No. 11-829

In The
Supreme Court of the United States

The Honorable David J. King, et al., *Petitioners*

v.

Kansas Judicial Watch et al., *Respondents*

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

Brief in Opposition

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Question Presented

Whether plaintiff is a "prevailing party" under 42 U.S.C. § 1988 (authorizing attorneys fees) if it obtains a preliminary injunction order providing (a) the specific relief sought and (b) an unambiguous, well-considered holding of likely merits success, though events beyond plaintiff's control moot the case.

Corporate Disclosure

Kansas Judicial Watch has no parent corporation and is a nonstock corporation, so no publicly held company owns 10 percent or more of its stock.

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Statement of the Case

In May 2006, Kansas Judicial Review ("KJR"), a nonpartisan political action committee,[1] the Honorable Charles M. Hart, a Kansas district court judge up for re-election in 2008, and Robb Rumsey, a candidate for Kansas district court judge in 2006, sued the individual members of the Kansas Commission on Judicial Qualifications (the "Commission") under 42 U.S.C. § 1983 to challenge the constitutionality of certain Canons of the Kansas Code of Judicial Conduct[2] as infringing on their First Amendment rights to speech and association. App.5a. Their claims rest on the following facts:

The Events Leading to the Suit

In February, 2006, Respondent KJR sent a questionnaire and cover letter to all the judicial candidates of Sedgewick County, Kansas, to collect their responses to eight propositions, designed to "elicit views on a variety of legal and political issues" for distribution before the August 2006 primary election. App.5a. All but one respondent declined to answer substantively, citing fear of running afoul of the pledges and commits or recusal clauses. *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1112-13, n.2

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[1] Kansas Judicial Watch officially changed its name to Kansas Judicial Review, Inc. on June 19, 2006. The Court of Appeals opinion reflects this change, while the district court's does not.

[2] The challenged Canons were 5A(3)(d)(i),(ii) (the "pledges and promises" and "commit clauses"), 5C(2) (the "solicitation clause"), App.4a-5a, and 3E(1) (the "recusal clause"). App.42a-43a.

(10th Cir. 2008) (*Stout III*). Respondent Rumsey wished to respond to KJR's questionnaire, App.5a, but, as in the past, he did not do so for fear of the Canons' threat. *Stout III*, 519 F.3d at 1117. Respondent Hart wished to personally seek voter signatures for his nomination petition, but feared discipline under the solicitation clause. App.5a.[3]

Attempting to placate the candidates' fears, Respondent KJR unsuccessfully sought advisory opinions of the Commission and the Panel. App.41a-42a. Upon a request by Respondent Rumsey for an opinion as to whether he could answer the questionnaire, the Panel issued JE 139, in which it declined to formally answer, but nonetheless opined that he could not. App.42a.[4] On May 24, 2006, three

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[3] Judge Hart had personally solicited signatures for his prior judicial campaigns, but stopped this practice after the Kansas Judicial Ethics Advisory Panel (the "Panel") issued an advisory opinion in 2004 declaring such a practice to violate the solicitation clause. *Stout III*, 519 F.3d at 117.

[4] After the district court granted preliminary injunction, the Commission attached a "Note" to JE 139, disavowing the Panel's approach. *Stout III*, 519 F.3d at 1113. In affirming the district court's finding of standing and ripeness, the Tenth Circuit rejected the Petitioners' argument that, in light of the Note, the fear of prosecution was illusory, observing that, although the Note distanced the Commission from the Panel's opinion, it was not "an affirmative disavowal of an intention to prosecute," and opining that "[h]aving created a system whereby judges and candidates may seek such advisory opinions before taking potentially risky actions, the state should not be surprised when parties rely on such opinions." *Stout III*, 519 F.3d at 1118. *See also Kansas Judicial Watch v.*

months before the election, Respondents filed suit.

