No. 22-773

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit correctly held that Respondents were "prevailing parties" entitled to attorney's fees under 42 U.S.C. § 1988 for successfully obtaining a preliminary injunction on all claims, which Petitioners did not appeal and which permitted Respondents to engage in otherwise-prohibited conduct for seven months, until the Tennessee Legislature repealed the challenged statutes for the express purpose of complying with the district court's ruling.

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BRIEF IN OPPOSITION

INTRODUCTION

The District Court, after thoroughly canvassing the merits and evidentiary record, concluded that Respondents established a strong likelihood of success on their claims that certain changes to Tennessee's election laws violated their First and Fourteenth Amendment rights. Because the court enjoined enforcement of those changes during the pivotal runup to the 2020 election, Respondents were able to engage in First Amendment-protected activities for seven months unburdened by the law's unconstitutional requirements. The State never appealed the injunction

and the legislature subsequently repealed the challenged provisions with the express goal of bringing the law into compliance with the District Court's ruling. Respondents then sought an award of attorney's fees under 42 U.S.C. § 1988 for their work securing the injunction that protected their rights during a critical period and was never undone. The District Court awarded fees and the Sixth Circuit affirmed.

Petitioners now seek this Court's review, claiming there is a multi-headed split among the circuits over when obtaining a preliminary injunction renders a litigant a "prevailing party" entitled to fees under Section 1988. No such split exists. This Court has held that, to confer prevailing-party status, a plaintiff must secure "at least some relief on the merits," *Buckhannon Bd. & Care Home, Inc.* v. *W.V. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001) (quotation marks omitted), and that the relief secured must be "enduring," *Sole* v. *Wyner*, 551 U.S. 74, 86 (2007). The circuits have applied these settled principles to preliminary injunctions by adopting a consistent, context-specific approach that considers the totality-of-the-circumstances to assess whether the relief obtained was material and enduring. Petitioners have identified a single decision that departs from this consensus approach—a pre-*Sole* opinion from the Fourth Circuit, whose holding that court is currently reviewing *en banc*. As a result, the only split is exceedingly shallow and may soon be resolved without this Court's intervention if the Fourth Circuit aligns itself with all the other courts of appeals. Petitioners' other efforts

to conjure up a division of authority rely on out-of-context and inapposite language from individual opinions.

This Court has repeatedly rejected similar invitations to address the issues raised in this Petition, and should do the same here—especially given the Fourth Circuit's decision to revisit its stance as the sole outlier.

This case is also a poor vehicle to address the question presented. Respondents would prevail under *any* of the approaches urged by Petitioners, aside from the Fourth Circuit's outdated and now-unsettled position. Tellingly, in straining to reach the conclusion that Respondents were not entitled to fees, the dissenting opinion below did not employ a legal test used by *any* circuit. Petitioners do not even attempt to defend the dissent's analysis.

The consensus approach, which the Sixth Circuit faithfully applied below, is a correct application of this Court's precedents. Outside the Fourth Circuit, it has been the law for well over a decade, and has not proven unworkable in practice. This Court should deny review.

STATEMENT

A. Respondents successfully obtain a preliminary injunction against Tennessee's unconstitutional restrictions on First Amendment activities.

On May 2, 2019, Tennessee Governor Bill Lee signed into law House Bill 1079/Senate Bill 971 (the "Act"). *See* 2019 Tenn. Pub. Acts Ch. 250. The Act imposed numerous burdensome and unnecessary restrictions

on First Amendment-protected activities. These restrictions included substantial civil and criminal penalties for any organization failing to include government-compelled content in Respondents' political communications, turning in "incomplete" voter registration forms, and failing to meet burdensome registration and reporting requirements before seeking to help their fellow citizens register to vote. *See, e.g.*, *id*. §§ 1, 2, 6. The law was slated to go into effect on October 1, 2019. *Id*. § 9.

Respondents are organizations that have a long history of engaging in First Amendment-protected activities, including encouraging and assisting eligible voters in registering to vote. Because of the burdens the Act imposed on those protected activities, Respondents challenged the Act as a violation of the First and Fourteenth Amendments and moved for a preliminary injunction. Four months after the suits were filed, and after full merits-focused briefing and Respondents' extensive, uncontested evidentiary submissions, the District Court granted two preliminary injunctions. *League of Women Voters* v. *Hargett*, 400 F. Supp. 3d 706 (M.D. Tenn. 2019); *Tenn. State Conf. of NAACP* v. *Hargett*, 420 F. Supp. 3d 683 (M.D. Tenn. 2019).[1]

In a pair of opinions totaling 60 pages, the District Court exhaustively detailed why Respondents had demonstrated a "strong" likelihood of success on the

[1] Respondents originally filed two separate suits, which were consolidated after the preliminary-injunction phase. Pet. App. 65. Respondents cite primarily to the *Tennessee State Conference of NAACP* injunction opinion.

merits of their claims. Scrutinizing the laws under the First Amendment, the District Court determined that Respondents had "shown a high likelihood that their claims will succeed, both with regard to the [challenged] provisions' substantive commands and the vagueness of their scope and requirements." *Tenn. State Conf. of NAACP*, 420 F. Supp. 3d at 706. The court had "little trouble" reaching this conclusion, *id.* at 707, and rejected Petitioners' contrary arguments as "baseless," *id.* at 698. The court repeatedly cited the "significant factual record" Respondents had developed in support of their claims, *e.g.*, *id.* at 699, 701, and Petitioners' failure to offer any evidence or reasons to support their contrary arguments, *id.* at 701, 705, 708.

The District Court also held that Respondents were highly likely to succeed in showing that the challenged "aspects of the Act, functioning together, create a cumulative burden on speech and expression that is even more difficult to justify as a constitutional matter." *Id*. at 710.

Finally, the District Court found that Respondents had demonstrated a strong likelihood of irreparable injury and substantial harm to the public interest, and therefore granted the requested injunctions. *Id*. at 711-712.[2]

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[2] The District Court also denied motions to dismiss the complaints on various grounds. *Tenn. State Conf. of NAACP* v. *Hargett*, 441 F. Supp. 3d 609 (M.D. Tenn. 2019); *League of Women Voters* v. *Hargett*, No. 3:19-cv-00385 (M.D. Tenn. Sept. 9, 2019), ECF No. 57.

