NO. 07-1427

IN THE
SUPREME COURT OF THE UNITED STATES

UFO CHUTING OF HAWAII, INC., et al.
Petitioners,

v.

LAURA H. THIELAN, 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

REPLY BRIEF OF PETITIONERS

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Pursuant to Sup. Ct. R. 15.6, Petitioners UFO Chuting of Hawaii, Inc. and K.M.B.S., Inc. (hereinafter "Petitioners") reply as follows to the new points raised in the brief in opposition filed by Respondents Laura H. Thielan, et al. (hereinafter "Opposition Brief").

STATEMENT OF POINTS IN REPLY

1. State law prohibits Petitioners from conducting parasailing business elsewhere in Hawaii. They lack permits required by State law to conduct parasailing on Oahu or Hawaii, the only islands having designated parasailing operating areas open between December 15 and May 15.

2. Petitioners' reference to the federal interest reflected by the Marine Mammal Protection Act ("MMPA") was intended to sharpen the Supremacy Clause question, a question fully litigated below, by negating the mistaken view of the appellate court that "non-preemption" was to be assumed because the ban involved a field traditionally occupied by the states.

3. It is the character of a final judgment, not its eventual effect, that determines eligibility for attorney's fees under section 1988. Tying fees to a fortuitous postjudgment circumstance, as did the court of appeals here, undermines the remedial purposes of the statute.

DISCUSSION

I. THE EFFECT OF THE FIVE MONTH BAN IS COMPLETE.

Respondents assert Petitioners are not prevented "from conducting their parasailing business elsewhere during this period [from December 15 to the following May 15]." Opposition Brief at 2. The assertion is false. Haw. Rev. Stat. § 200-37(d) expressly prohibits parasailing "on or above the waters of the State, except on or above areas and during time periods designated by the department." The "Lahaina-Kaanapali Offshore restricted area" is the single parasailing operating area designated by the department for the ocean waters offshore of the island of Maui. Haw. Admin. R. § 13-256-108(b).[1] The area is subject to the seasonal ban. Id.

A separate commercial permit is required to conduct parasailing in the two other parasailing operating areas designated by the department. Haw. Admin. R. § 13-256-19(a)(2).[2] The record does not support Respondents' assertion that a permit would be available were

[1] Subsection (b), "Restrictions," provides in relevant part:

> The Lahaina-Kaanapali Offshore restricted area is designated as a parasailing area. . . . This area shall be closed to parasailing operations from December 15 to May 15 of the following year.

[2] Haw. Admin. R. § 13-256-19(a)(2) provides:

> No commercial parasailing vessel shall operate on the waters of the State unless the owner has applied for and been issued a commercial operating area use permit for a designated parasail operating area, in addition to any commercial use permit required for state-owned facilities.

Petitioners willing to relocate their businesses to another island.[3]

Respondents desire to depreciate the effect of the ban on Petitioners' vessels is understandable. A measure that regulates could be viewed more charitably than one that is prohibitory.[4] But that does not give Respondents license to misstate the effect of the ban on Petitioners' vessels.

II. THE SUPREMACY ISSUE PRESENTED BY THE PETITION WAS LITIGATED AND WRONGLY DECIDED BELOW.

Respondents parse the question presented and conclude it was "neither presented to nor passed upon by the court of appeals." Opposition Brief at 6. They misunderstand the wording of the first question. Rather than attempting to revive the MMPA claim, Petitioners cite the act as evidence of the important if not paramount interest of the national government in protecting migratory marine mammals. The argument in support of the petition, as Respondents acknowledge, is grounded on the ban's effect on the right of coastwise navigation secured by Petitioners' federal licenses, not any preemptive effect of the MMPA itself. Respondents do not deny this issue was litigated below.

Protection of marine mammals underlies the purposes and objectives of the MMPA. Petitioners referenced the MMPA in the first question to underscore the point that preemption analysis in the context of a case such as this case not begin with an assumption of non-

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[3] The other designated operating areas include waters offshore of Maunalua Bay boat ramp on the island of Oahu, and waters within Kailua Bay on the island of Hawaii. Haw. Admin. R. §§ 13-256-88 and 155. The department's regulations authorize two operating permits for each area. Id.

[4] Once the line is crossed, as in this case, the burden shifts to the state to show that nothing short of a total ban would provide whales with protection beyond that currently afforded under federal law while within the Hawaiian Islands Humpback Whale National Marine Sanctuary. *See e.g.* 16 CFR § 922.184, which prohibits vessels from approaching within 100 yards of a humpback whale within the sanctuary.

preemption. The ban is preempted because MMPA's purposes and objectives can be achieved by measures short of an absolute ban such as limits on the speed at which they operate, the approach recently embraced by National Marine Fisheries Service to protect North Atlantic Right Whales from collisions with vessels longer than 65 feet. *See* Final Environmental Impact Statement to Implement Vessel Operational Measures to Reduce Ship Strikes to North Atlantic Right Whales, National Marine Fisheries Service (August 2008), which may be found at http://www.nmfs.noaa.gov/pr/pdfs/shipstrike/feis.pdf.

By assuming "non-preemption" the court of appeals disregarded *United States v. Locke*, 529 U.S. 89, 106-109 (2000) and required Petitioners to prove an exclusion of "only five months" rendered operation of their vessels "wholly economically infeasible." *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1194 (9th Cir. 2007). The petition makes clear that in light of *Locke* the court of appeals was wrong in beginning (and ending) its analysis with such assumption and by not requiring the State to show that regulation short of a ban of the operation of Petitioners' vessels would not protect migrating humpback whales. Petitioners respectfully submit the Supremacy question is fairly presented.

III. PETITIONERS' ELIGIBILITY FOR FEES IS DETERMINED BY CHARACTER OF THE FINAL JUDGMENT, NOT ITS SUBSEQUENT EFFECT ON RESPONDENTS.

Respondents appear to concede Petitioners' status as prevailing parties on entry of final judgment in their favor. They posit, however, that such status is contingent on postjudgment events. The argument conflates the alternate predicates for a fee award - - entry of an order that establishes "***entitlement*** to some relief on the merits of his claim" or a response to the suit outside the courtroom that affords the relief sought. *Compare Hanrahan v. Hampton*, 446 US 754, 757, 100 S.Ct. 1987, 1989 (1980) and *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 600 (1st Cir. 1982) (discussing application of the "catalyst" test to the "more difficult

question presented by parties that do not win on any significant issue in court but obtain what they seek anyway.").

Hanrahan makes clear fees may be awarded to the prevailing party even before entry of a remedial order such as the permanent injunction present in this case. It suffices that an order has been entered that "determines substantial rights of the parties." *Hanrahan v. Hampton*, *supra*. On that basis then circuit judge Stephen Breyer cautioned that entitlement to relief does not turn on the presence or absence of a fortuitous postjudgment circumstance:

> We are reinforced in this view by the language of the Supreme Court in Hanrahan, supra. The Court stated that Congress authorized awards 'to a party who has established his entitlement to some relief on the merits of his claim.' ***A party, in other words, prevails in a law suit when he establishes a legal entitlement to what he seeks, not when what he seeks is actually delivered.***

Coalition for Basic Human Needs, supra (citations omitted; emphasis supplied).

Petitioners won an enforceable judgment that altered the legal seascape. The decision of the court of appeals that prevailing party status turns on subsequent events directly conflicts with *Hanrahan* and its progeny, and should be reviewed.

CONCLUSION

The petition for a writ of certiorari should be granted as to both the preemption and attorney's fee questions.

Respectfully submitted.

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