League of Women Voters of Tenn. v. Hargett, No. 3:19-cv-385 (M.D. Tenn.) (consolidated with M.D. Tenn. No. 3:19-cv-365 for all purposes on Nov. 5, 2019)

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INTRODUCTION

This case implicates a circuit split on the proper interpretation of an important federal statute. The Civil Rights Attorney's Fees Awards Act of 1976 permits courts to award attorney's fees to the "prevailing party" in a § 1983 action. 42 U.S.C. § 1988(b). In *Sole v. Wyner*, 551 U.S. 74 (2007), this Court held that the term "prevailing party" does not include a plaintiff who wins "a preliminary injunction that is [later] reversed, dissolved, or otherwise undone by the final decision in the same case." *Id.* at 83. But the Court expressly left open the question of whether "success in gaining a preliminary injunction . . . warrant[s] an award of counsel fees" when a case never proceeds to "a final decision on the merits." *Id.* at 86.

In the years since, "[l]ower courts have struggled" to answer that question, *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715–716 (9th Cir. 2013), laying down rules that "are anything but uniform," *Dearmore v. City of Garland*, 519 F.3d 517, 521 (5th Cir. 2008). The decisions have created a circuit split on two fronts. The courts of appeals disagree about when, if ever, a preliminary-injunction decision is sufficiently "on the merits" to create the judicial imprimatur needed for prevailing party status. They also disagree about when, if ever, a preliminary injunction provides the "enduring" relief necessary to show that the plaintiff prevailed.

And the question presented is important. State and local governments face millions of dollars in fee awards based on hasty preliminary injunctions issued

before full development of the relevant facts and arguments. This flips state sovereign immunity on its head and incentivizes unyielding litigation to avoid a fee bill. The result leaves everyone worse off—including advocates for civil rights and policy reform.

By furthering the wrong side of the split, the Sixth Circuit's decision in this case presents an ideal vehicle for this Court's review. The respondents' prevailing party status is the one and only issue remaining in the action. The Sixth Circuit's position on both levels of the split dictated the outcome below. And the Sixth Circuit got the law wrong. This clean presentation provides the perfect backdrop for resolving the question presented.

This Court should grant the petition for certiorari and reverse the judgment below.

OPINIONS BELOW

The Sixth Circuit's opinion (App.1-16) is reported at 53 F.4th 406. The district court's opinion (App.19-51) is unreported but available at 2021 WL 4441262 (M.D. Tenn. Sept. 28, 2021).

JURISDICTIONAL STATEMENT

The Sixth Circuit entered judgment on November 16, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

The Civil Rights Attorney's Fees Awards Act of 1976, as amended, provides in pertinent part:

> In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 1988(b).

STATEMENT OF THE CASE

A. Legal Background

Litigation costs money—often, a lot of it. Under the "American Rule," each litigant "pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 370 (2019) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 253 (2010)). This "long-established" rule stems out of "our common law" and creates a baseline "presumption" against shifting fees between parties. *Baker Botts LLP v. ASARCO LLC*, 576 U.S. 121, 126 (2015). Consistent with that presumption, statutes deviating from the American Rule must provide "specific and explicit" authorization for fee shifting. *Alyeska Pipeline Serv. Co. v. Wilderness Soc.*, 421 U.S. 240, 260 (1975).

When enacting such provisions, Congress has frequently reserved fee shifting only for a suit's "prevailing party." 42 U.S.C. § 1988(b); *see also, e.g.*, 15 U.S.C. § 1117(a) (same); 28 U.S.C. § 2412(b) (same); 29 U.S.C. § 794a(b) (same); 35 U.S.C. § 285 (same); 42 U.S.C. § 2000a-3(b) (same); 52 U.S.C. § 10310(e) (same). This Court has long viewed "prevailing party" as a legal "term of art." *Astrue v. Ratliff*, 560 U.S. 586, 591

(2010). But pinning down its precise meaning has proved difficult in practice.

This Court's precedents offer some guideposts. The Court has said the "prevailing party" term applies "only to a party who has established his entitlement to some relief on the merits of his claims." *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980) (per curiam). This relief must flow from "succe[ss] on a[] significant issue in [the] litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quotation omitted). And "[t]he real value" of that success must be in "affect[ing] the behavior of the defendant." *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (emphasis omitted). Indeed, "[t]he touchstone of the prevailing party inquiry" is some "material alteration of the legal relationship of the parties." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–793 (1989).