As a result of the injunctions, Respondents were able to engage in voter registration activities free from the Act's significant burdens during the critical period leading up to the 2020 primary elections in Tennessee. Pet. App. 8.

Defendants chose not to appeal the injunctions. *See id.* at 6.

B. Tennessee repeals the challenged statutes and brings state law into compliance with the District Court's order.

After months of discovery, but "before the cases could proceed to a stage at which the entry of judgment would have been proper, the Tennessee General Assembly enacted, and the Governor signed, 2020 House Bill 2363, which repealed the challenged provisions." Pet. App. 23.

The legislature enacted the new law in direct response to the preliminary injunction, and drafted its language to comply with the court's order. The bill's sponsor assured fellow legislators that the new law "repeals all provisions enjoined in the federal court decision" and replaces them with measures designed to be "within the confines of the [District Court's preliminary injunction] ruling." *Hearing on H.B. 2363 Before the H. Subcomm. on Elections & Campaign Fin.*, 111th Gen. Assembly, 2020 Sess., at 43:28-43:30 (Tenn. Feb. 19, 2020) (statement of Rep. Tim Rudd, Chairman, H. Subcomm. on Elections & Campaign Fin.); *House Floor Session*, 111th Gen. Assembly, 2020 Sess., 56th Legis. Day, at 50:35-50:42 (Tenn.

Mar. 9, 2020) (statement of Rep. Tim Rudd, Chairman, H. Subcomm. on Elections & Campaign Fin.).[3]

Petitioners Tre Hargett, the Tennessee Secretary of State, and Mark Goins, the Tennessee Coordinator of Elections, likewise confirmed that the goal of the repeal legislation was to comply with the District Court's order. In a February 14, 2020 letter to State Senator Jeff Yarbro, Hargett and Goins explained that the District Court had preliminarily enjoined certain provisions of the Act, and that HB2363 "is being brought to provide reasonable protections within the confines of the federal court's ruling." Letter from Tre Hargett, Tennessee Secretary of State, and Mark Goins, Tennessee Coordinator of Elections, to Hon. Jeff Yarbro, Tennessee State Senator, at 1 (Feb. 14, 2020).[4] Given "the federal injunction, these protections are better than no protection at all," Hargett and Goins explained. *Id*. at 3.

The Governor signed HB2363 into law on April 2, 2020. It went into effect immediately and repealed all challenged provisions of the original Act. Pet. App. 6, 23, 57. Because Respondents had accomplished their goals for the litigation, Respondents agreed to dismiss their action without prejudice and without vacatur of the preliminary injunction. The District Court approved the parties' joint stipulation dismissing the case. *Id.* at 56-63.

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[3] Video recordings *available at* https://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=HB2363&GA=111.

[4] *Available at* D. Ct. Dkt. 100-2.

C. The District Court and Sixth Circuit hold Respondents are eligible for attorney's fees.

Respondents subsequently petitioned for a fee award under 42 U.S.C. § 1988(b), which allows "the court, in its discretion" to award "reasonable attorney's fee[s]" to a "prevailing party."

Applying a "contextual and case-specific inquiry," the District Court held that Respondents were "prevailing parties" because their success was "court-ordered," "material," and "enduring." Pet. App. 30-31 (quoting *McQueary* v. *Conway*, 614 F.3d 591, 598-599, 600 (6th Cir. 2010)). As the court explained, Respondents asked for—and received—a court order "enjoining the defendants from enforcing the challenged provisions of the Act for as long as those provisions remained duly enacted Tennessee statutes." *Id*. at 32. That relief meant Respondents "were free to perform the voter registration drives that they wished to perform, and votes have almost certainly been cast pursuant to registrations enabled by the court's preliminary injunctions." *Id*. at 35. And Respondents' relief was enduring, as "[n]either those votes nor the registrations themselves ever can or will be rescinded based on the Act." *Id*. The court therefore granted Respondents' fee request after making various downward adjustments. *See id.* at 39-54.

Petitioners appealed the District Court's "prevailing party" determination, but not the amount of the fee award. *See id.* at 6.

The Sixth Circuit affirmed. *Id.* at 1-10. Writing for the majority, Judge Kethledge, joined by Judge Bush,

held that the preliminary injunction order "undisputedly" qualified as material, court-ordered relief on the merits that had not been "reversed, dissolved, or otherwise undone by the final decision in the same case." *Id.* at 7 (quoting *Sole*, 551 U.S. at 83).

The Sixth Circuit also held that, "on this record," Respondents' relief was sufficiently "enduring" to satisfy the prevailing-party requirement, despite the Tennessee legislature's later decision to repeal the challenged statutory provisions. *Id*. at 7, 10. The preliminary injunction here was neither "fleeting" nor "hasty." *Id*. at 8 (quoting *Sole*, 551 U.S. at 83-84). On the contrary, the District Court's order "came four months after the suits were filed, after full briefing and an opportunity for each side to present evidence supporting its position." *Id*. And the District Court's lengthy opinion—most of which was dedicated to assessing Respondents' likelihood of success on the merits, *see id*. at 5—"was an emphatic and unambiguous indication of probable success on the merits." *Id*. at 9 (quotation marks omitted). Moreover, the relief ordered was "irrevocable" in that Respondents were able to engage in voter-registration efforts leading up to the 2020 election, which could not now be undone. *Id*. at 8-9.

In sum, the Sixth Circuit held that "[a] preliminary injunction that, as a practical matter, concludes the litigation in the plaintiffs' favor in the district court, and that is not challenged on appeal is—on this record at least—enduring enough to support prevailing-party status under § 1988." *Id*. at 10.

Judge Nalbandian dissented. Despite recognizing that a preliminary injunction can be the basis for a fee

award, the dissent argued that the relief was not "'enduring' enough," because the court did not grant *permanent* relief for all future elections or finally determine success on the merits of all claims. *Id*. at 14-16 (Nalbandian, J., dissenting). Petitioners did not seek rehearing *en banc*.

