No. _____

In the Supreme Court of the United States

TOWNSHIP OF ANN ARBOR; ANN ARBOR TOWNSHIP ZONING OFFICIAL; ANN ARBOR TOWNSHIP ZONING BOARD OF APPEALS,

Petitioners,

v.

TIM DiLAURA; DF LAND DEVELOPMENT L.L.C; APOSTOLATE FOR THE EUCHARISTIC LIFE,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Three Circuit Courts of Appeals have ruled that a judgment does not confer prevailing party status if it does not award some type of enforceable relief. The Sixth Circuit in this case has ruled otherwise. Does a judgment that does not award plaintiffs money damages, injunctive relief, or declaratory relief qualify plaintiffs as prevailing parties entitled to an award of attorney fees under 42 U.S.C. § 1988?

2. May an appellate court base its decision regarding prevailing party status on comments by the district court, instead of the unambiguous terms of the judgment at issue?

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The opinion of the Court of Appeals for the Sixth Circuit is reported at 471 F.3d 666 (6th Cir. 2006), and is reprinted in the Appendix to the Petition ("Pet. App.") at 4a. The Court of Appeals' order denying rehearing and rehearing en banc is not reported, but is available at 2007 U.S. App. LEXIS 15263 (6th Cir. June 12, 2007) and is reprinted at Pet. App.1a. The District Court's order and judgment are not reported, but are reprinted at Pet. App. 17a.

STATEMENT OF JURISDICTION

The Sixth Circuit issued its opinion on December 27, 2006. The Sixth Circuit entered its order denying rehearing and rehearing en banc on June 12, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

This case involves 42 U.S.C. § 1988 and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*. The pertinent provisions are reproduced at Pet. App. 60a.

STATEMENT OF THE CASE

1. District Court Jurisdiction.

The court of first instance, the United States District Court for the Eastern District of Michigan, had jurisdiction over this matter under 28 U.S.C. § 1331.

2. Factual Background.

Plaintiffs Tim DiLaura, DF Land Development LLC and Apostolate for the Eucharist Life proposed to use a house on Dixboro Road in Ann Arbor Township (the "Dixboro Road Property") as a retreat house. After defendant Ann Arbor Township Zoning Board of Appeals denied plaintiff's request for a zoning variance, plaintiffs filed suit against defendants Ann Arbor Township, Ann Arbor Township Zoning Official and Ann Arbor Township Zoning Board of Appeals (collectively, "the Township") in the Circuit Court for the County of Washtenaw, Michigan. Plaintiffs asserted various claims under the Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (the "RFRA"), alleging that the Township interfered with their exercise of religion by denying the request for a variance to use the Dixboro Road Property as a retreat house.

The Township removed the case to the Eastern District of Michigan and moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction.

On April 3, 2000, the district court granted the Township's motion and dismissed the case, holding that plaintiffs lacked standing. Plaintiffs' motion for reconsideration was denied. Plaintiffs appealed and the Sixth Circuit reversed in part and remanded the case. *DiLaura v. Ann Arbor Charter Township*, 30 Fed. Appx. 501; 2002 U.S. App. LEXIS 3135 (6th Cir. February 25, 2002). The Sixth Circuit affirmed the dismissal of plaintiffs' free exercise claims. The court held, however, that plaintiffs on remand could assert a claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, which was enacted while the appeal was pending.

On remand, plaintiffs filed an amended complaint asserting an RLUIPA claim. Subsequently, the Township's board, as the district court suggested at a scheduling conference, adopted a resolution approving the issuance of a conditional use permit for DiLaura to house overnight guests at the Dixboro Road Property. [Resolution (Dkt. 41, Response Brief, Ex. 6), Pet. App. pg. 55a]. The resolution found that DiLaura's proposed use qualified as a bed and breakfast under the Township zoning ordinance because the Dixboro Road Property would be used "for housing of no more than 6 transient overnight guests with sufficient off street parking, bathing facilities, and simple food service provided from the residential kitchen." [*Id.* pg. 56a]. Accordingly, DiLaura was free to operate the retreat house in every respect that he first proposed to the Township.

Unsatisfied with the conditional use permit, plaintiffs moved for summary judgment of their RLUIPA claim. The Township responded to plaintiffs' motion and filed a cross-motion for summary judgment. On April 9, 2003, the district court heard arguments on the parties' motions. [Transcript, Pet. App. pg. 22a].

