No. 07-1427

In the Supreme Court of the United States

UFO CHUTING OF HAWAII, INC., ET AL., PETITIONERS

v.

LAURA H. THIELEN, CHAIR AND ACTING DIRECTOR OF THE BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Hawaii's five-month ban on parasailing during humpback whale mating season in navigable waters off the coast of Maui is preempted by the Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq*.

2. Whether petitioners are "prevailing parties" eligible for attorney's fees under 42 U.S.C. 1988 where the district court stayed its permanent injunction entered in favor of petitioners before the injunction took effect and subsequently vacated that injunction and entered final judgment against petitioners.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, regulations and rule: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 508 F.3d 1189. An order of the district court (Pet. App. 39a-49a) is reported at 380 F. Supp. 2d 1160. Other orders of the district court (Pet. App. 20a-38a, 50a-56a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 2007. A petition for rehearing was denied on February 11, 2008 (Pet. App. 57a). The petition for a writ of certiorari was filed on May 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The State of Hawaii (State) prohibits parasailing and certain other boating activities in areas off the western and southern shore of the Island of Maui during the humpback whale mating season, a five-month period from December 15 to May 15. See Haw. Rev. Stat. Ann. §§ 200-37(i), 200-38(c). Petitioners own parasailing businesses in Maui that operate in waters covered by that seasonal prohibition.

1. In November 2003, petitioners filed suit challenging the State's seasonal parasailing ban. Petitioners' second amended complaint alleged, *inter alia*, that the Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. 1361 *et seq.*, preempted the State's ban because the MMPA, as is relevant here, provides that

> [n]o State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species * * * of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species * * * to the State.

16 U.S.C. 1379(a). See C.A. E.R. 295, 300. The district court agreed, granted summary judgment to petitioners, and, on September 29, 2004, issued a permanent injunction enjoining the State from enforcing the seasonal ban. *Id.* at 328-350, 369-370. In the absence of that injunction, petitioners' parasailing operations off Maui would have been prohibited under State law at the start of the next seasonal ban on December 15, 2004.

On December 8, 2004, while the State's appeal to the Ninth Circuit was pending, the President signed into law the Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 2809. Section 213 of that act provides:

> Hereafter, notwithstanding any other Federal law related to the conservation and management of marine mammals, the State of Hawaii may enforce any State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales, to the extent that such law or regulation is no less restrictive than Federal law.

118 Stat. 2884.

The State promptly moved the district court to stay its injunction and, on December 13, 2004—two days before the seasonal parasailing ban was to take effect—the district court stayed its injunction pending appeal. C.A. E.R. 405-406. The court of appeals subsequently ordered a partial remand of the State's appeal for the limited purpose of enabling the district court to consider the State's request for post-judgment relief under Fed. R. Civ. P. 60(b). C.A. E.R. 412-413.

The State moved for relief from judgment on the ground that Section 213 now authorized the State's parasailing prohibition; petitioners opposed relief on the ground that Section 213 violated separation of powers principles; and the United States intervened to defend the statute's constitutionality. On May 5, 2005, the district court granted the State's motion for post-judgment relief and vacated its injunction, holding that Section 213 was constitutional and "expressly authorize[d]" the parasailing ban. Pet. App. 25a; *id.* at 24a-36a. The court of appeals subsequently granted the State's motion to dismiss its appeal. C.A. E.R. 464-465.

On July 7, 2005, the district court granted summary judgment to the State on petitioners' remaining claims

by, *inter alia*, rejecting petitioner's contention that the parasailing ban conflicts with and was preempted by documents issued by the United States Coast Guard, which certify petitioners' vessels for use in "coastwise" trade along the Maui coast. *Id.* at 45a-49a.[1] The court denied petitioners' motion for attorney's fees, holding that petitioners were not "prevailing parties" who might obtain a fee award. *Id.* at 50a-56a.

2. The court of appeals affirmed. Pet. App. 1a-19a. It held that the State's seasonal parasailing ban did not conflict with and was not preempted by petitioners' Coast Guard certificates for their vessels because the ban did not constitute a total exclusion of coastwise trade, prohibits parasailing but not other forms of passenger-related commerce, and applies during only five months of the year. *Id.* at 5a-8a. The court further held that the seasonal ban was a reasonable, nondiscriminatory conservation measure that survived rational-basis review because it furthered a legitimate government interest within the State's police powers. *Id.* at 8a-13a. The court of appeals did not address whether the parasailing ban was preempted by the MMPA or whether

[1] The Coast Guard has issued Certificates of Documentation and Certificates of Inspection for two vessels owned by petitioners. C.A. E.R. 96-101. A Certificate of Documentation serves as evidence of a vessel's nationality and its "qualification to engage" in a specified trade such as coastwise trade. 46 U.S.C. 12134 (2006); see 46 U.S.C. 12105(a), 12112(a)(3) and (b) (2006); 46 C.F.R. 67.1, 67.19(a). The Certificates of Inspection, in turn, reflect that petitioners' vessels may carry 12 passengers each and have met "applicable vessel inspection laws and [associated] rules and regulations." C.A. E.R. 98, 100.

