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.*,
Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court consider whether a Hawaii law regulating parasailing is preempted by the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, when that question was neither presented to nor considered by the court of appeals?

2. Are petitioners entitled to attorney's fees pursuant to 42 U.S.C. § 1988 where judgment in their favor was set aside based on a change in federal law before the judgment materially altered the legal relationship between the parties or benefited petitioners in any way?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 6

I. THE MMPA PREEMPTION QUESTION WAS NEITHER PRESENTED TO NOR PASSED UPON BY THE COURT OF APPEALS, IT HAS NOT OCCASIONED ANY CONFLICT IN THE LOWER COURTS, AND THE DISTRICT COURT CORRECTLY RESOLVED IT IN THE STATE'S FAVOR 6

II. THE DENIAL OF ATTORNEY'S FEES INVOLVED A STRAIGHTFORWARD APPLICATION OF THIS COURT'S PRECEDENTS 9

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Page(s)

Balark v. *City of Chicago*, 81 F.3d 658 (7th Cir. 1996) 10

City of Springfield v. *Kibbe*, 480 U.S. 257 (1987) 6

Coalition for Basic Human Needs v. *King*, 691 F.2d 597 (1st Cir. 1982) 10

Delta Airlines, Inc. v. *August*, 450 U.S. 346 (1981) 6

Gerling Global Reinsurance Corp. of America v. *Garamendi*, 400 F.3d 803, *amended on other grounds*, 410 F.3d 531 (9th Cir. 2005) 10, 11

Hyundai Motor America v. *J.R. Huerta Hyundai, Inc.*, 775 F. Supp. 915 (E.D. La. 1991) 10

Malone v. *White Motor Corp.*, 435 U.S. 497 (1978) 8

Retail Clerks International Ass'n v. *Schermerhorn*, 375 U.S. 96 (1963) 8

Rhodes v. *Stewart*, 488 U.S. 1 (1988) 9

UFO Chuting of Hawaii, Inc. v. *Young*, 327 F. Supp. 2d 1220 (D. Haw. 2004) 3

Watson v. *County of Riverside*, 300 F.3d 1092 (9th Cir. 2002) 10

STATUTES AND REGULATIONS

Marine Mammal Protection Act,
16 U.S.C. §§ 1361 *et seq.* ..... i, 1
16 U.S.C. § 1379(a) 6

TABLE OF AUTHORITIES—Continued

Page(s)

42 U.S.C. § 1988 ..... i, 2, 5, 9

46 U.S.C. §§ 2101 *et seq.* 5

Pub. L. No. 108-447, 118 Stat. 2809 (2004) 3, 4, 7

Haw. Rev. Stat.
§ 200-37(i) (1993) 2, 3
§ 200-38(c) (1993) 2, 3

Haw. Admin. R. § 13-256-112 ..... 2, 3

LEGISLATIVE MATERIALS

Fiscal Year 2005 Omnibus Appropriations Bill, H.R. 4818 ..... 3, 7

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BRIEF FOR RESPONDENTS IN OPPOSITION

The petition should be denied for several independent reasons. First, this case does not properly present the questions on which petitioners seek certiorari. Petitioners first ask this Court to review whether the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §§ 1361 *et seq.*, preempts Hawaii's seasonal ban on parasailing in certain waters off the coast of Maui. Before the Ninth Circuit, however, petitioners asserted the preemptive effect only of their federal Coast Guard licenses, not of the MMPA. Petitioners then ask the Court to determine whether the enactment of legisla-

tion mooting a final judgment deprives a party status as a "prevailing party" for purposes of obt attorney's fees under 42 U.S.C. § 1988. But o question the court of appeals *agreed* with petit that subsequent legislation need not deprive a pa its "prevailing party" status. *See* Pet. App. 13 The court of appeals instead ruled that petitioners properly denied attorney's fees for a different r because they did not receive "a direct and subst benefit from [their] initial award of a permanent i tion." *Id.* at 14a. Petitioners do not even clearly lenge that holding.

