No. 15-46

In the Supreme Court of the United States

WENDY DAVIS, ET AL., PETITIONERS

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Under *Perry v. Perez*, the District of D.C. is the only district court that can "determine whether [a] state [redistricting] plan complies with § 5 [of the Voting Rights Act]"; "other district courts may not address the merits of § 5 challenges." 132 S. Ct. 934, 942 (2012) (per curiam). The Western District of Texas therefore appropriately did not address the merits of petitioners' Section 5 claim in this case. Instead, it granted a preliminary injunction against the 2011 Texas Senate redistricting plan on the sole basis that, under the *Perry* standard, there was a "not insubstantial" argument that the District of D.C. would deny Section 5 preclearance. *Id.* The district court expressly stated that the preliminary injunction was not based on any of petitioners' other claims.

The Fifth Circuit denied petitioners prevailing-party status for attorneys' fees because the district court never addressed the merits of petitioners' claims—a requirement for prevailing-party status recognized repeatedly by this Court and by each circuit. The questions presented are:

1. Whether the unanimous Fifth Circuit panel erred in holding that petitioners are not prevailing parties because the district court issued only preliminary relief without analyzing the merits of their claims.

2. Whether the Fifth Circuit erred when it used the word "simple" once to describe the non-dispositive question of whether the District of D.C. had granted Section 5 preclearance, and when the Fifth Circuit never held that parties are ineligible for attorneys' fees by raising only simple legal claims.

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OPINIONS BELOW

The opinion of the Fifth Circuit (Pet. App. 1a–28a) is reported at 781 F.3d 207. The opinion of the Western District of Texas (Pet. App. 29a–123a) is reported at 991 F. Supp. 2d 809.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2015. Petitions for panel and en banc rehearing were denied on April 14, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. In 2011, Texas enacted a new state Senate redistricting plan ("Plan S148"). Pet. App. 2a. In July 2011, Texas filed a declaratory judgment action before a three-judge district court in the District of D.C., seeking preclearance of this 2011 Senate plan under Section 5 of the Voting Rights Act. *Id.*

While the Section 5 proceedings were pending in the District of D.C., petitioners filed a separate suit before a different three-judge district court in the Western District of Texas in San Antonio; this lawsuit sought to enjoin the 2011 Senate plan. Pet. App. 3a. Petitioners argued that the 2011 Senate plan had not, and likely would not, receive Section 5 preclearance from the District of D.C. *Id.* They also argued that the plan violated Section 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments. *Id.*

2. a. The Western District of Texas enjoined implementation of the 2011 Senate plan because it had not been precleared under Section 5, and then entered an initial interim redistricting plan ("Plan S164"). Pet. App. 4a. The district court made clear that the "interim map is not a ruling on the merits of any claims asserted by the Plaintiffs in this case" and was imposed to "maintain[] the status quo as to the challenged district pending resolution of the preclearance litigation [in the District of D.C.]" *Id.*

This Court vacated the district court's interim Plan S164, explaining that district courts must use legislatively enacted plans "as a starting point" and

may deviate from those plans only in limited circumstances. *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (per curiam). The Court also clarified that for Section 2 and constitutional claims, interim plans could deviate from enacted plans only if "those legal challenges are shown to have a likelihood of success on the merits." *Id.* at 942. In contrast, for Section 5 claims, the interim plan can deviate from the portions of the enacted plan "that stand a reasonable probability of failing to gain § 5 preclearance"—that is, where the Section 5 challenges in the District of D.C. were "not insubstantial." *Id.* In other words, if a court draws interim maps based on Section 5 claims, it cannot reach the merits of the Section 5 claims.

On remand, the Western District of Texas adopted another interim plan ("Plan S172"). Pet. App. 6a. The district court again confirmed that it was not ruling on the merits of any of petitioners' claims. *Id.* It issued an order explaining that it "limited [its] changes in the State's enacted plan to those aspects of the plan 'that stand a reasonable probability of failing to gain § 5 preclearance.'" *Id.* The district court emphasized that "[n]othing in this order . . . represents a final judgment on the merits as to any claim or defense in this case, nor does it affect any future claim for attorney's fees." *Id.* at 7a. The court's order did not mention petitioners' Section 2 or constitutional claims. *Id.* The district court later explained that, "[g]iven the Court's conclusion under the § 5 standard, the Court did not need to consider whether Plaintiffs had demonstrated a substantial likelihood of success on the § 2 and Fourteenth Amendment

claims because those claims were also remedied through implementation of the § 5 interim remedy." Pet. App. 7a n.2.

b. Meanwhile, the District of D.C. denied Section 5 preclearance of Texas's 2011 Senate plan. *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013). Texas appealed to this Court. Pet. App. 7a.

c. On June 25, 2013, this Court issued its opinion and judgment in *Shelby County v. Holder*, which found unconstitutional Section 4(b)'s coverage formula for Section 5 preclearance. 133 S. Ct. 2612 (2013). Texas was therefore no longer a covered jurisdiction that needed to obtain Section 5 preclearance before implementing new election laws. Pet. App. 8a.