REASONS FOR DENYING THE PETITION

This petition satisfies none of the traditional criteria for this Court's review. There is no meaningful division of authority among the circuits on whether a preliminary injunction may qualify as relief that is both "on the merits" and sufficiently "enduring" to warrant a fee award under Section 1988. Every circuit that has addressed this issue since this Court's guidance in *Sole* has held that preliminary injunctions can satisfy these criteria, and every circuit has applied a totality-of-the-circumstances approach to assessing that issue, examining whether the relief was material and enduring. Only the Fourth Circuit, in a decision that predates *Sole*, has adopted an outlier position. But the *en banc* Fourth Circuit is currently reconsidering that very issue, prompted by an opinion noting that the Fourth Circuit is the lone outlier—making this a particularly poor time for this Court to take up this petition.

Notwithstanding the general agreement among circuits on the applicable legal standards, Petitioners attempt to conjure up a multi-pronged circuit split by relying on isolated, case-specific language from inapposite opinions. But this case is a poor vehicle for addressing any such asserted division, because the relief obtained here would satisfy *every* test that Petitioners purport to identify in other circuits (save the Fourth

Circuit's rule, which that court is already reconsidering *en banc*).

The consensus approach that the Sixth Circuit employed here is firmly grounded in this Court's precedent and has been the law in nearly every circuit for at least the last fifteen years. Petitioners identify nothing to justify the upheaval they request.

I. NO CIRCUIT SPLIT EXISTS THAT WARRANTS THIS COURT'S REVIEW.

The Court should deny review because there is no meaningful division among the circuits on how to apply *Sole* to preliminary injunctions that are not later undone on the merits. Petitioners claim this is an opportunity for this Court to weigh in on "the question left open by *Sole*," by which they mean whether securing a preliminary injunction can ever render a litigant a "prevailing party." Pet. 10. But Petitioners do not actually claim a circuit split on *whether* a plaintiff who obtains preliminary relief in a case that is later mooted before a merits decision can qualify as a "prevailing party." Nor could they. Every single circuit to address the issue after *Sole* has answered in the same way: A party who wins a preliminary injunction may be treated as a prevailing party when the decision rests on an assessment of the merits and provides enduring material relief. The Fourth Circuit's outlier opinion in *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268 (4th Cir. 2002), which held that preliminary relief could never be a basis for attorney's fees, predates *Sole* and is currently under reconsideration by the *en banc* court—precisely because it is an outlier.

The petition also purports to identify divisions about exactly when prevailing-party status results from a preliminary injunction. But the petition fails on this front, too. Across the circuits, courts employ a "contextual and case-specific inquiry," Pet. App. 30 (quoting *McQueary*, 614 F.3d at 601), asking whether the preliminary injunction (1) rests on a clear determination relating to the merits, and (2) alters the legal relationship between the parties in an enduring manner. Although the circuits' specific language occasionally varies, each asks fundamentally the same questions and applies the same legal principles. Any difference in outcomes is a result of different facts and procedural postures—not different legal standards.

A. There is no meaningful split about whether a preliminary injunction may constitute "some relief on the merits."

To qualify as a prevailing party, a plaintiff must "receive at least some relief on the merits of his claim." *Buckhannon*, 532 U.S. at 603 (quoting *Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987)). *Sole* clarified that "[p]revailing party status * * * does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." 551 U.S. at 83. But *Sole* had no occasion to address "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*. at 86.

In the sixteen years since *Sole*, every circuit to address whether a plaintiff who is awarded a non-vacated preliminary injunction has received "some relief

on the merits" has adopted the same basic legal inquiry. These courts consider whether the relief was based on a thorough examination of the merits, or whether it was hastily entered merely to preserve the status quo and provided only ephemeral relief. The only circuit to adopt a different test did so before *Sole*—and recently granted rehearing *en banc* to reconsider its outlier position. Given the highly lopsided nature of the purported split—and that any claimed division is likely to resolve itself—this Court's review is not warranted.

1. Petitioners correctly recognize that the Second, Fifth, Eighth, and Ninth Circuits all employ the same approach to the prevailing-party inquiry, but they are wrong to characterize it as a categorical rule. Contrary to Petitioners' claim, Pet. 12, these circuits do not hold that a likelihood-of-success finding at the preliminary injunction stage always satisfies the requirement that a prevailing party must obtain "some relief on the merits." Instead, these courts ask whether the preliminary injunction was based on a thorough assessment of a claim's merits, as opposed to being hastily entered to preserve the status quo or based primarily on a balancing of equitable factors. *See Haley* v. *Pataki*, 106 F.3d 478, 483 (2d Cir. 1997); *Mastrio* v. *Sebelius*, 768 F.3d 116, 120-122 (2d Cir. 2014) (per curiam) (reaffirming and applying *Haley*); *Dearmore* v. *City of Garland*, 519 F.3d 517, 524 (5th Cir. 2008); *Rogers Grp., Inc*. v. *City of Fayetteville*, 683 F.3d 903, 910 (8th Cir. 2012); *Higher Taste, Inc.* v. *City of Tacoma*, 717 F.3d 712, 717 (9th Cir. 2013).

Thus, the Second Circuit examines "whether a court's action is governed by its assessment of the

merits" through a "'close analysis of the decisional circumstances and reasoning underlying the grant of preliminary relief.'" *Haley*, 106 F.3d at 483 (quoting *LaRouche* v. *Kezer*, 20 F.3d 68, 72 (2d Cir. 1994)); *see also Mastrio*, 768 F.3d at 120. The Fifth Circuit similarly considers whether there was an "unambiguous indication of probable success," *Dearmore*, 519 F.3d at 524, and the Eighth Circuit examines whether a district court conducted "a thorough analysis" of the merits, *Rogers Grp.*, 683 F.3d at 910. The Ninth Circuit, too, asks whether a preliminary injunction hearing was "'hasty and abbreviated'" in assessing whether it confers prevailing-party status. *Higher Taste*, 717 F.3d at 716 (quoting *Sole*, 551 U.S. at 84).

