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SUPREME COURT, U.S.

No. 08-853

In the Supreme Court of the United States

BRUCE ZESSAR, PETITIONER,

v.

JOHN R. KEITH, *ET AL.*, RESPONDENTS.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a plaintiff is entitled to attorneys' fees under 42 U.S.C. § 1988 when the district court denied his request for preliminary injunctive relief and therefore refused to compel defendants to alter their conduct in any way, and plaintiff's only favorable, interlocutory order was mooted by a legislative change that plaintiff unsuccessfully challenged as inadequate to remedy his original constitutional claim.

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BRIEF IN OPPOSITION

The certiorari petition should be denied. Petitioner does not identify any actual conflict in lower court authority. Instead, he attempts to manufacture a split, but he does so only by misstating the holding below and eliding facts critical to the court of appeals' decision.

STATEMENT

1. In 2005, petitioner filed a complaint for prospective injunctive relief and damages, alleging that the absentee ballot provisions of the Illinois Election Code as then written, 10 ILCS 5/19-1 *et seq.* (2004), violated his constitutional rights because they failed to provide adequate notice and a hearing to absentee voters whose ballots were rejected. R. 1.

2. The district court certified a plaintiff class comprised of Illinois voters who submitted an absentee ballot for the November 2004 general election and had that ballot rejected without timely notice and an opportunity for a hearing. R. 85. The court also certified a defendant class of Illinois's 110 local election authorities. *Ibid.* The defendant class was represented by the remaining named defendants (after several defendants were dismissed), who are respondents here: the members and Executive Director of the Illinois State Board of Elections (State Respondents) and Willard R. Helander, the Clerk of Lake County, Illinois. *Ibid.*

3. The parties filed cross-motions for summary judgment, and on March 8, 2006, the district court entered an interlocutory order denying respondents' motions and granting petitioner's motion in part.

R. 86-87. The court concluded that absentee voters were entitled to notice and a hearing before their ballots were rejected, but declined petitioner's claims for damages or other equitable relief. R. 87. The court continued the matter for the parties to present plans to remedy the absentee ballot procedure. *Ibid.* Respondents moved for leave to appeal from the interlocutory grant of partial summary judgment immediately, R. 94, 96, but the district court denied their respective motions, R. 99.

4. On March 16, 2006, petitioner attempted to enforce the partial summary judgment order by moving for a preliminary injunction barring respondents from conducting the March 21, 2006, Illinois primary election pursuant to the challenged Election Code provisions. R. 90. The district court denied that motion, and the challenged provisions governed absentee voting for the March 2006 primary. R. 93.

5. While the matter remained pending before the district court, the Illinois General Assembly enacted Public Act 94-1000, effective July 3, 2006, amending the Illinois Election Code to provide, among other things, notice and a pre-deprivation hearing to absentee voters whose ballots are challenged. 10 ILCS 5/19-1 *et seq.* (2006).

6. On October 20, 2006, petitioner again moved for preliminary injunctive relief, this time in advance of the November 2006 general election, arguing that the newly enacted absentee ballot provisions did not remedy the alleged constitutional violations because they failed to provide adequate pre-deprivation process. R. 126. The district court denied the motion,

as well as petitioner's motion for reconsideration. R. 133, 137-138. The November 2006 general election was conducted under the new statutory provisions, notwithstanding petitioner's ongoing constitutional challenge to those provisions.

7. On June 13, 2007, the district court entered its final judgment. R. 156-157. The court rejected petitioner's claim that the amended statute was unconstitutional. Pet. App. 31a. Nonetheless, and despite the fact that the original statute was no longer in force, the court entered judgment holding the earlier version unconstitutional and deeming petitioner a prevailing party under 42 U.S.C. § 1988. Pet. App. 30a.

