No. 22-773

IN THE
# Supreme Court of the United States

TRE HARGETT, ET AL.,

*Petitioners*,

v.

TENNESSEE STATE CONFERENCE OF THE NAACP, ET AL.,

*Respondents*.

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

## REPLY BRIEF FOR PETITIONERS


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## INTRODUCTION

The Court should grant the petition. The Advocacy Groups admit to a circuit split but downplay it as a lopsided anomaly that will resolve without intervention. That is not an accurate portrayal of the case law. The Fourth Circuit is not an outlier; the Third Circuit also holds that a likelihood-of-success showing does not qualify as success "on the merits." And a separate circuit split exists on the application of *Sole*'s "enduring relief" requirement. No amount of massaging can reconcile the varying approaches taken by the Courts of Appeals.

And if the lower courts had adopted the Advocacy Groups' supposed "consensus approach," the Court would really need to intervene. That approach equates a likelihood-of-success determination with a final merits decision. It treats *temporary* relief as "enduring." And by looking at the thoroughness of the likelihood-of-success analysis and the government's motives in changing course, it jettisons clear lines for guesswork. Every aspect of the proffered rule runs contrary to this Court's jurisprudence.

The Advocacy Groups identify no obstacle to review. And the question presented raises a recurring and important issue, which is why sixteen States support this petition. The Court should grant review.

## ARGUMENT

### I. The Circuits Are Split.

Despite pages of argument, the Advocacy Groups cannot paper over the clear split on the "merits" and

"relief" showings necessary to qualify as a prevailing party.

***Courts disagree on what it means to prevail "on the merits."*** The circuits split into three camps: (1) Some hold that a likelihood-of-success determination is *not* sufficient; (2) others hold that a likelihood-of-success determination *is* sufficient; (3) still others hold that a likelihood-of-success determination is sufficient *if* the analysis is sufficiently thorough.

The Advocacy Groups acknowledge that the Fourth Circuit has held a likelihood-of-success determination does not satisfy the "on the merits" requirement, but they erroneously frame it as an "outlier," BIO 10. The en banc Third Circuit takes the same approach in *Singer Management Consultants, Inc. v. Milgram*, 650 F.3d 223 (3d Cir. 2011). *See* Pet. 11–12.

The Advocacy Groups cherry-pick from a footnote in *Singer* reciting the "proposition that . . . interim injunctive relief may be sufficient to warrant attorney's fees." 650 F.3d at 230 n.4 (quotations omitted). But that footnote continues: "We emphasize, however, that the determination must be merits-based . . . and *may not be merely a finding of a likelihood of success on the merits*." *Id.* (emphasis added). And the body of the opinion leaves no doubt. *Singer* explains that, "in the context of . . . preliminary injunctions," the plaintiff generally "show[s] a *likelihood* of success" and that showing "is not a resolution of any merit-based issue." *Id.* at 229 (quotations omitted). Because this "probability ruling is usually the only merits-related legal determination made when courts grant . . . preliminary

injunctions," a plaintiff "will not often 'prevail' based solely on" a preliminary injunction. *Id.* (quotations omitted).

The Third Circuit thus rejects the notion that a likelihood-of-success finding satisfies the merits requirement, permitting fees only in "that rare situation where a merits-based determination is made at the injunction stage." *Id.*; *see id.* at 230 n.4.[1] In fact, *Singer* described the Advocacy Groups' lead authority, *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008), as the "rare" case where a *final* merits ruling comes out of a preliminary motion. *Singer*, 650 F.3d at 229; *id.* at 230 n.4. (Regardless, that case pre-dated *Singer*'s en banc decision.) And the recent, unpublished Third Circuit cases cited in the Opposition reiterate *Singer*'s rule. BIO 17.

In the other circuits, by contrast, the plaintiff can obtain prevailing party status after a likelihood-of-success showing. Even those circuits, though, take differing approaches. The Advocacy Groups claim that all courts "ask whether the preliminary injunction was based on a *thorough* assessment of a claim's merits." BIO 13 (emphasis added). But only the Sixth and Tenth Circuits scrutinize the rigor of the district court's analysis. *See Kan. Jud. Watch v. Stout*, 653 F.3d 1230, 1239 (10th Cir. 2011); *see also Hodes & Nauser, MDs v. Moser*, No. 2:11-cv-02365-CM-KMH,

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[1] Some courts use the phrase "merits-based" to describe a *final* merits decision, *Singer*, 650 F.3d at 230 n.4, while others use it to describe an injunction that rests on a likelihood of success. *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 716 n.1 (9th Cir. 2013).