Applying these principles, these circuits have upheld awards of attorney's fees where the district court's preliminary injunction was "clearly merit-based," *Dearmore*, 519 F.3d at 525, and its assessment was "not hasty and abbreviated," *Higher Taste*, 717 F.3d at 716 (quotation marks omitted). They have also affirmed fee awards where "the preliminary injunction was not one that merely maintained the status quo" based on equitable considerations, but instead was rooted "in a thorough analysis of the probability" of success "on the merits." *Rogers Grp.*, 683 F.3d at 910.

These same circuits have denied fee awards where preliminary injunction proceedings were "'hasty and abbreviated'" and it was "uncertain" whether a district court's order was based on "an assessment of the merits." *See R.G. ex rel. M.G.* v. *Minisink Valley Cent. Sch. Dist.*, 531 F. App'x 76, 80 (2d Cir. 2013) (quoting *Sole*, 551 U.S. at 84). They have likewise denied fee

awards where the district court's decision "involved no determination on the merits" and instead merely operated to "return to the status quo." *Mastrio*, 768 F.3d at 121-122.

2. Petitioners attempt to group the First and Third Circuits, and the Sixth and Tenth Circuits, into separate camps that supposedly apply different legal standards from those in the Second, Fifth, Eighth and Ninth Circuits. Pet. 10-13. There is no basis for these distinctions. All these circuits conduct the same basic inquiry and consider whether a preliminary injunction resulted from a thorough merits assessment rather than a hasty effort to preserve the status quo. And although the petition fails to mention them, the Eleventh and D.C. Circuits also apply the same principles.

As the petition acknowledges, the Sixth and Tenth Circuits conduct a non-categorical inquiry that considers the circumstances of each case, Pet. 13—one that is entirely consistent with the principles applied by the other circuits and by the court below. Both circuits consider whether the preliminary injunction order contained "a serious examination" of the legal issues on the merits, as opposed to a "hasty" decision that did not follow "full briefing," and whether the order rested merely on a desire to preserve the status quo. *Kan. Jud. Watch* v. *Stout*, 653 F.3d 1230, 1238 (10th Cir. 2011); Pet. App. 8-9; *McQueary*, 614 F.3d at 600-601. This inquiry is indistinguishable from the inquiry conducted by the Second, Fifth, Eighth, and Ninth Circuits. *Supra* pp. 13-15.

Contrary to Petitioners' claim, Pet. 11-12, the First Circuit follows the same approach. It, too, distinguishes between an "in-depth assessment" of a plaintiff's "substantive arguments" and a "hasty review of the likelihood of * * * success on the merits." *Sinapi* v. *R.I. Bd. of Bar Examiners*, 910 F.3d 544, 552 (1st Cir. 2018). Petitioners attempt to paint the First Circuit as adopting a categorical rule that a likelihood-of-success showing is insufficient to satisfy the merits requirement. Pet. 11-12. But *Sinapi*—the petition's only citation for this claim—expressly says otherwise: "[W]e are not holding that preliminary equitable relief, unless explicitly followed by a favorable judgment on the merits, can never provide the basis for an attorneys' fee award." 910 F.3d at 552. Indeed, the petition appears to recognize that its characterization of the First Circuit applies only "where 'precipitant circumstances permit[ ] no thorough examination of the merits.'" Pet. 12 (quoting *Sinapi*, 910 F.3d at 551).

The Third Circuit applies the same non-categorical inquiry, as the States' amicus brief admits. *See* States Amicus Br. 10 n.2. In *People Against Police Violence* v. *City of Pittsburgh*, the Third Circuit "agree[d]" with its sister circuits "that relief obtained via a preliminary injunction can, under appropriate circumstances, render a party 'prevailing,'" and thus upheld a fee award based on a preliminary injunction. 520 F.3d 226, 232-233 & n.4 (3d Cir. 2008) (collecting cases). Once again, the petition's only support for its contrary claim says the opposite. In *Singer Management Consultants, Inc*. v. *Milgram*, the *en banc* Third Circuit expressly affirmed "the well-supported legal

proposition that, in some cases, interim injunctive relief may be sufficient to warrant attorney's fees." 650 F.3d 223, 230 n.4 (3d Cir. 2011) (*en banc*) (quotation marks omitted) (discussing *People Against Police Violence*). The Third Circuit has repeatedly reaffirmed this position since *Singer*. *See, e.g.*, *Nat'l Amusements Inc.* v. *Borough of Palmyra*, 716 F.3d 57, 64 (3d Cir. 2013); *Tilden Recreational Vehicles, Inc.* v. *Belair*, 786 F. App'x 335, 344 (3d Cir. 2019); *Doe 1* v. *Upper Saint Clair Sch. Dist.*, No. 22-2106, 2023 WL 179846, at *1 (3d Cir. 2023); *Doe 1* v. *N. Allegheny Sch. Dist.*, No. 22-2245, 2023 WL 179845, at *1 (3d Cir. 2023).

The Eleventh Circuit likewise considers whether a party has received "merits-based relief." *Common Cause Ga.* v. *Georgia*, 17 F.4th 102, 107 (11th Cir. 2021). And the D.C. Circuit asks whether a preliminary injunction order was based "on the trial court's view of the merits" as opposed to "a perceived hardship to the plaintiff." *Select Milk Producers, Inc.* v. *Johanns*, 400 F.3d 939, 948 (D.C. Cir. 2005); *see also District of Columbia* v. *Jeppsen ex rel. Jeppsen*, 514 F.3d 1287, 1290 (D.C. Cir. 2008) (reaffirming *Select Milk Producers*).

3. When confronting the question presented, all of these circuits have repeatedly cited one another, acknowledging the fundamental similarity of their positions. Thus, the very courts that Petitioners claim are in disagreement maintain that they are applying the same standards.