The day after *Shelby County* was decided, on June 26, 2013, the Texas Governor signed a bill repealing the 2011 legislatively enacted Senate redistricting map and adopting Plan S172—the second interim map drawn by the Western District of Texas. *Id.*

The next day, on June 27, 2013, this Court vacated the District of D.C.'s decision denying Section 5 preclearance and remanded for further proceedings in light of *Shelby County* and possible mootness. *Texas*, 133 S. Ct. 2885.

The District of D.C. later dismissed the Section 5 preclearance case as moot. It reasoned that "*Shelby County* dismantled the legal framework that called for preclearance of Texas's redistricting plans in the first place. That alone rendered Texas's claim for declaratory relief moot." Three-Judge Court Memorandum and Order at 4, *Texas v. United States*, No. 1:11-

cv-1303-RMC-TBG-BAH (D.D.C. Dec. 3, 2013), ECF No. 255.

3. In the Western District of Texas litigation at issue here, the court subsequently dismissed petitioners' Section 2 and constitutional claims as moot in light of Texas adopting a new Senate map in 2013. Pet. App. 10a. But the court awarded petitioners attorneys' fees. *Id.*

It held that petitioners were prevailing parties, under their Section 5 objection, because of the "interim relief obtained by Plaintiffs before Defendants mooted the case." *Id.* The district court explained that this award was not based upon petitioners' Section 2 or constitutional claims: "Given the Court's conclusion under the § 5 standard, the Court did not need to consider whether the Plaintiffs had demonstrated a substantial likelihood of success on the § 2 and Fourteenth Amendment claims because those claims were also remedied through implementation of the § 5 interim remedy." Pet. App. 7a n.2. The court then awarded petitioners $360,659.68 in attorneys' fees and costs, as well as an additional $2,718.75 in attorneys' fees a few months later. Pet. App. 10a.

4. The Fifth Circuit unanimously reversed, in an opinion written by Judge Higginson and joined by Chief Judge Stewart and Judge Jones.

a. The Fifth Circuit first held that petitioners were not prevailing parties on their Section 5 claims. Pet. App. 15a–22a. It began by recognizing that "[t]he San Antonio district court never had jurisdiction to address the merits of the Section 5 claim, which was

within the exclusive jurisdiction of the district court in D.C." Pet. App. 18a.

The court of appeals then applied a three-part test for determining whether a party qualifies for prevailing-party status in a preliminary-injunction context involving mootness. As the Fifth Circuit explained, "only the Fourth Circuit disagrees with this approach"—because the Fourth Circuit "hold[s] categorically that preliminary injunctions do not trigger prevailing-party status." Pet. App. 19a n.10 (citing *Smyth v. Rivero*, 282 F.3d 268, 276–77 (4th Cir. 2002)). The three-part test requires that a party "'(1) must win a preliminary injunction, (2) based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in favor of the plaintiff, (3) that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits.'" Pet. App. 19a (quoting *Dearmore v. Garland*, 519 F.3d 517, 524 (5th Cir. 2008)).

The Fifth Circuit held that petitioners failed to satisfy the second element because "the district court's analysis did not touch the merits of the Section 5 claim in any way." Pet. App. 21a; *see id.* (quoting *Hutchinson ex rel. Julien v. Patrick*, 636 F.3d 1, 10–11 (1st Cir. 2011), for the proposition that a court's analysis must include a "'sufficient appraisal of the merits' to trigger prevailing-party status"). As the Fifth Circuit recognized, "the Supreme Court 'ha[s] made clear that other district courts may not address the merits of [Section] 5 challenges.' *Perry*, 132 S. Ct. at 942." Pet. App. 21a. The court of appeals

therefore noted that "when the district court issued the February 28 interim-relief order, the district court was only permitted to determine whether Plaintiffs' Section 5 claim was 'not insubstantial.'" *Id.* at 21a–22a (quoting *Perry*, 132 S. Ct. at 942). "That inquiry did not involve merits analysis, and it therefore fell short of the searching (albeit preliminary) merits inquiry required to find prevailing-party status under *Dearmore*." *Id.* at 22a. The Fifth Circuit also quoted multiple orders from the district court emphasizing that the district court's rulings were not on the merits. *Id.*

b. The Fifth Circuit then held that petitioners were not prevailing parties on their remaining Section 2 and constitutional claims. Pet. App. 23a–26a. The court noted that, unlike the Section 5 claims, "both of these claims could have been analyzed under the traditional preliminary-injunction standard." *Id.* at 23a. But "because the district court never evaluated Plaintiffs' Section 2 or constitutional claims," petitioners were not prevailing parties on those claims either. *Id.* As the Fifth Circuit explained, the district court "emphasized that it only applied the 'not insubstantial' standard for the Section 5 claim; it never mentioned Section 2 or the preliminary-injunction standard." *Id.* And the court of appeals noted that the district court's order awarding fees "disavowed ruling on the Section 2 and constitutional claims." *Id.*

The Fifth Circuit recognized that "[a]lthough Texas eventually adopted the interim plan that remedied (and therefore mooted) these claims, this relief

was not judicially sanctioned," as the district court never addressed the merits of the Section 2 or constitutional claims. Pet. App. 24a. And without judicially sanctioned relief on the relevant claims, under this Court's precedent, petitioners could not be prevailing parties on their Section 2 or constitutional claims for purposes of attorneys' fees. *Id.* (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001)).

