No. 06-531

# In The Supreme Court of the United States

MICHAEL W. SOLE,
SECRETARY, FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION, *et al.*,

*Petitioners*

v.

T.A. WYNER AND GEORGE SIMON,

*Respondents*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF FOR RESPONDENTS


RANDALL C. MARSHALL
ACLU FOUNDATION OF FLORIDA, INC.
4500 Biscayne Blvd.
Miami, FL 33137

JAMES K. GREEN
JAMES K. GREEN, PA.
Suite 1650, Esperanté
222 Lakeview Ave.
West Palm Beach, FL 33401

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

BETH S. BRINKMANN
SETH M. GALANTER
*Counsel of Record*
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 887-6947

*Attorneys for Respondents*


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OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Whether respondents are entitled to reasonable attorneys' fees as prevailing parties under 42 U.S.C. § 1988 for the time expended to obtain a judicial order that enjoined state officials from interfering with or arresting them for an anti-war protest in a state park.

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## INTRODUCTION

This case involves an award of attorneys' fees for time spent to obtain a preliminary injunction that barred state officials from interfering with or arresting participants in an anti-war nude peace sign protest. The protesters won that preliminary injunction that allowed their protest to go forward as planned. The state officials lost.

Efforts by petitioners and their *amici* to undermine that victory and claim that the protesters were something other than the prevailing parties rely on a mischaracterization of the record and of the nature of the judicial order that resulted.

Contrary to the suggestions by petitioners and the United States, it was delay by state officials that limited the time for addressing a preliminary injunction, not any delay by the protesters. Respondent Wyner notified state officials a month in advance of the planned protest that was to include a peace sign composed of nude individuals. That notification was consistent with the ongoing cooperation between respondent Wyner and the state officials that arose out of a relationship that dated back more than a decade. Early in the past decade, Wyner had been arrested and threatened with arrest by state officials on various occasions because of her nude events at the beach. More recently, however, her nude events had been met "with cooperation or at least tolerance" by the state officials following an earlier round of state court litigation. Pet. App. 10a. In settling the earlier litigation, state officials had explicitly recognized that "nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." J.A. 22. Accordingly, state officials had allowed Wyner to direct and perform a play at the beach that contained nudity without interference or arrest.

Consistent with that history and past practice, the park manager for this protest initially responded to Wyner's notification about the nude anti-war protest in this case by stating that he was "sure that everything would work out fine" and that he did "not anticipate any

problems." *Id*. at 26. State officials waited until one week before the scheduled protest date to send Wyner a letter with their change of position. In that letter, Wyner was informed for the first time that state officials now believed the planned nude anti-war protest was not expressive conduct protected by the First Amendment and, even if it were, a prohibition on nudity at the protest was a reasonable manner restriction despite the fact that state officials had not previously prohibited nudity on the beach when it was part of a play rather than a political protest. Wyner moved with dispatch to bring a suit to allow the nude anti-war protest to go forward as planned without interference or arrest by state officials. She won precisely the relief she sought.

The judicial order enjoining petitioners from interfering with respondents' protest was based on what the district court recognized to be candid testimony by a state official that the State was applying the regulations regarding nudity differently to the nude anti-war protest than to the prior nude plays, undermining the State's argument that it was an appropriate manner restriction. The judicial order created a material change in the relationship between the protesters and the state officials. As a result of the preliminary injunction, the protesters engaged in their February 14, 2003 anti-war protest at the time, location, and in the manner planned, and state officials are permanently barred from imposing criminal sanctions on the protesters for that protest. That material alteration of the legal relationship between the parties by court order authorized the district court to award respondents reasonable attorneys' fees under 42 U.S.C. § 1988, limited to the fees incurred to obtain the preliminary injunction.

## STATEMENT

### A. Factual Background

The impetus for this case was the decision by state officials to deny a request by respondent T.A. Wyner for permission to create a temporary art installation

composed of nude individuals in the form of a peace sign as part of an anti-war protest scheduled to take place in the MacArthur Beach State Park on February 14, 2003. Petitioners are the manager of the park, Terence Coulliette, and the Secretary of the Florida Department of Environmental Protection who is responsible for the park.[1]

State officials had prior experience with events by Wyner involving nudity at the beach dating back more than a decade to when the State adopted rules prohibiting nudity at this particular beach that had historically had a clothing-optional section. Pet. App. 11a; J.A. 120-121 (State acknowledging such historical use). Respondent Wyner as well as respondent George Simon had brought earlier litigation in connection with arrests and threats of arrest at those events. Pet. App. 11a-12a. Indeed, state officials had entered into a 1995 court-enforceable settlement of respondent Simon's earlier suit that provided, in part, that although the state officials "do not condone or encourage nudity at John D. MacArthur Beach State Park, they recognize that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." Pet. App. 11a-12a; J.A. 22. Subsequent to that settlement, Wyner engaged in nude theatrical events on occasion at the beach without arrest. Pet. App. 12a.

In mid-January 2003, respondent Wyner notified petitioner Coulliette by telephone of her intent to engage in a peaceful anti-war protest involving nudity to occur at the state beach the following month, on February 14, 2003. J.A. 60a. Her notification was consistent with the spirit of the settlement agreement and pursuant to the park's rules that indicated that persons engaging in "[f]ree speech activities," such as performances, displays, and signs, could contact the park manager to "determine what restrictions as to time, place, and manner may apply." Pet.

[1] David D. Struhs was sued in his official capacity as Secretary of the Department; he has been succeeded by Michael W. Sole.

App. 6a n.3 (reprinting Fla. Admin. Code Ann. r. 62D-2.014(18)).

Respondent Wyner received no response from the state official for approximately two weeks. J.A. 24. On January 28, 2003, Coulliette responded to ask that Wyner repeat her intentions in writing. Wyner did so the next morning, on January 29, 2003, via electronic mail. Respondent Wyner explained:

> In the spirit of cooperation, I phoned MacArthur Park two weeks ago to let you know of my plans to return to MacArthur Beach for a traditional peaceful demonstration, during the annual Winter Naturist Gathering in Palm Beach County. When you responded to my call, after returning from vacation, I explained my plans to date. After discussing my plans with your supervisor(s), yesterday you phoned to request I repeat my plans in writing.

*Id*. at 24. Respondent Wyner explicitly stated that she planned "to create a temporary art installation, comprised of nude bodies * * * on the traditionally clothing optional section" of the beach. *Ibid.* Moreover, she reiterated her desire to cooperate with petitioners, even though she believed that the First Amendment protected her proposed event. *Id*. at 25.

Later in the day on January 29, petitioner Coulliette responded by electronic mail and stated that he was "sure that everything will work out fine, as we communicate effectively, and seek cooperation and understanding." *Id*. at 26. Coulliette stated that he was forwarding Wyner's letter to the Bureau Chief, Parks District Five, for "review, consideration and input," and he did "not anticipate any problems at this time." *Ibid.*

On February 6, 2003, more than a week later, and just a week before the planned protest, petitioner Coulliette, on behalf of the Department, wrote Wyner a letter taking a different position. Contrary to the longstanding court settlement, the state officials now took the position that the First Amendment did not apply. The letter declared

that, "[a]t this time, the Division does not believe that the nudity planned for your activities is expressive conduct protected by the First Amendment." *Id*. at 29. The letter further stated that, "even if this were not the case," the State believed that "the decision not to allow nudity as part of your demonstration is a reasonable manner restriction." *Ibid*. The letter further noted that clothing was required by Florida Administrative Code Ann. r. 62D-2.014(7)(b), *id*. at 29, *see* Pet. App. 6a n.2 (reprinting provision), which state officials earlier had informed Wyner was enforceable by arrest and punishment as a misdemeanor. J.A. 57.

## B. Proceedings Below

### 1. Preliminary Injunction

After receiving the state officials' letter with their new position that the planned nude anti-war protest was not constitutionally protected and would be criminally prohibited, respondent Wyner filed the instant suit seeking a court order to allow the planned protest to go forward on February 14, 2003, without interference or arrest by state officials. The Valentine's Day date of the event was scheduled to coordinate with other anti-war protests that weekend. Pet. App. 20a-21a; J.A. 65. Respondent George Simon, now a resident of Hawaii, also joined as a plaintiff because he intended to travel back to Florida from Hawaii to videotape the February 14, 2003 anti-war protest. J.A. 12; Pet. App. 10a.

Respondents brought the action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida on February 12, 2003, claiming violations of the First and Fourteenth Amendments. J.A. 18-19. Respondent Wyner alleged that she planned to engage in expressive conduct on February 14, 2003, and feared arrest. *Id*. at 17. Respondent Simon alleged that he wanted to travel to Florida to observe the protest on February 14, 2003, in an uncensored form. *Ibid*. The first claim for relief specifically sought the court's entry of "injunctive relief prohibiting [the state officials]

from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." *Id*. at 18.

Respondent Wyner also separately alleged that she intended to conduct expressive conduct in the future in the park involving non-erotic displays of nude bodies. *Id*. at 17. Based on that allegation, she sought in a separate claim for relief the court's entry of "injunctive relief prohibiting defendants from interfering with future expressive activities that may include non-erotic displays of nude human bodies." *Id*. at 19. Both respondents further sought, *inter alia*, attorneys' fees under 42 U.S.C. § 1988. *Id*. at 19.

Simultaneous with the filing of the complaint, respondents filed a Motion for Temporary Restraining Order and/or Preliminary Injunction to enjoin petitioners from arresting Wyner or otherwise interfering with the planned protest. *Id*. at 32-34. Respondents requested that the district court waive the time requirements of Federal Rule of Civil Procedure 65 and hold an immediate hearing. *Id.* at 32. They explained that it was only late the week before that petitioners had notified Wyner that they "disavowed [the] agreement" from 1995 in which they theretofore had acknowledged that "nudity coupled with expressive activity is protected by the First Amendment." *Id*. at 33.