The Third Circuit, for instance, has noted its "agree[ment]" with "nearly every Court of Appeals," citing decisions from the Sixth, Seventh, Ninth, Elev-

enth, and D.C. Circuits. *People Against Police Violence*, 520 F.3d at 232-233 & n.4. The Fifth Circuit has acknowledged that its approach "does not signal any disagreement" with the approaches followed in the Third, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits. *See Dearmore*, 519 F.3d at 521-523, 525, 526 n.4. Similarly, the Sixth Circuit has cited with approval decisions from the Seventh, Ninth, and D.C. Circuits. *McQueary*, 614 F.3d at 599. The Seventh Circuit signaled agreement with its "sister circuits" of the Ninth, Eleventh, and D.C. Circuits in *Dupuy* v. *Samuels*, 423 F.3d 714, 723 n.4 (7th Cir. 2005), which the Eighth Circuit in turn cited with approval, *Northern Cheyenne Tribe* v. *Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006). Reciprocating, the Ninth Circuit has recognized its alignment with the Eighth Circuit as well as the Second, Third, Fifth, Sixth, Seventh, and Eleventh Circuits. *Higher Taste*, 717 F.3d at 716-717. And, finally, the Tenth Circuit has cited with approval decisions from the Third, Sixth, and Ninth Circuits. *Kan. Jud. Watch*, 653 F.3d at 1237, 1240. These courts plainly do not consider themselves to be at odds with one another.

4. The only arguable outlier is a twenty-year-old decision from the Fourth Circuit, decided before *Sole*: *Smyth ex rel. Smyth* v. *Rivero*, 282 F.3d 268 (4th Cir. 2002). Although *Smyth* appears to foreclose attorney's fees when plaintiffs secure only a preliminary injunction because the court's "merits inquiry * * * is necessarily abbreviated," *id.* at 276, the *en banc* Fourth Circuit is currently reconsidering this position in light of its outlier status. *Stinnie* v. *Holcomb*, 37 F.4th 977 (4th Cir. 2022), *reh'g en banc granted*, No.

21-1756, 2022 WL 3210714 (4th Cir. Aug. 9, 2022). The court held argument in late January and its decision remains pending.

The timing of *Smyth*, and the background principles animating it, explain why this decision has remained an outlier. The *Smyth* opinion followed on the heels of this Court's decision in *Buckhannon*, holding that purely voluntary changes in conduct in response to litigation cannot support a fee award under Section 1988. *See Smyth*, 282 F.3d at 274-275. At the time, the Fourth Circuit held that "[a] plaintiff's burden to show a likelihood of success on the merits * * * varie[d] according to the harm the plaintiff would be likely to suffer absent an injunction." *Id.* at 277. Therefore, when "*Smyth* was decided, courts in [the Fourth Circuit] could grant preliminary injunctions on equitable grounds without a showing of likely success on the merits." *Stinnie*, 37 F.4th at 984 (Harris, J., concurring).

Based on that procedural framework, *Smyth* concluded that a preliminary injunction was "closely analogous * * * to the examples of judicial relief deemed insufficient in *Buckhannon*" to confer prevailing party status, such as denying a motion to dismiss, where the merits inquiry was "necessarily abbreviated." *Smyth*, 282 F.3d at 276. *Smyth* thus reflected a concern about awarding "prevailing party" status to a plaintiff who had obtained preliminary relief primarily due to the balance of the harms. *See id.* at 276-277; *Stinnie*, 37 F.4th at 984 (Harris, J., concurring).

But the Fourth Circuit has since adopted a new framework for analyzing preliminary-injunction requests. *Real Truth About Obama, Inc.* v. *Fed. Election*

Comm'n, 575 F.3d 342, 346 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010). Today, the Fourth Circuit requires a plaintiff to "make a clear showing that it will likely succeed on the merits at trial" in order to obtain a preliminary injunction. *Id.* at 346-347. This framework mitigates the concern underpinning *Smyth*. *See Stinnie*, 37 F.4th at 984 (Harris, J., concurring).

As Petitioners begrudgingly admit, Pet. 12 n.2, the *en banc* Fourth Circuit is currently reconsidering *Smyth* in *Stinnie*, No. 21-1756 (argued Jan. 25, 2023). In her concurring opinion calling for *en banc* review, Judge Harris explained that these later developments had significantly undermined *Smyth*'s rationale and confirmed that *Smyth* "is a complete outlier" because no other circuit employs "a bright-line rule that a preliminary injunction *never* can satisfy the prevailing party standard." *Id*. at 984-985 (Harris, J., concurring). Judge Harris also expressed concern that *Smyth*'s rule "allows defendants to game the system" by "litigating" a suit challenging a "very probably illegal provision * * * through the preliminary injunction stage," waiting until the "court confirms the likely merit of the plaintiff's claim," then "ceas[ing] the challenged conduct (or persuad[ing] the legislature to do so), moot[ing] the case, and avoid[ing] the payment of fees." *Id*. at 985.

This Court regularly denies review when it appears that any tension among the circuits may self-correct. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4 (11th ed. 2019). Granting review before the

Fourth Circuit clarifies its position would be premature, given the consensus that has emerged in the other circuits.

B. There is no meaningful split over what constitutes an "enduring" change in the parties' legal relationship.

There is similarly no split among the circuits on the standards for demonstrating "enduring" relief. This Court has said that in order to qualify as a prevailing party, a plaintiff must secure an "enduring 'chang[e] [in] the legal relationship' between herself and the" defendant. *Sole*, 551 U.S. at 86 (quoting *Tex. State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)). In other words, a plaintiff does not qualify as a prevailing party on the basis "of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Id*. at 83.

This rule has not generated confusion in the lower courts. The petition attempts to manufacture a circuit split by claiming that some courts have adopted a "strict framework" that requires a preliminary injunction to provide "all" the relief requested by a party in order to qualify as "enduring." Pet. 14-15. The petition does not expressly define what "all" entails—and whether it includes both preliminary and permanent relief, or whether "all" means preliminary relief on all substantive claims. But whatever the petition intends, no court has adopted such a rule. To the contrary, this Court has already held that a prevailing party is one who "receive[s] *at least some* relief on the merits of his claim." *Buckhannon*, 532 U.S. at 603

(emphasis added) (quotation marks omitted). Unsurprisingly, the petition therefore fails to demonstrate the existence of a split on this issue. In fact, the only judicial opinion Petitioners cite that advocates for this "strict framework" is the single-judge *dissent* in this very case, Pet. App. 14-15, which in turn does not cite *any* published decision from *any* court that has adopted its proposed rule.[5]

In an effort to obfuscate this omission, the petition attempts to muster a secondary split on an entirely different issue: whether a plaintiff must show "that the preliminary injunction caused the defendant to moot the action." Pet. 17 (quotation marks and brackets omitted). But the primary source for this claimed split, the Fifth Circuit, expressly *disclaimed* any outlier status from its sister circuits in the very decision Petitioners cite. *See Dearmore*, 519 F.3d at 521-522, 526 n.4.