With this guidance, the lower courts have repeatedly read "prevailing party" in an expansive manner, prompting this Court to step in and reinforce the American Rule.

Most notably, in the 1990s, the courts of appeals relied on the so-called "catalyst" theory to conclude that a plaintiff could "prevail" in his lawsuit without ever winning anything in court. Under that theory, a plaintiff prevailed when a lawsuit caused the defendant to voluntarily change its conduct in a manner that provided some of the sought-after relief. *Singer Mgmt.*

Consultants, Inc. v. Milgram, 650 F.3d 223, 231 (3d Cir. 2011) (en banc).

But this Court rejected that idea in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). According to *Buckhannon*, "a 'prevailing party' is one who has been awarded some relief *by the court*." *Id.* at 603 (emphasis added). "A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change" to confer prevailing party status. *Id.* at 605. Were it otherwise, a plaintiff could prevail "by simply filing a nonfrivolous but nonetheless . . . meritless lawsuit," *id.* at 606—a result at odds with the bedrock requirement that a prevailing party "receive at least some relief *on the merits* of his claim," *id.* at 603 (emphasis added) (quoting *Hewitt*, 482 U.S. at 760).

Still, expansion of fee-shifting persisted. Even after *Buckhannon*, lower courts conferred prevailing party status on plaintiffs who ultimately *lost* their cases but secured some interim relief before the unfavorable judgment. Courts reasoned that a preliminary injunction could be granted "on the merits" of the claims at issue, even if those "merits" were not ultimately proved. *See Wyner v. Struhs*, 179 F. App'x 566, 569 (11th Cir. 2006).

Again, this Court intervened. Speaking unanimously in *Sole v. Wyner*, 551 U.S. 74 (2007), the Court held that "[a] plaintiff who achieves a transient victory at the threshold of an action" is not a prevailing party

"if, at the end of the litigation, her initial success is undone," *id.* at 78. This is because "[a]t the preliminary injunction stage, the court is called upon to assess the *probability* of the plaintiff's ultimate success on the merits." *Id.* at 84 (emphasis added). "[W]ith the benefit of a fuller record," however, the court may "recognize[] that its initial assessment was incorrect." *Id.* at 85. If it does, "the merits of the case are ultimately decided" in the *defendant's* favor, *id.* at 86, so the plaintiff cannot have "prevailed on the gravamen of her plea," *id.* at 83. Accordingly, the Court held that a plaintiff "who secures a preliminary injunction, then loses on the merits" does not qualify as a prevailing party eligible for fees. *Id.* at 86 (cleaned up).

In reaching that conclusion, the Court "express[ed] no view on 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." *Id.* It left that question for another day.

B. Factual and Procedural Background

That day has come; this case presents the question left open by *Sole*. In May 2019, the State of Tennessee made several changes to its voter-registration laws, seeking to improve the quality and transparency of large registration drives with paid staff. *See* Act to Amend Tenn. Code Ann., Title 2, Relative to Elections, 2019 Tenn. Pub. Acts Ch. 250, Sec. 1(a), (g).[1] Under Tennessee's revised laws, such drives would have to

[1] https://publications.tnsosfiles.com/acts/111/pub/pc0250.pdf.

(1) pre-register their leaders; (2) have staffers complete free, state-provided training; and (3) "deliver or mail completed voter registration forms" to state authorities "within ten . . . days of the . . . drive." Sec. 1(a). The statute also imposed civil penalties on any drive that "fil[ed] one hundred . . . or more incomplete voter registration applications" with state authorities "within a calendar year." Sec. 2(a). And it prohibited anyone operating a voter-registration drive from "retaining" any applicant's personal information without consent. Sec. 1(b). Finally, the statute required public communications and websites containing or collecting registration information to make clear their purposes and disclaim any affiliation with the State. *See* Sec. 6.