1. Respondents Seek Immediate Injunctive Relief.

In their complaint, Respondents sought a declaration that the Canons were unconstitutional and preliminary and permanent injunctive relief prohibiting their enforcement. App.18a; App.5a-6a; App.44a-45a. On the same day, Respondents moved for a preliminary injunction to prevent the Commission from initiating disciplinary proceedings under the Canons for Respondents' activities. App.6a.[5]

2. The Court Held an Evidentiary Hearing on the Preliminary Injunction Motion.

On June 28, 2006, the district court held an evidentiary hearing at which the Petitioners offered

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Stout, 455 F. Supp. 2d 1258, 1266-67 (D. Kan. 2006) ("*Stout II*") (denying stay of injunction on appeal) ("Defendants appear to suggest that no judge or judicial candidate is entitled to rely upon an advisory opinion for guidance because neither the Commission nor the Kansas Supreme Court will ever be bound by it.")

[5] Respondents also moved for consolidation under Fed. R. Civ. P. 65(a)(2) and to expedite a hearing. The court granted the motion to expedite, scheduling a hearing on the motions for June 16, 2006, later rescheduled upon motion by the Petitioners. In its order on preliminary injunction, the district court denied consolidation, noting that Respondents sought relief beyond "the injunctive relief sought in the preliminary and permanent injunctions" and the court had not "give[en] the parties notice of an intent to consolidate . . . that would still afford them a full opportunity to present their cases." App.91a.

witnesses and adduced evidence, and the parties argued the motions for preliminary injunction and consolidation. App.34a-35. On July 19, 2006, the district ruled on those motions.

3. The District Court Grants Preliminary Injunction.

Addressing threshold issues, the court ruled that Respondents claims were ripe, finding their fears of discipline under the challenged Canons reasonable, App.50a, and ruled that *Pullman*[6] abstention would be improper, as "the delay from abstaining could perpetuate the alleged chilling effect on the First Amendment rights . . . ." App.53a. Then, "[i]n a thoughtful and comprehensive opinion, the district court determined that [Respondents] satisfied each of the four requirements for a preliminary injunction." App.6a (footnote omitted).

In determining Respondents' likelihood of success on the merits, the district court first examined this Court's decision in *White*[7] and its progeny, and reviewed the overbreadth and vagueness doctrines. App.6a-7a; App.57a-64a. The district court's application of this law to the three challenged Canons[8] and comprehensive answers to Petitioners'

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[6] *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

[7] *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

[8] The district court denied preliminary injunction with respect to the recusal clause, App.77a-79a, that ruling was not

arguments on the merits of Respondents' claims spanned 14 pages of the *Federal Reporter*—24 pages of the Appendix here. *See* App.64a-77a (determining that pledges, promises, and commits clauses are unconstitutional facially and as applied to the questionnaire); App.79a-88a (determining that the solicitation clause fails strict scrutiny and is facially overbroad and unconstitutional as applied to the questionnaire and nomination petitions).[9] In short,

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appealed, *see* App.107a n.6, and Respondents have made a good-faith effort to reduce their claim for attorney's fees to reflect this limited success. *See Hensley v. Eckerhart*, 461 U.S. 424 436-37 (1983).

[9] In contrast, analysis of the other three preliminary injunction prongs required a scant four paragraphs. App.88a-89a. *See also* App.7a (noting that the district court "succinctly concluded that [Respondents] satisfied the other three elements.") In recounting its ruling on preliminary injunction in its denial of Petitioners' motion to stay the injunction pending appeal, the district court emphasized the weight given the Respondents' showing of substantial likelihood of success on the merits of their claims:

> this court found that [Respondents] had a substantial likelihood of success of showing the pledges and promises and commits clauses . . . are overbroad because they chill a real and substantial amount of protected speech. . . . [and that] the solicitation clause was not narrowly tailored to serve the compelling state interest in judicial impartiality, either meaning judicial impartiality toward parties, or meaning open-mindedness. *Having found a substantial likelihood of success on the merits as to these clauses, the Court concluded* that plaintiffs were able to show [the remaining three factors tipped in their favor]"

Stout II, 455 F. Supp. 2d at 1261 (emphasis added).

the district court performed, as the Tenth Circuit later observed, "a painstaking examination of the merits prong of the preliminary-injunction standard." App.7a.