1. No circuit requires parties to obtain "all the relief requested" to be "enduring." The petition expressly recognizes that the Second, Third, Sixth, Ninth, and Eleventh Circuits are aligned on when relief qualifies as "enduring." Pet. 16-17. So is the D.C. Circuit. In all these circuits, preliminary relief is "enduring" if it

[5] The dissent claimed that the Sixth Circuit applied this rule in an unpublished decision, *McQueary* v. *Conway*, 508 F. App'x 522 (6th Cir. 2012) (per curiam). But that decision merely considered whether the district court had abused its discretion in *denying* fees in part on that basis, and lauded the district court's "contextual and case-specific inquiry." *Id.* at 524 (quotation marks omitted). As the court's decision in this case proves, the Sixth Circuit does not follow the absolute rule the dissent advocates.

is neither "transient," "fleeting," or "ephemeral," nor "reversed, dissolved, or otherwise undone by the final decision in the same case." *See, e.g.*, *Planned Parenthood Sw. Ohio Region* v. *DeWine*, 931 F.3d 530, 539 (6th Cir. 2019) (quoting *Sole*, 551 U.S. at 78, 83, 86). The plaintiff need not receive "everything it asked for" in order to qualify as a prevailing party. *Id.* at 540; *see also Haley*, 106 F.3d at 483-484 (2d Cir.); *Singer*, 650 F.3d at 230 n.4 (3d Cir.); *People Against Police Violence*, 520 F.3d at 232-233 (3d Cir.); *Higher Taste*, 717 F.3d at 717 (9th Cir.); *Watson* v. *County of Riverside*, 300 F.3d 1092, 1094, 1096 (9th Cir. 2002); *Common Cause/Georgia* v. *Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009); *Select Milk Producers*, 400 F.3d at 945 (D.C. Cir.); *Xereas* v. *Heiss*, 987 F.3d 1124, 1136 (D.C. Cir. 2021). Applying this test, these circuits have awarded attorney's fees based on preliminary injunctions where the facts and circumstances warranted, and denied fees where they did not.

Contrary to the petition's claim, the Seventh and Eighth Circuits are aligned with the consensus position. Petitioners argue that the Seventh Circuit has established a rule that relief is "enduring" only when a preliminary injunction provides "all the relief" requested. Pet. 15 (quotation marks omitted). The Seventh Circuit has said no such thing. Like the rest of the circuits, that court looks to whether a preliminary injunction "resolved *any aspect* of the case in a sufficiently concrete and irreversible way," or whether the relief was "defeasible by further proceedings." *Dupuy*, 423 F.3d at 719, 722 (emphasis added) (quotation marks omitted).

Neither of the two Seventh Circuit cases Petitioners cite support their claims. In *Young* v. *City of Chicago*, 202 F.3d 1000 (7th Cir. 2000) (per curiam), the Seventh Circuit affirmed a fee award based on a preliminary injunction, even though the City mooted the case before it could reach final judgment. The court explained that "[a] defendant cannot defeat a plaintiff's right to attorneys' fees by taking steps to moot the case after the plaintiff has obtained the relief he sought, for in such a case mootness does not alter the plaintiff's status as a prevailing party." *Id*. at 1000-01. *Young* did not consider a situation involving a plaintiff who received some, but not all, of the relief requested.

Petitioners' characterization of *Dupuy* is even further afield. Pet. 15. There, the Seventh Circuit affirmed its decision *not* to adopt "a hard and fast rule that a preliminary injunction can never be an adequate predicate for" a fee award. *Dupuy*, 423 F.3d at 723. In so holding, the Seventh Circuit expressly aligned itself with other circuits holding "that attorneys' fees may be awarded after a party has obtained a preliminary injunction and the case subsequently has become moot." *Id*. at 723 n.4; *see also Zessar* v. *Keith*, 536 F.3d 788, 798 (7th Cir. 2008) (acknowledging that fees may be appropriate "where, despite there being no final judgment or consent decree, the legal relationship of the parties will be changed due to a defendant's change in conduct brought about by a judicial act exhibiting sufficient finality"). Applying this rule in *Dupuy*, the Seventh Circuit declined to award fees only because it was unclear whether the district court's preliminary ruling was sufficiently "'concrete

and irreversible'" to "warrant an interim attorneys' fee award" while the case was still pending. 423 F.3d at 722.

Relying on *Northern Cheyenne*, Petitioners also argue that the Eighth Circuit has adopted a "strict framework" that requires plaintiffs to obtain everything they ask for to qualify as a prevailing party. Pet. 15-16. But *Northern Cheyenne* merely asked whether the preliminary injunction had altered the legal relationship between the parties. *See Northern Cheyenne*, 433 F.3d at 1085-86. Consistent with the consensus position, *supra* pp. 12-17, the Eighth Circuit held that a preliminary injunction that merely preserves the "status quo" to avoid the risk of irreparable harm before a merits decision is typically not a "material alteration," as opposed to a preliminary injunction that rests on an assessment of likely success on the merits. *See id*. at 1086-87. Because the injunction in *Northern Cheyenne* was the former kind, fees were not appropriate. *Id*.

The Eighth Circuit's decision in *Rogers Group* represents a straightforward application of *Northern Cheyenne*—not, as Petitioners suggest, some sort of makeshift "workaround." *See* Pet. 16. There, "the district court engaged in a thorough analysis of the probability that Rogers Group would succeed on the merits of its claim." *Rogers Grp.*, 683 F.3d at 910. Because "the preliminary injunction was not one that merely maintained the status quo" but was instead "a court-ordered change in the legal relationship between the parties," the court upheld the fee award. *Id*. (quotation marks omitted).

