No. 17-1041

In the Supreme Court of the United States

GERARD A. SHERIDAN, PETITIONER

v.

MANUEL DE JESUS ORTEGA MELENDRES, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that petitioner's appeal was moot.

2. Whether the court of appeals erred in awarding the private plaintiffs attorney's fees under 42 U.S.C. 1988(b) for defending the judgment against petitioner's appeal.

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OPINIONS BELOW

The order of the court of appeals dismissing petitioner's appeal as moot (Pet. App. 6a-9a) is not published in the Federal Supplement but is available at 2017 WL 4315029. The order of the court of appeals finding petitioner liable for attorney's fees on appeal (Pet. App. 1a-5a) is reported at 878 F.3d 1214.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2017. A petition for rehearing was denied on October 24, 2017 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on January 22, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a former Chief Deputy Sheriff in the Maricopa County Sheriff's Office (MCSO). In 2007, private plaintiffs filed a class action against Maricopa

County and then-Sheriff Joseph Arpaio under 42 U.S.C. 1983, alleging that the defendants had engaged in discriminatory policing against Latinos in violation of the Fourth and Fourteenth Amendments. The district court issued a preliminary injunction prohibiting the defendants from engaging in certain unlawful detention practices, see 836 F. Supp. 2d 959, 994, and later determined at trial that the defendants were liable for various constitutional violations, see 989 F. Supp. 2d 822. The court entered a permanent injunction directing MCSO to amend its policies and procedures to address the violations. It also appointed an independent monitor to oversee compliance with the injunction. 2013 WL 5498218. The Ninth Circuit largely affirmed that injunction. 784 F.3d 1254, cert. denied, 136 S. Ct. 799.

2. The district court subsequently learned that the defendants had violated pretrial discovery obligations to turn over recordings of traffic stops and an oral post-trial order regarding the preservation of recordings. D. Ct. Doc. 880, at 3-5 (Feb. 12, 2015). In the post-trial order, the court had directed petitioner, who was present in the courtroom, to "quietly" develop a protocol for retrieving outstanding recordings, so as to prevent concealment or destruction of evidence by MCSO deputies. D. Ct. Doc. 700, at 25-27 (May 14, 2014). Petitioner confirmed that he would do so. *Id.* at 26-35. But he did not comply, and instead issued instructions for collecting recordings in a way that flouted the court's direction. D. Ct. Doc. 880, at 14-15, 24-25. In addition, an administrative investigation established that the defendants had continued their unlawful detention practices for "at least seventeen months" after the district court issued its preliminary injunction. *Id.* at 5.

The district court issued an order to show cause why the defendants, as well as petitioner and other MCSO officers, should not be held in civil contempt. D. Ct. Doc. 880, at 8-9. The court set forth three potential bases for civil contempt: (1) failing to implement and comply with the December 2011 preliminary injunction, (2) violating pretrial discovery obligations, and (3) failing to comply with the court's May 2014 post-trial order regarding retrieval of outstanding recordings. *Ibid.*

The district court scheduled an evidentiary hearing. Petitioner, Arpaio, and MCSO moved to vacate the hearing, acknowledging that they had violated the court's orders and consenting to a finding of civil contempt against them based on facts presented in the order to show cause. D. Ct. Doc. 948 (Mar. 17, 2015). After the parties' attempts to settle the matter were unsuccessful, the court denied the motion to vacate the hearing. C.A. E.R. 234.

The district court held a 21-day evidentiary hearing regarding whether petitioner, Arpaio, and others committed civil contempt. C.A. E.R. 68. After the first four days of the hearing, petitioner and Arpaio moved for recusal of the district court judge under 28 U.S.C. 455. The court denied the motion. C.A. E.R. 269. Petitioner and Arpaio then filed a petition for mandamus in the Ninth Circuit, which the court denied. 15-72440 Order 2 (Sept. 15, 2015). In the meantime, the district court granted the federal government's motion to intervene. D. Ct. Doc. 1239 (Aug. 13, 2015).

Following the hearings, the district court held petitioner, Arpaio, and MCSO Lieutenant Joseph Sousa in civil contempt for knowingly and intentionally failing to implement the preliminary injunction. D. Ct. Doc. 1677, at 3, 16-20 (May 13, 2016). The court also found that

petitioner had violated its orders to gather recordings of police stops. *Id.* at 40-43. The court noted that petitioner had admitted that he had violated these court orders. *Id.* at 16-20.