The court stated during the hearing that it did not believe the Township had substantially burdened plaintiff's exercise of religion, but also that the label "bed and breakfast" did not properly characterize plaintiffs' proposed property use. "But I don't think there's a substantial burden, but I don't think the bed and breakfast is a fair characterization for what happened." [*Id.* pg. 44a].

Although the Township informed the court that there was no requirement that overnight guests at the retreat house make any payment to plaintiffs, the court ruled that the Township substantially burdened plaintiffs' religious exercise "[b]y

labeling [the retreat] as a bed and breakfast and the fact that you have to have payment in return." [*Id.* pg. 46a]. The court then acknowledged that granting summary judgment in plaintiffs' favor was purely technical: "As I say I'm not sure I'm doing them a favor because if I grant their motion for summary judgment, it doesn't put them anywhere anyhow." [*Id.* pg. 45a].

The district court rejected plaintiffs' request for injunctive relief:

> I'm not going to give you any kind of injunction. All I'm going to do at this point—I guess they can continue to do it until the Township comes up with another ordinance.
>
> . . . .
>
> I'm not—the reason I'm not going to issue an injunction because the relief that you're asking for in effect is them not enforcing their ordinance. I'm going to grant that. That's your motion for summary judgment.

[*Id.* pgs. 46a-47a].

The district court's order granting summary judgment was a single page order as follows:

> On April 9, 2003, the plaintiffs' and the defendants' motions for summary judgment came before the Court. A hearing was held and oral arguments were heard. For the reasons stated on the record, and in accordance with the terms stated on the record,

> IT IS ORDERED that the plaintiffs' motion for summary judgment is granted.
>
> IT IS FURTHER ORDERED that the defendants' motion for summary judgment is denied.

[Order, Pet. App. pg. 51a].

The district court's judgment did not grant plaintiffs relief:

> The court has issued an order granting the plaintiffs' motion for summary judgment.
>
> Accordingly,
>
> IT IS ORDERED AND ADJUDGED that judgment be and is hereby granted for plaintiffs and against defendants. Costs to be permitted in accordance with law.

[Judgment, Pet. App. pg. 53a].

Plaintiffs filed a motion for attorney fees under 42 U.S.C. § 1988, asserting that they were "prevailing parties" on their RLUIPA claim. The Township then timely appealed the district court's judgment, and as a result, plaintiffs' motion for attorney fees was stayed.

On October 6, 2004, the Sixth Circuit in an unpublished opinion affirmed the district court's judgment. *See DiLaura v. Ann Arbor Charter Township*, 112 Fed. Appx. 445; 2004 U.S. App. LEXIS 21159 (6th Cir. October 6, 2004).

Plaintiffs then renewed their motion for attorneys' fees, which was referred to a magistrate judge. On March 24,

2005, the magistrate judge issued a Report and Recommendation recommending that the district court award plaintiffs over $178,000 in fees, the full amount requested. [Opinion and Order, Pet. App. pg. 18a]. The Township objected to that recommendation.

On September 28, 2005, the district court entered its Opinion and Order Accepting in Part and Rejecting in Part Magistrate Judge's Report and Recommendation Regarding Plaintiff's Motion for Costs and Attorney Fees. [*Id*, pg. 17a]. On the same date, the district court entered a Judgment awarding plaintiffs costs and attorney fees in the amount of $72,214.24. [Judgment, Pet. App. pg. 21a]. Although the district court "agree[d] with the magistrate judge's conclusion that plaintiffs are prevailing parties within the meaning of 42 U.S.C. § 1988(b)," the court also "disagree[d] with the magistrate judge's conclusions that plaintiffs in this lawsuit 'received exactly what they sought'. . .." [Opinion and Order, Pet. App. pg. 18a]. The district court noted that "While plaintiffs did succeed in obtaining a ruling that defendants violated their rights under [RLUIPA], they did not prevail on *any* of their other claims and they did not obtain *any* other relief." [*Id.*, pg. 18a (emphasis in original)].

The district court explained that "In the present case, plaintiffs' success was 'partial or limited' indeed. None of the claims initially pled succeeded and none of the relief initially sought was obtained." [*Id.*, pg. 20a]. Plaintiffs obtained summary judgment for their RLUIPA count only, but "no declaratory or injunctive relief was awarded." [*Id.*, pg. 20a].

Plaintiffs appealed the district court's reduction of the amount of fees the magistrate judge had recommended. The

Township cross-appealed the district court's determination that plaintiffs were prevailing parties under 42 U.S.C. § 1988.