To be sure, the dissenting judge below does appear to articulate a strict all-the-relief-requested requirement. *See* Pet. App. 14-15. But, as the foregoing discussion makes clear, no court of appeals has ever adopted such a rule—which would be at odds with this Court's decision in *Buckhannon*, 532 U.S. at 603. The petition's efforts to leverage the dissent's isolated and novel proposition into a genuine circuit split rests on out-of-context language drawn from circuits that do not apply such a rule.

2. The petition also fails in its attempt to manufacture yet another sub-split, this time over whether a plaintiff must show that the defendant acted to moot the case "in response to a court order, not just in response to the filing of a lawsuit," to qualify for prevailing party status. *Amawi* v. *Paxton*, 48 F.4th 412, 418 (5th Cir. 2022) (quoting *Dearmore*, 519 F.3d at 524). Notably, even if this were the standard, Respondents here would still qualify for fees, so this case provides no reason to address this issue. *See infra* p. 28.

But the Fifth Circuit's consideration in *Amawi* of whether a preliminary injunction caused the defendant to moot the case does not make it an outlier. In fact, when it first articulated this consideration, the court expressly declared that its "test does not signal any disagreement with the approaches adopted by the other circuits, with the exception of the Fourth Circuit"—which had not yet taken this question *en banc*. *Dearmore*, 519 F.3d at 526 n.4; *see also id*. at 521-522 (collecting cases).

Those other circuits have considered the causal relationship between the court order and any subsequent mootness as a factor in their context-driven

analysis of whether relief is sufficiently enduring. *See, e.g.*, *People Against Police Violence*, 520 F.3d at 233-234; *Select Milk Producers*, 400 F.3d at 949-950. The same goes for the Eighth Circuit's passing consideration of causation in *Northern Cheyenne*. 433 F.3d at 1086. Like the Fifth Circuit, the Eighth Circuit has emphasized the similarity of its approach to that of its sister circuits. *See supra* p. 18. Tellingly, the petition does not cite a single example of a fee award that would have been rejected in the Fifth or Eighth Circuits, but was affirmed elsewhere.

In short, there is no division among the circuits that requires harmonization. There is no split on when a preliminary injunction constitutes relief "on the merits," or on when a preliminary injunction is "enduring," or on the causal relationship between a preliminary injunction and any subsequent mootness. The circuits have coalesced around a context-specific test for addressing those questions, meaning there is no need for this Court's intervention.

II. THIS CASE IS A POOR VEHICLE TO ADDRESS THE QUESTION PRESENTED.

In any event, this case is a poor vehicle to review the question presented because Respondents would prevail under any of the approaches described in the Petition—except the Fourth Circuit's outlier approach in *Smyth*, which the *en banc* court is actively reconsidering. *See Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 192 (1997) (the Court "should not consider differences among the various * * * rules used by the Circuits" where they "would [not] affect the outcome in this case").

There is no serious dispute in this case about the petition's leading issue—whether the relief here was "on the merits." Both the majority below (Pet. App. 7) and the dissent (Pet. App. 14) agree that the preliminary injunction here rested on the legal merits of the case. Moreover, Petitioners did not argue below that preliminary injunctions can *never* qualify as sufficient relief on the merits to result in a "prevailing party" determination, making this a particularly poor vehicle for addressing that question. *See* Br. of Defendants-Appellants, *Tenn. State Conf. of NAACP* v. *Hargett*, 53 F.4th 406 (6th Cir. 2022) (No. 21-6024); Reply Br. of Defendants-Appellants, *Hargett*, 53 F.4th 406 (No. 21-6024).

This case is also a poor vehicle to consider whether the relief was sufficiently "enduring" because—even assuming the petition has identified a meaningful division among the circuits—Respondents would win under *any* of the approaches Petitioners purport to identify. The Sixth Circuit expressly determined that Respondents secured "irrevocable" relief, Pet. App. 8-9 (quotation marks omitted)—echoing the language Petitioners rely on in the Seventh and Eighth Circuit cases that the petition cites on this issue. *See supra* pp. 23-25. This case also satisfies any "causal component" of the analysis. Pet. 17. Petitioners and legislators expressly and repeatedly acknowledged that the subsequent amendment to the law was prompted by, and designed to comply with, the district court's preliminary injunctions. *See supra* pp. 6-7.

Tellingly, the dissent below did not employ a test used by *any* circuit. Instead, it broke new ground in arguing that a preliminary injunction must grant

"everything" a plaintiff asks for to qualify as sufficiently "enduring." *See* Pet. App. 14-16. Although Petitioners have yet to clearly state what analysis they think this Court *should* apply to the question presented, *see* Pet. 23-24, even they do not appear to defend the dissent's radical departure from the post-*Sole* consensus approach among the lower courts.

III. THE DECISION BELOW IS CORRECT.

The Sixth Circuit's approach to determining prevailing-party status is firmly grounded in this Court's precedents and was correctly applied in this case.

The Sixth Circuit's inquiry follows directly from this Court's precedents. In order to qualify as a "prevailing party" under Section 1988, the plaintiff must obtain "at least some relief on the merits of his claim." *Buckhannon*, 532 U.S. at 603 (quotation marks omitted). That relief must represent a "material alteration of the legal relationship of the parties." *Id*. at 604 (quotation marks omitted); *see also Lefemine* v. *Wideman*, 568 U.S. 1, 4 (2012) (per curiam). It "must not have been 'reversed, dissolved, or otherwise undone by the final decision in the same case.'" Pet. App. 7 (quoting *Sole*, 551 U.S. at 83). And it must be "enduring." *Id*. (quoting *Sole*, 551 U.S. at 74).

The Sixth Circuit correctly held that the first three requirements were "undisputedly met here: the district court entered a preliminary injunction that enjoined defendants from enforcing H.B. 1079 against them" after extensively analyzing the merits, and "that injunction was never reversed, dissolved, or even vacated." *Id*.