8. On appeal, the Seventh Circuit reversed that part of the district court's judgment declaring the pre-amendment version of the challenged Election Code provisions unconstitutional. Pet. App. 20a. Specifically, the court held that petitioner's challenge to that statute was moot before the district court entered judgment, and the court should not have entered judgment on a moot issue. Pet. App. 9a-13a. The court of appeals also reversed the determination that petitioner was a prevailing party. Pet. App. 20a. In reaching this conclusion, the Seventh Circuit explained that the partial summary judgment order lacked sufficient finality to qualify petitioner as a prevailing party. Pet. App. 17a-19a.

In particular, the court held that the interlocutory partial summary judgment order was not enforceable against respondents because it did not order them to do anything and, indeed, petitioner had attempted and failed to enforce it against them when he

unsuccessfully moved for preliminary injunctive relief. Pet. App. 17a-18a. Furthermore, respondents "never indicated any intention to implement the findings of the [district] court" but rather sought an immediate interlocutory appeal from that order. Pet. App. 18a. Finally, petitioner did not prevail at all, for he continued to challenge the amended version of the statute unsuccessfully. Pet. App. 18a-19a. For these reasons, the partial summary judgment order did not impose the sort of judicially sanctioned change on respondents' conduct that is necessary to confer prevailing party status on petitioner. Pet. App. 20a.

REASONS FOR DENYING THE PETITION

The petition mischaracterizes this case in multiple ways. First, petitioner contends that the decision below announces a new "'final judgment on the merits' requirement for 'prevailing party' status," Pet. 5 (footnote omitted), when in fact the Seventh Circuit relied on its own prior case law to reject precisely such a requirement. Second, petitioner invokes a string of cases awarding "prevailing party" status to plaintiffs who succeeded in obtaining preliminary injunctions forcing defendants to modify their conduct, *id.* at 10-13—and accuses the Seventh Circuit of breaking from this line of cases here, *id.* at 12—without ever informing this Court that petitioner *never* obtained a preliminary injunction. Indeed, he failed twice in trying to secure preliminary injunctive relief. Third, petitioner tells the Court that he "prevailed on the merits" in the end because the amended Election Code provides the "notice" and "opportunity to contest" rejected absentee ballots that he sought in filing suit. *Id.* at 13 n.6. But this ignores petitioner's litigation

position below, where he argued vigorously that the amendment failed to cure the constitutional infirmities he alleged in his complaint. Fourth, and finally, petitioner continually reports that it was respondents who mooted the case by amending the Election Code. *Id.* at 3, 8, 9. But respondents did not (and cannot) amend Illinois law; this was the work of the Illinois General Assembly, an independent branch of state government.

1. Petitioner founds his entire petition on a faulty premise. He claims that the Seventh Circuit announced a new rule defining a prevailing party under 42 U.S.C. § 1988 and that this unprecedented pronouncement created a circuit split. Pet. 4-5. In particular, petitioner contends that the Seventh Circuit adopted a standard requiring a party to receive a final judgment on the merits to qualify as a prevailing party under § 1988. Pet. 5. But this wholly misstates the decision below, which simply followed this Court's well-established rules that to be a prevailing party, "'a civil rights plaintiff must obtain at least some relief on the merits of his claim,'" Pet. App. 14a (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)), and that the ruling must involve "a 'judicial *imprimatur* on the change,'" meaning that a "*judicial act* must bring about 'a corresponding alteration in the legal relationship of the parties,'" Pet. App. 14a (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health*, 532 U.S. 598, 601, 605 (2001)) (latter emphasis supplied).

Thus, contrary to petitioner's contention, Pet. 4-5, the Seventh Circuit did not limit § 1988 fee awards to parties that obtain a final judgment on the merits. The court held merely that the failure to obtain a final

judgment on the merits "gives a plaintiff a hurdle to overcome" to establish that he was a prevailing party. Pet. App. 16a. The court made clear that the hurdle was surmountable; petitioner simply failed to clear it here. As the court explained, although "[n]ormally, such a determination [of prevailing party status] will require a final judgment on the merits or a consent decree," "[c]ases will sometimes arise where, despite there being no final judgment or consent decree, the legal relationship of the parties will be changed due to a defendant's change in conduct brought about by a judicial act exhibiting sufficient finality." Pet. App. 19a-20a. Based on its specific procedural history, the court properly determined that this was not such a case. Pet. App. 19a. But the court did so by engaging in precisely the analysis that petitioner advocates—the court looked beyond the fact that there was no final judgment on the merits and assessed whether the partial summary judgment order had sufficient finality to qualify petitioner as a prevailing party. In short, the Seventh Circuit came nowhere close to announcing a "final judgment on the merits" requirement. Pet. 5.