The state officials filed a memorandum of law opposing the motion. *See* Pet. Mem. of Law in Opp. to Resp. Emergency Mot. for Temporary Restraining Order and/or Preliminary Injunction. They did not claim that they had insufficient time to respond, nor did they claim that respondents were somehow dilatory in filing the complaint and motion. Indeed, state officials later acknowledged that they had anticipated Wyner's legal challenge "as of early 2003," when she first wrote to them. Pet. Mem. of Law in Opp. to Mot. to Compel, Dist. Ct. Dkt. 52, at 3. They did not oppose respondents' request

to waive the time requirements of Federal Rule of Civil Procedure 65.

The district court convened a hearing on February 13, 2003, to consider respondents' request for a preliminary injunction. The court noted at the hearing that there was "short notice," but it understood that "the plaintiff ha[d] only had since about the 6th since she apparently got word that she couldn't do what she wanted to do." J.A. 37. The court specifically noted that petitioners were able to respond to the motion with their own memorandum. *Ibid.*; *see also Id.* at 96. Contrary to the claim of the United States that the district court was denied "adequate time to read the relevant case law" (U.S. Br. 4), the district court made clear that it had "read [the] memorandum" filed by the state officials, "together with I believe all the cases both of you have cited." *Id.* at 37; *see also id.* at 81 (district court discussing case law during hearing), *id.* at 92 (district court stating "I have heard the arguments, read the cases").

Respondent Wyner testified at the hearing. *Id.* at 44-69. She described her prior expressive activities involving nudity at MacArthur Beach State Park as well as the court-enforceable stipulation in respondent Simon's prior lawsuit in which respondent Wyner's plays involving nudity are expressly mentioned and in which the state officials "recognize[d] that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." *Id.* at 22, 47-52. Wyner testified that the February 14, 2003 event was "intended to be a protest against the potential war in Iraq," *id.* at 60, and, based on the settlement and her initial contact with petitioner Coulliette, there had appeared to be no legal impediment to her plan. *Id.* at 63. Petitioners did not challenge Wyner's credibility. Indeed, petitioners had noted at the outset that there were no disputed facts. *Id.* at 39; *see also id.* at 42.

Respondents also proffered an affidavit from respondent Simon, which explained that he was planning

to fly from Hawaii to Florida with the intent to witness and videotape the February 14, 2003 protest at MacArthur Beach State Park. *Id*. at 67-68.

The state officials introduced testimony by Peter Scalco, the chief of operations for the Florida Park Service. *Id*. at 70-77. Mr. Scalco testified that he had observed all of respondent Wyner's plays in the park since 1997 as the assistant bureau chief in the district in which MacArthur Beach State Park is located. *Id*. at 70, 73. On cross-examination, Mr. Scalco was asked why the Department allowed some performances in the nude but prohibited others. *Id*. at 71. Mr. Scalco testified that the Department sought the advice of legal counsel. *Id*. at 73-76. He testified that they looked at each event individually to see if the same rules applied. *Id*. at 71. If he thought "there may be some controversy," he would ask for an opinion. *Id*. at 73. He acknowledged that "in each of those instances where nudity occurred" in plays at the beach, the Department did not apply its regulations requiring bathing suits – not because the nudity did not violate the regulations, but because "the context of the play fell within the parameters of our understanding of the legality of the action." *Id*. at 74. On redirect examination, the state attorneys confirmed that in past years they had been dealing with a specific play by Ms. Wyner, and that "this year something other than the play [was] going to go on." *Id*. at 77.

In response to a question from the court as to what was the basis for the different treatment of respondent Wyner's plays where nudity had sometimes been allowed and the proposed February 14, 2003 protest at issue before the court, Mr. Scalco testified that "the previous plays * * * talked about John D. MacArthur and the history of the park and this one seems to be about a peace demonstration." *Ibid*.

The court granted the motion for preliminary injunction at the close of the hearing. *Id*. at 93. The court ruled that "it is clear" that Wyner's "protest does involve expression, it's not nudity for nudity's sake, the nudity

seems to be a significant part of the kind of statement that she is attempting to make, and I think that, while at least to me it seems a bit strange to protest the war in that fashion, I credit her statements about the vulnerability that it shows with respect to the war and the fact that there are no weapons." *Id*. at 94. The court found that "to ban it with respect to an anti-war protest is not in keeping with the First Amendment." *Id*. at 95.

The court specifically found "that it is apparent that on previous occasions Ms. Wyner's nude expression has been permitted and tolerated." *Id*. at 93. The court concluded that, although the Department argued that the nudity ban was "across-the-board and relates to free speech activities in every instance and that may be the intention going forward," "that has not been the history." *Id*. at 94. The court emphasized that testimony that an anti-war demonstration is different from a play was worrisome. *Ibid*. The court concluded that there were alternatives to meet the government's interests that were less restrictive than a complete nudity ban, such as signs and a barrier to advise beachgoers of the nudity in that area of the beach, which the State could explore. *Ibid*.

Finally, the court noted that there were other issues on which he was not prepared to rule that day, but that he was "satisfied with respect to this issue." *Id*. at 95.

Later that day, the district court entered a written preliminary injunction ordering that petitioners, in their official capacities, "shall neither prevent nor interfere with Plaintiffs' planned event on February 14, 2003." Pet. App. 19a.[2] The court stated that the questions before it were, "judging on the standards applied to a preliminary injunction motion, whether the planned activity is indeed expressive conduct, and if so, whether the restrictions, as applied to this activity, are permissible, and thus whether [the state officials'] prevention of the event would be a

[2] A version of the order correcting some typographical errors was filed on February 27, 2003, and is the version reprinted in the Petition Appendix.

First Amendment violation." Pet. App. 13a. Consistent with Eleventh Circuit precedent, the court held that respondents had "clearly established": (1) a substantial likelihood of success on the merits; (2) irreparable harm to respondents; (3) that the threatened injury outweighed any potential damage to the Department; and (4) that the injunction would not be adverse to the public interest. Pet. App. 14a. The court reasoned that the last three factors, *i.e.*, harm, comparative injury, and the public interest in this case, all depended on the first factor – the merits of whether the State's suppression of the activity would violate the First Amendment. *Id*. at 14a.

The court ruled in respondents' favor on the threshold claim, that "[n]ude overtly political speech in the form of a 'living nude peace symbol' is expressive conduct well within the ambit of the First Amendment," *id*. at 15a, and it recognized circuit precedent holding that the particular beach is a public forum. *Id.* at 16a. The court emphasized its concern that the rules had not been applied in a content neutral fashion and that "[t]he Department indicated that the restrictions on speech activities are different when applied to plays and other artistic activities as compared to acts of political expression such as a peace demonstration or antiwar protest." *Id*. at 16a-17a. The district court found it unnecessary to rely on the apparent lack of content neutrality of the Department's actions because respondents prevailed even under the *O'Brien* test. *Id*. at 17a, 22a n.5. As the court explained, "[t]here have already been instances of nude expression allowed in the Park" and the earlier settlement laid out less restrictive alternatives to a total ban on nudity. *Id*. at 18a. The court further noted that "the result in this case would be essentially the same regardless of which test were applied." *Id.* at 21a n.2. Thus, the court concluded, that "it is impossible to maintain the total ban on nudity as a reasonable restriction on the manner in which the 'living nude peace symbol' may be presented." *Id*. at 19a. In a final observation, the court noted that "[p]rotesting a potential war through naked protest seems a bit quixotic, but it is also part of the freedom that both those

supporting the war and those who oppose it seek to protect." *Ibid*.

The state officials did not seek a stay of the injunction from the district court. They did not exercise their statutory right to an immediate appeal of the preliminary injunction, *see* 28 U.S.C. § 1292(a)(1), and they did not seek a stay from a panel of the court of appeals, *see* Fed. R. App. P. 8(a)(2), or one of its judges, *see* Fed. R. App. P. 8(a)(2)(D).

The injunction therefore went into effect and respondents' anti-war protest involving a nude peace sign took place as scheduled on February 14, 2003, at the state park. As ordered by the court, the state officials did not and could not interfere or arrest respondent Wyner and the other participants for their peaceful protest.[3]

**2. Summary Judgment And Attorneys' Fees Award**

a. After the February 14, 2003 anti-war protest, the litigation continued on respondent Wyner's request for permanent injunctive relief to allow for future expressive activities by her that involved nudity to take place at the beach.

At a hearing on cross-motions for summary judgment, the district court made clear that the as-applied challenge to the State's application of the nudity ban to the February 14, 2003 protest on which the preliminary injunction had been granted was significantly different from the

[3] The court had made clear that its "injunction does not preclude the posting of notices or signs advising Park visitors of the occurrence of th[e] event nor the use of other measures used in the past with respect to [respondent Wyner's] play [containing nudity]." Pet. App. 19a-20a. The court's injunction did not, however, require respondents to post notices or use a screen to hide the protest from the public. Nor did petitioners inform respondent Wyner on the day of the protest that she and the other demonstrators were required to stay behind a screen while nude. *See* Pet. Mem. of Law in Opp. to Resp. Mot. for Summary Judgment, Dist. Ct. Dkt. No. 69, at 6; Resp. Reply to Pet. Opp. to Resp. Mot. for Summary Judgment, Dist. Ct. Dkt. No. 77, at 8 n.12.

challenge that remained before the court to the constitutionality of the nudity ban regulation on its face. J.A. 102. The court emphasized that it had "granted the injunction basically based on the as applied arguments," focusing on the testimony that the reason the state officials did not let respondent engage in nudity this time was because "this was an anti-war protest" and not a play. *Id*. at 102; *id*. at 141.[4] By contrast, the court stated that all that was left was the facial challenge to the rule that one has to wear a bathing suit and that was "not a very strong case." *Id*. at 102. Whereas the court saw the merit in the case "we had before" where the State allowed some nude expression but then drew "the line at the anti-war protests," it did not find merit to the remaining facial challenge. *Id*. at 103. The court explained that "the danger at least that we saw" at the time of the preliminary injunction "was a decision being made based on content," and that was "no longer present" because prospectively the nudity ban, on its face, applied regardless of the event. *Id*. at 129; *id*. at. 129-130 ("the opinion could be read different ways, but really the reason for the opinion was [that state official's] testimony that this is, we can't do this one because it's an anti-war protest, that was the driving force behind the preliminary injunction.").

