

Nos. 19-17000, 19-17002, 19-7004, 19-17007, 19-17009

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JERRY GRIFFIN, *et al.*,

Plaintiffs-Appellees,

v.

ALEX PADILLA,

in his official capacity as Secretary of State of California;

Defendant-Appellant,

AND CONSOLIDATED APPEALS

**PLAINTIFFS-APPELLEES DONALD J. TRUMP FOR PRESIDENT,
INC.'S AND DONALD J. TRUMP'S
PARTIAL OPPOSITION TO APPELLANTS' MOTION TO DISMISS**

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Appellees Donald J. Trump for President, Inc. and Donald J. Trump agree with Appellants that the California Supreme Court's decision in *Patterson v. Padilla* moots this appeal. The Trump Appellees also agree with Appellants that the district court's decision should be vacated, and the case should be remanded. *See, e.g., Paulson v. City of San Diego*, 475 F.3d 1047, 1048-49 (9th Cir. 2007). The Trump Appellees disagree, however, that the case should be remanded with directions for the district court to dismiss the case. The Court should instead remand with instructions for the district court to decide whether Plaintiffs-Appellees are entitled to attorneys' fees. *See, e.g., id.* (finding an appeal from an injunction was moot and remanding to the district court to consider whether the plaintiff was entitled to attorneys' fees).

Almost all of the Plaintiffs-Appellees' claims arise under 42 U.S.C. § 1983, which provides attorneys' fees for a "prevailing party." *See* 42 U.S.C. § 1988; *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir. 1980). But "[a] final judgment on the merits is not a condition precedent to obtaining the status of a 'prevailing party.'" *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1197 (9th Cir. 2007). "A party has prevailed on the merits of at least some of [its] claims when it has obtained a preliminary injunction that results in a direct and substantial benefit." *Id.* (cleaned up). Here, Plaintiffs-Appellees obtained a preliminary injunction on *all* of the claims upon which they moved for a preliminary injunction. ER 1-24. And "a plaintiff who obtains a preliminary injunction is a prevailing party for purposes of 42 U.S.C. § 1988 even if the underlying case

becomes moot.” *Richard S. v. Dep’t of Developmental Servs. of State of California*, 317 F.3d 1080, 1088 (9th Cir. 2003). As result, Plaintiffs-Appellees are entitled to attorneys’ fees on remand. *See, e.g., Williams*, 625 F.2d at 847-48 (explaining that a plaintiff is entitled to attorneys’ fees if the plaintiff obtains a preliminary injunction that is mooted on appeal); *Martinez v. Wilson*, 32 F.3d 1415, 1422 n.8 (9th Cir. 1994) (“That a decision favorable to a section 1983 plaintiff is later vacated as moot does not alter the plaintiff’s status as a prevailing party provided the plaintiff achieved that status before the case was rendered moot.”). The correct path forward is to remand the case to the district court to consider Plaintiffs-Appellees’ fee petitions. *See Paulson*, 475 F.3d at 1049 (remanding “to the district court to determine whether, and to what extent, counsel for plaintiff-appellee may be entitled to attorneys’ fees.”).¹

The Plaintiffs-Appellees in *Griffin v. Padilla*, 19-17000, *Melendez v. Newsom*, 19-7004, and *Koenig v. Newsom*, 19-17007 join this partial opposition to the motion to dismiss.

¹ The cases that Appellants cite where an intervening decision in another court mooted the appeal do not change this result. Though this Court did include instructions for dismissal on remand in two of those cases, *see NASD Dispute Resolution, Inc. v. Judicial Council of State of Cal.*, 488 F.3d 1065, 1070 (9th Cir. 2007); *Enrico’s, Inc. v. Rice*, 730 F.2d 1250, 1255 (9th Cir. 1984), the plaintiffs had lost before the district court and thus could not have been “prevailing parties.” There was no reason for the district court to consider a fee petition as a result. *See also Lombardo v. Warner*, 481 F.3d 1135, 1136 (9th Cir. 2007) (finding the appeal moot and dismissing it without instructions to dismiss the case on remand).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of November 2019, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system and served on all parties through that system.

/s/ Thomas R. McCarthy
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*Counsel for Plaintiffs-Appellees Donald J. Trump for
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this partial opposition complies with the length limits permitted by Federal Rule of Appellate Procedure 27 and Ninth Circuit Rule 27-1(d) because it contains fewer than 20 pages. This partial opposition's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Thomas R. McCarthy
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