Because the defendants were no longer violating the injunction, the district court did not use its contempt power to coerce compliance. D. Ct. Doc. 1677, at 155. The court ordered the defendants to pay compensation to the victims, but it expressly declined to hold petitioner, a nonparty contemnor, jointly and severally liable for those costs. D. Ct. Doc. 1791, at 3 (Aug. 19, 2016).

The district court later issued a supplemental permanent injunction—the second supplemental permanent injunction/judgment order—which mandated new internal affairs procedures. 2016 WL 3965949. Among other things, the injunction authorized an independent investigator to examine specified incidents of misconduct by MCSO employees toward the plaintiff class and, if appropriate, to recommend employee discipline against current MCSO officials. *Id.* at *30-*35. The injunction did not authorize any disciplinary action against individuals who were not current MCSO officials.

The district court also referred petitioner to another judge of the district court to determine whether criminal contempt charges were appropriate to address his discovery violations. D. Ct. Doc. 1792, at 2 (Aug. 19, 2016). Petitioner was never prosecuted for criminal contempt, and the statute of limitations has now run.

3. a. Petitioner, Arpaio, and Sousa appealed from the second supplemental permanent injunction/judgment order and subordinate interlocutory orders, arguing that the injunction exceeded the district court's remedial powers. C.A. Doc. 11, 29-42 (Dec. 27, 2016). They moved for disqualification of the district judge and

the court-appointed monitor and asked that the injunction and underlying contempt findings be vacated. *Id.* at 43-59.

Subsequently, Arpaio was defeated in his bid for reelection, and petitioner and Sousa retired from MCSO. Arpaio's successor as sheriff, Paul Penzone, filed a notice of substitution for Arpaio and then dismissed Arpaio's appeal. Sousa also dismissed his appeal, leaving petitioner as the only remaining appellant. D. Ct. Doc. 2044, at 2 (May 18, 2017); C.A. Doc. 24 (Feb. 9, 2017); C.A. Doc. 29 (Apr. 26, 2017); C.A. Doc. 33 (May 23, 2017); C.A. Doc. 34 (May 25, 2017).

Private plaintiffs and the United States moved to dismiss petitioner's appeal for lack of standing in light of petitioner's retirement from MCSO. C.A. Doc. 38-1 (June 2, 2017); C.A. Doc. 48-1 (June 22, 2017). Petitioner argued that he had standing to appeal the injunctive relief and contempt findings because they had "reopened or initiated new internal affairs investigations into [petitioner]'s past acts, which * * * damaged his professional reputation." C.A. Doc. 50, at 8-9 (June 22, 2017). He further asserted that, as a result of these investigations, he "could ultimately be stripped of any certifications and could likely never obtain employment in law enforcement again." *Id.* at 18; see C.A. Doc. 52, at 7-8 (July 3, 2017).

b. In an unpublished order, the court of appeals granted the motions to dismiss petitioner's appeal based on lack of standing. Pet. App. 6a-9a. The court explained that petitioner was a "non-party civil contemnor" who "ha[d] incurred no personal liability, financial or otherwise, as a result of the district court's judgment or finding of civil contempt." *Id.* at 7a. It stated that while "he originally was bound by the judgment insofar

as it imposed obligations on the Maricopa County Sheriff's Office, where he was then employed, his subsequent retirement mooted that interest." *Ibid.* Moreover, the court observed that petitioner's allegation that he suffered reputational harm as a result of the otherwise moot orders was "insufficient to save his appeal from mootness." *Id.* at 8a.