Indeed, had the court of appeals declared such a rule, it would have been required to overturn its own prior decision in *Palmetto Props., Inc. v. County of DuPage*, 375 F.3d 542 (7th Cir. 2004). Yet far from overruling *Palmetto*, the decision below carefully distinguishes it. Pet. App. 17a-20a. As the court explained, Palmetto was a prevailing party despite the lack of a final judgment on the merits because of the case-specific "finality surrounding the district court's order granting a motion for summary judgment." Pet. App. 17a. In contrast, the interlocutory order of partial summary judgment in favor of petitioner here "lacked

the finality exhibited in *Palmetto*," as the Seventh Circuit recognized. *Ibid.* The court thus distinguished *Palmetto* on several grounds. First, the plaintiff in *that case obtained an enforceable judgment prior to the* defendant mooting the case, but here petitioner could not enforce the partial order of summary judgment. Pet. App. 17a-18a. Second, the *Palmetto* defendant acquiesced in the court's order and took steps to comply with the order, whereas here respondents sought an immediate appeal of the partial summary judgment order and took no steps to amend Illinois law; it was the Illinois General Assembly, not respondents, who mooted the case. Pet. App. 18a. Third, the amendment in *Palmetto* satisfied the plaintiff, but here petitioner continued to challenge the constitutionality of the amended statute. *Ibid.*

The court did not disregard *Palmetto*, as petitioner suggests, Pet. 5 n.3; quite the opposite, it faithfully adhered to that decision and examined whether the partial summary judgment order in this case had sufficient finality *despite* the lack of a final judgment on the merits. Pet. App. 17a-20a. The Seventh Circuit's discussion of *Palmetto* thus was consistent with its other precedent recognizing that a plaintiff may be a prevailing party entitled to attorneys' fees even in the absence of a final judgment. See *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005) ("Several of our cases provide examples of the circumstances in which an interim award of attorneys' fees is appropriate or in which an attorneys' fee award should be upheld despite a lack of a final judgment."); *Young v. City of Chicago*, 202 F.3d 1000, 1000-1001 (7th Cir. 2000) (upholding award of attorneys' fees where

plaintiff obtained preliminary injunction and defendant mooted case before final judgment).

In short, far from adopting the per se rule that petitioner describes, the court below reaffirmed the principle, illustrated by *Palmetto*, that final judgment on the merits is not required to obtain a fee award under § 1988. Accordingly, the decision below does not implicate petitioner's supposed split in authority. Indeed, it is perfectly consistent with each of the cases on which petitioner relies, as shown below.

2. As support for his alleged split in circuit court authority, petitioner points to cases in which the plaintiff obtained a judicial decree requiring the defendant to take, or refrain from taking, certain action. The plaintiff in most of these cases obtained a preliminary injunction before the dispute became moot, see *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 233-235 (3d Cir. 2008); *Dearmore v. City of Garland*, 519 F.3d 517, 523-524 (5th Cir. 2008); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 946-949 (D.C. Cir. 2005); *Watson v. County of Riverside*, 300 F.3d 1092, 1093-1094 (9th Cir. 2002). The fee-seeking parties in petitioner's remaining cases were equally successful. Two obtained a preliminary and permanent injunction with defendants consenting to either one or both, see *United States v. Flowers*, 281 Fed. Appx. 960, 962-963 (11th Cir. 2008); *Sandusky County v. Blackwell*, 191 Fed. Appx. 397, 399-400 (6th Cir. 2006), another obtained interlocutory injunctive relief compelling the defendants to issue an environmental impact statement, see *Pres. Coalition of Erie County v. Fed. Transit Admin.*, 356 F.3d 444, 451-452 (2d Cir. 2004), and in *Me. Sch. Admin. Dist. No. 35*

v. Mr. R., 321 F.3d 9 (1st Cir. 2003), the *defendants* were prevailing parties because they defeated the plaintiff's request for judicial relief, see *id.* at 17. None of these cases is in any way inconsistent with the Seventh Circuit's decision below.