5. The Fifth Circuit denied petitioners' petitions for panel and en banc rehearing. Pet. App. 133a–135a. No member of the panel or active circuit judge requested that the court be polled for rehearing en banc. *Id.* at 134a.

ARGUMENT

I. THE FIFTH CIRCUIT'S CORRECT DECISION DOES NOT IMPLICATE ANY CIRCUIT SPLIT.

The Fifth Circuit's correct, fact-bound decision involves issues that are unlikely to recur in light of *Shelby County*, as it concerns the type of analysis district courts besides the District of D.C. conduct when considering Section 5 claims. Nor does the Fifth Circuit's decision implicate any purported conflict over when attorneys' fees can be rewarded based on a party obtaining only preliminary relief. All the circuits agree with this Court's repeated statements that a court must have addressed a party's likelihood of success on the merits before awarding prevailing-party status. While the Fourth Circuit has a categorical rule denying prevailing-party status based on

mere preliminary relief, that conflict is not implicated here because petitioners would still lose under the Fourth Circuit's rule. Furthermore, the alleged conflict regarding prevailing-party status may be illusory due to the Fourth Circuit's separate line of precedent precluding a merits analysis for preliminary injunctions.

A. The Fifth Circuit's Decision Was Correct, And All Circuits Recognize that a Court Must Have Addressed the Merits Before Awarding Prevailing-Party Status.

This Court's established precedent holds that parties attain prevailing-party status only after a court has analyzed the *merits* of their claims. *See, e.g.*, *Sole v. Wyner*, 551 U.S. 74, 82 (2007) (quoting *Hewitt v. Helms*, 482 U.S. 755, 760 (1987), for the proposition that a "plaintiff must 'receive at least some relief on the merits of his claim before he can be said to prevail'"); *Buckhannon*, 532 U.S. at 603–04 (same); *see id.* at 603 (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam), for the proposition that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims").

Each circuit recognizes this premise.[1] So there is no circuit conflict on the established proposition that

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[1] *See, e.g.*, *Race v. Toledo–Davila*, 291 F.3d 857, 858–59 (1st Cir. 2002); *Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997); *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (en banc); *Smyth v. Rivero*, 282 F.3d 268, 277 (4th Cir. 2002); *Dearmore v. City of Garland*, 519 F.3d 517, 521, (5th Cir.

a party can attain prevailing-party status only after a court has analyzed the merits of its claims.

The Fifth Circuit's decision here was therefore correct. Petitioners are not prevailing parties because the district court never ruled for petitioners on the merits of any of their claims. The district court could not possibly have ruled on the merits of petitioners' Section 5 claims, as this Court has "made clear that other district courts [besides the District of D.C.] may not address the merits of § 5 challenges." *Perry*, 132 S. Ct. at 942. And the district court never addressed the merits of petitioners' Section 2 and constitutional claims. *See* Pet. App. 7a n.2, 23a.

B. The Fifth Circuit's Decision Does Not Implicate a Conflict with the Fourth Circuit's Categorical Rule.

Petitioners would not be prevailing parties under any test that denies attorneys' fees in more circumstances than the Fifth Circuit's test, because the Fifth Circuit's test still denied them prevailing-party status here. *Cf.* Pet. 14–17. Any possible conflict with the Fourth Circuit's more restrictive, categorical rule

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2008); *Dubuc v. Green Oak Twp.*, 312 F.3d 736, 753 (6th Cir. 2002); *Dupuy v. Samuels*, 423 F.3d 714, 719 (7th Cir. 2005); *Rogers Grp., Inc. v. City of Fayetteville*, 683 F.3d 903, 909–10 (8th Cir. 2012); *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715–16 (9th Cir. 2013); *Kan. Judicial Watch v. Stout*, 653 F.3d 1230, 1235–36 (10th Cir. 2011); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1356 (11th Cir. 2009); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 947–48 (D.C. Cir. 2005); *Ward v. U.S. Postal Serv.*, 672 F.3d 1294, 1297 (Fed. Cir. 2012).

against prevailing-party status based only on preliminary relief is therefore not implicated.

1. With the exception of the Fourth Circuit, the other circuits to have considered the issue agree that preliminary relief can sometimes entail a sufficient analysis of the merits to warrant prevailing-party status. *See, e.g.*, Pet. 15 (citing cases from the Third, Fifth, and Seventh Circuits for this proposition). The Fourth Circuit has held that the type of analysis it conducts in evaluating preliminary injunctions under its precedent does not entail a sufficient analysis of the merits to provide a basis for awarding attorneys' fees. *Smyth*, 282 F.3d at 276–77.

Any circuit split caused by the Fourth Circuit's rule is not implicated by the decision here. Under the Fourth Circuit's categorical rule, petitioners also would not be entitled to attorneys' fees because they obtained only preliminary relief. *See id.* Thus, this case would have been decided the same way—and petitioners would not be prevailing parties—regardless of whether it was decided under Fourth or Fifth Circuit precedent.