Quite apart from these threshold obstacles view, the decision below was correct and does no flict with any decision of another court of appeals. ther review is not warranted.

STATEMENT OF THE CASE

1. In 1990, in part in an effort to protect the n grounds of endangered humpback whales, the H legislature passed a statute prohibiting certain a ties, including parasailing, in a small area of near- navigable waters off the west and south coasts of from December 15 to May 15. *See* Haw. Rev. §§ 200-37(i), 200-38(c) (1993); Haw. Admin. R. § 1 112.

Petitioners operate parasailing businesses. two parasailing vessels are licensed by the Coast (to carry up to twelve passengers in "coastwise" on the west coast of Maui. Pet. App. 2a-3a. The S seasonal ban on parasailing prevents petitioners conducting their parasailing business in the prot waters from December 15 to May 15. State law not prohibit petitioners from conducting their pa ing business elsewhere during this period; Stat

does not prohibit petitioners from entering the protected waters for activities not covered by the ban; and State law does not prohibit petitioners from conducting their parasailing business in the protected area at other times of the year. *See* Haw. Rev. Stat. §§ 200-37(i), 200-38(c) (1993); Haw. Admin. R. § 13-256-112.

2. On November 28, 2003, more than 13 years after the State law became effective, petitioners filed a complaint in the United States District Court for the District of Hawaii seeking a determination on various grounds that the State law was preempted by federal law. Pet. 12.

On July 9, 2004, the district court granted summary judgment for petitioners, solely on the ground that the State's parasailing ban was preempted by the MMPA. *UFO Chuting of Hawaii, Inc.* v. *Young*, 327 F. Supp. 2d 1220, 1229-1230 (D. Haw. 2004). The court issued a permanent injunction barring enforcement of the State law on September 29, 2004 and entered judgment on October 1. Pet. App. 3a. The State appealed to the Ninth Circuit.

3. Congress then passed the Fiscal Year 2005 Omnibus Appropriations Bill, H.R. 4818, which President Bush signed into law on December 8, 2004. Pub. L. No. 108-447, 118 Stat. 2809, 2809. Section 213 clarifies that the MMPA does not preempt Hawaii laws that regulate boating to protect whales. It 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 exter
> or regulations is no less restri
> eral law.

Id. at 2884.

The next day (December 9, 2(motions asking the district court tc and to indicate whether it would e: alter the judgment pursuant to F(Procedure 60(b) on remand. On De(stayed the injunction and indicate reconsider the judgment. Pet. 14; P

All this occurred before the Sta parasailing in the protected water: cember 15. Because the district (junction before December 15, petiti to benefit from the injunction by] one day of the seasonal ban period.

After a formal remand from th additional briefing,[1] the district cou the State and denied petitioners' re court found that Section 213 was rendered the parasailing ban no lc the MMPA. Pet. App. 24a. The cc tioners were not entitled to attor they had not benefited from the pe which the court had stayed before on December 15. *Id.* at 54a-55a.

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[1] Petitioners' additional briefing in th a claim that Section 213 is unconstitutior intervened to defend the law. The distric gument. Petitioners did not pursue this iss

4. Petitioners timely appealed to the Ninth Cir(The sole basis for their appeal on the merits was t contention that State law was preempted by the C Guard licensing scheme codified at 46 U.S.C. §§ 21C *seq.* Petitioners did not appeal the district court's ing that, in light of the recently enacted Section the MMPA did not preempt State law. *See* Plaint Appellants' Opening C.A. Br. 18-19 (discussing the emptive effect of federal licenses, not of the MMI *available at* 2005 WL 4155371.

The Ninth Circuit affirmed. The court found State law did not "completely exclude" UFO's righ operate vessels under its federal maritime coastin censes "or actually conflict with federal law." Pet. A 8a. The court also found that the State law was a sonable and non-discriminatory regulation of the eral licenses. *Id.* at 8a-13a.