The obvious and dispositive difference between this case and *People Against Police Violence, Dearmore, Select Milk Producers,* and *Watson* is that, unlike petitioner, the plaintiffs in those cases all received preliminary injunctive relief compelling the defendants to change their conduct. In *People Against Police Violence*, for example, the court enjoined the City of Pittsburgh from enforcing its parade-permit ordinance, and that relief governed the City's conduct until the City drafted an ordinance satisfying the plaintiffs' concerns. See 520 F.3d at 228-230. Thus, the plaintiffs succeeded in obtaining a court order compelling defendant to alter its behavior for more than two years. Similarly, the *Dearmore* plaintiffs obtained a preliminary injunction barring enforcement of a City of Garland law permitting inspections and searches of certain unoccupied property. See 519 F.3d at 519. The court's order remained in effect for 12 days, until the City drafted an ordinance conforming to the court's interlocutory ruling. See *id.* at 519-520. During that period, the court's order required the City to refrain from doing something; therefore, the plaintiffs obtained a judicially sanctioned alteration of the parties' legal relationship. Likewise, in *Select Milk Producers* the plaintiffs obtained a preliminary injunction barring the Secretary of Agriculture from implementing a new price for Class III butterfat milk, and the injunction constrained the Secretary's actions for more than two years, until he announced a new

rule and the parties agreed to dismiss the matter as moot. See 400 F.3d at 941. Again, the defendant was prohibited from taking certain action by an enforceable court order. Finally, in *Watson*, the plaintiff obtained a preliminary injunction preventing the defendants from introducing a sworn report into evidence in an administrative hearing. See 300 F.3d 1093-1094. The injunction remained in place for the duration of the proceeding, which was conducted without the report. See *id.* at 1094.

In contrast, petitioner never obtained a preliminary injunction, a dispositive fact he omits entirely from the petition. Petitioner sought to enforce the partial summary judgment order and enjoin application of the challenged Election Code provisions to the March 2006 primary election, but the district court denied that request, R. 90, 93, and that election proceeded unaffected in any way by petitioner's suit. Petitioner later tried to enforce the partial summary judgment order again, this time to enjoin application of the amended Election Code provisions to the November 2006 general election, R. 126, but that effort likewise failed, R. 133. As the Seventh Circuit concluded, there simply "was no way to enforce this grant of partial summary judgment because [respondents] were not directed to do, or refrain from doing, anything." Pet. App. 17a-18a.

Because, unlike the plaintiffs in the cases he cites, petitioner never obtained preliminary injunctive relief, respondents were never required to change their conduct. This distinction is crucial, for a party may be a prevailing party only when the "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the

defendant's behavior," *Farrar*, 506 U.S. at 111-112, and that alteration is judicially sanctioned, see *Buckhannon*, 532 U.S. at 605. The only judicially sanctioned order that petitioner obtained here was an interlocutory ruling granting partial summary judgment, and that ruling had no effect on the respondents' conduct.[1]

And not only did petitioner fail to receive preliminary injunctive relief, but he also failed to obtain a final, permanent injunction, which makes this case distinguishable from *Flowers*, 281 Fed. Appx. at 962-963, and *Sandusky*, 191 Fed. Appx. at 399-400, two unpublished decisions on which petitioner also relies. Moreover, whereas the plaintiff in *Preservation Coalition* received injunctive relief requiring the defendant to issue an environmental impact report, see 356 F.3d at 451-452, here respondents were not required to do (or refrain from doing) anything. As for *Maine School*, the defendants there qualified as prevailing parties because they defeated the plaintiff's motion for a preliminary injunction and the plaintiff subsequently dismissed the case, see 321 F.3d at 17, meaning the defendants in effect received a final

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[1] This Court has left open the question whether, in the absence of a final judgment on the merits on a permanent injunction claim, an award of preliminary injunctive relief can confer prevailing party status. See *Sole v. Wyner*, 127 S. Ct. 2188, 2196 (2007). But this case does not allow the court to resolve that issue because petitioner never succeeded in obtaining a preliminary injunction.

judgment on the merits, which petitioner did not obtain here.