On January 28, 2004, the district court entered an order granting summary judgment to the state officials in relevant part. Pet. App. 23a-48a. The district court held that the preliminary injunction had "expired on its own terms" because it had applied only to the February 14, 2003 event. *Id*. at 34a. The court again noted that the preliminary injunction was based on the evidence that the nudity ban had been applied in a content-based fashion. *Id*. at 47a n.2. The court expressly held that respondents

[4] Petitioners' attempt to undermine the credibility of the testimony on this straightforward question by claiming that it was "preliminary and rushed," Pet. Br. 7, ignores the district court's contrary assessment of the candor of the testimony. J.A. 114, 141.

were "successful at the preliminary injunction stage." *Id*. at 45a.

The statement by the district court elsewhere in the opinion that is highlighted by petitioners (Pet. Br. 10, quoting Pet. App. 35a) to the effect that respondents failed to show "actual success on the merits," plainly referred to the court's subsequent ruling in the opinion on the facial challenge. On that facial challenge that supported the request for a permanent injunction, the court ruled that respondents had not established that the State's across-the-board ban on nudity was unconstitutional on its face and it declined to permanently enjoin the state officials from enforcing the anti-nudity regulation as a reasonable manner restriction on free speech activities on the beach. Pet. App. 35a-42a.

b. The district court retained jurisdiction "for the purpose of awarding costs and fees, including those expended on the Motion for Preliminary Injunction upon which [respondents] prevailed." J.A. 145.

Respondents subsequently filed a motion to recover attorneys' fees under 42 U.S.C. § 1988 for the work expended to obtain the preliminary injunction that allowed the February 14, 2003 anti-war protest to proceed without interference or arrest by the State, which was "the primary purpose for filing this litigation." Resp. Mem. of Law in Supp. of Application for Award of Attorneys' Fees and Reimbursement of Litigation Expenses, Dist. Ct. Dkt. 90, at 1. Respondents did not seek to recover fees for the time expended pursuing any relief other than the preliminary injunction. *Id.* at 2.[5]

The district court awarded respondents $25,924.50 in attorneys' fees. The court explained that respondents

[5] Respondents also did not seek any attorneys' fees against petitioner Coulliette in his individual capacity because no injunctive relief was sought against him in his individual capacity, J.A. 12 ¶ 10, and because the district court held that petitioner Coulliette in his individual capacity was entitled to qualified immunity on the damages claim. Pet. App. 32a.

prevailed on their as-applied challenge, and that "the driving force behind" the court's decision was the testimony of the State's witness at the preliminary injunction hearing that indicated that anti-war protests were treated differently by the State than plays. Br. in Opp. App. 4a n.2. Accordingly, the court held that respondents "achieve[d] one of the primary purposes for filing this litigation, [the] prevention of the [petitioners] from interfering with the temporary art installation planned for February 14, 2003." *Id*. at 3a.

### 3. Eleventh Circuit Affirmance

The court of appeals affirmed. Pet. App. 1a-8a. The court held, as an initial matter, that petitioners' appeal from the preliminary injunction was moot because "the injunction was about a finite event that occurred and ended on a specific, past date." *Id*. at 5a-6a n.1.

On the validity of the limited award of attorneys' fees, the court applied that circuit's test for determining whether a party obtaining a preliminary injunction was a prevailing party: whether the respondents obtained relief "on the merits" as opposed to an order that decided "no substantive issues." *Id*. at 2a (quoting *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987)). The court concluded that the "preliminary injunction in this case decided a substantive issue – whether or not the state officials could arrest the nude peace symbol participants – and thus was on the merits." *Id*. at 3a.

The court rejected the argument that the attorneys' fees award should be reversed because the preliminary injunction was "based on a mistake of law" that had been "corrected" by the district court at the permanent injunction stage. *Id*. at 3a. With regard to the facial challenge which was the basis for the request for *permanent* injunctive relief, the court of appeals noted that the district court had held that "new developments" indicated that "a total ban on nudity was no greater than was essential to further the government's interest in protecting the public from offense of nudity." *Id.* at 4a. The

Eleventh Circuit thus concluded that the preliminary injunction was not based upon a mistake of law, but was based upon the different facts and circumstances of the different requests for injunctive relief. *Id.* at 5a.[6] Recognizing that the preliminary injunction embodied an as-applied challenge that was separate and distinct from the facial challenge adjudicated at the summary judgment stage, the court of appeals ruled that respondents "are entitled to prevailing party status and attorney's fees because the [district] court granted the preliminary injunction on the merits and [respondents] obtained the primary relief they sought." *Ibid.*

## SUMMARY OF ARGUMENT

Respondents won a preliminary injunction on their as-applied challenge. They obtained a judicially enforceable order that provided them the relief they sought to allow their anti-war protest involving a nude peace sign to take place as scheduled. The preliminary injunction materially altered the legal relationship between them and the state officials who were prohibited from enforcing the nudity ban against them with respect to that protest. Nothing that happened in this case after the issuance of that preliminary injunction affected that victory. The injunction was not reversed. Respondents thus are prevailing parties under 42 U.S.C. § 1988, entitled to attorneys' fees for the time spent to obtain the preliminary injunction.

## I.

A plaintiff who obtains a preliminary injunction can meet the definition of "prevailing party" distilled by this Court in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), if the injunction provides "some relief by

[6] The court of appeals suggested that the district court was incorrect to conclude that its own earlier preliminary injunction had been based on petitioners' content-based application of its rule to the anti-war protest as opposed to plays. Pet. App. 6a n.4. *But see* pages 42-43, *infra*.

the court" to the plaintiff and creates a "material alteration of the legal relationship of the parties."

A. Preliminary injunctions can, and in this case did, materially alter the legal relationship between the parties. Respondents obtained an injunction that allowed their February 14, 2003 anti-war nude peace sign protest to go forward in the manner planned and it prohibited state officials from arresting or otherwise interfering with them for that protest. Respondents engaged in the February 14, 2003 protest under protection of that court order and are still protected by that order from arrest for their conduct on that day.

The state officials did not exercise their express statutory right of immediate appeal under 28 U.S.C. § 1292(a)(1). Congress enacted that immediate appeal in recognition of the fact that preliminary injunctions have permanent consequences that cannot be undone unless immediately appealed, which distinguishes injunctions from procedural orders. Petitioners' claim that they lacked the time to seek immediate appeal because of delay on the part of respondents is frivolous. Petitioners' attempt to claim that the nature of a preliminary injunction proceeding is somehow too "truncated" to support a fee award is similarly without merit. The record here is clear that the timing of the preliminary hearing was due to the state officials' delay in responding to respondents' advance notice of the protest, a month beforehand. And the courts of appeals are ready and able to resolve expedited appeals.

The state officials' failure to appeal, or even to seek a stay, meant that the preliminary injunction bound them and was backed by the court's contempt authority. Petitioners' claim that a court order that could put them in jail for contempt of court is *not* a sufficient alteration of the parties' legal relationship to satisfy the prevailing party standard therefore must be rejected.

B. Issuance of an injunction, whether preliminary or permanent, requires a court to consider the strength of the merits of the plaintiff's legal claim, in addition to

balancing other relevant factors. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1219 (2006). Petitioners' assertion that lower courts disregard this requirement is unsupported by any evidence of a pattern in the lower courts to that effect. There certainly is no evidence of such error in this case. Indeed, the district court here made clear that its consideration of the merits of respondents' First Amendment challenge to the state officials' application of the nudity ban against their anti-war protest was the "primary consideration" for its entry of the injunction. Pet. App. 14a.

This Court already has rejected petitioners' argument that Section 1988 requires a full adjudication of the merits to support an attorneys' fees award. More than 25 years ago, the Court held that prevailing party status under Section 1988 can rest upon the entry of a consent decree, *i.e.*, a settlement agreement reached by the parties that is entered as an order of the court, even though a consent decree is entered by a court without any adjudication of the merits of the claims. *See Maher v. Gagne*, 448 U.S. 122 (1980). Each reason given by the Court for that result is equally applicable to preliminary injunctions. This Court's more recent decision in *Shalala v. Schaefer*, 509 U.S. 292 (1993), that a plaintiff was a prevailing party even though his eligibility for benefits remained uncertain at the end of the lawsuit, confirms that a plaintiff need not obtain final adjudication of the merits of a claim in order to be entitled to attorneys' fees. No decision of this Court supports petitioners' contrary position.

C. The language Congress used in Section 1988 demonstrates that it did not intend to limit a prevailing party only to those parties who prevailed in a final order. If Congress had intended to impose such a limit on the award of attorneys' fees under Section 1988, Congress could have mandated that fees be recoverable only where a plaintiff prevailed in a "final order" as Congress has done in other statutes both before and after it enacted Section 1988.

There were good policy reasons for Congress not to impose a final order requirement under Section 1988.

Congress intended through the remedies of Section 1988 to encourage litigation under Section 1983 to prevent and deter not just long-term violations of the Constitution, but also temporary or sporadic violations which often undermine the exercise of some of the most fundamental constitutional rights, including under the First Amendment.

## II.

A. Petitioners err when they argue that respondents' preliminary injunction was somehow undermined by the district court's subsequent denial of a permanent injunction on a challenge to the nudity ban on its face. Petitioners reach this erroneous conclusion because they conflate respondents' as-applied challenge to the application of petitioners' regulation to the February 14, 2003 anti-war protest and respondent Wyner's facial challenge to the constitutionality of the regulation across the board.

Petitioners' claim that a plaintiff who obtains a preliminary injunction is never entitled to attorneys' fees when the merits underlying that injunction are subsequently rejected plainly does not apply to the instant case. The district court made clear in oral findings at the preliminary injunction hearing and in its subsequent written orders that the court granted the preliminary injunction because of the content-based nature of the state officials' application of the rule regarding nudity to the anti-war protest planned for February 14, 2003. That respondent Wyner did not succeed on her later facial challenge to the nudity ban has no bearing on the preliminary injunction entered to protect respondents from application of the state law to the February 14 protest. Further, the district court and court of appeals both correctly noted that nothing in the later order demonstrated that the earlier order was issued in error. In any event, such an argument would not bar recovery of attorneys' fees for respondent Simon, who had standing to pursue an injunction only for the February 14, 2003 protest.