2012 WL 1831549, at *1, *3 (D. Kan. May 18, 2012). The other circuits simply confirm that the injunction rests on a likelihood of success, as opposed to "so-called 'stay put' or 'status quo' injunctions, which do not entail a[ny] judicial determination regarding the plaintiff's likelihood of success." *Higher Taste*, 717 F.3d at 716 n.1; *see also, e.g.*, *Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997); *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1558 (11th Cir. 1987).

Regardless, whether the circuits take two different approaches or three, a split exists on the merits requirement.

***Courts disagree on the relief showing necessary to prevail.*** On the "enduring relief" requirement, the circuits likewise split into three camps: (1) Some hold that a temporary restraint is *not* sufficient unless it effectively provides permanent relief; (2) others hold that a temporary restraint *is* sufficient; (3) still others hold that a temporary restraint is sufficient *if* it causes a separate, more-permanent victory.

But the Advocacy Groups mash these three positions into a "consensus." They say that *all* circuits "award[] attorney's fees based on preliminary injunctions where the facts and circumstances warrant[ it], and den[y] fees where they d[o] not." BIO 23. That "position" begs the question—and contorts the applicable law.

The Advocacy Groups first assert that "no court of appeals has ever adopted" Judge Nalbandian's view that temporary restraints are "enduring" only when they effectively provide permanent relief. BIO 26. But

the Eighth Circuit did just that in *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083 (8th Cir. 2006). The court stated that preliminary relief was enduring when it "functions . . . like the grant of an irreversible partial summary judgment on the merits" because "the party's claim [for a] permanent injunction is rendered moot by the impact of the preliminary injunction." *Id.* at 1086. And the court held that preliminary relief was *not* enduring when it "grants only temporary relief pendente lite." *Id.*

Ignoring that language, the Advocacy Groups claim *Northern Cheyenne* denied fees because the injunction "merely preserve[d] the 'status quo' to avoid the risk of irreparable harm before a merits decision . . . [,] as opposed to a preliminary injunction that rests on an assessment of likely success on the merits." BIO 25. Not true. In fact, the Eighth Circuit specifically noted that the district court "issu[ed] the preliminary injunction [after] consider[ing] whether the Tribes were *likely* to prevail on the merits." 433 F.3d at 1086. When the opinion referred to "preserv[ing] the status quo," it meant literally maintaining the existing state of affairs through an injunction; it was not referring to a so-called "status quo," non-merits injunction. *Id.*

The Seventh Circuit takes the same approach. The Advocacy Groups admit that *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000), deemed preliminary relief enduring because it provided the plaintiff all "the relief . . . sought." BIO 24. But they claim the Seventh Circuit did not consider a situation involving a plaintiff who obtained only temporary relief followed

by further proceedings. The Seventh Circuit, however, considered that circumstance in *Dupuy v. Samuels*, and it stated that fees were not appropriate. 423 F.3d 714, 723 (7th Cir. 2005). In fact, *Dupuy* explained that *Young* awarded fees only because "[t]he relief the plaintiffs had obtained through the preliminary injunction . . . was not defeasible [given that] [t]he sole event covered by the injunction . . . had ended." *Id.*

Thus, as other courts recognize, the Seventh and Eighth Circuits hold that a preliminary injunction providing "temporar[y]" relief "will not confer 'prevailing party' status"; rather, there must be "substantive, indefeasible relief akin to final relief on the merits." *Dearmore v. City of Garland*, 519 F.3d 517, 522 (5th Cir. 2008) (quotations omitted) (citing *N. Cheyenne* and *Dupuy*).

The Advocacy Groups also fail to refute the split on causation. To prevail in the Fifth Circuit, the plaintiff must "show[] that" a legislative revision "was passed *in direct response* to the district court's preliminary injunction." *Amawi v. Paxton*, 48 F.4th 412, 418 (5th Cir. 2022). "[S]uch a showing c[an] be accomplished" by "establishing a compelling timeline," obtaining "an outright admission," or relying on the law's "language." *Id.* at 419. One way or another, though, courts in the Fifth Circuit must decide that "the legislature had the preliminary injunction in mind when it" changed the law. *Id.* at 418.

The Sixth Circuit, by contrast, has "eschew[ed] fact-based and speculative inquiries into why govern-

ment bodies altered their conduct." *McQueary v. Conway*, 614 F.3d 591, 598 (6th Cir. 2010). It believes such inquires "waste scarce judicial resources on [a] question[] which [is] almost impossible to answer." *Id.* (quotations omitted).