Insofar as there is a conflict to be resolved, the proper vehicle would arise in two contexts: (1) in a case from the Fourth Circuit in which prevailing-party status was denied under the categorical rule but there is a significant argument that other circuits would have granted prevailing-party status; or (2) in a case from another circuit *granting* prevailing-party status based on mere preliminary relief, which would conflict with the Fourth Circuit's categorical rule.

Here, though, the Fifth Circuit *denied* prevailing-party status, so any conflict is not implicated.

2. That said, the conflict over the Fourth Circuit's categorical rule regarding prevailing-party status may actually be illusory. Even *Smyth* recognized that prevailing-party status turned on whether a court assessed the merits. 282 F.3d at 277. The Fourth Circuit's categorical rule may stem from a deeper problem with the Fourth Circuit's own precedent on a predicate issue: the type of merits analysis conducted in a preliminary-injunction posture. As Judge Luttig explained, Fourth Circuit precedent "virtually eliminate[s] altogether the inquiry into the likelihood of success on the merits," "by overvaluing the inquiry into the relative equities" and "den[ying] any value whatsoever to the inquiry into the likelihood of success on the merits." *Safety-Kleen, Inc. (Pinewood) v. Wyche*, 274 F.3d 846, 868 (4th Cir. 2001) (Luttig, J., concurring).

If the Fourth Circuit is misconstruing the type of merits analysis conducted when reviewing preliminary injunctions, then it may not be misapplying this Court's precedents on prevailing-party status. After all, if the Fourth Circuit is not conducting a merits analysis in considering preliminary injunctions, then a decision granting a preliminary injunction would not entail "some relief on the merits" to trigger prevailing-party status. *Sole*, 551 U.S. at 82; *Buckhannon*, 532 U.S. at 603–04; *Hewitt*, 482 U.S. at 760. The conflict to resolve, therefore, could be the Fourth Circuit's treatment of the merits prong of a preliminary-

injunction analysis—and not its application of this Court's prevailing-party precedent.

3. Regardless, both petitioners and the Fifth Circuit here recognize that the Fourth Circuit's approach is unique. *See* Pet. 15 ("To date, the Fourth Circuit is alone in adopting a *per se* holding"); Pet. App. 19a n.10 ("only the Fourth Circuit disagrees with this approach").

While petitioners try to tie the Third Circuit's approach to the Fourth Circuit's categorical rule, Pet. 15–16, the Third Circuit has expressly rejected such a rule. *See Singer*, 650 F.3d at 230 n.4 ("[W]e do not mean to 'cast[] doubt' on the 'well-supported legal proposition' that, in some cases, interim injunctive relief may be sufficient to warrant attorney's fees. We agree that 'interim relief remains a proper basis for an award of attorney's fees when that relief is based on a determination of the merits of the plaintiff's claims.' We emphasize, however, that the determination must be merits-based . . . ."). And *Singer* turned on a fact-bound analysis about the district court's particular comments on the merits in that case. *Singer* explained that the district judge who issued the preliminary injunction had doubts about the merits and could resolve them later: "Judge Debevoise acknowledged that 'the State *maybe* has some merit to its position' (emphasis added), and stated it could resolve the merits 'at a later date upon the return day of the Order to Show Cause.'" *Id.* at 230 n.3. Thus, the Fourth Circuit is the only circuit with a categorical rule against prevailing-party status based on mere preliminary relief.

In any event, whatever conflict may exist between the Fifth Circuit's test for prevailing-party status and a more restrictive approach—like the Fourth Circuit's categorical rule—that conflict is not implicated here. Under any of these approaches, petitioners are not prevailing parties.

C. There is No Conflict Between the Fifth Circuit's Decision and the Approaches of the D.C., Eighth, and Eleventh Circuits.

Petitioners try to manufacture a conflict with the D.C., Eighth, and Eleventh Circuits that does not exist. Pet. 17–19, 22. Petitioners say that prevailing-party status in these three circuits does not turn on whether courts addressed the merits, but merely on "the *effect* of the relief ordered." Pet. 17. On the contrary, the cases petitioners cite comport with this Court's established precedent and the circuit consensus that a court must address the merits for a party to prevail.

1. The D.C. Circuit's opinion in *Select Milk* does not conflict with the Fifth Circuit's decision here. *Cf.* Pet. 17–18. *Select Milk* did not adopt a prevailing-party test that examined only the effect of any relief ordered rather than whether the court addressed the merits. The reason *Select Milk* spent virtually no time addressing the merits was because the opposing party there did not "take issue with the District Court's finding that Milk Producers *undoubtedly would have succeeded on the merits*." 400 F.3d at 948 (emphasis added). Indeed, the D.C. Circuit noted

that "Milk Producers secured a preliminary injunction in this case *largely because their likelihood of success on the merits was never seriously in doubt*." *Id.* (emphasis added). The merits analysis was therefore not just an atmospheric point; the merits analysis was quite "noteworthy" because it allowed the D.C. Circuit to treat that preliminary injunction just like "final judgments on the merits." *Id.*; *cf.* Pet. 18 n.4.