B. The court of appeals' conclusion that the appeal of the preliminary injunction became moot after the anti-war protest occurred does not alter the prevailing party analysis. Every court of appeals to reach the issue has concluded that the fact that injunctive relief becomes moot before it is reviewed on appeal does not itself defeat prevailing party status. The two cases cited by petitioners in an attempt to draw this consensus into doubt are inapposite. They each involve a situation in which the relevant judgment was entered after the dispute already was moot. There is no disagreement here that there was an actual and on-going controversy between the parties at the time the preliminary injunction was issued, and that the district court's preliminary injunction benefited respondents personally by authorizing them to engage in the protest at the time and in the manner they desired without fear of arrest. An immediate appeal would not have been moot, but petitioners chose not to take that appeal.

## ARGUMENT

### RESPONDENTS WERE PREVAILING PARTIES ENTITLED TO REASONABLE ATTORNEYS' FEES UNDER 42 U.S.C. § 1988 FOR THE INJUNCTION THEY OBTAINED TO ALLOW THEIR ANTI-WAR PROTEST TO GO FORWARD WITHOUT INTERFERENCE OR ARREST BY THE STATE

#### I. THE PRELIMINARY INJUNCTION HERE PROTECTED THE FEBRUARY 14, 2003 ANTI-WAR PROTESTERS FROM APPLICATION OF STATE LAW SUCH THAT RESPONDENTS WERE PREVAILING PARTIES UNDER SECTION 1988

A plaintiff who obtains a preliminary injunction is a "prevailing party" under 42 U.S.C. § 1988, if the plaintiff is "one who has been awarded some relief by the court" and the court order creates a "material alteration of the legal relationship of the parties." *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and*

*Human Resources*, 532 U.S. 598, 603 (2001). Respondents are prevailing parties here where the injunction allowed them to exercise their constitutional rights with a court order against interference or arrest by state officials.

### A. Preliminary Injunctions Can Provide Relief That Materially Changes The Legal Relationship Between The Parties And The Failure Of The State Officials To Exercise Their Right To An Immediate Appeal Ensured That The Injunction Did So In This Case

#### 1. Preliminary injunctions can award relief and materially alter the legal relationship between parties

Respondent Wyner engaged in her February 14, 2003, anti-war nude peace-sign protest at the time, location, and in the manner planned despite the state officials' notification to her that the protest was not protected by the First Amendment and was subject to a state park nudity ban that was criminally enforceable. The preliminary injunction thus certainly conferred "some relief" upon her, as *Buckhannon* requires.

Respondent was able to engage in that protest without threat of interference or arrest by the State only because of the district court order enjoining petitioners. She could not have obtained, and indeed did not seek, any more judicial relief with regard to that protest. As the Tenth Circuit has explained in a similar circumstance, "[b]ecause of the district court's preliminary injunction, he did so participate [in an athletic competition]. No subsequent judicial proceedings could have given him any more relief on his claim." *Dahlem v. Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508, 1513 (10th Cir. 1990).

Further, that preliminary injunction has an enduring material effect on the relationship between the respondent protesters and the petitioner state officials because

petitioners continue to be prevented from prosecuting respondents for engaging in the protest on February 14, 2003. *See Ashcroft v. ACLU*, 542 U.S. 656, 670-672 (2004) (upholding preliminary injunction that prohibited enforcement of a criminal law in part because preliminary injunction protected against threat of prosecution and thus against risk of self-censorship).[7] In this sense, the preliminary injunction "functions much like the grant of an irreversible partial summary judgment on the merits." *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006).

Petitioners attempt to blur this fact by arguing (Pet. Br. 16, 18, 24; U.S. Br. 24 n.14) that preliminary injunctions are short-term injunctions. But that depends entirely on the circumstances of a particular case. There is no correlation between the type of injunction and the length of time that the injunction is in effect. This Court often encounters preliminary injunctions that have been in effect for years. *See, e.g.*, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1219 (2006) (affirming preliminary injunction issued four years earlier); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming preliminary injunction issued five years earlier). By

[7] *See Oklahoma Operating Co. v. Love*, 252 U.S. 331, 338 (1920) (a district court's authority to enter a preliminary injunction includes the authority to permanently "restrain enforcement of penalties" for actions protected by that perliminary injunction, even if no constitutional violation is ultimately found); *see also, e.g.*, *Blackard v. Memphis Area Med. Ctr. for Women, Inc.*, 262 F.3d 568, 578-581 (6th Cir. 2001) (preliminary injunction, reversed on appeal, that enjoined state courts from implementing state law prohibited imposition of liability on individuals who acted contrary to state law under protection of injunction while it was in effect), *cert. denied*, 535 U.S. 1053 (2002); *Clarke v. United States*, 915 F.2d 699, 702 (D.C. Cir. 1990) ("a federal judgment, later reversed or found erroneous, is a defense to a federal prosecution for acts committed while the judgment was in effect"); *United States v. Mancuso*, 139 F.2d 90, 92 (3d Cir. 1943) ("If the litigant does something, or fails to do something, while under the protection of a court order he should not, therefore, be subject to criminal penalties" even if the court order is erroneous and subject to reversal).

contrast, a permanent injunction may address a single, discrete event (such as a city obtaining a court order to raze a building) that occurs shortly after it is issued and then expires.

The amount of time that an injunction is in effect, whether preliminary or permanent, is not the talisman for whether a party prevails for purposes of attorneys' fees under Section 1988. The relevant issue is whether the injunction materially alters the legal relationship between the parties. A preliminary injunction can do that to the same extent as a permanent injunction. *See Coalition for Basic Human Needs v. King*, 691 F.2d 597, 601 (1st Cir. 1982) (Breyer, J.) (rejecting argument that "obtaining relief that is called 'preliminary' never warrants the award of attorney's fees").

In this case, for example, respondents went into court because the state officials had informed them that they believed the nude, expressive anti-war protest scheduled for February 14, 2003, was not protected by the First Amendment and that it was subject to the ban on nudity, which was criminally enforceable. The court entered an order enjoining the state officials from interfering or arresting respondents based on those grounds. That court order constitutes the type of "enforceable judgment" that "permits an award of attorneys' fees." *Buckhannon*, 532 U.S. at 607 n.9.

If an injunction is reversed on appeal, however, plaintiffs have not "prevailed" in the ordinary sense of that word, and thus attorneys' fees would ordinarily not be available. That is not the case here, however. The preliminary injunction in this case was not reversed.

**2. Petitioners' failure to exercise their right to an immediate appeal of the preliminary injunction ensured the alteration in the legal relationship between the parties in this case**

a. Congress made the grant of a preliminary injunction immediately appealable. *See* 28 U.S.C. § 1292(a)(1). The express statutory right to an immediate appeal demonstrates Congress's recognition that the grant of a preliminary injunction can have enduring and material consequences that cannot be undone unless subject to immediate review. "The manifest intent of this provision" was "to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests." *Smith v. Vulcan Iron Works*, 165 U.S. 518, 524-25 (1897); *see Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 180-81 (1955) ("No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.").

The right to an immediate appeal distinguishes a preliminary injunction as an enforceable judgment, *see* Fed. R. Civ. P. 54(a), and not a mere procedural order regarding the conduct of the litigation, such as an order compelling discovery. The courts have consistently avoided any such slippery slope by distinguishing the type of order that falls within the scope of immediate appeal under Section 1292(a)(1) from one that does not, by a determination of whether the order: is directed to a party; has serious consequences; is enforceable by contempt, and is designed to accord or protect some or all of the substantive relief sought by a complaint. *See Bogosian v. Woloohojian Realty Corp.*, 923 F.2d 898, 901 (1st Cir. 1991) (Breyer, J.); 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure*, § 3922 (3d ed. 1998); 19 James W. Moore, *Moore's Federal Practice*

§ 203.10[2] (3d ed. 2006).[8] Temporary restraining orders are generally not considered appealable injunctions under Section 1292(a)(1) because they are, by rule, supposed to be effective only for a very short duration, they are typically issued without notice to the adverse party, and they are issued before the trial court has had a full presentation of the underlying law. *See* 16 Wright & Miller, *supra*, § 3922.1; 19 Moore, *supra,* § 203.10[4].

b. Petitioners chose not to pursue their right of immediate appeal of the preliminary injunction in this case and, thus, allowed the preliminary injunction to go into effect so that it eliminated petitioners' authority to criminally sanction the protesters for the February 14, 2003 protest. That choice by the state officials is not an appropriate basis on which to deprive respondents of their status as prevailing parties entitled to a reasonable attorneys' fees for the preliminary injunction they obtained. That is particularly so because it is extraordinarily likely that the preliminary injunction would have been upheld on such an appeal against the state officials' declared view that the First Amendment did not apply and their failure to apply the nudity ban to other expressive conduct by respondent Wyner, which undermined a finding that application of the total ban to the anti-war protest was no greater than necessary.

Petitioners and their *amici* attempt to claim that petitioners lacked the time to seek appellate review of the court's injunction because respondents waited until the last minute to file their lawsuit. They similarly attempt to claim that the nature of the preliminary injunction proceeding was last minute and therefore somehow too

[8] These appeals under Section 1292(a)(1) are distinct from the sovereign immunity or qualified immunity appeals relied upon by the United States. U.S. Br. 27. Those appeals are permitted under the collateral order doctrine of 28 U.S.C. § 1291 because, in part, the immunity orders "resolve an important issue completely separate from the merits of the action." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993).

"truncated" to support a fee award. Those arguments are completely devoid of merit. The record here is clear that the timing of the preliminary hearing was due to the state officials' delay in responding to respondents' advance notice of the protest, a month beforehand.