Finally, the cases that petitioner asserts are on *respondents'* side of the supposed circuit split do not support further review by this Court. Pet. 12-13 (citing *Christina A. v. Bloomberg*, 315 F.3d 990 (8th Cir. 2003); and *Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002)). The issue before the Eighth Circuit in *Christina A.* was whether a court-approved final settlement of a class action suit, *not* an interlocutory order of the court, possessed sufficient judicial imprimatur to qualify the plaintiffs as prevailing parties. See 315 F.3d at 991. The court applied this Court's holding in *Buckhannon* that a consent decree does carry sufficient judicial imprimatur but a private settlement between the parties does not, and determined that the court-approved agreement at issue was closer to a private settlement agreement than a consent decree. See *id.* at 992-994. Thus, the Eighth Circuit applied the same rule at work in all of petitioner's cases—"a legal change, rather than a voluntary change, in the relationship of the parties is required," *id.* at 992—but to a factual circumstance wholly distinct from this one.

The Fourth Circuit's decision in *Smyth* is similarly beside the point. There, the court considered whether a preliminary injunction that barred defendants from enforcing a state regulation until the case was mooted possessed sufficient judicial imprimatur to confer prevailing party status, and held that it did not. See 282 F.3d at 275-277. Again, petitioners here did not obtain preliminary injunctive relief, making *Smyth* irrelevant to this case. Even if *Smyth* were an outlier

on the question of the effect of a preliminary injunction on prevailing party status, any such conflict would not be implicated here given petitioner's failure to obtain a preliminary injunction.

3. Having failed to establish a split in the circuits, petitioner makes a bid for error-correction review by contending that he in fact prevailed on the merits of his claim because he "ultimately obtained the review sought in his complaint; to be given notice of his ballot rejection and allowed an opportunity to contest." Pet. 13 n.6. To the contrary, petitioner continued to challenge the amended Election Code provisions, claiming that they did not cure the constitutional defects alleged in his complaint. Petitioner thus sought to enjoin the use of these provisions in the November 2006 general election on the ground that they were inadequate to protect his rights, and he persisted in that argument until the district court issued a final judgment on the merits rejecting his claim that the amended statute was unconstitutional. It is disingenuous for petitioner now to suggest that he obtained the relief he sought when he consistently argued before the district court that this "relief" violated his constitutional rights.

Even more importantly, the relief petitioner obtained did not come as the result of a judicially sanctioned change in respondents' conduct. First, although the petition repeatedly refers to the "defendants" having mooted the case, it was the Illinois General Assembly and not respondents who amended the statute. In that respect this case is very different from *People Against Police Violence, Dearmore, Select Milk Producers,* and *Watson*, where the defendants themselves took the actions that mooted the case. Far

from acquiescing in petitioner's challenge, respondents sought an immediate appeal of the interlocutory order awarding petitioner partial summary judgment. Second, the legislature's action was not compelled by any court order. Indeed, while the district court ordered petitioner and respondents to submit proposed remedial plans, the court did not and could not order the Illinois General Assembly to pass the amending legislation. Petitioner ultimately seeks to resurrect the "catalyst theory," whereby voluntary changes precipitated by a lawsuit are enough to confer prevailing party status, but this Court has expressly rejected that theory. See *Buckhannon*, 532 U.S. at 604-610. Because petitioner did not obtain any relief due to a judicially sanctioned change in respondents' conduct, he was not a prevailing party under § 1988.