The court of appeals next determined that petitioner had put forward no concrete collateral consequence sufficient to preserve a live dispute. Pet. App. 8a. It concluded that "the district court's criminal contempt referral" did not save the case from mootness because the referral itself "carrie[d] no legal consequences" and because petitioner "ha[d] since been dismissed from the criminal contempt proceedings on the ground that the statute of limitations has run." *Ibid.* The court of appeals further concluded that there was not a live controversy because the Arizona Peace Officer Standards and Training Board had begun an investigation as a result of the contempt referral, reasoning that the Board inquiry was "an independent investigation whose resolution 'depends on the unfettered choices made by independent actors not before the courts.'" *Ibid.* (citations omitted). Finally, the court determined that petitioner's allegations that "the district court's actions interfere with his ability to procure future employment" were speculative, because petitioner "has not identified 'even one such job for which [he] has in fact applied.'" *Ibid.* (citation omitted; brackets in original). Because petitioner "ha[d] no legally cognizable interest in the litigation at this point," the court of appeals concluded that petitioner "also lack[ed] standing to seek recusal of the district judge and monitor." *Ibid.*

c. Petitioner sought panel rehearing. C.A. Doc. 58 (Sept. 18, 2017). With his petition for rehearing, petitioner submitted an affidavit asserting concrete collateral injuries from the civil contempt order. See Pet. App. 13a-18a. The government argued that panel rehearing should be denied because petitioner's affidavit was not properly in the record and petitioner had not identified any facts or points of law that the panel had overlooked or misapprehended. C.A. Doc. 64 (Oct. 13, 2017). The panel denied rehearing without opinion. Pet. App. 11a.

4. The court of appeals granted the private plaintiffs' motion for attorney's fees and costs in connection with their motion to dismiss petitioner's appeal. Pet. App. 1a-5a. The court determined that the plaintiffs were "prevailing parties," *id.* at 3a, for the purposes of 42 U.S.C. 1988(b), which authorizes "the prevailing party, other than the United States," to recover "a reasonable attorney's fee" in any action or proceeding to enforce rights under Section 1983. The plaintiffs were prevailing parties, the court concluded, because "[t]hey succeeded in obtaining an injunction in the district court and succeeded in dismissing [petitioner's] appeal from its finding of contempt for violating that injunction." Pet. App. 3a. It concluded that the fact that petitioner's appeal was dismissed "for lack of standing rather than on the merits" did not "divest [p]laintiffs of prevailing party status." *Ibid.*

The court of appeals also concluded that *Kentucky* v. *Graham*, 473 U.S. 159 (1985), did not bar an award of attorney's fees. Pet. App. 3a-4a. *Graham*, the court explained, rejected a fee award against a state entity that had been dismissed from a lawsuit on Eleventh Amendment grounds, and did not participate in the litigation

thereafter. *Id.* at 4a. Petitioner, in contrast, "actively inserted himself into the litigation by appealing the contempt finding in the hope of clearing his name." *Ibid.* The court then referred the matter to the appellate commissioner to determine the reasonableness of the plaintiffs' fee request. *Id.* at 5a. The appellate commissioner subsequently awarded $52,877.42 in attorney's fees. C.A. Doc. 72, at 7 (Mar. 1, 2018).

ARGUMENT

Petitioner contends (Pet. 13-21) that the court of appeals erred in dismissing his appeal as moot. The court of appeals correctly dismissed the appeal, and its decision does not conflict with any decision of this Court or another court of appeals. Petitioner further contends (Pet. 26-34) that the court of appeals erred in awarding attorney's fees to the private plaintiffs for defending the judgment against petitioner's appeal. That decision also does not generate any conflict or otherwise warrant this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

1. a. The court of appeals correctly dismissed as moot petitioner's appeal of the district court's order determining that petitioner and others had committed civil contempt. The doctrines of standing and mootness derive from the "case-or-controversy" requirement in Article III, Section 2 of the Constitution. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). To demonstrate standing under Article III, a plaintiff must demonstrate, among other things, that he has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citation omitted).

This Court has described mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 397 (1980) (citation omitted). A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC* v. *Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Murphy* v. *Hunt*, 455 U.S. 478, 481 (1982) (per curiam)). Put another way, a case is moot where it "is no longer embedded in any actual controversy about the plaintiffs' particular legal rights." *Alvarez* v. *Smith*, 558 U.S. 87, 93 (2009); see *DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (per curiam) (case is moot where it no longer "touches the legal relations of parties having adverse legal interests") (brackets and citation omitted).