Respondent Wyner notified the petitioner park manager in mid-January of her planned February 14, 2003 protest. Petitioners did not respond for two weeks and then only to request a written submission. Respondent Wyner immediately provided a written submission and was led to believe that there would be no cause for litigation because the petitioner park manager did "not anticipate any problems." J.A. 29. It was not until a week before the scheduled protest that the state officials informed respondents of their new view that the nude protest was not protected by the First Amendment and that it would violate park rules that are criminally enforceable, contrary to their longstanding settlement with respondent Simon. In response to that notice, respondents moved promptly to bring suit for a preliminary injunction to allow the scheduled protest to go forward without the State's intervention or arrest.

Petitioners did not object to the timing of the hearing, did not claim that they had had inadequate time to prepare, and did not seek leave to develop more evidence. Indeed, their suggestion now of any claim of prejudice from the timing is frivolous. In the course of later litigation of certain discovery issues in this case, petitioners unequivocally conceded that, "as of early 2003" they expected litigation "as a result of communications with Plaintiff [Wyner] regarding her First Amendment rights." Pet. Mem. of Law in Opp. to Mot. to Compel, Dist. Ct. Dkt. 52, at 3. That expectation was, of course, the only reasonable expectation once the state officials decided to notify respondent Wyner that they believed the First Amendment did not apply, in light of the more than

decade-long history of litigation between the parties over earlier restrictions by the State.[9]

c. If the state officials had chosen to immediately appeal the preliminary injunction, rather than to capitulate, they could have taken their First Amendment arguments directly to the Eleventh Circuit for *de novo* review of the legal rulings, *see O Centro*, 126 S. Ct. at 1219, before expiration of the preliminary injunction (but, of course, would have faced the significant hurdle of the clearly correct constitutional analysis of the district court). The courts of appeals have recognized that special procedures are necessary to ensure that appeals from preliminary injunctions under Section 1292(a)(1) are reviewed in extremely short time frames. They have established extensive procedures for such cases.

In the Eleventh Circuit, consistent with other federal circuits, emergency motions may be filed outside of normal business hours where the appeal must be resolved within a day or so. *See* 11th Cir. R. 27-1(b). Counsel is also authorized to telephone the clerk and describe the motion prior to filing it to expedite its processing. *Ibid.* The Eleventh Circuit maintains a separate routing log for emergency cases, *see* 11th Cir. R. 27, I.O.P. 2, and, in part because of the Eleventh Circuit's extensive experience with capital cases, it can expeditiously resolve emergency appeals and motions. *See e.g.*, *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289 (11th Cir. 2005) (reviewing district court's denial of temporary relief entered earlier that same day); *Touchston v. McDermott,* 234 F.3d 1130 (11th Cir. 2000) (en banc) (denying injunction pending appeal filed three days earlier), *cert. denied*, 531 U.S. 1061 (2001);

[9] Petitioners' general implication that problems might arise in other cases ignores the substantive rules that are in place to prevent delay by plaintiffs in bringing suit. Under settled rules of equity, in an appropriate case a court may withhold equitable relief, even if otherwise warranted, if a plaintiff has engaged in undue delay or tactics that prejudice the defendants. *See, e.g.*, *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275-276 (2d Cir. 1985); *GTE Corp. v. Williams*, 731 F.2d 676, 678 (10th Cir. 1984).

*Lops v. Lops,* 140 F.3d 927 (11th Cir. 1998) (granting emergency stay on the day following district court order), *cert. denied*, 525 U.S. 1158 (1999); *FTC v. Hospital Bd. of Directors of Lee County,* 38 F.3d 1184 (11th Cir. 1994) (granting emergency injunction on the day following district court order).

### 3. Preliminary injunctions are enforceable through contempt with continuing collateral effects

Petitioners and their *amici* do not dispute the basic nature of an injunction as an alteration of the legal relationship between the parties. Indeed, they appear to concede that if the exact same order at issue here had been issued as a permanent injunction, that order would have met the test for a prevailing party, even if petitioners' broader facial challenge had failed at the same time. Pet. Br. 16, 30. Petitioners erroneously suggest, however, that there are distinctions between a preliminary injunction and a permanent injunction that make the former always insufficient to render the plaintiff "prevailing" for purposes of Section 1988. The courts of appeals have, with virtual unanimity, disagreed with this argument.[10] This Court should abide by that settled view.

The United States recognizes that, absent a stay or reversal on appeal before the protest, petitioners would have been in contempt of court if they failed to comply

[10] *See, e.g.*, *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939 (D.C. Cir. 2005); *Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982); *Vacchio v. Ashcroft,* 404 F.3d 663 (2d Cir. 2005); *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); *Dubuc v. Green Oak Twp.*, 312 F.3d 736 (6th Cir. 2002); *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987); *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083 (8th Cir. 2006); *Watson v. County of Riverside*, 300 F.3d 1092 (9th Cir. 2002), *cert. denied*, 538 U.S. 923 (2003); *Dahlem v. Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508 (10th Cir. 1990); *Taylor v. City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987). *But see Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002).

with the preliminary injunction. U.S. Br. 27 n.18. It is well established that in such circumstances, stay or immediate appeal is the necessary avenue to attempt to undo the victory obtained by the opposing party: "If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect." *Maness v. Meyers*, 419 U.S. 449, 458 (1975); *see also Walker v. City of Birmingham*, 388 U.S. 307 (1967). Thus, any efforts at a prosecution of the protesters for the February 14, 2003 anti-war nude peace sign protest would open petitioners up to contempt sanctions. Petitioners' claim that this court order that could put them in jail for contempt of court is *not* a sufficient material alteration of the parties' legal relationship to satisfy the prevailing party standard therefore must be rejected.

Moreover, protection from criminal prosecution is not the only enduring effect of such a preliminary injunction. Contrary to petitioners' assertion (Pet. Br. 21), preliminary injunctions sometimes can have *res judicata* effect on the parties on an issue if the issue was fully and fairly litigated. *See* 18A Wright & Miller, *supra*, § 4445; 18 Moore, *supra,* § 132.03[5][b][ii]; *Restatement (Second) of Judgments* § 13 cmt. g (1982). Although *res judicata* effect is not always appropriate for injunctions, *see University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), that is no basis for categorically excluding all preliminary injunctions from making a plaintiff a prevailing party, as petitioners argue.[11] Likewise, a decision on appeal from the

[11] The fact that some, but not all, preliminary injunctions do not have *res judicata* effects explains the "usual practice" of this Court and the courts of appeals to "dismiss the appeal as moot and not vacate the order appealed from" when a preliminary injunction expires prior to or during the pendency of the appeal. *Gjertsen v. Bd. of Election Comm'rs*, 751 F.2d 199, 202 (7th Cir. 1984) (Posner, J.); *see Nelson v. Quick Bear Quiver*, 126 S. Ct. 1026 (2006) (dismissing appeal from three-judge

(Continued on following page)

grant or denial of a preliminary injunction may become law of the case. *See* 18B Wright & Miller, *supra*, § 4478.5.

### B. Preliminary Injunctions Are Based On The Merits Of A Claim As Well As Other Factors And Section 1988 Does Not Require A Full Adjudication Of The Merits To Support An Attorneys' Fees Award

#### 1. Preliminary injunctions are based on the merits of a claim as well as a balance of other factors

The authority of a district court to issue an injunction is circumscribed by longstanding equitable rules. Those rules do not differ in any significant respect between preliminary and permanent injunctions. No injunction, whether preliminary or permanent, is issued without a court considering the strength of the merits of the plaintiff's legal claim, in addition to balancing relevant equitable factors.

A plaintiff seeking a preliminary injunction must demonstrate: (1) a likelihood of succeeding on the merits, *see O Centro*, 126 S. Ct. at 1219; *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); and (2) that irreparable harm will result if a preliminary injunction is not entered. *O Centro*, 126 S. Ct. at 1219. A preliminary injunction will issue only on a showing of both these elements, balanced against consideration of (3) "the conveniences of the parties and possible injuries to them" that may "be affected by the granting or withholding of the

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court as moot, but not vacating preliminary injunction issued by that court); 13A Wright & Miller, *supra*, § 3533.10 ("if the case remains alive in the district court, it is sufficient to dismiss the appeal without directing" that an injunction that has expired or become moot "be vacated"). *Compare U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994) (describing the "equitable tradition of vacatur" reflected in *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), that normally warrants the vacatur of a lower court's final judgment when the entire case becomes moot).

injunction" and (4) "the public interest." *Yakus v. United States*, 321 U.S. 414, 440 (1944).

Petitioners attempt to challenge preliminary injunctions generally as inappropriate for fee awards, asserting that they are not based on an assessment of the merits of the claim by lower courts, but only on the equities of the case. Pet. Br. 19-21. Petitioners' assertion is unsupported by any evidence of such a pattern of error on the part of the lower courts in violation of this Court's contrary instructions.

There certainly is no evidence of such error in this case. Indeed, the district court here made clear that its consideration of the merits of respondents' First Amendment challenge to the state officials' application of the nudity ban against their anti-war protest was the central basis for its entry of the injunction. After identifying the four-factor analysis, the court concluded that the public interest, the irreparable harm, and the relative injuries all rested on whether respondents had a meritorious claim. Pet. App. 14a-15a. To that end, the district court read all the cases cited by the parties, J.A. 37, 92, heard evidence from both sides, allowed oral argument, and then issued a detailed order describing his reasoning for issuance of the preliminary injunction explaining that its "primary consideration" in determining whether to grant the injunction was whether "a violation of [respondents'] First Amendment rights *will* occur." Pet. App. 14a (emphasis supplied).

The fundamental flaw in petitioners' assertion (Pet. Br. 19-21; U.S. Br. 12-13) that the balancing of other factors somehow eliminates the required determination by the court of the strength of the plaintiff's claim on the merits, is evident once one realizes that it would make every *permanent* injunction ineligible to convey prevailing party status, regardless of the strength of the merits. For the most part, the standard that governs a grant of a permanent injunction subsumes the standard that governs the grant of a preliminary injunction. *See eBay Inc. v.*

*MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839 (2006) (four-part analysis includes weighing of various equities).[12]

### 2. The same reasons that the Court held a consent decree can support prevailing party status, although it does not include a full adjudication of the merits, demonstrate that a preliminary injunction can as well

More than 25 years ago, this Court held that a plaintiff can be a "prevailing party" for purposes of Section 1988 without obtaining a judgment on the merits. The Court ruled that the entry of a consent decree, *i.e.*, a settlement agreement reached by the parties that is entered as an order of the court enforceable through the court's contempt authority, can render the plaintiff a prevailing party under Section 1988. *See Maher v. Gagne*, 448 U.S. 122 (1980); *see Buckhannon*, 532 U.S. at 604 (reiterating holding of *Maher*).