In a published opinion, the Sixth Circuit affirmed the district court's ruling that plaintiffs were prevailing parties under Section 1988. *DiLaura v. Ann Arbor Charter Township*, 471 F.3d 666 (6th Cir. 2006), reh. denied, 2007 U.S. App. LEXIS 15263 (6th Cir. June 12, 2007). The court based its decision not on the terms of the district court's judgment, but rather on statements the district court made at the summary judgment hearing:

> While acknowledging that the defendants were not going to enforce the bed and breakfast provisions at the present time, the district court stated that it had "to look at what [the bed and breakfast ordinance] says and take it [as] exactly what [the defendants] could do." Joint Appendix ("J.A.") at 838 (Mot. Hr'g on Cross-Mot. for Summ. J. ("Hr'g") at 27). The district court did not formally grant an injunction, but, rather, *stated on the record* that the defendants could never enforce the bed and breakfast provisions against the plaintiffs.

471 F.3d at 669 (emphasis added) [Pet. App. pg. 7a].

The Sixth Circuit premised its entire prevailing party analysis, and subjected the Township to attorney fee liability, solely on the district court's remarks in the transcript:

> Here, the district court granted the plaintiffs' motion for summary judgment, and stated *on the record* that the defendants could not enforce their ordinance against the plaintiffs' proposed use of the property. The *district court explained that it was not granting an*

> *injunction* because "the relief [the plaintiffs were] asking for in effect is [the defendants] not enforcing their ordinance. I'm going to grant that. That's your motion for summary judgment." J.A. at 836 (Hr'g at 25). While the district court *declined to label the relief "injunctive,"* the effect of its order granting summary judgment materially affected the legal relationship between the parties in that after the district court's judgment was rendered, the threat of enforcement no longer existed. The plaintiffs' victory was not merely technical or symbolic, and the district court's determination that the plaintiffs were prevailing parties was not clearly erroneous.

Id. at 671 (emphasis added) [Pet. App. pgs. 11a-12a].

The Sixth Circuit also reversed the district court's reduction of the fee recommended by the magistrate judge, after finding that plaintiffs obtained "complete" relief. *Id* at 671 [Pet. App. pg. 12a].

REASONS FOR GRANTING THE WRIT

1. The Sixth Circuit's Analysis Significantly Departs from this Court's Standard for Prevailing Party Status.

This Court has strictly construed statutory fee-shifting exceptions to the American rule that requires parties to pay their own legal fees. *See Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602; 121 S. Ct. 1835; 149 L. Ed. 2d 855 (2001) ("Under this 'American Rule,' we follow 'a general practice of not awarding fees to a prevailing party absent explicit statutory authority.'" quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819; 114 S. Ct. 1960; 128 L. Ed. 2d 797 (1994)).

Although 42 U.S.C. § 1988 allows fee awards to prevailing parties, "Section 1988 is not 'a relief Act for lawyers.' Instead, it is a tool that ensures the vindication of important rights, even when large sums of money are not at stake, by making attorney's fees available under a private attorney general theory." *Farrar v. Hobby*, 506 U.S. 103, 122; 113 S. Ct. 566; 121 L. Ed. 2d 494 (1992) (O'Connor, J., concurring) quoting *Riverside v. Rivera*, 477 U.S. 561, 588; 106 S. Ct. 2686; 91 L. Ed. 2d 466 (1986) (Rehnquist, J., dissenting).

This Court has addressed the prevailing party issue several times in the last 20 years, describing the type of relief a party must obtain in order to recover fees under Section 1988 and similar fee shifting statutes. *See, e.g., Hewitt v. Helms*, 482 U.S. 755; 107 S. Ct. 2672; 96 L. Ed. 2d 654 (1987); *Rhodes v. Stewart*, 488 U.S. 1; 109 S. Ct. 202; 102 L. Ed. 2d 1 (1988); *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792; 109 S. Ct. 1486; 103 L. Ed. 2d 866 (1989); *Farrar, supra; Buckhannon, supra; Sole v. Wyner*, 551 U.S. ___; 127 S. Ct. 2188; 167 L. Ed. 2d 1069 (2007). Through these cases, the Court has established the threshold requirements for prevailing party status. The Sixth Circuit decision contradicts this Court's prevailing party limitations.

The formulation in *Farrar, supra,* made clear that only an enforceable judgment, consent decree, or settlement confers prevailing party status:

> To be sure, a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, "the moral satisfaction [that] results from

> any favorable statement of law" cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.

Farrar, 506 U.S. at 112-113.