As soon as Tennessee's Governor signed these new rules into law, a handful of advocacy groups—Respondents here—challenged them in court. *See* Complaint, *Tenn. State Conf. of the NAACP v. Hargett*, No. 3:19-cv-365 (M.D. Tenn. May 2, 2019), ECF No. 1; Complaint, *League of Women Voters v. Hargett*, No. 3:19-cv-385 (M.D. Tenn. May 9, 2019), ECF No. 1. Several months later, as the statute's effective date approached, the Advocacy Groups asked the district court to enjoin Tennessee officials from enforcing the new rules while their legality was under review. *See* Pls.' Mot. Prelim. Inj., *NAACP*, No. 3:19-cv-365 (M.D. Tenn. Aug. 16, 2019), ECF No. 39; Pls.' Mot. Prelim. Inj., *League*, No. 3:19-cv-385 (M.D. Tenn. Aug. 30, 2019), ECF No. 54.

Mere days after briefing concluded, and without ever holding a hearing, the district court issued a series of orders and opinions granting preliminary relief.

See League, 400 F. Supp. 3d 706 (M.D. Tenn. 2019); *NAACP*, 420 F. Supp. 3d 683 (M.D. Tenn. 2019). Sorting through a partial record and a web of convoluted jurisprudence, the court held that the Advocacy Groups had shown a likelihood of success on their claims because Tennessee had insufficient evidence to justify new burdens on political expression. *See League*, 400 F. Supp. 3d at 719–732 & n.9. It also criticized portions of the statute as impermissibly vague, based in part on the Advocacy Groups' written descriptions of how registration drives work in practice. *See, e.g.*, *id.* at 727–728.

But the court's preliminary conclusions did not ultimately lead to a final judgment on the merits. Less than seven months after the preliminary injunction issued, the Tennessee legislature "repeal[ed] all of the provisions of the" voter-registration statute "challenged in" the Advocacy Groups' lawsuit. App.57. In response, the Advocacy Groups "voluntarily dismiss[ed]" their claims "without prejudice," explaining that "although [their suits were] not technically moot as a matter of law," "further litigation" would serve "little purpose." App.57-58.

Almost immediately after withdrawing their claims, the Advocacy Groups moved for attorney's fees, and the district court granted their request. *See* App.19-51. The court concluded that the Advocacy Groups were "prevailing parties," and thus eligible for statutory fee shifting, despite their failure to secure a final judgment. *See* App.30-37. Citing Sixth Circuit precedent, the court reasoned that the Advocacy

Groups had won "court-ordered," "enduring" relief because the preliminary injunction "prevented the challenged laws from being enforced until, through the ordinary operation of the state's legislature, the laws . . . ceased to exist." App.33, 36. For the preliminary proceedings alone, the court ordered the State to pay nearly $800,000 in fees. App.52-54.

A divided panel of the Sixth Circuit affirmed. *See* App.1-16. In the majority's view, "[t]he relief the plaintiffs obtained" was "distinguishable from the 'fleeting' relief in *Sole*" because "the court never vacated or dissolved the injunction" and the "plaintiffs were able to conduct voter-registration . . . unburdened by the [challenged] requirements." App.8.

But Judge Nalbandian dissented. In his view, courts "must deny attorney's fees in preliminary-injunction cases if a defendant's voluntary action moots the case." App.12 (Nalbandian, J., dissenting). "Granting . . . fees" in that situation "promotes the very [catalyst theory] *Buckhannon* cast aside." App.13. Judge Nalbandian further reasoned that the preliminary injunction itself was not "'enduring' enough to support prevailing-party status." App.14. "It's not as if the relief sought here was for a single event, thus allowing plaintiffs to obtain their one-time prayer for relief via a preliminary injunction." App.15. "To the contrary," the Advocacy Groups "sought . . . permanent relief for all future elections," and they "didn't win the war for all future elections, at least not in court." App.15.

REASONS FOR GRANTING THE PETITION

This Court should answer the question left open by *Sole*: When, if ever, does a party who obtains a preliminary injunction, but who never wins a final merits determination, qualify as a "prevailing party" for the purpose of statutory fee shifting? *See* 551 U.S. at 86. The divided lower courts need guidance on this important, recurring issue, and this case provides the ideal vehicle for resolving the confusion.

I. The Courts of Appeals Are Divided on the Question Presented.

This case implicates a clear, entrenched circuit split on the question of when preliminary injunctive relief supports prevailing party status. That issue has created confusion on two fronts. *First*, courts disagree about whether a preliminary injunction grants relief "on the merits" for purposes of the prevailing party inquiry. *Higher Taste*, 717 F.3d at 716. *Second*, courts disagree about when the interim relief obtained from a preliminary injunction is sufficiently "enduring" to render a party "prevailing." *Id.* This layered disarray calls out for the Court's intervention.