This is so even though a consent decree is entered by a court without an admission of liability by the defendants, *Buckhannon*, 532 U.S. at 604; *Maher*, 448 U.S. at 126 n.8, and often, in fact, contains an express *denial* of liability by the defendant. A court may enter a consent decree so long as it "spring[s] from" a complaint within the court's subject-matter jurisdiction; "come[s] within the general scope of the case" made by the complaint; and "further[s] the objectives of the law upon which the complaint was based." *Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (citing *Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986)).

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[12] The United States contends that reliance on a preliminary injunction would impinge on the Seventh Amendment right to a jury trial. U.S. Br. 18. But suits against States (through their officials in their official capacities) under Section 1983 may seek only prospective injunctive relief, *see Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), and thus the Seventh Amendment, which governs only "suits at common law," has no applicability, *see City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999).

The Court has identified three reasons for reading the term "prevailing party" to include a plaintiff who obtains a court entry of a settlement as a consent decree without an independent determination of the merits of the claims. Each reason given by the Court is equally applicable to preliminary injunctions. Indeed, as one court has noted, "there is even more reason to award attorneys' fees [for a preliminary injunction], where appellees did obtain a judicial determination that appellants had acted unconstitutionally" than "where a party prevails through a settlement." *Williams v. Alioto*, 625 F.2d 845, 848 (9th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 1012 (1981).

First, there is "nothing in the language" of Section 1988 that conditions a district court's power to award attorneys' fees "on a judicial determination that the plaintiff's rights have been violated." *Maher*, 448 U.S. at 129. The statutory text is satisfied if the plaintiff has succeeded in establishing a "court-ordered 'change in the legal relationship between the plaintiff and the defendant.'" *Buckhannon*, 532 U.S. at 604 (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (brackets omitted)). As demonstrated above, the preliminary injunction in this case did just that.

Second, Congress intended that a consent decree convey prevailing-party status on a plaintiff. The *Maher* Court noted that the Senate Judiciary Committee report on Section 1988 stated that plaintiffs are prevailing parties "when they vindicate their rights through a consent judgment." 448 U.S. at 129 (quoting S. Rep. No. 94-1011, at 5 (1976)). The House Judiciary Committee report reached the same conclusion: "If the litigation terminates by consent decree, for example, it would be proper to award counsel fees." H.R. Rep. No. 94-1558, at 7.

Similarly, Congress intended that a preliminary injunction like the one obtained by respondents convey prevailing party status. Both the Senate and House Reports indicated that Congress intended plaintiffs who obtained injunctive relief *pendente lite* to be prevailing

parties, even if the case was not concluded. *See* H.R. Rep. No. 94-1558, at 8; S. Rep. No. 94-1011, at 5.

Third, the Court recognized that an award of attorneys' fees to a party that prevails through a court-approved settlement promotes judicial economy because it eliminates any incentive to continue to litigate a case to a final ruling on the merits for the sole reason of ensuring fee recovery. The Court emphasized that "Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court." *Marek v. Chesny*, 473 U.S. 1, 10 (1985) (quoting H.R. Rep. No. 94-1588, at 7). The settlement of Section 1983 litigation "provides benefits for civil rights plaintiffs as well as defendants and is consistent with the purposes of [Section 1988]." *Evans v. Jeff D.*, 475 U.S. 717, 732-733 (1986).

So too with regard to preliminary injunctions. An award of fees to plaintiffs who obtain a preliminary injunction that protects a planned protest or other time-sensitive exercise of constitutional rights, eliminates an incentive that otherwise arises to continue to litigate for additional remedies, such as damages, for the sole reason of recovering attorney's fees. That often is the situation in Section 1983 cases that are comparable to the instant case but do not have the same long history. A plaintiff challenging an application of law as unconstitutional against a particular protest or other event, such as an election or high school graduation, often has no interest in and does not pursue a broader facial challenge.

### 3. The Court also has held that a reversal of agency action without full adjudication of the merits can support prevailing party status

This Court's decision in *Shalala v. Schaefer*, 509 U.S. 292 (1993), interpreting the term "prevailing party" in the Equal Access to Justice Act, 28 U.S.C. § 2412(d), confirms that a plaintiff need not obtain a full adjudication on the merits of a claim in order to be entitled to attorneys' fees.

That case involved a challenge to a decision by the Secretary of Health and Human Services to deny an individual Social Security benefits. At the end of the court litigation, the plaintiff had not obtained benefits but was nonetheless deemed a prevailing party for purposes of obtaining attorneys' fees. The district court had denied plaintiff's motion for summary judgment to be awarded benefits, but also had determined that the Secretary had made three errors in its determination of whether plaintiff was eligible for Social Security benefits that required the agency
to reconsider the case. The court thus reversed the Secretary's decision and remanded the issue to the Secretary for further consideration.

This Court explained that such a remand "confer[red] prevailing-party status" because "'the plaintiff ha[d] succeeded on [a] significant issue in litigation which achieved some of the benefit . . . sought in bringing suit.'" *Schaefer*, 509 U.S. at 302 (quoting *Texas State Teachers*, 489 U.S. at 791-792 (citation and other internal quotation marks omitted in original)). The plaintiff was thus entitled to attorneys' fees regardless of whether he was ultimately awarded benefits. *Ibid.*; *see Muhur v. Ashcroft*, 382 F.3d 653, 654 (7th Cir. 2004) (Posner, J.).

#### 4. This Court's precedents do not require full adjudication of the merits as a necessary prerequisite for prevailing party status

Petitioners invoke several of this Court's attorneys' fees precedents to support their argument that a judgment on the merits is required for prevailing party status under Section 1988, but none of those decisions support their position.

As petitioners note (Pet. Br. 16-17, 32), the district court in *Buckhannon* had entered a stay in that case and they suggest that this Court's opinion can somehow be read to hold implicitly that a stay is insufficient to support prevailing party status because it is not an adjudication on the merits. But this Court did not give any legal

significance to the stay in its ruling in the case. In fact, the majority tersely described it merely as an agreement by the parties to stay enforcement of the orders. *See* 532 U.S. at 601; *see id*. at 623 (Ginsburg, J., dissenting) (also characterizing it as an agreement by parties). Rather, the Court ruled on whether the fact that the lawsuit allegedly caused the defendant to amend its laws, without more, *i.e.*, as a "catalyst," was sufficient to make plaintiff a prevailing party under Section 1988, and held that it was not.

Petitioners also rely (Pet. Br. 18-19) on *Hewitt v. Helms*, 482 U.S. 755 (1987), to suggest that this Court has held that rulings that address, but do not finally determine, the merits of a plaintiff's claim cannot confer prevailing party status. But in *Hewitt*, the problem was that plaintiff never received any injunction or judgment in his favor, even though he may have been eligible for such relief. "[T]he fact is that Helms' counsel never took the steps necessary to have a declaratory judgment or expungement order properly entered. Consequently, Helms received no judicial relief." *Id*. at 760. That was because, until the attorneys' fees proceeding, the primary goal in that lawsuit was to recover damages against officials in their individual capacities; "[i]n the District Court, Helms pursued only his claims for damages." *Id*. at 758. Having received no relief, he could hardly be described as a prevailing party.

Similarly, petitioners' reliance (Pet. Br. 19; U.S. Br. 9-10, 23) on this Court's statements that liability and attorneys' fees go hand in hand, *see, e.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985), is error because those statements address a separate question of *who* is required to pay attorneys' fees. They do not address the standard for determining when a plaintiff is a prevailing party entitled to such fees. The district court in this case plainly abided by this requirement. The state officials in their official capacities who were enjoined are those against whom the attorneys' fees were imposed. The attorneys' fee award does not run against the state official Coulliette in his individual capacity because the preliminary injunction did not run against him in his individual capacity. *See* note 5, *supra*.

Finally, *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (per curiam), relied on by petitioners (Pet. Br. 15, 34; U.S. Br. 15-16), also is not on point. In that case, the court of appeals reversed a judgment in favor of the defendants and remanded a case for a new trial. The Court held that plaintiffs were not "prevailing parties" because the court of appeals' order simply gave plaintiffs the opportunity to prove their case to a jury, the very position that "they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court." *Hanrahan*, 446 U.S. at 759. Here, by contrast, the court's preliminary injunction gave respondents the right to engage in their anti-war protest at the time and location and on the date and in the manner they had planned, without interference or fear of arrest, a change from when they initiated the litigation. Although the opinion in *Hanrahan* states that plaintiffs must obtain "some relief on the merits" to be a prevailing party, *id*. at 757, the opinion was decided in summary fashion without full briefing before this Court issued its fully-briefed decision in *Maher*, which made clear that a consent decree conveyed prevailing party status regardless of any court consideration of the merits. In any event, as demonstrated above, the preliminary injunction in the instant case was rooted in the district court's assessment of the merits of respondents' First Amendment claim.[13]

[13] The United States alone (U.S. Br. 14-15) argues that *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam), also supports petitioners' argument. In *Stewart*, the only relief obtained was a declaratory judgment by the district court against the prison that was of no benefit to plaintiffs because they had already been released from prison. Here, by contrast, respondents obtained court-ordered relief that personally benefited them because the preliminary injunction removed the reasonable fear of prosecution for being arrested for being nude at the anti-war protest on February 14, 2003.

### C. Congress Did Not Require In Section 1988, As It Did In Certain Other Statutes, That A Plaintiff Prevail In A "Final Order" To Be Eligible For Attorneys' Fees And That Omission Is Supported By Powerful Policy Considerations

The language Congress used in Section 1988 demonstrates that it did not intend to limit a prevailing party only to those parties who prevailed in a final order. If Congress had intended to impose such a limit on the award of attorneys' fees under Section 1988, it had several statutory models which it could have followed. *See* H.R. Rep. No. 94-1558, at 13-14 (listing 54 previously enacted attorneys' fees provisions). There were good policy reasons for Congress not doing so.