Other courts, too, analyze the relief requirement without considering causation. For example, in *Common Cause/Georgia v. Billups*, the Eleventh Circuit noted that the "injunction remained effective until Georgia repealed the law at issue," without asking why the law was repealed. 554 F.3d 1340, 1356 (11th Cir. 2009). And in *Kansas Judicial Watch*, the Tenth Circuit found the relief-requirement satisfied without asking why the Kansas Supreme Court changed the rules. 653 F.3d at 1238–1239.

* * *

The circuit split is clear. Even if the Fourth Circuit changes course, Third Circuit law will still hold that a likelihood of success does not satisfy the "on the merits" requirement. Nor will the Fourth Circuit's decision resolve the separate disagreement over what constitutes "enduring" relief. Far from being "premature," BIO 21, review is overdue and necessary to align approaches that "are anything but uniform." *Dearmore*, 519 F.3d at 521.

## II. The Manufactured Consensus Rule Would Warrant the Court's Attention.

If the Advocacy Groups' fabricated "consensus approach" were being applied nationwide, BIO 2, the question presented would be all-the-more certworthy

because that "consensus approach" defies this Court's precedent.

According to this Court, the trial judge "[a]t the preliminary injunction stage . . . assess[es]" only "the *probability* of the plaintiff's ultimate success." *Sole v. Wyner*, 551 U.S. 74, 84 (2007) (emphasis added). This precedent underlies the reasoning of the Third and Fourth Circuits, namely that the preliminary assessment "is best understood as a prediction of a probable, but necessarily uncertain, outcome." *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002). It thus "is not a resolution of any merit-based issue," *Singer*, 650 F.3d at 229 (quotations omitted), and it generally should not be taken to presage the "contingent questions" of final judgment, *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945).

Yet the Advocacy Groups' "consensus approach" treats a preliminary, probabilistic likelihood-of-success determination as final resolution of the merits, at least in some circumstances. Acknowledging the need for a "judicial *imprimatur*," *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 605 (2001), the Groups claim that all courts distinguish between preliminary injunctions that are "based on a *thorough* assessment of a claim's merits" and those that are not. BIO 13 (emphasis added). That thoroughness inquiry is beset with problems.

This Court has emphasized time and again that the law shifts fees for a specific reason: to reward material, court-ordered changes to "the legal relationship of the parties." *Tex. State Teachers Ass'n v. Garland*

*Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989); *Buckhannon*, 532 U.S. at 606; *Sole*, 551 U.S. at 83. To ask how "thoroughly" a judge vetted the merits before ordering a temporary change is to "mire" the courts in "distract[ing]" retrospectives and speculations, *Texas Teachers*, 489 U.S. at 791, that have nothing to do with the measure of "judicial relief" obtained, *Buckhannon*, 532 U.S. at 606. Inquiring into the "thoroughness" of a likelihood-of-success determination privileges dicta and demonstrative language over the earned outcomes of a lawsuit. *See, e.g.*, App.5–6.

Further, the "thoroughness" rule does not "have much to recommend it from the viewpoint of judicial administration." *Texas Teachers*, 489 U.S. at 791. By focusing on the trial judge's "subjective" sense of certainty regarding a lawsuit's eventual outcome, it requires the same type of "unstable threshold to fee eligibility" this Court has avoided. *Id.* If courts cannot separate unadjudicated claims that are "colorable" from those that are "groundless," *Buckhannon*, 532 U.S. at 606 (quotations omitted), they cannot separate claims deemed likely to succeed from those deemed *really* likely to succeed. And if judges should not be looking into the "importance of an issue to the litigants," *Texas Teachers*, 489 U.S. at 791, they should not be judging the thoroughness of other judges' opinions.

The supposed "consensus" approach separately flouts this Court's pronouncements on the "enduring relief" requirement. The Advocacy Groups contend that "preliminary relief" from the enforcement of a law pending further litigation qualifies as "enduring."

BIO 22–23. But *Sole* characterized precisely that relief as "fleeting." 551 U.S. at 83. There, an injunction temporarily enabled the plaintiff to display an "art installation" without "police interference," *id.* at 81, whereas here an injunction temporarily allowed the Advocacy Groups to help register voters without violating the law. In both cases, the court's order did no more than "every preliminary injunction" does for "every recipient of a preliminary injunction." *N. Cheyenne*, 433 F.3d at 1085. If that is not an "ephemeral" victory, *Sole*, 551 U.S. at 86, what is?