A. Courts disagree on whether a likelihood-of-success showing satisfies the merits requirement of the prevailing party inquiry.

The circuits are split on the merits showing necessary to obtain prevailing party status. It is well settled that a plaintiff must "receive at least some relief *on the merits* of his claim before he can be said to prevail." *Buckhannon*, 532 U.S. at 603 (emphasis added)

(quoting *Hewitt*, 482 U.S. at 760). But in considering whether to grant preliminary relief, courts determine only whether the movant is "*likely* to succeed on the merits." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (emphasis added). The Courts of Appeals hold different views about whether that early, probabilistic decision provides the judicial sanction necessary to justify an award of attorney's fees.

The Third and Fourth Circuits have held that a likelihood-of-success determination is *not* sufficient to satisfy the "on the merits" requirement. *See Singer*, 650 F.3d at 229 (3d Cir.) (en banc); *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002). They recognize that "[w]hile granting [a preliminary] injunction does involve an inquiry into the merits of a party's claim," that inquiry "is necessarily abbreviated." *Smyth*, 282 F.3d at 276. At the preliminary-injunction stage, a court's assessment of the merits "is best understood as a prediction of a probable, but necessarily uncertain, outcome" and "by no means represents a determination that the claim in question will or ought to succeed." *Id.* That is not enough, according to these courts, to qualify as a decision "on the merits." *Id.*; *see Singer*, 650 F.3d at 230 & n.4. And because the likelihood-of-success determination "is usually the only merits-related legal determination made when courts grant TROs and preliminary injunctions, it follows that parties will not often 'prevail' based solely on those events." *Singer*, 650 F.3d at 229. In short, in the Third and Fourth Circuits, a plaintiff cannot satisfy "the 'merits' requirement" by establishing "only . . . a *likelihood* of success on the merits (that is,

a reasonable chance, or probability, of winning)." *Id.*; *see Smyth*, 282 F.3d at 276–277.[2]

The First Circuit has taken a similar approach, at least where "precipitant circumstances permit[] no thorough examination of the merits." *Sinapi v. R.I. Bd. of Bar Exam'rs*, 910 F.3d 544, 551 (1st Cir. 2018). In *Sinapi*, the First Circuit held that a "*likelihood* of success on the merits" is not enough to validate the plaintiff's suit. *Id.* at 551–552. In doing so, the court explained that "[i]t would be unfair to deem [the plaintiff] a 'prevailing' party" and "slap [the defendant] with a fee bill based on a" view of the merits that the defendant "never received a fair opportunity to contest on a properly developed record." *Id.* at 552. Accordingly, the court concluded that "'prevailing party' status was not justified" with nothing more than a likelihood-of-success determination. *Id.*

By contrast, the Second, Fifth, Eighth, and Ninth Circuits have all held that showing a likelihood of success *categorically* satisfies the "on the merits" requirement and secures the judicial sanction needed to make the plaintiff a prevailing party. *See Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997); *Dearmore*, 519 F.3d at 524 (5th Cir.); *Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903, 910 (8th Cir. 2012); *Higher Taste*, 717 F.3d at 716 (9th Cir.). According to those courts,

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[2] The Fourth Circuit has granted *en banc* review in a case implicating its holding in *Smyth*. *See Stinnie v. Holcomb*, No. 21-1756, 2022 WL 3210714 (4th Cir. Aug. 9, 2022). But the entrenched split on the merits requirement will persist even if the court flips its position in that case.

a "likelihood-of-success finding ensures that the preliminary relief . . . obtained [i]s the product of more than merely a 'nonfrivolous but nonetheless potentially meritless lawsuit,'" *Higher Taste*, 717 F.3d at 716 (quoting *Buckhannon,* 532 U.S. at 606), and that showing suffices.

The Sixth and Tenth Circuits fall somewhere in between. Rather than deeming a likelihood-of-success finding categorically sufficient or insufficient, the Tenth Circuit looks at the circumstances of each case and considers whether the district court "undert[ook] a *serious examination* of the" legal issues and found an "unambiguous indication of probable success on the merits." *Kan. Jud. Watch v. Stout*, 653 F.3d 1230, 1238 (10th Cir. 2011) (emphasis added); *see also Hodes & Nauser, MDs, P.A. v. Moser*, No. 2:11-cv-2365, 2012 WL 1831549, at *3 (D. Kan. May 18, 2012) (interpreting the Tenth Circuit's requirement of a "serious examination" and "unambiguous finding" to require more than an "expedited" likelihood-of-success determination). The Sixth Circuit, although less explicit in its reasoning, has likewise contrasted a "hasty" merits review from a decision "after full briefing and an opportunity for each side to present evidence supporting its position"—evaluating "the prospect that . . . the [district] court would [have] reverse[d] course." App.8-9.