As to petitioners' right to attorney's fees unde U.S.C. § 1988, the court of appeals acknowledged the subsequent statutory change created by Sec 213 did not by itself prevent UFO from being a " vailing party." Pet. App. 14a. Nevertheless, "[b]ec the district court stayed the implementation of permanent injunction before the State had to chang behavior—before Hawaii stopped enforcing its p sailing ban," the Ninth Circuit determined that U had never received "a direct and substantial ben from the award of the permanent injunction. *Id.* at 15a. It was on this basis that the court concluded petitioners could not be considered "prevailing part within the meaning of Section 1988.

REASONS FOR DENYING TE

I. THE MMPA PREEMPTION QUESTIO SENTED TO NOR PASSED UPON BY PEALS, IT HAS NOT OCCASIONED A LOWER COURTS, AND THE DISTRIC RESOLVED IT IN THE STATE'S FAVO

The petition should be denied because it seeks review of a questi presented to nor passed upon by t *See, e.g., City of Springfield* v. *Kibb* (1987) ("We ordinarily will not de raised or litigated in the lower court v. *August*, 450 U.S. 346, 362 (1981) dant's petition for certiorari presen the District Judge's abuse of discre fendants costs under Rule 54(d), th raised in the Court of Appeals and fore us.").

Petitioners frame their first "Q as follows:

> Does Hawaii's five-month se parasailing in navigable (fede Maui's coast violate the Supren cause it furthers neither the p objectives of the federal Marin tection Act, 16 U.S.C. § 1379(a nant federal regime enacted 1972 for the safety and well bei whales?

Pet. *i.*

Petitioners did not argue this q of appeals. In that court, they ac not dispute the district court's ruli

altered the preemptive effect of the MMPA by resolving the conflict with the [parasailing] Ban." Plaintiffs-Appellants' Opening C.A. Br. 2 (citing district court decision). The State's answering brief similarly noted that "Plaintiff's only theory on appeal is that State law actually conflicts with their federal coastwise licenses. ... [Although] plaintiffs originally prevailed below on the basis of a conflict with the MMPA ... [t]hey ... do not pursue that claim on appeal." Defendants-Appellees' Answering C.A. Br. 7 & n.5, *available at* 2005 WL 4668591.

Unaccountably, petitioners now try to revive their abandoned MMPA claim in this Court. But petitioners fail to advise this Court that they did not argue the point in the court of appeals. Nor do they explain why this Court should address an issue not briefed or argued to the court of appeals and not discussed in that court's decision.

In any event, even if petitioners had properly preserved their MMPA preemption argument, this Court's review would still be unwarranted. First, petitioners identify no conflict among the lower courts as to the MMPA's preemptive effect, and the State is aware of none.

Second, the district court was correct in holding that Section 213 of the Fiscal Year 2005 Omnibus Appropriations Bill precludes any claim that the MMPA preempts Hawaii's seasonal parasailing ban.

Section 213 provides 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 man-

agement of humpback whales." Pub. L. No. 108-
118 Stat. at 2884.

"[A]ny other federal law related to the conse
tion and management of marine mammals" plainly
cludes the MMPA, the central function of which i
regulate the conservation and management of ma
mammals. Just as plainly, the State's seasonal ba
parasailing constitutes a "State law or regulation
respect to the operation in State waters of recreati
and commercial vessels, for the purpose of conserva
and management of humpback whales." In enac
Section 213, as the district court correctly held, (
gress thus exempted the State's seasonal parasai
ban from the MMPA's preemptive effect.

Remarkably, petitioners do not even mention
tion 213 in the argument section of their petit
Rather than discussing Section 213 and Congressi
purpose, "the ultimate touchstone" of preempt
Malone v. *White Motor Corp.*, 435 U.S. 497, 504 (1
(quoting *Retail Clerks Int'l Ass'n* v. *Schermerhorn*,
U.S. 96, 103 (1963)), petitioners attempt to distract
Court with talk of heightened scrutiny for state
utes that conflict with federal fields of interest.