Under those principles, a litigant may not continue to litigate a case that would otherwise be moot simply by claiming that he suffered reputational harm as a by-product of determinations in the litigation. In *Spencer* v. *Kemna*, 523 U.S. 1, 8 (1998), this Court concluded that an appeal of the court's "finding of a parole violation for forcible rape and armed criminal action" was moot, *id.* at 15 (citation omitted), when the parolee had completed his sentence based on the parole violation, *id.* at 18. This Court rejected the argument that because there had been "a finding that an individual has committed a serious felony," the parolee could avoid mootness based on his "interest in vindicating reputation." *Id.* at 16 n.8 (citation and ellipses omitted). The Court stated that it "obviously [had] not regarded [that interest] as suffi-

cient in the past" to save a challenge to a judicial decision from mootness, and that it had instead required "concrete collateral consequences." *Ibid.*

Reputational harm in some circumstances may establish standing when a litigant challenges an ongoing governmental action as causing such harm. See *Meese* v. *Keene*, 481 U.S. 465, 468, 469-477 (1987) (determining that a litigant had standing to bring a First Amendment challenge to the federal government's designation of certain films as "political propaganda" under the Foreign Agents Registration Act of 1938, 22 U.S.C. 611 *et seq.*, based on reputational harm established through detailed supporting affidavits). But those cases do not permit a litigant to keep alive a dispute that is otherwise moot by asserting reputational harm as a byproduct of the litigation itself.

The court of appeals correctly applied those principles when it concluded that petitioner's appeal became moot following his retirement from MCSO. Petitioner was never ordered to pay compensation under the contempt order, and there is no dispute that petitioner lacked continuing obligations under the district court's orders once he retired from MCSO. Pet. App. 7a. Nor does the underlying litigation in this case concern some ongoing governmental action alleged to be causing petitioner harm. Rather, petitioner asserted only that he suffered reputational harm as a collateral consequence of the district court's orders adjudicating the dispute between the parties. Consistent with *Kemna*, the court of appeals correctly concluded that petitioner could not continue his appeal by arguing that the district court's otherwise moot orders had harmed his reputation. *Id.* at 8a.

The court of appeals also correctly concluded that petitioner had not put forward any concrete collateral consequences from the judgment, because he had failed to demonstrate any interference with his employment prospects; the district court's criminal contempt referral carried no legal consequences and did not yield a prosecution; and the state investigation of which petitioner complains was "an independent investigation whose resolution 'depends on the unfettered choices made by independent actors not before the courts.'" Pet. App. 8a (citations omitted). Although petitioner now asserts (Pet. 25) additional injuries from the district court's decision, those factual assertions were raised for the first time in a petition for panel rehearing, and therefore were not properly before the court below.

b. The decision below does not create any circuit conflict. Other courts of appeals have held that when a litigant has taken the steps required under a coercive contempt order, he cannot appeal the civil contempt finding because the dispute is moot. See, *e.g.*, *In re Grand Jury Subpoena Duces Tecum*, 955 F.2d 670, 672 (11th Cir. 1992) ("In the context of purely coercive civil contempt, a contemnor's compliance with the district court's underlying order moots the contemnor's ability to challenge his contempt adjudication."); *Cordero* v. *De Jesus-Mendez*, 867 F.2d 1, 21 (1st Cir. 1989) (stating that when a "contempt order has been complied with, no case or controversy remains, and the appeal must be dismissed"); *In re Establishment Inspection of Kulp Foundry, Inc.*, 691 F.2d 1125, 1128-1129 (3d Cir. 1982) (finding moot an appeal from a civil contempt order for failure to honor an administrative inspection warrant, on the ground that "[b]ecause the warrant, as modified by the district court,

has been fully executed and no citations have been issued, the trial court's order has no on-going effect").

The Second Circuit similarly found moot a contemnor's appeal of a civil contempt order under which he was incarcerated for refusal to testify, after the contemnor had been released from custody because of the end of the proceeding for which his testimony had been sought. *United States* v. *Johnson*, 801 F.2d 597, 599, 600-601 (1986). The court of appeals concluded that once the contemnor was released, "no live case or controversy remain[ed] as to alleged errors in the contempt adjudication." *Id.* at 600. It stated that "[t]his general proposition is of course subject to an exception where collateral legal consequences may still stem from the contempt order," but that "[s]uch consequences are difficult to establish as to a civil contempt" and that "even in the case of a criminal contempt the potential danger of moral stigma, in contrast to a possible loss of legal rights, is not sufficient to avoid mootness." *Ibid.* (citing *St. Pierre* v. *United States*, 319 U.S. 41, 42 (1943) (per curiam)).