1. At the time that Section 1988 was under consideration, Congress had enacted a number of statutes, including the civil rights attorneys' fees statute at issue in *Bradley v. School Board of the City of Richmond*, 416 U.S. 696 (1974), that authorized a court to "allow the prevailing party * * * a reasonable attorneys' fee as part of the costs" only "[u]pon entry of final order of a court." *Id*. at 709 n.12 (quoting Education Amendments of 1972, Pub. L. No. 92-318, § 718, 86 Stat. 235, 369). Congress understood the term "final order" to impose a requirement separate from the "prevailing party" language. *See* 117 Cong. Rec. 11,343 (1971) (Statement of Sen. Mondale) ("the requirement that payment of fees and costs be made only after a final order had been issued * * * makes sense, in order to discourage champertous lawsuits. * * * We do not want an attorney to be given fees unless the court and the parties have determined that the suit was well founded * * * ."); *id*. at 11,523 (Statement of Sen. Allen) (statute requires that suit must "be prosecuted to a successful conclusion").

The Court in *Bradley* held, relying on that "final order" language, that the Education Amendments "make[ ] the existence of a final order a prerequisite to the award." *Bradley*, 416 U.S. at 722. Thus, contrary to the argument of the United States (U.S. Br. 23), the requirement of a

final order in *Bradley* derived not from the term "prevailing party" in that statute, but rather from the express statutory language of "final order" not found in Section 1988.

Congress has continued to use that same "final order" language in other federal attorneys' fee statutes after it enacted Section 1988. *See*, *e.g.*, Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. No. 103-297, § 5, 108 Stat. 1545, 1549 (1994) (codified at 15 U.S.C. § 6104(d)); Water Resources Development Act of 1990, Pub. L. No. 101-640, § 402, 104 Stat. 4604, 4644 (1990) (codified at 16 U.S.C. § 460tt(c)(1)); *see also* U.S. Br. 18-19 n.10 (noting earlier costs statute that imposed a "final hearing" requirement).

Despite these clear examples limiting fees to those who prevailed only in a "final order," Congress did not incorporate that language into Section 1988. Rather, it enacted a statute that did not condition recovery of attorneys' fees on final orders, and did so intentionally. The House Judiciary Committee Report on Section 1988 specifically explained that "the word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered." H.R. Rep. No. 94-1558, at 8; *see also* S. Rep. No. 94-1011, at 5 (Senate Judiciary Committee report states that "counsel fees under [the reported bill] may be awarded pendente lite").[14]

[14] Shortly before Congress enacted Section 1988, it also had enacted a statute that permitted an award of attorneys' fees only if a plaintiff "finally prevails" in an action. *See* Magnuson-Moss Warranty Act, Pub. L. No. 93-637, § 110, 88 Stat. 2183, 2189 (1975) (codified at 15 U.S.C. § 2310(d)(2)) ("If a consumer finally prevails in any action * * *, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) * * * ."); *see also* 7 U.S.C. § 18(d) ("If the petitioner finally prevails, he shall be allowed a reasonable attorneys' fee to be taxed and collected as a part of the costs of the suit."); 7 U.S.C. § 210(f) (same); 7 U.S.C. § 499g(b) (same); 45 U.S.C. § 153(p) (same); 47 U.S.C. § 407 (same). What showing is required to establish that a plaintiff "finally prevails" in an action

(Continued on following page)

2. The absence of a final order requirement in Section 1988 makes sense given the broad range of remedies that are appropriate under Section 1988. Congress rationally concluded that Section 1988 needed to be broader than its predecessors and to not incorporate a final order requirement.

Congress intended through the remedies of Section 1988 to encourage litigation under Section 1983 to prevent and deter not just long-term violations of the Constitution, but also temporary or sporadic violations which often undermine exercise of some of the most fundamental constitutional rights including under the First Amendment. *See* H.R. Rep. No. 94-1558, at 4-5.

The instant case exemplifies that fundamental role of Section 1983 in curbing government violation of constitutional rights. The February 6, 2003 notice from the state officials to respondent Wyner stated that they did not believe that "the nudity planned for [her] activities is expressive conduct protected by the First Amendment." Pet. App. 13a. That position was directly contrary to a pre-existing court-approved settlement in which state officials stated that they "recognize[d] that nudity coupled with expressive activity is generally protected by the First Amendment subject to reasonable restrictions on time, place and manner." *Id*. at 11a-12a. The State's February 6 notice further stated that, even if the First Amendment applied, the state officials believed that the nudity ban was a reasonable restriction and that Wyner could not engage in an anti-war protest using the expressive tool (*i.e.*, nudity) of her choice without running afoul of the rule, which is criminally enforceable. J.A. 29. That position was inconsistent with the state officials' prior

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under those statutes is not at issue in this case, although respondents can be said to have finally prevailed in this action because they finally prevailed on their claim for relief for the February 14, 2003 anti-war protest. What is notable is that Congress did not include such a requirement in Section 1988 despite the use of such language in other contemporaneous fees statutes.

application of the very same state rule to other expressive activity by Wyner, herself, that involved nudity which they had allowed without interference or arrest.

The February 6 notice is precisely the type of state action that Section 1988 was intended to address, as the notice sought to discourage the exercise of First Amendment rights through a discretionary content-based decision of a low level official. Most telling perhaps is that, after the preliminary injunction had been adjudicated, the petitioner state officials again admitted later in this litigation that "[i]nnocent, non-erotic nudity in expressive activities in MacArthur Beach State Park is protected under the First Amendment." Joint Pretrial Stipulation, Dist. Ct. Dkt. 76, at 16 ("Issues of Law in which the Parties Agree"). Yet, absent the ability to recover the attorneys' fees required to obtain a preliminary injunction, an individual normally would be unable to afford to challenge an action such as the State's February 6, 2003 notice, which the state officials themselves later recognized was based on an erroneous constitutional interpretation.

The *amicus* briefs filed in this case by organizations that represent individuals and entities from across the spectrum who are likely to be plaintiffs in cases covered by Section 1988 demonstrate that there are a host of situations in which plaintiffs need to bring constitutional challenges to government actions that, by their nature, must be resolved by a preliminary injunction to provide meaningful relief but which become moot before discovery and a full bench trial can be heard by a district court. These cases involve core constitutional rights such as voting, access to the ballot, the free exercise of religion, and free speech by public school students. *See* Brief of the Brennan Center, at 6-13; Brief of Americans United for Separation of Church and State *et al*., at 9, 11, 12-13; Brief of the Center for Individual Rights, at 2-6.

Petitioners' proposal to disregard the plain text of Section 1988 and to import into that provision a limitation imposed by Congress in different statutes through

different language is unsupported by any indication on the part of Congress to shield such time-sensitive violations from litigation. Yet, absent the availability of court-awarded attorneys' fees, that would be the result because few potential plaintiffs will be able to afford to retain attorneys to challenge those violations. *See* S. Rep. No. 94-1011, at 5-6; H.R. Rep. No. 94-1558, at 2-3; Brief of the Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity *et al*., at 7-13 (predicting, based on empirical study, that a *per se* rule excluding preliminary injunctions would erode the ability of indigent civil right claimants to find legal representation).

3. Finally, an inherent flaw in petitioners' final order argument with regard to preliminary injunctions is that that argument would mean that almost no permanent injunctions would support prevailing party status for attorneys' fees under Section 1988 either. The notion of a final order is not as concrete with regard to injunctions generally as it is when dealing with monetary relief. A district court is vested with authority to alter, amend, or vacate both preliminary and permanent injunctions based on changes in statutes, case law, or factual circumstances. *See Agostini v. Felton*, 521 U.S. 203 (1997); *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 384-385 (1992); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 233-234 (1995) (Federal Rule of Civil Procedure 60, which "authorizes discretionary judicial revision of judgments, * * * merely reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity") (citation omitted).

## II. LATER RULINGS ON THE BROADER FACIAL CHALLENGE TO THE STATE RULE AND ON MOOTNESS OF THE PRELIMINARY INJUNCTION APPEAL DO NOT REQUIRE REVERSAL

Petitioners contend that, even if some preliminary injunctions are sufficient to make a plaintiff a prevailing

party, the preliminary injunction in this case was not because it was undermined by the subsequent denial of a permanent injunction and was mooted prior to the final judgment. Neither of those claims is correct in this case.

### A. The Later Denial Of A Permanent Injunction On The Broader Facial Challenge Does Not Deprive Respondents Of Their Prevailing-Party Status On The As-Applied Preliminary Injunction

Petitioners argue (Pet. Br. 28-31) that a plaintiff who obtains a preliminary injunction is never entitled to attorneys' fees when that injunction "rests on premises rejected in a subsequent decision on the merits of plaintiff's claims." That argument does not apply to this case for two reasons.

1. Petitioners are mistaken that the district court ultimately rejected on the merits the same claim that gave rise to the preliminary injunction. The preliminary injunction was granted based on an as-applied challenge and the permanent injunction was denied on a facial challenge. *See* Br. in Opp. 4 (quoting Pet. App. 3a-4a).

Respondents' successful claim at the preliminary injunction stage was a challenge to the state officials' application of the nudity ban to the anti-war nude peace sign protest on February 14, 2003, when state officials earlier had stipulated that the First Amendment applied to such activity and had not found it necessary to apply the nudity ban to other expressive activity involving nudity in which respondents had engaged.