Buckhannon confirmed the rule in *Farrar* that only "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon,* 532 U.S. at 604. *Buckhannon* rejected the "catalyst theory" that had recognized an opponent's voluntary conduct as the basis of a prevailing party determination. After *Buckhannon*, in order for a party to be a "prevailing party," there must be a "judicially sanctioned change in the relationship of the parties." *Id.* at 605.

It is insufficient that plaintiffs have achieved the land use they sought. Under *Buckhannon* and *Farrar*, a plaintiff's failure to obtain an injunction or other enforceable relief contained in the terms of a judgment precludes prevailing party status. Recently, this Court in *Wyner*, *supra*, ruled that a plaintiff who obtained a preliminary injunction but was not granted permanent injunctive relief was not a prevailing party. Plaintiffs' situation here is not unlike that of plaintiff in *Wyner*: plaintiffs arguably achieved the goal of the litigation, but were not granted permanent injunctive relief. *Wyner* ruled that such a result did not entitle a plaintiff to fees under 42 U.S.C. § 1988:

> Wyner, on the other hand, urges that despite the denial of a permanent injunction, she got precisely

> what she wanted when she commenced this litigation: permission to create the nude peace symbol without state inference. That fleeting success, however, did not establish that she had prevailed on the gravaman of her plea for injunctive relief, *i.e.*, her charge that the state officials had denied her and other participants in the peace symbol display "the right to engage in constitutionally protective expressive activities."

Wyner, 127 S. Ct. at 2195.

To be sure, *Wyner* addressed whether the fleeting success of a preliminary injunction later vacated by a ruling on the merits provided sufficient grounds to confer prevailing party status. This case is analogous to *Wyner*, however, in that plaintiff here relies on comments by the district court during oral argument that the Township could not enforce its zoning ordinance, but the resulting judgment did not grant permanent injunctive or other relief.

Obvious examples of enforceable relief are money judgment, injunction, declaratory judgment, and consent judgment. The Seventh Circuit has also ruled that under *Buckhannon*, settlements incorporated in orders of dismissal will also suffice to confer prevailing party status. *See, e.g. Gautreaux v. Chi. Hous. Auth.*, 491 F.3d 649, __; 2007 U.S. App. LEXIS 15158 at *14 (7th Cir. June 26, 2007) ("Following this logic, we have held that cases in which 'the terms of the settlement were incorporated into the dismissal order and the order was signed by the court rather than the parties, or the order provided that the court would retain jurisdiction to enforce the terms of the settlement,' have a sufficient judicial imprimatur to entitle the plaintiff to prevailing-party status."). None of these examples, however, matches the judgment entered in this case. The Sixth Circuit's

decision, therefore, is contrary to this Court's prevailing party jurisprudence.

2. The Circuits are Divided on this Important Issue.

Unlike the Sixth Circuit, the Eighth Circuit ruled that an order granting summary judgment but no enforceable relief did not confer prevailing party status. In *Sierra Club v. City of Little Rock*, 351 F.3d 840 (8th Cir. 2003), the Sierra Club sued the City of Little Rock and the Little Rock Sanitary Sewer Committee under the Clean Water Act. After the Sierra Club settled with the Sewer Committee, it moved for summary judgment. The district court found that the City of Little Rock was in violation of its National Pollutant Discharge Elimination System (NPDES) permit, but refused to enter an injunction or order any other remedy against the city. The Sierra Club moved for an award of attorney fees, contending that it was a "prevailing or substantially prevailing party" entitled to fees under the Clean Water Act. The district court awarded the Sierra Club over $50,000 in attorney fees. The Court of Appeals reversed because the district court had not granted any enforceable relief. The Eighth Circuit explained:

> Although the district court granted summary judgment in Sierra Club's favor, *all Sierra Club received was a declaration that the City had violated its permit.* The court declined to grant any of the relief that Sierra Club sought, not even a requested order enjoining the City from future violations of its permit. . . . Sierra Club can point to no effect that the judicial declaration had on the City's behavior toward Sierra Club. Further, without any relief to enforce, Sierra Club did

> not receive an "enforceable judgment" and was not a prevailing party.

Id. at 845 (parentheticals omitted) (emphasis added).

The Court of Appeals in *Sierra Club* pointed out that without an injunction in place, "the court could not have held the City in contempt under its retained jurisdiction because the City would not have been in violation of any court order." *Id.* at 846. In the Eighth Circuit, unlike the Sixth Circuit, the grant of summary judgment without injunctive or other enforceable relief does not confer prevailing party status.