Moreover, courts of appeals have consistently held that an otherwise moot dispute does not remain live simply because a litigant asserts reputational harm as a collateral consequence of the litigation itself. See, *e.g.*, *R.M. Inv. Co.* v. *United States Forest Servs.*, 511 F.3d 1103, 1108 (10th Cir. 2007) (dispute over lodging operator's permit to operate on national forest land was moot notwithstanding asserted reputational harm because "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review") (quoting *Kemna*, 523 U.S. at 8-9), cert. denied, 553 U.S. 1054 (2008); see *Anderson* v. *Carter*, 802 F.3d 4, 11 (D.C. Cir. 2015) (dispute was moot

when the plaintiff relied on "the alleged reputational injury" that was "the 'lingering effect of an otherwise moot action'"), cert denied, 137 S. Ct. 65 (2016); see also *Danos* v. *Jones*, 652 F.3d 577, 584 (5th Cir. 2011) (concluding that Article III did not permit a litigant to pursue a claim based on reputational harm from "an otherwise moot aspect of a lawsuit") (citation omitted).

The decisions on which petitioner principally relies (Pet. 11-17) confirm that litigants cannot keep alive otherwise moot disputes by asserting reputational harm as a collateral effect. For instance, in *McBryde* v. *Committee to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52 (D.C. Cir. 2001), cert. denied, 537 U.S. 821 (2002), a judge challenged sanctions imposed by a judicial council. The sanctions included a one-year ban on receiving new cases, a three-year ban on presiding over certain cases, and a public reprimand. *Id.* at 55. The court of appeals determined that the judge's challenge to the expired one- and three-year sanctions was moot, but that "[t]he dispute over the public reprimand" was not because of the reprimand's ongoing nature. *Id.* at 56-57. The D.C. Circuit expressly acknowledged that, as here, "where an effect on reputation is a *collateral* consequence of a challenged sanction, it is insufficient to support standing." *Id.* at 57; see *ibid.* ("[W]hen injury to reputation is alleged as a secondary effect of an otherwise moot action, we have required that 'some tangible, concrete effect' remain, susceptible to judicial correction.").

Foretich v. *United States*, 351 F.3d 1198 (D.C. Cir. 2003), is similarly consistent with the decision below. The plaintiff in that case challenged a federal statute that prevented him from obtaining custody or visitation

rights with respect to his child, based on a determination that he had committed child abuse. He submitted an affidavit detailing the manner in which the law had caused the "loss of business and professional opportunities" and other harms. *Id.* at 1211. Because the plaintiff's child had turned 18 by the time of the suit, the custody and visitation provisions lacked any ongoing legal effect. The court of appeals therefore concluded that the plaintiff's challenge to those restrictions was moot, notwithstanding his claim that the restrictions caused him reputational harm, because "where harm to reputation arises as a byproduct of government action, the reputational injury, without more, will not satisfy Article III standing when that government action itself no longer presents an ongoing controversy." *Id.* at 1212-1213 (emphasis omitted). By contrast, the court determined that the plaintiff could challenge Congress's enactment "effectively branding him a child abuser and an unfit parent" based on reputational harms, because that claim of injury "derives directly from an unexpired and unretracted government action." *Id.* at 1213-1214. *Foretich* is consistent with the determination of the Ninth Circuit below that petitioner could not continue to litigate his claim, because petitioner's interest in challenging the judgment and subordinate orders rests on "harm to reputation aris[ing] as a byproduct" of an otherwise moot dispute. *Id.* at 1212.

The additional decisions that petitioner cites (Pet. 17-20) are also consistent with the principle that reputational harm can support standing if it is a direct result of the unexpired governmental action challenged in the suit, but not if it is merely a collateral or indirect consequence of an otherwise moot action. See, *e.g.*, *Parsons* v. *United States Dep't of Justice*, 801 F.3d 701, 712

(6th Cir. 2015) (reputational harm resulting from federal gang designation supported standing to challenge the designation); *NCAA* v. *Governor of New Jersey*, 730 F.3d 208, 220 (3d Cir. 2013) (holding that sports leagues had standing based on reputational injury to challenge a New Jersey gambling law as preempted by the Professional and Amateur Sports Protection Act, 28 U.S.C. 3701 *et seq.*), cert. denied, 134 S. Ct. 2866 (2014), abrogated by *Murphy* v. *NCAA*, No. 16-476 (May 14, 2018); *Gully* v. *National Credit Union Admin. Bd.*, 341 F.3d 155, 160-162 (2d Cir. 2003) (reputational injury was sufficient to defeat mootness because it resulted from an independent agency's finding that the plaintiff was unfit to hold a job in her field).[*]