4. The District Court Rejects Petitioners' Motion to Stay the Injunction.

Three weeks after the decision, Petitioners appealed and simultaneously moved in the district court to stay the injunction pending appeal. In arguing for a stay, Petitioners asserted that the "harm factors" tipped in their favor because "enforcement of the injunction . . . 'eliminates the Commission's ability to enforce these important Judicial Canons,'" while Respondents would not suffer harm from a stay because each could speak or act—or already had. *Stout II*, 455 F. Supp. at 1264.[10]

The court found instead that the balance of harms tipped in Respondents' favor, as "the loss of First Amendment freedoms per se constitutes irreparable injury [footnote omitted]," and "[respondents] and the public would suffer irreparable harm by virtue of the fact that the Questionnaire could not be published prior to the election in November." *Id.*

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[10] In ruling against a stay of the injunction, the district court noted that if "'the moving party has established that the three "harm" factors tip decidedly in its favor, the "probability of success" requirement is somewhat relaxed.'" *Id.* at 1263 (citation omitted). This stands in contrast to the standard applied here in *granting* the preliminary injunction. As the Tenth Circuit pointed out, the district court did not grant the injunction based on a similarly "modified" test relaxing the "probability of success" requirement. App.6a n.2.

Moreover, the court had "found a likelihood of success on the merits of plaintiffs' claim that the canons are facially invalid, meaning the named plaintiffs are not the only ones to suffer harm from enforcement of the canons." *Id.*

Petitioners argued that they were likely to succeed on appeal with respect to the pledges and promises and commits clauses[11] because the caselaw was in flux on canons of that type and, they asserted, the Panel's opinion on the clauses was not authoritative. *Id.*

The court pointed out that "all of the available federal district court decisions construing pledges and promises and commit clauses on the merits have reached the conclusion that they are unconstitutional." *Id.* at 1265. State court decisions were not analogous, of course, because Kansas had not authoritatively interpreted its Canons. *Id.* at 1266.[12] Moreover, the court seemed doubtful that a suitable interpretation was possible, as it had "found

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[11] Petitioners made no showing of likelihood of success on the merits of the appeal of the ruling on the solicitation clause. *Id.*

[12] In the same opinion, *id.* at 1262-63. the court denied Petitioners' motion to certify. *See supra* n.5. The court ruled that the question to be certified—whether the pledges, promises, and commits clauses would "'operate[ ] in fact as the functional equivalent of an 'announce' clause,'" *id.* at 1262—was not a question of unsettled state law, but was subsumed in a federal constitutional question decided in the preliminary injunction determination that was then pending on appeal. *Id.* at 1263.

that the clauses were facially unconstitutional because the legitimate reach of the clauses is much narrower than the illegitimate reach." *Id.*[13]

The court was not persuaded that the Petitioners' disavowal of the Panel's advisory opinion to Respondent Ramsey mooted the chill of the pledges and promises and commits clauses. *Id.* at 1267.[14] In any event, the court recognized, apart from the contradictory views expressed by the Note and JE 139, that neither were authoritative constructions of the Canon, which, by its plain text, gave rise to the chill of which Respondents complained. In short, the court had not relied solely on JE 139 in finding "a substantial likelihood of success of showing a real

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[13] Any such doubts seem well-founded. While presented with certified questions that would allow the state's highest court to fulfill its "duty to construe statutes in a constitutional manner, and to save a statute, if possible, rather than strike it down,"App.121a, Kansas amended the Code containing the challenged canons. App.173a-74a.