Section 213 was constitutional because petitioners failed to renew those challenges on appeal.[2]

The court of appeals also affirmed the district court's denial of attorney's fees on the ground that petitioners were not "prevailing part[ies]" within the meaning of 42 U.S.C. 1988. Pet. App. 13a-15a. The court explained that, to achieve "prevailing party" status, a plaintiff must obtain relief that "materially alters the legal relationship between the parties" in a manner that "directly benefits the plaintiff," and therefore must "show that the judgment somehow affected the behavior of the defendant towards the plaintiff." *Id.* at 13a-14a (citations omitted). The court of appeals thus concluded that petitioners did not qualify as prevailing parties because the district court stayed its (now vacated) injunction before the State's seasonal ban began on December 15, 2004, such that the injunction did not alter the parties' conduct in a manner that might have benefitted petitioners. *Id.* at 15a.

ARGUMENT

The court of appeals correctly concluded that the State's seasonal ban on parasailing off the coast of Maui is not preempted by federal law and that petitioners are not "prevailing parties" eligible to receive an award of attorney's fees. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioners contend that the MMPA reflects the federal government's "pervasive role" in protecting "all

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[2] Because the United States intervened solely to defend the constitutionality of Section 213 from petitioners' separation-of-powers challenge, which petitioners abandoned on appeal, the United States did not file a brief or otherwise participate in the court of appeals.

marine mammals, including humpback whales," Pet. 19, and that Section 1379(a) "[c]onfirm[s]" that exclusive federal role by "explicitly" preempting state law relating to the taking of marine mammals unless the federal government has transferred relevant authority to a state. Pet. 20. Petitioners therefore conclude that the MMPA preempts state regulation regarding "the health and well being of marine mammals" under the doctrines of express preemption and field preemption. *Ibid.*; see Pet. 18-25. Petitioners' contentions are meritless.

First, this case does not properly present the question whether the MMPA preempts the State's seasonal parasailing ban because petitioners did not raise the question on appeal and the court of appeals did not pass upon it. Petitioners abandoned the argument on appeal and, under this Court's "traditional rule," matters not pressed or passed upon below are not properly subject to review by writ of certiorari. *United States* v. *Williams*, 504 U.S. 36, 41-43 (1992) (citations omitted).

Moreover, petitioners' argument is unavailing on its merits. "Congressional intent is the 'ultimate touchstone' in any preemption analysis," Pet. 18, and Congress made plain in 2004 that—"notwithstanding *any* other Federal law related to the conservation and management of marine mammals"—the "State of Hawaii may enforce *any* State law or regulation with respect to the operation in State waters of recreational and commercial vessels, for the purpose of conservation and management of humpback whales," so long as it imposes obligations no less restrictive than federal law. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 213, 118 Stat. 2884 (emphasis added). Whatever the preemptive scope of the MMPA in other contexts, Congress has expressly authorized the State in this case to

enforce its seasonal parasailing ban and similar prohibitions protecting humpback whales "notwithstanding" the MMPA.[3]

2. Petitioners' argument (Pet. 26-29) that they qualify as "prevailing parties" eligible for attorney's fees is also without merit. It is well settled that a litigant must succeed on some "significant issue in litigation which achieves some of the benefit [it] sought in bringing suit"