4. That the Illinois General Assembly and not respondents were responsible for amending the Election Code also defeats petitioner's effort to correct what he sees as bad policy. Pet. 14-15 (arguing that, under the Seventh Circuit's purported "final judgment rule," "the wrongdoer may moot a plaintiff's claim at the eleventh hour to avoid paying attorneys fees"). Respondents were sued because they were required to enforce the challenged Election Code provisions; they did not enact the legislation, nor did they (or could they) amend it to prevent petitioner from qualifying as a prevailing party. They defended the statute, and their ability to continue that defense was cut off when the case was mooted by a non-party, the Illinois legislature. It would defy both good policy and equity to find respondents liable to petitioner under § 1988 in these circumstances.

This conclusion follows from the prevailing rule that a legislature's enactment of a statutory amendment is not considered the act of the executive branch officials named in a suit seeking to enjoin the law's enforcement. See, *e.g., Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 879 (9th Cir. 2006); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121 (4th Cir. 2000); *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997). As in these cases, respondents did not pass the legislation at issue. Rather, they sought (unsuccessfully) to take an immediate appeal from the partial summary judgment order and continue to defend the constitutionality of the statute.[2] This critical distinction between the actions of a legislature and of executive branch officials bound to enforce legislation is lost on petitioner. Pet. 3 ("defendants' actions had mooted the case"); *id.* at 8 ("Defendants' mooting actions followed the District Court's definitive summary judgment ruling on the merits"); *id.* at 9 ("Defendants were able to 'moot' the case").

Moreover, even if the actions of the General Assembly could be attributed to respondents, and even if it were the courts' role to redefine "prevailing party" in § 1988 to promote what petitioner considers good policy, there are sound reasons against declaring petitioner a prevailing party here. This Court in

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[2] Indeed, Respondent Helander continued to argue the validity of the pre-amendment statute in her brief on appeal to the Seventh Circuit, and the State Board Respondents adopted that argument in their brief.

Buckhannon reasoned that it is desirable for defendants to change their conduct voluntarily, see 532 U.S. at 608, and petitioner's proposed redefinition of "prevailing party" would undercut that goal by encouraging defendants to continue litigating to avoid attorneys' fees where they might otherwise adopt agreeable remedial measures. Critically, the policy favoring voluntary resolution of claims is especially strong in cases such as this one, involving the enactment of remedial legislation. Indeed, even if a legislature amends a statute in response to a lawsuit, that action "represents responsible lawmaking, not manipulation of the judicial process." *Nat'l Black Police Ass'n*, 108 F.3d at 352 (internal quotation marks omitted); accord *Khodara Envtl. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 195 (3d Cir. 2001); *McClendon v. City of Albuquerque*, 100 F.3d 863, 868 (10th Cir. 1996). An award of fees under § 1988 in this case surely would counsel in the future against proactive, remedial legislation before a final judgment is reached. Such a result would be the antithesis of responsible lawmaking and run afoul of *Buckhannon*'s policy favoring voluntary resolution of claims.

Furthermore, insofar as petitioner claims that his lawsuit precipitated the General Assembly's amendment of the Election Code, Pet. 8 n.4, this is irrelevant given this Court's rejection of the catalyst theory, *see Buckhannon,* 532 U.S. at 604-610. In *Buckhannon*, this Court repudiated the approach that any voluntary change by defendants in response to a lawsuit entitled plaintiffs to attorneys' fees because it permitted an award of fees where there was no judicially sanctioned change in the legal relationship of the parties, and thus discouraged defendants from

changing their conduct voluntarily. See *id.* at 605-608. Accordingly, a legislator's reference to petitioner's lawsuit in the debates—even if fairly understood to indicate that petitioner's lawsuit was the catalyst for the statutory amendment, as he contends, Pet. 8—is legally irrelevant. Were petitioner to get his way, defendants would recognize the substantial disincentive to changing their conduct voluntarily, and that would be especially harmful in cases, like this, where the legislature acted responsibly and undertook a proactive solution to a perceived statutory problem.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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