These three camps cannot all be right. This Court should decide who is.

B. Courts disagree on whether a preliminary injunction provides the "enduring" relief necessary to obtain prevailing party status.

The circuit split takes on a second dimension when it comes to the relief needed to prevail. Again, it is settled law that, to qualify as a prevailing party, a plaintiff must establish that judicial relief caused an "*enduring* 'chang[e] [in] the legal relationship' between herself and the" defendant. *Sole*, 551 U.S. at 86 (emphasis added) (quoting *Texas Teachers*, 489 U.S. at 792). But the obvious disconnect between *preliminary* injunctions and *enduring* relief has caused confusion in the lower courts.

This stems from the fact that, broadly speaking, *every* preliminary injunction changes the parties' legal relationship by restraining the defendant's conduct. *Lorillard Tobacco Co. v. Engida*, 611 F.3d 1209, 1217 (10th Cir. 2010). But while some injunctions impose truly temporary restraint pending further proceedings, others effectively provide the plaintiff *all* the relief requested. For instance, a plaintiff who sues to hold a parade on a specific day, obtains a preliminary injunction allowing him to do so, and then holds the parade unimpeded has obtained the only tangible benefit he sought in filing suit. *Cf. Dahlem ex rel. Dahlem v. Bd. of Educ.*, 901 F.2d 1508, 1513 (10th Cir. 1990) (finding relief enduring when plaintiff "participate[d] in interscholastic gymnastics during his senior year"). But the circuits disagree on whether that scenario is the only situation where relief counts as "enduring" enough to support prevailing party status.

To date, the Seventh Circuit has deemed preliminary relief "enduring" only in the limited circumstance where the preliminary injunction provided all "the relief . . . sought" in the lawsuit. *Young v. City of Chi.*, 202 F.3d 1000, 1000 (7th Cir. 2000) (per curiam); *see also Dupuy v. Samuels*, 423 F.3d 714, 723–725 (7th Cir. 2005) (summarizing Seventh Circuit law). And some have viewed this situation as the only viable path to prevailing party status when a case fails to reach final judgment. As Judge Nalbandian put it, preliminary relief qualifies as enduring only in the "rare cases" where a plaintiff "obtain[s] their one-time prayer for relief via a preliminary injunction," such as where "the relief sought" is "for a single event." App.14-15 (Nalbandian, J., dissenting) (citing *Miller v. Caudill*, 936 F.3d 442, 450 (6th Cir. 2019)).

The Eighth Circuit adopted this strict framework in *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083 (8th Cir. 2006). The court recognized that sometimes a "preliminary injunction functions much like the grant of an irreversible partial summary judgment on the merits" because "the party's claim [for a] permanent injunction is rendered moot by the impact of the preliminary injunction." *Id.* at 1086. That did not fit the case at hand, however, where the district court's preliminary injunction provided "only interim relief." *Id.* (noting that the injunction was based on a likelihood of success). In the court's view, "a preliminary injunction that grants only temporary relief pendente lite is not, without more, a judicially sanctioned *material* alteration of the parties' legal relationship within the meaning of *Buckhannon*." *Id.* The court thus placed a high bar on the relief required—effectively,

only in cases like the parade example—to obtain prevailing party status. After *Northern Cheyenne*, however, the Eighth Circuit created a workaround for plaintiffs: include a request for a preliminary injunction in the complaint so that obtaining one will constitute complete victory on one requested remedy. *Rogers Grp.*, 683 F.3d at 911 (noting that the plaintiff's complaint "asked the District Court for equitable relief in the form of a preliminary injunction" and "[w]hen the District Court issued the injunction, it granted [the plaintiff] the precise relief that [it] had requested" (quotation omitted)).