[3] Petitioners' reply brief filed in response to the State's brief in opposition asserts that petitioners' argument "is grounded on the ban's effect on the right of coastwise navigation secured by Petitioners' federal licenses [issued by the Coast Guard], not any preemptive effect of the MMPA itself." Reply 4. That position cannot be squared with the question presented or the body of the petition. The relevant question presented, as framed by petitioners, is whether the State's seasonal parasailing ban "violate[s] the Supremacy Clause because it furthers neither the purposes nor the objectives of the federal Marine Mammal Protection Act." Pet. i. Petitioners' list of relevant statutory provisions therefore includes provisions of the MMPA and no provisions regarding documentation for vessels issued by the Coast Guard. Pet. 2-7. The petition's argument likewise focuses on the purported preemptive effect of the MMPA and petitioners' view that this Court's decision in *United States* v. *Locke*, 529 U.S. 89 (2000), requires the presumption that "the federal presence over the management and preservation of humpback whales in navigable waters is dominant" and precludes the state's ban unless that ban satisfies a "higher level of [judicial] scrutiny," Pet. 23. See Pet. 18-25. Although the petition briefly mentions Coast Guard documentation for petitioners' vessels, it does so only in the context of explaining that the court of appeals' purported misapplication of *Locke* "also infected" its evaluation of whether the ban was a reasonable, nondiscriminatory exercise of the State's police power. Pet. 24-25. Nowhere does the petition argue that such federal documentation preempts the State's ban. Indeed, while the Certificates of Documentation and Inspection issued by the Coast Guard for petitioners' vessels reflect that the vessels are qualified to be employed in coastwise trade and have met applicable inspection requirements for their use off Maui, see p. 4 note 1, *supra*, they do not preempt the State's seasonal restrictions on parasailing.

in order to qualify as a "prevailing party." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted) (emphasis added). Indeed, a "plaintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail," and that court-ordered relief must effectuate a "material alteration of the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603-604 (2001) (citations omitted). A plaintiff will therefore qualify as a prevailing party "if, and only if," it obtains judicial relief that "affects the behavior of the defendant toward the plaintiff." *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (per curiam).

In this case, although petitioners initially obtained an injunctive order, the district court stayed that order before it might affect the legal relationship of the parties. The district court then vacated the injunction enjoining the enforcement of the State's ban before the injunction could alter the State's enforcement efforts. The State never changed its behavior as a result of judicial relief in this case, and petitioners ultimately obtained no reprieve from the State's seasonal parasailing ban. The court of appeals thus correctly concluded that petitioners were not "prevailing parties." Pet. App. 14a-15a; cf. *Sole* v. *Wyner*, 127 S. Ct. 2188, 2196 (2007) (holding that party who obtains preliminary injunction temporarily altering the parties' legal relationship is not a "prevailing party" if the preliminary injunction "is reversed, dissolved, or otherwise undone by the [court's] final decision").

Petitioners cite no contrary authority holding that prevailing party status may be based on a vacated judgment that never altered the defendant's conduct. Pet. 28. They instead rely on inapposite decisions either ad-

vancing legal theories subsequently rejected by this Court[4] or involving parties that arguably obtained some degree tangible of judicial relief.[5] Further review is therefore unwarranted.

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[4] Compare *Coalition for Basic Human Needs* v. *King*, 691 F.2d 597 (1st Cir. 1982) (basing prevailing party status on issuance of injunction pending appeal of denial of temporary restraining order even though suit became moot before injunction took effect), with *Rhodes*, 488 U.S. at 4 (judgment ordering action by defendant that became moot before it could take effect did not confer prevailing party status on plaintiffs); compare also *Hyundai Motor* v. *J.R. Huerta Hyundai, Inc.*, 775 F. Supp. 915, 919-920 (E.D. La. 1991) (applying catalyst theory), with *Buckhannon*, 532 U.S. at 605 (rejecting catalyst theory).

[5] See, *e.g.*, *Gerling Global Reinsurance Corp.* v. *Garamendi*, 400 F.3d 803, 806 (9th Cir. 2005) (plaintiffs obtained permanent injunction providing "all of the relief they sought in their lawsuit" and "materially alter[ing] the legal relationship between the parties" (citation omitted)); *Balark* v. *City of Chicago*, 81 F.3d 658, 662 (7th Cir.) (plaintiffs obtained consent decree affecting defendant's conduct for more than a decade), cert. denied, 519 U.S. 1006 (1996). Petitioners also rely on two cases that based prevailing party status on the entry of a preliminary injunction that briefly altered the defendant's conduct before the case became moot prior to final judgment. See Pet. 28 (citing *Watson* v. *County of Riverside*, 300 F.3d 1092, 1095 (9th Cir. 2002) (preliminary injunction prevented use of arrest report in administrative hearing), cert. denied, 538 U.S. 923 (2003), and *Hyundai Motor*, 775 F. Supp. at 917-919 (preliminary injunction "provided the plaintiffs with the relief they sought for the pertinent period of time")). Even assuming *arguendo* that the Court's recent decision in *Sole* does not affect the vitality of such decisions, both cases involved plaintiffs who, unlike petitioners, obtained judicial relief temporarily altering the defendant's conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2008