[14] The court found "untenable" the implications of Petitioners' argument that the Commission's (post-litigation) disavowal of the advisory opinion mooted the Canon's chill. *Id.* at 1267. Evidence adduced by Petitioners at the preliminary injunction hearing established that such "notes" had been added only twice before, and if the Note were given the weight Petitioners urged, then "no judge or judicial candidate is entitled to rely upon an advisory opinion for guidance because neither the Commission nor the Kansas Supreme Court will ever be bound by it." *Id.* The substantive effect of the contradictory positions of the Note and the advisory opinion, the court found, was to buttress Respondents' claim—which the court had heretofore rejected—that the pledges and promises and commits clauses were vague. *Id.*

and substantial threat that the promises and pledges and commit clauses chill protected speech in relation to their plainly legitimate sweep." *Id.* at 1267.

5. The Tenth Circuit Affirms the District Court's Rulings on Standing and Ripeness and Certifies Questions to the Kansas Supreme Court.

The Tenth Circuit affirmed the justiciability of Respondents' claims, concluding that Respondents had "sufficiently demonstrated a credible, contemporary injury to their First Amendment rights, App.116a. In light of the passing of the election, the court also considered mootness and held Respondents' claims fell under the exception to the mootness doctrine for cases "'capable of repetition, yet evading review." App.110a n.9 (citations omitted). Additionally, as both parties recognized, the district court's order on preliminary injunction covered all of Canon 5C, while Respondents had only challenged the solicitation clause. *See* App.173a n.2. Noting its duty to limit the solution to a constitutional flaw to the problem, App.124a, the court "limited application of the preliminary injunction to the personal solicitation of publicly stated support." *Id.*[15]

As did the district court, the Tenth Circuit declined to abstain in a First Amendment facial

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[15] The Tenth Circuit had already granted Petitioners' motion to that court for a stay "with respect to the portion of the Solicitation Clause concerning a judicial candidate's personal solicitation of campaign contributions." App.107a.

challenge, as the delay "could prolong the chilling effect on speech." App.117a. Noting this Court's preference for certifying questions to a state's supreme court over abstention, and in keeping with its own rules on certification, the court concluded that Respondents' claims "rest[ed] on sufficiently novel and determinative questions of state law that certification is warranted." App.120a.

The court declined to certify, and held that the district court had not abused its discretion in declining to certify, the question pressed by the Petitioners, i.e. "whether the Pledges and Commits Clauses are de facto announce clauses." App.119a n.11. The court noted that "this question is not dispositive," as a negative answer would leave to the court to determine "how they might otherwise be interpreted under state law." *Id.* The court instead certified five pertinent questions to the Kansas Supreme Court and, as expected when certifying questions to a state supreme court, "[r]eserv[ed] judgment . . . pending the response from the Kansas Supreme Court[, and] retain[ed] jurisdiction over the appeal." App.125a.

6. The Kansas Supreme Court Answers the Certified Questions and Adopts Amendments to the Canons That Moot Respondents' Claims.

In December 2008, the Kansas Supreme Court answered the Tenth Circuit's certified questions. App.126a *et seq*. At the same time, it advised the court that it was considering proposed amendments

to the challenged Canons. App.173a-74a.

The Tenth Circuit ordered supplemental briefing addressing the potential effect of the forthcoming amendments on the court's jurisdiction. App.174a. The changes, adopted in January 2009 (before briefing on their import to the case was complete), to take effect in March 2009 "completely eliminate[d] the challenged portion of the Solicitation Clause. . . . [and] materially narrow[ed] the language and scope of the Pledges and Commits Clauses." App.174a. The court rejected Respondents' contention that the new Canons materially retained the offending pledges and promises and commits clauses, App.177a-78a, and that the collateral consequences doctrine applied. App.180a-181a. Because the court found no likelihood of collateral consequences, it "perceived no reason to deviate from [its] general practice of vacatur in this case." App.181a.