Because the merits issue was not questioned in *Select Milk*, the D.C. Circuit did not spend much time addressing it. But that hardly means that the D.C. Circuit adopted a test for prevailing-party status that ignores this factor. In fact, *Select Milk* expressly applied this Court's opinion in *Buckhannon*. 400 F.3d at 946–50. And *Buckhannon* made clear that a merits analysis is required for a party to prevail. *See* 532 U.S. at 603–04 (quoting *Hewitt*: plaintiff must "receive at least some relief on the merits of his claim before he can be said to prevail"; quoting *Hanrahan*: fees are available "only when a party has prevailed on the merits of at least some of his claims").

2. The Eighth Circuit's opinion in *Rogers Group* likewise evaluated the merits and creates no conflict with the Fifth Circuit's decision. *Cf.* Pet. 18. *Rogers Group* held that there was a court-ordered change in the legal relationships between the parties, which conferred prevailing-party status, because a preliminary injunction was obtained "based on the [d]istrict [c]ourt's conclusion that [Rogers Group was] *likely to prevail on the merits*." 683 F.3d at 910.

Further confirming that the D.C. Circuit's *Select Milk* opinion did not jettison an analysis of the merits, the Eighth Circuit in *Rogers Group* analyzed the merits while applying *Select Milk*. *Id.* And under this framework, the Eighth Circuit explained that "the district court engaged in a thorough analysis of the probability that Rogers Group would succeed on the merits of its claim . . . ; therefore, the preliminary injunction was not one that merely maintained the status quo." *Id.* As the Eighth Circuit had noted, a preliminary injunction "that merely maintains the status quo does not confer prevailing party status."[2] *Id.* (quoting *N. Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1086 (8th Cir. 2006)). That is so because such an injunction has "nothing to do with the merits." *Id.* (quoting *McQueary v. Conway*, 614 F.3d 591, 600 (6th Cir. 2010)).

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[2] Other circuits recognize that a preliminary injunction based on a need to maintain the status quo, rather than a merits analysis, does not trigger prevailing-party status. *See, e.g.*, *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226, 234 (3d Cir. 2008) (analogizing to a D.C. Circuit case in reasoning that the preliminary injunction at issue did not "merely maintain the status quo" but instead "afforded plaintiffs lasting relief on the merits of their claims"); *Dearmore*, 519 F.3d at 522 (noting that various circuits, including the Sixth Circuit, hold that prevailing-party status must rest on merits analysis and not on preliminary relief that "merely preserves the status quo temporarily"); *Dupuy*, 423 F.3d at 723 n.4 (stating that there is no conflict between the Seventh Circuit's holding in *Dupuy* and the Eleventh Circuit's statement that a preliminary injunction may justify an award of attorneys' fees if it does not "merely [maintain] the status quo" but instead rests on merits analysis).

3. The Eleventh Circuit also analyzes the merits in determining whether issuance of a preliminary injunction triggers prevailing-party status. The language quoted by petitioners confirms this: "a preliminary injunction *on the merits*, as opposed to a merely temporary order which decides no substantive issues but merely maintains the status quo, entitles one to prevailing party status and an award of attorney's fees." Pet. 18 (quoting *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987), *abrogated on other grounds by Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)) (emphasis added and omitted). Thus, the Eleventh Circuit recognized prevailing-party status where the preliminary injunction "was granted on the merits." *Taylor*, 810 F.2d at 1558; *see id.* at 1560 (finding prevailing-party status because "[t]he preliminary injunction entered below was granted squarely on the merits").

Petitioners suggest that a "decision is 'on the merits' so long as the effect of the relief is not simply to maintain the status quo." Pet. 19. But the Eleventh Circuit in *Taylor* never said that, and petitioners commit a logical fallacy in suggesting it. An order temporarily maintaining the status quo is just one example of a judicial action that does not address the merits. Yet that does not mean that all orders that do something besides temporarily maintain the status quo are somehow rendered injunctions on the merits. Stated differently, to qualify as an injunction on the merits, it is necessary but not sufficient that

the injunction be based on something more than temporarily maintaining the status quo. The dispositive inquiry is whether the court actually addressed the merits.

Nor does *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009), create any conflict with the Fifth Circuit's decision. The Eleventh Circuit there noted that prevailing-party status follows when "a party has been awarded by the court at least some relief on the merits of his claim." *Id.* at 1356 (quoting *Smalbein ex rel. Estate of Smalbein v. City of Daytona Beach*, 353 F.3d 901, 905 (11th Cir. 2003) (per curiam)). And it quoted *Taylor* for the proposition that "a preliminary injunction on the merits . . . entitles one to prevailing party status and an award of attorney's fees." *Id.* (quoting *Taylor*, 810 F.2d at 1558). As petitioners admit, the plaintiffs there obtained a preliminary injunction based on a "substantial likelihood of success on the merits of their claims." *Id.* at 1346. Petitioners suggest that the Eleventh Circuit "did not note that as a factor guiding its prevailing party analysis." Pet. 19. But that is belied by the language just quoted from the Eleventh Circuit's opinion. And in any event, the Eleventh Circuit never said that a merits analysis was irrelevant and that the court needed only to examine the relief ordered.