Petitioners once again confuse the issue. The c
of appeals discussed the appropriate level of defer
to afford state legislatures when reviewing stat
that do *not* conflict with federal law. Pet. App. 8a
That question arose in the context of the only issue
fore the court—the preemptive effect of the petitior
Coast Guard licenses. It has nothing to do with
MMPA preemption question petitioners now urg
this Court.

II. THE DENIAL OF ATTORNEY'S FEES INVOLVE STRAIGHTFORWARD APPLICATION OF THIS CO PRECEDENTS

In their second question presented, petitioner this Court to consider whether "enactment of le tion mooting a judgment ... deprive[s] the prev party, here petitioners, of the right to attorney's under 42 U.S.C. § 1988." Pet. *i.* But the court c peals answered that question in petitioners' favor, ing that "the subsequent statutory change" did n itself "undermine UFO's status as a [potential] pr ing party." Pet. App. 14a. Instead, the court of ap upheld the denial of attorney's fees for an indepe reason:

> [t]he entry of judgment in a party's favor doe not automatically render that party a "prevail ing party" under § 1988. *Rhodes v. Stewart*, 48 U.S. 1, 3, 109 S. Ct. 202, 102 L. Ed. 2d 1 (198 (per curiam). The judgment is not the end but means to receiving some redress from the de fendant. *Id.* To be considered a "prevailin party," the plaintiff must show that the judg ment somehow affected the behavior of the de fendant towards the plaintiff.

Pet. App. 14a. Because the injunction was overt two days before it would have taken effect, the held, petitioners "did not receive a direct benefit" it. *Id.* at 15a.

The petition does not clearly challenge that for the denial of a fee award. And petitioners' clai a circuit conflict are without merit because they re a similarly confused view of the relevant legal que In each of the cases petitioners cite as evidence of a conflict, the plaintiffs were found to be entitled

torney's fees precisely because, unlike petitic they actually enjoyed substantial benefits fr tial remedies they achieved even though tl dies were later overturned or rendered moot.

In *Watson* v. *County of Riverside*, 300 (9th Cir. 2002), for example, the plaintiff obta liminary injunction prohibiting introduction evidence in an administrative proceeding. A lost the case two years later, by the time th resolved, "the administrative hearing had come and gone," *id.* at 1094, and the prelimin tion had successfully prevented introduction dence the plaintiff had sought to keep out.

In *Balark* v. *City of Chicago*, 81 F.3d 6 1996), the plaintiffs obtained a consent decre trolled how the city had to pay out tort jud ten years before it was dissolved.

In *Coalition for Basic Human Needs* v F.2d 597 (1st Cir. 1982), the plaintiffs at "temporary and provisional relief" that wa mary object" of their appeal. *Id.* at 601. S *Hyundai Motor America* v. *J.R. Huerta Hy* 775 F. Supp. 915 (E.D. La. 1991), the plaintif "the primary relief sought," first through a injunction barring the state from holding ministrative proceedings in a manner th claimed was biased against them and th state legislation doing away with the objecti ture of the proceedings. *Id.* at 917.

Finally, in *Gerling Global Reinsuranc America* v. *Garamendi*, 400 F.3d 803, *a other grounds*, 410 F.3d 531 (9th Cir. 2005) Circuit applied exactly the standard appli finding that the plaintiffs were entitled to

fees. Because they had "directly benefited" fr injunction barring the State from enforcing a s requiring insurance companies to provide certa formation, they had prevailed and merited an aw attorney's fees. *Id.* at 806-807.

In each of these cases, the plaintiffs benefited the relief they sought, for at least some period. by contrast, the short-lived injunction never re the State to alter its behavior towards petitioner petitioners thus received no benefit from it. The of appeals, like the district court, was thus corr ruling that they were not entitled to attorney's fe

CONCLUSION

The petition for a writ of certiorari should b nied.

Respectfully submitte

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