The Seventh Circuit in *Petersen v. Gibson,* 372 F.3d 872 (7th Cir. 2004), also ruled that a judgment that did not provide monetary, declaratory, or injunctive relief was insufficient to confer prevailing party status. Plaintiff in *Petersen* obtained a jury verdict against defendant police officer under 42 U.S.C. § 1983 and was awarded $1 in nominal damages. Plaintiff then moved for a new trial arguing that the trial court erred in giving the jury a nominal damages instruction resulting in the $1 award. The trial court granted the motion, vacated the damages award, and set the matter for a trial on the issue of damages only. The parties subsequently settled. After the settlement, plaintiff moved for attorney fees under 42 U.S.C. § 1988. The court in *Petersen* was faced with the issue of whether a judgment that confirmed a violation of plaintiff's civil rights, but was devoid of any damage award or other relief, was sufficient to make plaintiff a prevailing party. The Seventh Circuit ruled that the judgment did not:

> Therefore, in determining whether Petersen has prevailed, we must examine the practical impact of the judgment. The only judgment here is the one entered

> after the trial. That judgment originally awarded Petersen nominal damages, which would have been sufficient under *Farrar* to obtain prevailing party status, but not necessarily to obtain fees. That damage award, however, was vacated on Petersen's motion, and the settlement followed. *Therefore, the only judgment in this case is a determination that Petersen's rights were violated.* As the Supreme Court noted in *Buckhannon* however, attorney's fees are not available where plaintiff has "acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by '*judicial* relief.'" [emphasis in original]. It is the settlement, not the judgment of the court, that obtained the practical relief sought by Petersen, and therefore the judgment cannot provide a basis for prevailing party status.

Id. at 865-66.

The Seventh Circuit, therefore, has ruled that a judgment merely affirming a violation of civil rights but not awarding other relief does not confer prevailing party status.

The District of Columbia Circuit in *Thomas v. National Science Foundation,* 330 F.3d 486 (D.C. Cir. 2003), also strictly followed this Court's teachings on prevailing party status. In *Thomas*, plaintiffs filed suit against the National Science Foundation ("NSF"), a government agency, and Network Solutions, Inc. ("NSI"), a private contractor. Plaintiffs alleged that the NSF and NSI collected fees for internet registration services and the NSF retained 30% for deposit into a fund for future government use on internet projects. Plaintiffs alleged that the deposit of registration fees into the fund was an unconstitutional tax that was neither imposed nor ratified by Congress. The district court issued a

preliminary injunction barring the NSF and NSI from spending money in the fund. The district court also awarded plaintiffs partial summary judgment by declaring the portion of registration fees deposited into the fund unconstitutional. The district court did not award any other injunctive or monetary relief in connection with the award of partial summary judgment. After the grant of the preliminary injunction and partial summary judgment, Congress passed legislation that properly authorized deposits into the fund, rendering plaintiff's case moot. Plaintiffs then moved for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(e)(1)(A), contending that they were prevailing parties. Citing to *Buckhannon* and *Hewitt*, the D.C. Circuit ruled that plaintiffs were not prevailing parties.

Thomas reviewed *Buckhannon, Hewitt, Texas State Teachers,* and *Rhodes* and found three core principles in this Court's prevailing party jurisprudence. The first principle was that a claimant must show that there has been a "court-ordered 'change [in] the legal relationship between [the plaintiff] and the defendant.'" *Thomas,* 330 F.3d at 493, quoting *Buckhannon,* 532 U.S. at 604. Second, a party must be awarded a judgment providing "some relief by the court." *Id.* at 493, quoting *Buckhannon* at 603. Third, "a claimant is not a 'prevailing party' merely by virtue of having 'acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by *judicial* relief.'" *Id.*, quoting *Buckhannon* at 606. Under these principles, *Thomas* determined that the grant of a preliminary injunction did not afford plaintiffs prevailing party status. *Thomas* also rejected plaintiffs' argument that the grant of partial summary judgment made them prevailing parties:

> Appellees' claim fares no better with respect to the partial summary judgment. That order merely

> declared that the disputed Preservation Assessment was an unconstitutional tax. The partial summary judgment did not afford appellees any concrete relief beyond this mere legal declaration. As noted above, *Buckhannon* and *Hewitt* make it clear that a mere "judicial pronouncement that the defendant has violated the Constitution," unaccompanied by "*judicial* relief," is not sufficient to make a claimant a "prevailing party." This type of "judicial decree" is not enough to warrant a fee award, because it represents "not the end but the means" of litigation. A declaration must require "some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or specific performance or determination of some conduct." The partial summary judgment in this case did not achieve any such results.