D. There is No Confusion Among Other Circuits.

As explained above, all of the circuits agree that a merits analysis is necessary for prevailing-party status. *See supra* Part I.A. Petitioners suggest confusion amongst the Ninth Circuit versus the Second and Sixth Circuits versus the Fifth and Tenth Circuits. Pet. 19–22. But there is no confusion here. There is no basis to believe that any minor differences in how the test is phrased result in disparate outcomes. And even if there were, none of these slight differences in wording would change the outcome here: It was clear that the district court did not address the merits of petitioners' claims, because the district court did not have power to consider the merits of the Section 5 claims and expressly did not address the Section 2 or constitutional claims. *See supra* pp.6–7.

There is no daylight between the tests for prevailing-party status in the Second, Fifth, Sixth, and Tenth Circuits. *Cf.* Pet. 21. All require a clear showing of probable success on the merits, as petitioners appear to concede. *See* Pet. 21 (stating that the Second, Fifth, Sixth, and Tenth Circuits require an "unambiguous indication of probable success on the merits" and citing *Haley*, 106 F.3d at 483; Pet. App. 21a–22a; *Dubuc*, 312 F.3d at 753; *Kan. Judicial Watch*, 653 F.3d at 1238).

Petitioners assert that the Fifth and Tenth Circuits require something more—a "searching" or "serious" examination of the merits. Pet. 21 (quoting Pet. App. 22a; *Kan. Judicial Watch*, 653 F.3d at

1238). But it is unclear what additional work petitioners believe a "searching" or "serious" examination does beyond looking for an "unambiguous indication"—or whether petitioners believe the Second and Sixth Circuits are conducting only a cursory examination of the merits in searching for an "unambiguous indication." *Cf. Haley*, 106 F.3d at 483 (Second Circuit stating that a preliminary injunction must be "clearly based on the merits").

The Fifth Circuit does not view its standard as more rigorous, as it quoted the Sixth Circuit's language in fashioning the test in *Dearmore*. *See* 519 F.3d at 524 (requiring "an unambiguous indication of probable success on the merits"); *see id.* at 523 ("As noted, the Sixth Circuit provides that a plaintiff is a prevailing party if the preliminary injunction represents an 'unambiguous indication of probable success on the merits"). The Fifth Circuit in *Dearmore* even noted that the plaintiff there would qualify as a prevailing party in at least the Sixth, Seventh, and Ninth Circuits. *Id.* at 524. The Fifth Circuit here likewise quoted the same standard from *Dearmore*, which came from the Sixth Circuit. Pet. App. 19a. And the Fifth Circuit's singular use of the word "searching" here was just a way to explain the test it previously adopted from *Dearmore* and the Sixth Circuit. Pet. App. 22a. This is not circuit confusion; it is circuit conformity.

In all events, any linguistic quibbling over the standard could not possibly have made a difference here, because no searching inquiry was needed to determine whether the district court addressed the

merits of petitioners' claims. This Court had already "made clear that other district courts [besides the District of D.C.] may not address the merits of § 5 challenges," *Perry*, 132 S. Ct. at 942, and the district court expressly disavowed any reliance on petitioners' Section 2 or constitutional claims, Pet. App. 7a n.2, 23a.

That leaves petitioners with the Ninth Circuit, Pet. 20, but its precedent creates no conflict. Just like other circuits, the Ninth Circuit requires a showing of probable success on the merits. As petitioners recognize, the Ninth Circuit requires a showing that an injunction "entail[s] a judicial determination that the claims on which the plaintiff obtains relief are *potentially* meritorious." Pet. 20 (quoting *Higher Taste*, 717 F.3d at 715). In other words, to establish prevailing-party status based on a preliminary injunction, the Ninth Circuit requires "a finding that the plaintiff has shown a likelihood of success on the merits."[3] *Id.* (quoting *Higher Taste*, 717 F.3d at 716). And the Ninth Circuit in *Higher Taste* recognized that it was "clear" that the party there "was likely to succeed on the merits." 717 F.3d at 716. The Ninth Circuit even cited and relied on the Fifth Circuit's decision in *Dearmore*. *Id.*

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[3] Petitioners suggest the Ninth Circuit's own precedent is confused on this point. Pet. 20 n.5. The Ninth Circuit does not believe so: "Several circuits, including ours, have held that a preliminary injunction satisfies the judicial imprimatur requirement if it is based on a finding that the plaintiff has shown a likelihood of success on the merits." *Higher Taste*, 717 F.3d at 716.

When the Fifth Circuit previously said that the Ninth Circuit takes a "relatively generous" approach, that statement was made simply to contrast the Fourth Circuit's categorical rule against prevailing-party status based on preliminary relief. Pet. 20 (quoting *Planned Parenthood of Houston & Se. Tex. v. Sanchez*, 480 F.3d 734, 741 (5th Cir. 2007)). The Fifth Circuit said that "[t]he Ninth Circuit has also taken a relatively generous approach" in that, like the Sixth and D.C. Circuits, it recognized that a preliminary injunction could trigger prevailing-party status. *Planned Parenthood*, 480 F.3d at 741. "By contrast," the Fifth Circuit explained, "the Fourth Circuit has expressed strong skepticism that a preliminary injunction could ever serve as the basis for prevailing party status." *Id.* (citing *Smyth*, 282 F.3d at 276). Consequently, the Fifth Circuit's characterization of the Ninth Circuit's rule does not establish any conflict with circuits besides the Fourth Circuit. And any split with the Fourth Circuit is not implicated here. *See supra* Part I.B.