To bridge the gap between *preliminary* injunctions and *enduring* relief, the Advocacy Groups claim that courts "consider[] the causal relationship between" the preliminary injunction and a voluntary change that mooted the litigation. BIO 26. There is a name for that: the "catalyst theory," *Buckhannon*, 532 U.S. at 601, which this Court has rejected "whole hog," *John T. ex rel. Paul T. v. Del. Cty. Intermediate Unit*, 318 F.3d 545, 561 (3d Cir. 2003). Indeed, *Buckhannon* squarely foreclosed any inquiry into a defendant's "motivations in changing its conduct" that turns on "inferences from the nature and timing of" that change. 532 U.S. at 609 (quotations omitted). But that is exactly what the Fifth Circuit has been doing, *see Amawi*, 48 F.4th at 418, and the Advocacy Groups say it is "not . . . an outlier." BIO 26.

## III. This Case Presents the Ideal Vehicle for Resolving an Important, Recurring Issue.

The Advocacy Groups identify no obstacle to this Court's review and no legitimate vehicle issues. They contend only that they would "prevail under any of the

approaches described in the Petition," aside from the Fourth Circuit. BIO 27.

But the notion that the Advocacy Groups "prevail" under every approach does not pass the straight face test. They would not prevail under the Third Circuit's approach, because there was no final merits decision—only a likelihood-of-success determination. *See supra* at 2–3. And they could not have prevailed in the Seventh or Eighth Circuits because the preliminary injunction provided only temporary relief. *See supra* at 5–6; App. 13–15 (Nalbandian, J., dissenting). Securing the benefit of voter registration to some nameless nonlitigants cannot "change . . . the *parties'* legal relationship." *N. Cheyenne*, 433 F.3d at 1085 (emphasis added). Nor could the Advocacy Groups claim victory in the Fifth Circuit because the Sixth Circuit does not apply a causation test, and, therefore, the parties have not addressed the issue. *See supra* at 6–7.

The Advocacy Groups also try, unsuccessfully, to minimize the importance of the split. *First*, the Advocacy Groups' claim that the question presented is "inherently narrow." BIO 32. That will come as a surprise to the *amici* States, who have explained—with many examples—that this type of fees award "happens a lot." Amicus Br. 9.

*Second*, the Advocacy Groups downplay the financial burden on the States, claiming that Petitioners identified only "a handful of . . . significant awards." BIO 33. But there are plenty of recent, significant awards coming out of the Sixth Circuit alone. *Roberts v. Neace*, 65 F.4th 280 (6th Cir. 2023) ($272,142.50);

*G.S. v. Lee*, No. 2:21-cv-02552, Dkt. 140 (W.D. Tenn. Sept. 30, 2022) ($126,793); *Ramsek v. Beshear*, No. 3:20-CV-00036-GFVT, 2022 WL 3591827, at *8 (E.D. Ky. Aug. 22, 2022) ($224,950). And there is no end in sight. *See S.B. v. Lee*, No. 3:21-CV-317-JRG-DCP, Dkt. 165 (E.D. Tenn. April 28, 2023) (report and recommendation) ($127,350). And the Advocacy Groups avoid acknowledging the extraordinary fee total in this case: nearly $800,000, with more surely to come from the appeal, given the ever-increasing roster of lawyers.

*Third*, the Advocacy Groups point to a handful of times this Court has denied review. But those cases framed the split at a higher level of generality, rather than focusing on the specific differences in the application of the merits- and relief-requirements.

In any event, the prior petitions are distinguishable. They were either decided over a decade ago, *King v. Kan. Jud. Watch*, No. 11-829; *Live Gold Operations, Inc. v. Dow*, No. 11-211, involved explicitly *non*-merits-based injunctions, *Davis v. Abbott*, No. 15-46, or presented a non-final decision on prevailing party status, *Conway v. McQueary*, No. 10-569. The only recent petition—*Yost v. Planned Parenthood Sw. Ohio Region*, No. 19-677—had substantial vehicle issues. The Court faced a threshold standing question, and the preliminary injunction stayed in force for an abnormally long time—almost *twelve years*. *Planned Parenthood v. Dewine*, 931 F.3d 530, 541 (6th Cir. 2019). Moreover, the parties and timing of that case may have caused the Court to stay its hand. *See Gee*

*v. Planned Parenthood*, 139 S. Ct. 408, 410 (2018) (Thomas, J., dissenting from denial).

In sum, this petition presents the best opportunity in years to resolve a multi-faceted split on an important and recurring question of federal law.

## CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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