The district court made clear in several instances that the preliminary injunction was granted because of the content-based nature of the state officials' application of the nudity ban to the anti-war protest planned for February 14, 2003, including in its oral findings at the conclusion of the preliminary injunction hearing, see Fed. R. Civ. P. 52(a), in the hearing on summary judgment on the permanent injunction, and in its subsequent orders. *See* Pet. App. 47a n.2 (explaining in summary

judgment order that "[f]rom Mr. Scalco's testimony, the Court perceived the [Department] to be applying the rules in a content-based and therefore unconstitutional manner."); Br. in Opp. App. 4a n.2 (same in order regarding attorneys' fees); Pet. App. 16a-17a (district court's opinion on grant of preliminary injunction stating concern that "[t]he Department indicated that the restrictions on speech activities are different when applied to plays and other artistic activities as compared to acts of political expression such as a peace demonstration or anti-war protest."); J.A. 94 (district court noting at preliminary injunction hearing that testimony was worrisome "that somehow an anti-war demonstration is different than a play."); J.A. 129-130 (district court stating during summary judgment hearing that, "really the reason for the opinion was [the] testimony that this is, we can't do this one because it's an anti-war protest, that was the driving force behind the preliminary injunction."). Although the court of appeals indicated its disagreement with the district court's explanation, Pet. App. 4a n.4, certainly, the district court judge, himself, was in the best position to identify the ground on which he had based his own order. *Cf. Fiore v. White*, 531 U.S. 225 (2001) (accepting Pennsylvania Supreme Court's explanation of what its earlier opinion meant).

The continuation of the lawsuit after the anti-war protest took place on February 14, 2003, was, by contrast, based on respondent Wyner's challenge to the constitutionality of the nudity ban regulation on its face. Although the district court rejected the latter challenge, nothing in its order reversed its preliminary injunction holding on the merits or precludes future as-applied challenges based on intervening factual circumstances, such as new evidence of content- or viewpoint-based enforcement by state officials. *Cf. Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 812-813 (1985) (reversing injunction against federal policy because government had "facially neutral" grounds for policy, but remanding for further evidence whether "the exclusion of *respondents* was impermissibly motivated by a desire to

suppress a particular point of view" (emphasis supplied)).[15] Indeed, the court of appeals also expressly concluded that the preliminary injunction was not based upon a "mistake of law," but was based upon the different facts and circumstances of the different requests for injunctive relief. Pet. App. 5a.

2. The distinct standing of the two respondents in this case further highlights the distinction between the two legal challenges.

Although respondent Wyner established standing to challenge both the application of the park regulation to the February 14, 2003 protest *and* the facial constitutionality of the regulation after that date, the evidence about respondent Simon involved *only* application of the park regulation to the February 14, 2003 protest. Thus, as the United States notes, Simon lacked standing to obtain any relief for any events subsequent to the February 14, 2003 protest. U.S. Br. 3 n.3; *see also* Pet. Mem. of Law in Opp. to Resp. Mot. for Summary Judgment, Dist. Ct. Dkt. No. 69, at 3 (arguing that there was no admissible evidence regarding Simon's future plans to travel from Hawaii to Florida to engage in or observe nude expressive activity).

The United States' analysis stops short, however. Because respondent Simon lacked standing to seek any

[15] One of petitioners' *amici* notes that petitioners were held to be the prevailing party for purposes of costs at the same time respondents were the prevailing party for purposes of costs and attorneys' fees. Br. of Nat'l League of Cities *et al.*, at 21. It is not uncommon that both sides in litigation will be denominated the prevailing party in a single action. *See* Thomas J. Goger, Annotation, *Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims*, 66 A.L.R.3d 1115, § 4 (1975); *see also Dobson v. Hartford Carpet Co.*, 114 U.S. 439, 447 (1885) ("The final decrees in all of the suits are reversed, and the cases are remanded to the circuit court, with directions to disallow the award of damages in each suit, and to award six cents damages in each, and to allow to the defendants a recovery in each case for their costs after interlocutory decree, and to the plaintiff in each case a recovery for its costs to and including interlocutory decree.").

relief other than the preliminary injunction that he obtained, the district court's ultimate denial of a permanent injunction on the merits could not and did not bind him. Thus, as to respondent Simon, this case is no different than if the district court had lost the authority to issue an ultimate conclusion on the merits because the case subsequently became moot, an issue we discuss in Part II.B, *infra*.

This Court already has made clear that "[t]he congressional intent to limit awards to prevailing parties" requires that "unrelated claims [in a single lawsuit] be treated as if they had been raised in separate lawsuits" to determine whether attorneys' fees are available for a claim. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Likewise, it is appropriate to treat the claims in this action as if they had been filed in separate lawsuits: respondent Simon filed a complaint for an injunction based on the February 14, 2003 protest and nothing else; respondent Wyner filed the same complaint for an injunction based on the February 14, 2003 protest but also filed a separate complaint for a broader injunction based on the alleged unconstitutionality of the nudity ban on its face. Respondents also could have structured their complaint to have two distinct counts, but either way, respondents would have plainly prevailed in the first action (or count) on a preliminary injunction, but not in the second, and thus would be entitled to reasonable attorneys' fees for the first but not the second.

The eligibility for an award of attorneys' fees cannot turn on whether plaintiffs bring all their challenges in separate actions challenging discrete events or policies, in separately denominated counts of a single complaint, or if they litigate the as-applied and facial components of a single count separately. The contrary rule would encourage claim splitting with no appreciable benefit to defendants, while imposing an additional strain on judicial resources.

### B. The Court Of Appeals' Ruling That Petitioners' Later Appeal Of The Preliminary Injunction Was Moot Does Not Deprive Respondents Of Their Status As Prevailing Parties On The Preliminary Injunction

Petitioners claim that any injunction that becomes moot before the district court enters final judgment cannot be the basis for determining a party's status as a prevailing party. Petitioners' argument in this regard is not limited to preliminary injunctions, but even permanent injunctions that become moot before the final judgment is entered in the case by the district court.

There is no rationale for petitioners' reliance on the district court's final judgment as the point to measure whether a plaintiff prevailed by obtaining an injunction. Particularly when Congress provided each defendant subject to a preliminary injunction an opportunity to an immediate appeal, looking to the district court's final judgment makes no sense. The courts of appeals agree that "[t]he fact that the case was moot by the time of appeal does not alter the fact that the injunction altered the legal relationship between the parties when it was issued." *Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528 (D.C. Cir. 1999). Indeed, one of petitioners' own *amicus* recognizes that "every circuit to reach the question has concluded that the fact that injunctive relief becomes moot before it can be reviewed on appeal does not itself defeat prevailing party status." Br. of Nat'l League of Cities *et al.*, at 23 n.17 (collecting cases from seven circuits).[16]

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[16] See, in addition to the D.C. Circuit cases cited in the text, *e.g.*, *Haley v. Pataki*, 106 F.3d 478 (2d Cir. 1997); *Murphy v. Ft. Worth Indep. Sch. Dist.*, 334 F.3d 470 (5th Cir. 2003) (per curiam); *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000) (per curiam); *Bishop v. Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n*, 686 F.2d 1278 (8th Cir. 1982); *Richard S. v. Dep't of Developmental Servs. of Cal.*, 317 F.3d 1080 (9th Cir. 2003); *Dahlem v. Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508 (10th Cir. 1990).

The two cases cited by petitioners in an attempt to draw this consensus into doubt are inapposite. They each involve a situation in which, at the time that the relevant judgment was entered, the underlying case or controversy already had become moot. Of course, when a court lacks the authority to issue a judgment because there is no existing case and controversy, it is appropriate to say that any judgment issued in that case did not make the plaintiffs prevailing parties. That is the holding of *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam).

In the instant case, however, there is no dispute that there was an actual and on-going controversy between the parties in this case at the time the preliminary injunction was entered. That validly entered court order benefited respondents personally by authorizing them to engage in the protest at the time and in the manner they desired without fear of arrest and was not reversed.

*Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990), is likewise of no support to petitioners. In that case, the Court vacated the court of appeals' judgment in favor of the plaintiff because of an intervening change in law that had occurred while the case was pending in the court of appeals that mooted plaintiff's challenge. The Court thus concluded that plaintiff was no longer a prevailing party *in the court of appeals*. The Court expressly did not decide whether the plaintiff could recover attorneys' fees for prevailing in the district court in a case where the case became moot after the district court entered its final judgment "but before the losing party *could* challenge its validity on appeal." *Id.* at 483 (emphasis supplied). This case is at least one step removed from *Lewis*. An appeal of the preliminary injunction would not have been moot before the losing party could challenge its validity on appeal, because petitioners had an immediate right of appeal under 28 U.S.C. § 1292(a)(1). Petitioners chose not to take that appeal. They should not obtain a benefit for their inaction.

In this case, the district court's preliminary injunction provided certain relief to respondents by altering the legal

rights of the parties – protecting respondents from arrest for their conduct on February 14, 2003, while placing petitioners under threat of contempt unless they complied with the injunction. The preliminary injunction was not vacated or reversed by either the district court or court of appeals. It expired when the protest concluded. "The mootness of the subsequent appeal of that holding following the actual [anti-war protest] * * * emphasizes, rather than detracts from, the practical substance of their victory." *Grano v. Barry*, 783 F.2d 1104, 1109 (D.C. Cir. 1986).

* * *

A ruling in this case that a preliminary injunction can make a plaintiff a prevailing party does not mean that the plaintiff is entitled to fees expended on any other aspect of the case, or even all the fees for the preliminary injunction portion of the case. As this Court noted in *Buckhannon*, a district court's determination of the distinct question of what are reasonable attorneys' fees is extremely fact-intensive and can be influenced by all the circumstances surrounding the case. *See* 532 U.S. at 604 & n.6; *see also Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 790 (1989) ("the *degree* of the plaintiff's success in relation to the other goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee, not to eligibility for a fee award at all"). But petitioners' proposed categorical rule that excludes from prevailing-party status all plaintiffs who obtain only preliminary injunctions has no basis in the text or history of the statute or the precedents of this Court.

## CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully submitted,

RANDALL C. MARSHALL
ACLU FOUNDATION OF
FLORIDA, INC.
4500 Biscayne Blvd.
Miami, FL 33137

JAMES K. GREEN
JAMES K. GREEN, PA.
Suite 1650, Esperanté
222 Lakeview Ave.
West Palm Beach, FL 33401

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

BETH S. BRINKMANN
SETH M. GALANTER
*Counsel of Record*
BRIAN R. MATSUI
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, DC 20006
(202) 887-6947

*Attorneys for Respondents*

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