II. THERE IS NO CIRCUIT SPLIT ON WHETHER "SIMPLE" LEGAL CLAIMS PRECLUDE ELIGIBILITY FOR ATTORNEYS' FEES.

There is no circuit split on whether parties are ineligible for attorneys' fees when they raise only "simple" legal claims. *Cf.* Pet. 22–30. Petitioners misunderstand the basis for the Fifth Circuit's holding, which rests on clear precedent from this Court requiring merits analysis to be a prevailing party—not a new theory about simple legal claims. The Fifth

Circuit did not hold that parties are categorically ineligible for attorneys' fees when they raise only "simple" claims, and it did not create a split with the Third and Tenth Circuits on this point.

A. Petitioners take out of context the Fifth Circuit's single use of the word "simple." In explaining that the district court had not ruled on the merits of petitioners' Section 5 claims, the Fifth Circuit said:

> Before issuing the September 29 injunction, the district court was faced with a simple threshold question that required a "yes" or "no" answer: had Texas's 2011 plan been approved in D.C.? Even when that answer was "no," the next level of analysis still did not address the merits of Plaintiffs' Section 5 claim. Only the D.C. district court could assess the merits of a Section 5 challenge, and the Supreme Court "ha[s] made clear that other district courts may not address the merits of [Section] 5 challenges." *Perry*, 132 S. Ct. at 942. . . . Thus, when the district court issued the February 28 interim-relief order, the district court was only permitted to determine whether Plaintiffs' Section 5 claim was "not insubstantial." *Id.* That inquiry did not involve merits analysis . . . .

Pet. App. 21a–22a.

This passage reveals that the Fifth Circuit did not deny petitioners prevailing-party status because their claims were "simple." *Cf.* Pet. 23. The Fifth Circuit denied prevailing-party status because the district court's inquiry into whether petitioners' Section

5 claims were "not insubstantial" did not involve merits analysis.

The Fifth Circuit was analyzing, step by step, what the district court needed to examine in considering whether to grant a preliminary injunction based on petitioners' Section 5 claims. The Fifth Circuit recognized that the first thing the district court needed to answer was whether Section 5 preclearance had been obtained. This, indeed, was a "simple" question because it was undisputed that the redistricting plan had not been precleared by the District of D.C.

Nowhere did the Fifth Circuit suggest that petitioners were categorically ineligible for attorneys' fees just because one of the questions the district court needed to address was this simple threshold question. To the contrary, the Fifth Circuit correctly noted that after addressing that simple threshold question, the district court still had to address a further question: whether petitioners' Section 5 claims were "not insubstantial." Pet. App. 22a (quoting *Perry*, 132 S. Ct. at 942). Yet consideration of that additional question was not a sufficient analysis for prevailing-party status because "[t]hat inquiry did not involve merits analysis." *Id.* The Fifth Circuit therefore did not deny prevailing-party status on the basis that the substantiality of petitioners' Section 5 claims was a "simple" question.

Petitioners attempt to evade the Court's holding in *Perry* by suggesting that "the fact that the Western District court had no jurisdiction to address the merits of the Section 5 *preclearance* claim had no

bearing on whether the Western District court actually addressed the merits of the Section 5 *enforcement* claim." Pet. 26. But the only court that had power to address the merits of any Section 5 claim was the District of D.C., as *Perry* made crystal clear. *See* 132 S. Ct. at 942 ("other district courts may not address the merits of [Section] 5 challenges"). Furthermore, petitioners cite outdated Eleventh Circuit precedent, Pet. 26, based on the "catalyst" theory of prevailing-party status that was expressly rejected by this Court in *Buckhannon*, 532 U.S. at 610. *See Maloney v. City of Marietta*, 822 F.2d 1023, 1026 (11th Cir. 1987) (granting prevailing-party status where a party's "lawsuit was the catalyst in vindicating a right guaranteed under the [Voting Rights] Act").[4]

B. Petitioners are also incorrect in asserting that they would have been deemed prevailing parties under Third or Tenth Circuit precedent. *Cf.* Pet. 25, 28–30. Like every other circuit, the Third and Tenth Circuits require a merits analysis before awarding prevailing-party status. *See supra* p.9 n.1. In light of the actual basis for the Fifth Circuit's decision (that the district court never addressed the merits of petitioners' claims), it is clear that no circuit split exists on

[4] In the other Eleventh Circuit case cited by petitioners, Pet. 26, "[t]he State conceded that Brooks was entitled to fees as a prevailing party," so the standard for prevailing-party status was not at issue. *Brooks v. Ga. State Bd. of Elecs.*, 997 F.2d 857, 860 (11th Cir. 1993). Additionally, *Brooks* relied on *Maloney*, which invoked the now-repudiated catalyst theory. *Id.* at 861.

whether simple legal claims preclude eligibility for attorneys' fees.