By contrast, in the Second, Third, Sixth, Ninth, and Eleventh Circuits, a preliminary injunction can provide relief sufficient to "prevail," regardless of whether it provides all of the relief sought. *See Haley*, 106 F.3d at 483–484 (2d Cir.); *Singer*, 650 F.3d at 230 n.4 (3d Cir.); App.3 (6th Cir.); *Higher Taste*, 717 F.3d at 717 (9th Cir.); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009). Many of these courts hold that prevailing party status attaches when the preliminary injunction provides any "relief" at all. *See Haley*, 106 F.3d at 483–484; *Common Cause*, 554 F.3d at 1356; *see also Kirk v. N.Y. State Dep't of Educ.*, 644 F.3d 134, 137 n.3 (2d Cir. 2011) ("[A] plaintiff who achieves relief, even if only interim relief, does not lose prevailing party status if there is a later determination on appeal that the case is moot."). Others have reasoned that the resolution of a case without a final judgment "transform[s] what had been temporary relief capable of being undone . . . into a lasting alteration of the parties' legal relationship." *Higher Taste*,

717 F.3d at 718. Still others consider whether the preliminary injunction had any lasting, secondary impacts. *See* App.8-9. Whatever the reasoning, in these circuits, the grant of a preliminary injunction can, in certain circumstances, satisfy the relief requirement in the prevailing-party inquiry even when the injunction does not provide the plaintiff all of the requested relief.

Taking a third position, some courts have incorporated a causal component into the relief requirement. The Fifth Circuit has stated this most clearly, requiring a showing that the preliminary injunction "*cause*[*d*] the defendant to moot the action." *Dearmore*, 519 F.3d at 524 (emphasis added). In other words, a law mooting a dispute must be "passed *in direct response* to the district court's preliminary injunction"—and not for some unrelated reason—before a plaintiff can be said to prevail. *Amawi v. Paxton*, 48 F.4th 412, 418 (5th Cir. 2022). The Eighth Circuit's *Northern Cheyenne* decision also adopts that reasoning, albeit in less explicit terms. There, the court focused on "the impact of the preliminary injunction" and denied prevailing party status, at least in part, because "the [plaintiffs] achieved their desired result" through "voluntary action" the defendants took "*for reasons unrelated*" to the lawsuit. 433 F.3d at 1086 (emphasis added).

Again, these approaches are not reconcilable. Either temporary relief is sufficient or not. Either the preliminary injunction must cause the defendant to moot the action or not. The circuits' divergent approaches cannot all be correct.

* * *

In sum, the courts of appeals are split into multiple, discordant camps on at least two levels of analysis: (1) the "on the merits" requirement and (2) the meaning of "enduring" relief. This confusion requires this Court's intervention.

II. The Question Presented Is Important.

This Court primarily "resolve[s] 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 408 (2018) (Thomas, J., dissenting from denial of certiorari) (quoting Sup. Ct. R. 10(a)). And the question presented here is critically important to the States and other parties.

First, the broad interpretation of "prevailing party" adopted by many circuits places a substantial financial burden on States. This case and countless others involve constitutional challenges to short-lived state legislation. *See Amawi*, 48 F.4th at 415; *Haley*, 106 F.3d at 481; *Coal. for Basic Hum. Needs v. King*, 691 F.2d 597, 598–599 (1st Cir. 1982). In most circuits, the plaintiffs can win fees by riding a partial evidentiary record to a hasty preliminary injunction and dismissing as soon as the legislature tweaks the law. *See supra* at 12–13, 16–17. And in large swaths of the country, a plaintiff does not even have to show that his lawsuit actually caused any lasting change. *See supra* at 17. Yet these circumstances often lead to a substantial fee award.

Indeed, it is common for a State to pay a six-figure bill in a case involving mere preliminary relief. *See,*

e.g., *Planned Parenthood of Sw. Oh. Region v. Dewine*, 931 F.3d 530, 537 (6th Cir. 2019) ($382,529.98); *Kan. Jud. Watch v. Stout*, No. 06-4056, 2012 WL 1033634, at *14 (D. Kan. Mar. 27, 2012) ($151,470.08). Here, the bill came closer to *seven* figures—not including appeal—even after substantial reductions from the district court. *See* App.47-51. That sum is all the more shocking considering this case never went to trial and never even required summary judgment briefing. With States facing a barrage of (often meritless) constitutional challenges to duly enacted legislation, the threat of such heavy fees attaching to preliminary injunction proceedings necessarily jeopardizes state legislative priorities and skews democratic policymaking.