Id. at 493-94 (citations omitted).

The D.C. Circuit, therefore, ruled that summary judgment confirming a Constitutional violation but awarding no other relief fails to confer prevailing party status.

The Sixth Circuit in this case held that summary judgment without an award of judicially enforceable relief is sufficient to make plaintiffs prevailing parties. This ruling is contrary to the Seventh, Eighth, and D.C. Circuits in *Sierra Club*, *Peterson*, and *Thomas*.

3. If Repeated, the Sixth Circuit's Reliance upon Statements Made on the Record and Not Incorporated in a Judgment Will Erode the Certainty of Judgments and this Court's Prevailing Party Rulings.

It is axiomatic that "The court speaks through its judgment, and not through any other medium." *Hill v United States ex rel. Wampler,* 298 U.S. 460, 465; 56 S. Ct. 760; 80 L. Ed. 1283 (1936); *see also Bell v. Thompson*, 545 U.S. 794, 805; 125 S. Ct. 2825; 162 L. Ed. 2d 693 (2005) ("'Basic to the operation of the judicial system is the principle that a court speaks through its judgments and orders.'" quoting *Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 741 F.2d 41, 44 (4th Cir. 1984)).

According to *Murdaugh*:

> Courts must speak by orders and judgments, not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or after trial, or during argument. When the terms of a judgment conflict with either a written or oral opinion or observation, that judgment must govern.

Id. at 44.

This reasoning is sound, but unfortunately contradicted by the Sixth Circuit's opinion. This Court should affirm the time-honored rule in *Murdaugh* that a court speaks only through its written orders and judgments. A judgment that does not grant enforceable relief by its express terms cannot be the basis for prevailing party status.

Murdaugh's rule provides certainty in the judicial process. The Sixth Circuit's position that it is acceptable to look behind a written judgment does not.

The district court's judgment in this case is the only judicial pronouncement upon which the Sixth Circuit should have based a prevailing party determination, but the judgment does not order or enjoin any conduct or award any damages. The terms of the judgment, therefore, do not support a ruling that plaintiffs are prevailing parties because those terms do not direct "some action (or cessation of action) by the defendant" such as "the payment of damages, or some specific performance, or the termination of some conduct." *Hewitt*, 482 U.S. at 761. The Sixth Circuit instead reviewed and relied upon selective comments the district court made at the summary judgment hearing to conclude that plaintiff obtained enforceable relief. The Sixth Circuit's reliance on the hearing transcript, not the judgment, produces the peculiar result that plaintiffs, despite not being awarded injunctive or declaratory relief, nevertheless obtained "complete" relief:

> When the plaintiffs filed their First Amended Complaint, the defendants denied them their requested use of the property. Now the plaintiffs are *expressly allowed* their proposed use of the property without any application of the defendants' zoning ordinances. *The fact that the court did not grant an injunction or declaratory judgment when it granted the plaintiffs' motion for summary judgment does not make the ultimate relief less complete.*

471 F.3d at 671 (emphasis added) [Pet. App. pg. 16a].

The Sixth Circuit characterized the judgment as having the effect of a declaratory ruling or injunction "expressly

allow[ing] [plaintiffs'] proposed use of the property." *Id.* The district court, however, noted that "no declaratory or injunctive relief was awarded" by its judgment. Opinion, Appx. at 20a.

Certainty and finality are essential to our judicial system. Judgments are always the product of deliberation. At the conclusion of a hearing or trial, the litigants and the court itself often do not know what a judgment will state. Indeed, a judgment is commonly entered well after argument. Ultimately, however, the court must make its decision, and when it does, its judgment should be the clear and final word. *See, e.g., Ramdass v. Angelone*, 530 U.S. 156, 174; 120 S. Ct. 2113; 147 L. Ed. 2d 125 (2000) ("it is judgment which signals that the case has become final and is about to end or reach another stage of proceedings."). Any other result would mean chaos, with appellate courts and litigants unsure of what, if anything, a court has decided. The Sixth Circuit's opinion provides a basis to undermine the certainty and finality of judgments. If comments a court makes while considering the parties' arguments can later be grafted on to a judgment, both certainty and finality are at risk. This Court should grant certiorari to prevent a danger to the judicial process.

CONCLUSION

This Court should grant the Township's petition for certiorari to address important issues of federal law on which the circuits are divided and which this Court should settle.

Respectfully submitted,

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