The Third Circuit has held that the simplicity of legal claims does not categorically bar eligibility for attorneys' fees. *Staten v. Hous. Auth. of City of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980). Even though plaintiffs were prevailing parties in *Staten*, the district court decided not to award them attorneys' fees because the case was "simple" and should have been "handled routinely." *Id.* The Third Circuit disapproved, stating, "Simplicity, by itself . . . is not a 'special circumstance' justifying a denial of attorneys' fees in a section 1983 case. Rather, it is but one of the factors to be considered in determining the amount of the fees award." *Id.* (footnote omitted).

Nothing in *Staten* conflicts with the Fifth Circuit's holding here. *Cf.* Pet. 28. Petitioners did not receive attorneys' fees because they were not prevailing parties, and they were not prevailing parties because their claims did not receive merits analysis. *See* Pet. App. 26a. The simplicity of their claims was not dispositive of whether their claims were evaluated on the merits. In contrast, *Staten* speaks only to situations in which a party already has attained prevailing-party status. *See Staten*, 638 F.2d at 604. In those circumstances, the Third Circuit holds that it is improper to deny attorneys' fees merely because a case is straightforward. *See id.* at 604–05.

Nor does the Fifth Circuit's decision conflict with any decision of the Tenth Circuit. *Cf.* Pet. 28–29. The Tenth Circuit merely has adopted the Third Circuit's holding in *Staten* that the simplicity of a claim is not

a special circumstance allowing for denial of attorneys' fees to prevailing parties. *See J&J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1474, 1478 (10th Cir. 1985), *abrogated on other grounds by Dennis v. Higgins*, 498 U.S. 439 (1991) (holding that, while the trial court erred in finding that special circumstances precluded an award of attorneys' fees to the prevailing party, the party still could not receive attorneys' fees because Section 1983 was not an appropriate basis for the relief sought).

Two major differences thus distinguish the conclusions of the Third and Tenth Circuits from the holding of the Fifth Circuit here. First, the discussion of simplicity in *Staten* and *J&J Anderson* concerns awards of attorneys' fees to prevailing parties. But petitioners here were not prevailing parties because the district court did not address the merits of their claims in granting a preliminary injunction. Second, the Third and Tenth Circuits hold that the simplicity of a claim cannot automatically prevent a prevailing party from receiving attorneys' fees, and the Fifth Circuit's opinion below is not to the contrary. The Fifth Circuit's holding turned not on the simplicity of petitioners' Section 5 claim, but rather on the absence of merits analysis. The Fifth Circuit did note the obvious proposition that before considering whether petitioners' Section 5 claims were not insubstantial, the court needed to ask whether the District of D.C. had already granted Section 5 preclearance. But the fact that this threshold question was simple did not cause the Fifth Circuit to deny prevailing-

party status. Thus, the question of whether the simplicity of a claim is relevant to the legitimacy of a fee award or merely to its amount is in no way implicated by the Fifth Circuit's decision.

III. THERE ARE SIGNIFICANT VEHICLE PROBLEMS PREVENTING THE COURT FROM RESOLVING THE QUESTIONS PRESENTED.

On the first question presented, as explained above, petitioners lose under either the Fifth Circuit's analysis here or the Fourth Circuit's categorical rule. *See supra* Part I.A, I.B. Any conflict caused by the Fourth Circuit's outlier approach is therefore not implicated by the Fifth Circuit's decision. Moreover, the Fourth Circuit's categorical rule may not be creating any circuit conflict on prevailing-party status; instead, any conflict appears to be caused by the Fourth Circuit's unique precedent on whether the merits can be analyzed when considering a preliminary injunction. *See supra* Part I.B.2. That question is not presented here, and if the Court is concerned about the Fourth Circuit's precedent, the proper vehicle would be a case from the Fourth Circuit.

The second question presented is not implicated because the Fifth Circuit never held that parties raising only simple legal claims are ineligible to receive attorneys' fees. *See supra* Part II.

There are also alternative bases to affirm. *See generally* Petition for a Writ of Certiorari, *State of Texas v. Wendy Davis et al.*, No. 15-522 (U.S. filed Oct. 22, 2015). *Cf.* Pet. App. 15a–16a. First, the Constitution prohibited any award of attorneys' fees

based on any preliminary relief obtained under the unconstitutional preclearance framework nullified by *Shelby County*. For the same reason that *Shelby County* invalidated the Voting Rights Act's preclearance framework, the Constitution does not permit Congress to authorize attorneys' fees in Section 5 lawsuits and exacerbate the unconstitutional "federalism costs" recognized by *Shelby County*, 133 S. Ct. at 2627 (internal quotation marks omitted). Second, in the alternative to that constitutional basis to deny attorneys' fees, petitioners could not be prevailing parties under the attorneys' fees statutes as of the moment *Shelby County* was decided. *Shelby County* nullified Section 4(b)'s coverage formula, thus removing Texas from Section 5's coverage. And *Shelby County* was binding precedent the day this Court issued its decision and judgment (which was before Texas repealed the 2011 Senate map). *Shelby County* applied retroactively, so the preclearance framework had been an unconstitutional nullity since at least 2006, when it was most recently reauthorized. *Shelby County*, 133 S. Ct. at 2630–31. Petitioners therefore could not be prevailing parties on their Section 5 claim; a party cannot "prevail" when it relies upon a statute that this Court nullifies as unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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