Second, the threat of fees from preliminary relief creates a perverse incentive to ossify state law and policy. Given the protections of sovereign immunity, suits challenging state and local policy very often seek prospective injunctive relief but not money damages. *See Frew ex rel. Frew v. Hawkins,* 540 U.S. 431, 437 (2004); *Green v. Mansour*, 474 U.S. 64, 68 (1985). This means that amending a challenged state law will often moot any ongoing litigation concerning that law's enforcement. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (per curiam). That reality, combined with prevailing fee-shifting rules, produces results that flip sovereign immunity on its head: States face increased exposure to early, substantial fee awards precisely because of the States' immunity from monetary damages.

This increased prospect of a prematurely fixed fee award drives state lawmakers *away* from compromise.

A State's leaders may wish to change a challenged law to address an unintended consequence. They may have contemplated a change *before* the litigation even began. Or they may simply want to accommodate plaintiffs and avoid the expense and distraction of litigation. But in many circuits, after a preliminary injunction has issued, the State cannot change course without mooting the ongoing controversy and incurring a hefty fee award. *See Higher Taste*, 717 F.3d at 718.

Thus, rather than explore options that might better serve the public, a State that engaged in conduct that "may not be illegal" must litigate cases tooth-and-nail to protect taxpayer dollars. *Buckhannon*, 532 U.S. at 608; *see also id.* (explaining that a defendant may be deterred from "altering its conduct," especially if the conduct "may not be illegal," if doing so will result in a fee award). This not only degrades lawmaking decisions, it also drives more discovery, more dispositive briefing, more trials, more appeals, and even more interlocutory appeals—all to oppose prevailing party status. *Cf.* App.10 (using the decision not to seek an interlocutory appeal as a fact favoring prevailing party status). It is difficult to see how anyone is better off in this scenario.

Third, the contours of prevailing party status apply well beyond the circumstances of this case. Section 1988 allows fee shifting in suits brought under the Civil Rights Act, the Religious Freedom Restoration Act, the Religious Land Use and Institutionalized Persons Act, Title IX, and several other statutes. *See* 42

U.S.C. § 1988(b). States, territories, local governments, the United States, and private parties all face fee requests under these fee-shifting regimes. *See Watson v. Cnty. of Riverside*, 300 F.3d 1092, 1094 (9th Cir. 2002); *Mercer v. Duke Univ.*, 50 F. App'x 643, 644 (4th Cir. 2002) (per curiam); *N. Cheyenne*, 433 F.3d at 1084. And because this Court has held that "prevailing party" generally has a consistent meaning throughout the U.S. Code, *see Buckhannon*, 532 U.S. at 602–603 & n.4, precedent developed through civil rights litigation will project into dozens of other areas, *cf. id.* at 611 (Scalia, J., concurring) (noting "the term 'prevailing party' appears at least 70 times in the current United States Code").

This Court can thus provide widespread and much needed guidance by resolving the tidy question presented in this petition.

III. This Case Offers an Ideal Vehicle for Resolving the Question Presented.

This case presents an ideal vehicle for answering the question presented. It cleanly raises the question, squarely implicates the circuit split, and involves a massive fee award granted for reasons that cannot withstand scrutiny.

First, no factual or procedural obstacles will complicate this Court's review. The only remaining dispute here is whether the Advocacy Groups' preliminary injunction made them prevailing parties. That issue has been litigated at each stage of this case, and both the trial court and the Sixth Circuit squarely addressed the dispute. *See supra* at 8–9. This case thus

provides a clean vehicle for reaching the interpretive question.

Second, this case squarely presents both components of the circuit split. On the merits, the district court awarded the Advocacy Groups preliminary relief based only on a "likelihood of success." *League*, 400 F. Supp. 3d at 719–733. In the Third and Fourth Circuits, that determination would not establish prevailing party status because a mere likelihood of success is no substitute for judicial approval "on the merits." *See Singer*, 650 F.3d at 229–230 & n.4; *Smyth*, 282 F.3d at 276. But under the Sixth Circuit's approach, the likelihood-of-success showing on a partial documentary record sufficed. *See supra* at 9. Thus, the showing necessary to satisfy the merits requirement dictated the outcome.