2. a. Petitioner's challenge to the court of appeals' award of attorney's fees (Pet. 26-35) also does not warrant further review. Section 1988(b) provides that in a proceeding to enforce Section 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. 1988(b). A prevailing party is one that "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted). When a party meets that

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[*] In *Lebron* v. *Rumsfeld*, 670 F.3d 540, cert. denied, 567 U.S. 906 (2012), the Fourth Circuit held that a litigant did not have standing to challenge his designation as an enemy combatant based on reputational harm. The court stated that "'[c]ontinuing, present adverse effects' stemming from '[p]ast exposure to illegal conduct' can suffice to establish standing" but that the plaintiff could not establish standing based on reputational injury when his "criminal convictions for serious terrorism related charges ma[d]e it unlikely that he suffer[ed] any additional harm as a result of his designation as an enemy combatant." *Id.* at 562 (second set of brackets in original).

standard, the party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 429 (citations omitted). Here, the court of appeals determined that it was appropriate to award attorney's fees incurred defending petitioner's appeal, when petitioner had "disobeyed the injunction entered in the underlying litigation" and then "actively inserted himself into the litigation by appealing the contempt finding in the hope of clearing his name," relying in part on the common practice of assessing civil contemnors attorney's fees. Pet. App. 4a (citing cases).

Petitioner is mistaken in asserting (Pet. 26-27) that the award of attorney's fees is inconsistent with *Kentucky* v. *Graham*, 473 U.S. 159 (1985). The question presented in that case was "whether 42 U.S.C. § 1988 allows attorney's fees to be recovered from a governmental entity when a plaintiff sues governmental employees only in their personal capacities and prevails." *Id.* at 161. The plaintiffs had sued several police officers in their personal capacities for deprivation of federal rights, seeking money damages. *Id.* at 161-162. The plaintiffs also sued the Commonwealth of Kentucky, but only for attorney's fees in the event they prevailed on the merits. *Id.* at 162. The district court dismissed the Commonwealth under the Eleventh Amendment. After the case settled in favor of the plaintiffs, the court nevertheless assessed attorney's fees against the Commonwealth. *Id.* at 162-163. This Court reversed the fee award, holding that "[a] victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him." *Id.* at 167-168. The Court emphasized that the Commonwealth had not participated in the underlying litigation

and thus had "no opportunity to present a defense." *Id.* at 168. The decision below does not conflict with *Graham*. Petitioner did not decline to participate in the litigation here; rather, he disobeyed the injunction entered by the district court and then appealed the court's judgment and underlying orders, thereby forcing the plaintiffs to incur fees to defend the judgment on appeal.

b. Petitioner errs in asserting (Pet. 27) that the court of appeals' assessment of attorney's fees conflicts with *Johnson* v. *City of Aiken*, 278 F.3d 333, 335 (4th Cir. 2002). That decision simply held that in a suit with multiple defendants, a court could not assess one defendant the fees attributable to the plaintiff's litigation against a different entity on a different claim. In *Johnson*, a jury found two police officers liable for civil rights violations under 42 U.S.C. 1983, and found the City of Aiken liable on a separate claim under state law. 278 F.3d at 335. The court of appeals then overturned the Section 1983 award against one officer—leaving intact only the state-law award against the city and the Section 1983 award against the remaining officer. *Id.* at 336. On remand, the district court concluded that the officer found liable under Section 1983 could be charged all the plaintiffs' attorney's fees in the litigation, including the fees that the plaintiffs incurred in obtaining the state-law judgment against the city. *Id.* at 336-337. The Fourth Circuit reversed, holding that "the district court erred in basing [the officer's] § 1988 liability on [the plaintiffs'] success against the City on the state law assault claim." *Id.* at 338. That conclusion is consistent with the decision below, because petitioner was held liable only for the attorney's fees arising out of his own appeal seeking to vacate the district court's determination regarding petitioner's own contempt of court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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