The Sixth Circuit thus correctly focused on the only issue disputed by Petitioners: "whether the court's relief was 'enduring' enough to support prevailing party status." *Id*. (quoting *Sole*, 551 U.S. at 74). Consistent with *Sole* and the approach taken in all circuits to have addressed this issue since *Sole*, the Sixth Circuit appropriately distinguished between "fleeting" or "hasty" injunctions, on the one hand, and "enduring" and "irrevocable" relief on the other. Pet. App. 8-9; *see, e.g.*, *Sinapi*, 910 F.3d at 552; *Minisink*, 531 F. App'x at 80; *Higher Taste*, 717 F.3d at 717-718.

Applying this consensus approach, the Sixth Circuit correctly determined that the relief Respondents secured was sufficiently enduring. The District Court never vacated or dissolved the injunction, nor did Petitioners appeal or otherwise seek vacatur. Pet. App. 6-7. Given the District Court's extensive merits analysis, the prospect that the District Court might "reverse course, and enter judgment in favor of the defendants, was remote in the extreme." *Id.* at 9-10. And, practically speaking, the relief was irrevocable: Respondents were able to communicate with the public regarding voter registration and engage in their voter registration activities for seven months before the 2020 election without meeting the law's requirements—and the effects of their actions cannot now be undone. *Id.* at 8-9.

The Sixth Circuit's approach is plainly not the "catalyst" theory rejected in *Buckhannon*. Under the catalyst theory, a plaintiff could be deemed a prevailing party "where there is no judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 605. In *Buckhannon*, the defendant

changed its conduct to moot the case immediately after the complaint was filed. *Id.* at 600-601. Here, by contrast, Petitioners changed their conduct only after a court-ordered preliminary injunction materially altered the legal relationship between the parties, and the relief awarded by the court could not be undone. *See* Pet. App. 32-33. Thus, contrary to the petition and dissent's claims, granting fees under these circumstances does not "promote[ ] * * * the catalyst theory." Pet. 9; Pet. App. 13. On the contrary, the Sixth Circuit's decision is entirely consistent with the precedents—*Buckhannon* and *Sole*—rejecting that theory.

IV. THE QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW.

Finally, this Court has repeatedly declined to review the question presented here. *Yost* v. *Planned Parenthood Sw. Ohio Region,* 141 S. Ct. 189 (2020) (No. 19-677); *Davis* v. *Abbott,* 136 S. Ct. 534 (2015) (No. 15-46); *King* v. *Kan. Jud. 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).

This Court has repeatedly denied review for good reason: The circuits' common approach is correct and does not give rise to any practical problems. The only relevant development since the Court's most recent denial of the petitions cited above is that the Fourth Circuit has decided to address this issue *en banc*—making the question presented an even less suitable candidate for this Court's review now. Petitioners' and the States' contrary arguments are red herrings.

1. The question presented is inherently narrow: It arises only when plaintiffs have secured a preliminary injunction but a case is mooted before final judgment—and even then only in the limited circumstances when the case-specific inquiry applied by the circuits is satisfied. *See, e.g.*, *Amawi*, 48 F.4th at 416 (describing this as a "narrow" situation); *McQueary*, 614 F.3d at 601 (acknowledging test "will generally counsel against fees in the context of preliminary injunctions").

Attorney's fees are not available, for example, if a State voluntarily moots the case *before* a preliminary injunction decision issues or where the State obtains reversal of the preliminary injunction on appeal or chooses to continue litigating through the merits and ultimately prevails. *Sole*, 551 U.S. at 83. Furthermore, contrary to the amicus States' claim, no circuit allows a fee award simply "because changing a law would better serve the public interest." States' Amicus Br. 15. That is because, under the prevailing contextual and case-specific inquiry, fees are only available where a preliminary injunction is based on a thorough assessment of the merits, as opposed to just balancing the equities.

2. Given these realities, there is no merit to Petitioner's claims (Pet. 18-19) that the consensus approach of the circuits places an unwarranted financial burden on the States. Attorney's fees in cases involving preliminary injunctions alone are generally for relatively modest amounts compared with awards following merits decisions. Petitioners call out "six-figure" fee awards in individual cases, Pet. 18-19, but they do not attempt to contextualize those figures in

any way, let alone compare those fees to the costs associated with litigating those cases to final judgment. And, tellingly, Petitioners did not seek to appeal the amount of the fees awarded here.

Moreover, the consensus approach has been the rule in virtually every circuit for over a decade—yet Petitioners can identify no more than a handful of isolated instances of such significant awards. That is strong evidence that the consensus approach has not had an unmanageable impact on state budgets.

States can also take a number of intermediate approaches to reduce or limit fee awards, including negotiating with plaintiffs to limit or forgo fee awards in exchange for a voluntary settlement. Or, if a State believes it must adopt a different approach, it can appeal the preliminary injunction and/or litigate the case to a merits judgment, with the clear understanding that this course may impose a greater financial burden—both in terms of the State's own litigation costs and a potential fee award.

3. Contrary to the petition's claims, fee awards based on preliminary injunctions do not "ossify state law and policy" or lead States to "litigate cases tooth-and-nail." Pet. 19-20. Attorney's fees are far from the only element of a state official's political calculus, and there is no reason to think that leaving the status quo in place will somehow "drive[ ] state lawmakers *away* from compromise." *Id.* at 19. Petitioners' behavior in this very case proves the point. Neither the District Court's opinion granting fees nor the Sixth Circuit's opinion affirming the fee award broke new legal ground. *See* Pet. App. 33-37, 9-10. Petitioners were thus on notice that they might face a fee award as a

result of the preliminary injunction under existing precedent. But despite that risk, Petitioners did not feel compelled to appeal the preliminary injunction or litigate the merits case to judgment, nor did the legislature feel any apparent constraint to avoid changing the law. That is because States consider many factors when deciding whether to resolve litigation after a preliminary injunction order—most importantly, whether they assess a district court's analysis to be strong enough to hold up as the litigation moves forward. That is an entirely appropriate consideration when government officials are deciding whether to change course.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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