7. The District Court Rules That Respondents Are Not Prevailing Parties.

On June 1, 2009, the district court entered judgment, dismissing the case pursuant to the Tenth Circuit's mandate. On June 12, Respondents filed a motion for attorney's fees under 42 U.S.C. § 1988(b), arguing that they qualified as "prevailing parties" under the statute because the preliminary injunction, in effect from July 2006 until April 2009, constituted a "'judicially enforceable judgment that materially alter[ed] the legal relationship between the parties.'" App.8a. The district court denied the

motion on November 19, 2009, reasoning that the preliminary injunction did not confer prevailing party status because:

> The primary relief sought by plaintiffs was declaratory relief. While plaintiffs succeeded in preserving the status quo—no disciplinary action for answering the questionnaire and for soliciting publicly-stated support—they did not succeed in obtaining relief on the merits. Plaintiffs did not merely seek an injunction that allows them to answer and distribute the questionnaire and solicit publicly-stated support in the 2006 primary election. They sought declarations that the judicial canons at issue were unconstitutional both on their face and as applied to the questionnaire and petitions, in 2006 and beyond. Under these circumstances, the Court does not find that the legal relationship between the parties was materially altered by the preliminary injunction.

App.32a. In essence, the district court found that the preliminary injunction was neither relief "on the merits" nor the "primary relief sought." *Id.*

8. The Tenth Circuit Overturns the District Court, Holding That Respondents Are Prevailing Parties on the Basis of the Preliminary Injunction.

The Tenth Circuit found that the district court had denied prevailing party status under the "central issue" or "primary relief" doctrine, an

approach specifically contradicted by this Court in *TSTA*.[16] App.19a-20a."'[T]he search for the "central" and "tangential" issues in the lawsuit, or for the "primary," as opposed to the secondary," relief sought, much like the search for the golden fleece, distracts the district court from the primary purposes behind § 1988 and is essentially unhelpful in defining the term "prevailing party."'" App.20a (*quoting TSTA*, 489 U.S. at 791). Instead, the Tenth Circuit said, "'[a] plaintiff crosses the threshold to "prevailing party" status by succeeding on a single claim, even if he loses on several others and even if that limited success does not grant him the "primary relief" he sought.'" App.20a (*quoting McQueary v. Conway*, 614 F.3d 591, 603 (6th Cir. 2010).

The court reversed and remanded, and Petitioners' unsuccessfully sought review *en banc* and timely filed the petition now before the court.

Reasons For Denying the Petition

I.

The Circuits Are Not in Conflict Nor Are They Confounded Over the Question Presented by This Case

The Circuits are neither conflicted on nor confounded with the question of prevailing party status for a plaintiff that wins a preliminary

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[16] *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989).

injunction providing the specific relief sought with an unambiguous, well-considered holding of likely merits success, whose claims are later mooted through events beyond plaintiff's control. On this question, the courts' approaches are, in fact, in agreement with one another and with the Tenth Circuit's holding here.

The opinion Petitioners cite extensively for their assertion that the Circuits are in disarray on this issue instead supports the opposite conclusion. In *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008), the Fifth Circuit announced its test for determining when a plaintiff winning a preliminary injunction that is later mooted is a prevailing party for purposes of § 1988(b):

> [T]o qualify as a prevailing party under § 1988(b), we hold that the plaintiff (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.[17]

Id. at 524 (5th Cir. 2008) (footnote added). This approach, the court offered, "does not signal any

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[17] The third requirement, that the *defendant* moot the action, rather than a third party, is a superficial distinction, as the import of the requirement is that the *plaintiff* does not moot the case.

disagreement with the approaches adopted by the other circuits, with the exception of the Fourth Circuit." *Id.* at 526 n.4.[18] *But see infra* (addressing *Smyth v. Rivero*, 282 F.3d 268, 276 (4th Cir. 2002)).