This case likewise tees up the divergent approaches to the relief requirement in the prevailing party inquiry. This is not a case (like the parade example discussed *supra* at 14) where a preliminary injunction provided plaintiffs all of the relief they asked for. The preliminary injunction secured only a temporary reprieve from enforcement of the challenged law, which paled in comparison to the permanent judgment the Advocacy Groups sought when they came into court. Elsewhere in this country, the limited nature of that relief would have mattered, *see supra* at 14–16, and it would have foreclosed the Advocacy Groups' fee award. But under the Sixth Circuit's approach here, the temporary restraint on enforcement of the challenged law was enough.

Thus, this case implicates both aspects of the circuits' confusion—the merits and relief showings necessary to obtain prevailing party status—and resolution of those issues was outcome determinative.

Third, the Sixth Circuit has the law wrong. As several courts elsewhere have recognized, a grant of preliminary relief necessarily follows a cursory fact-gathering process that both favors the plaintiff and rushes the court's decisionmaking. *See Smyth*, 282 F.3d at 276; *see also Singer*, 650 F.3d at 229–230; *Sinapi*, 910 F.3d at 551–552. In most cases, the defendant has two weeks or less to marshal the documents, testimony, and authorities needed to support its challenged action. And the court may have even less time to render a decision, regardless of the complexity of the case. *See League*, 400 F. Supp. 3d 706 (M.D. Tenn. 2019) (granting preliminary relief three days after Tennessee's response in opposition)*; NAACP,* 420 F. Supp. 3d 683 (M.D. Tenn. 2019) (granting preliminary relief one week after the plaintiff's reply in support of the motion).

That is why pre-judgment relief can issue on a mere "likelihood" that the plaintiff will succeed, *Winter*, 555 U.S. at 20, a far cry from the plaintiff "establish[ing] . . . entitlement to . . . relief on the merits," *Hanrahan*, 446 U.S. at 757. The probabilistic likelihood-of-success determination is necessarily subject to reconsideration and revision as the facts and arguments develop. *Sole*, 551 U.S. at 85. And if the case concludes without a final ruling, the court's early assessment of the lawsuit has no preclusive effect, *Medtronic, Inc. v. Gibbons*, 684 F.2d 565, 569 (8th Cir.

1982) (citing *Starbuck v. City & County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977)), and offers precious little insight on what the law actually is, *see A.M. Capen's Co. v. Am. Trading & Prod. Corp.*, 202 F.3d 469, 472–473 (1st Cir. 2000). Put simply, a likelihood-of-success showing means that a plaintiff "won the [initial] battle"; "they didn't win the war." App.15 (Nalbandian, J., dissenting).

Moreover, even if preliminary relief *could* clear *Buckhannon*'s "judicial *imprimatur*" merits requirement, 532 U.S. at 605, it should at most qualify as "enduring" relief only in the narrowest of circumstances. Admittedly, some time-sensitive lawsuits make preliminary relief the *only* real remedy available. *See Young*, 202 F.3d at 1000–1001. But those are exceptional cases. More often, plaintiffs seek "permanent," or indefinite, protection from state government action. *Cf.* App.15 (Nalbandian, J. dissenting) (noting plaintiffs "sought . . . permanent relief for all future elections"). And in those cases, a temporary injunction that only "stop[s] [the] defendant's threatened conduct from causing (irreparable) harm *until* the court has a meaningful chance to resolve the case on the merits," *Doster v. Kendall*, 54 F.4th 398, 441 (6th Cir. 2022) (emphasis added), necessarily offers less than the "enduring" relief *Sole* requires. *Sole*, 551 U.S. at 78, 86 (describing preliminary relief as a "transient" and "ephemeral" victory).

Indeed, the relief obtained here could only be described as enduring because of what happened *outside* the litigation: Tennessee's voluntary amendment of its laws. *See* App.31-32. No plaintiff should be allowed

to rely on such extrajudicial relief to claim he "prevailed" *in court*, *see Buckhannon*, 532 U.S. at 603, especially without ever showing that his lawsuit made any difference at all.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

JONATHAN SKRMETTI
Attorney General

ANDRÉE S. BLUMSTEIN
Solicitor General

ZACHARY T. HINKLE
Associate Solicitor General

J. MATTHEW RICE
Special Assistant to the Solicitor General
Counsel of Record

GABRIEL KRIMM
Assistant Solicitor General

State of Tennessee
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 532-6026
Matt.Rice@ag.tn.gov

Counsel for Petitioners

FEBRUARY 13, 2023