In *Select Milk Producers, Inc. v. Johanns*, the D.C. Circuit applied its general test to the circumstances of a preliminary injunction:

> First, in order to be a prevailing party, a claimant must show that there has been a court-ordered change in the legal relationship between the plaintiff and the defendant. [citation omitted]
>
> Second, a prevailing party is a party in whose favor a judgment is rendered, regardless of the amount of damages awarded. [citation omitted]
>
> Third, a claimant is not a prevailing party merely by virtue of having acquired a judicial pronouncement unaccompanied by judicial relief. [citation omitted]

400 F.3d 939, 947 (D.C. Cir. 2005) (citation omitted). There is nothing in this test that conflicts with other

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[18] Prior to *Dearmore*, the Fifth Circuit "had not yet created or endorsed a particular test," and instead "held that a plaintiff who obtains a preliminary injunction is not a prevailing party if he fails to qualify under any of the other circuits' tests." *Dearmore*, 519 F.3d at 522. *See also Yousuf v. Motiva Enterprises LLC*, 246 F. App'x 891, 893-94 (5th Cir. 2007). The Fifth Circuit's familiarity with and use of the other Circuits' approaches lends authority to its test as an accurate synthesis.

Circuits' approaches, including the Tenth's. And a comment in a dissent neither requires a response from this Court nor signifies that the court was at a loss as how to resolve the question. Judge Henderson may have disagreed with the application of this test to the case before the court or with the proposition that a preliminary injunction can ever confer prevailing party status, *id.* at 952, but disagreement between members of panel is not a conflict between Circuits, nor is it a product of confusion, but of complex legal analysis.

Even the Fourth Circuit's approach—often cited as the most negative–is not at odds with the result here or in other Circuits. In *Smyth v. Rivero*, often cited as critical of preliminary injunctions conveying prevailing party status because "the merits inquiry in the preliminary injunction context is necessarily abbreviated," the court was referring to a "modified" preliminary injunction inquiry: "Our precedent establishes that a plaintiff may, depending on the circumstances, need only to establish that his case presents a 'substantial question' to obtain preliminary injunctive relief." 282 F.3d 268, 276 (4th Cir. 2002). This does not conflict with the *Dearmore*'s synthesized approach, 519 F.3d at 524 (requiring "an unambiguous indication of probable success on the merits") and here, the Tenth Circuit was careful to point out that a "modified" test such as *Smyth* was considering was not at issue. App.6a n.2.

Similarly, in *McQueary v. Conway*, another case Petitioners cite as adopting a "narrow approach," the language on which they would have the Court

focus is dicta—an observation following an exhaustive analysis of all the possible rationales for and against finding that a preliminary injunction confers prevailing party status. The court concluded that "all of this leaves us with a contextual and case-specific inquiry, one that does not permit us to say that preliminary-injunction winners always are, or never are, 'prevailing parties.'" 614 F.3d 591, 601 (6th Cir. 2010) *cert. denied*, 131 S. Ct. 927.

Moreover, the court followed with a similarly exhaustive analysis of why the district court was *wrong* in denying prevailing party status, *id.* at 604, and ultimately reversed and remanded with instructions for the district court to undertake that "contextual and case-specific inquiry." *Id.* Such an inquiry does not create confusion or unduly tax the district courts, which are intimately familiar with the analysis done in granting the injunction, the relief afforded in relation to that sought by the plaintiff, and the cause and timing of the mootness ending the case.

Finally, *Singer Mgmt. Consultants, Inc. v. Milgram* is inapposite to the question presented here. The question before the court was whether a party prevails for purposes of § 1988 when it "obtains a temporary restraining order the day after it files suit (after a hearing but before briefing from the opposing side), and fails to get a preliminary injunction "because the opposing party's voluntary change of position moots the case" 650 F.3d 223, 224 (3d Cir. 2011) *cert. denied*, 132 S. Ct. 500 (U.S. 2011).

Indeed, *Singer* distinguishes *People Against Police Violence v. City of Pittsburgh*, 520 F.3d 226 (3d Cir. 2008) ("*PAPV*"), a case nearly on all fours with this one,[19] as "an example of that rare situation where a merits-based determination is made at the injunction stage." 650 F.3d at 230. *Singer* was not addressing the question presented here, while *PAPV* was, and *Singer* casts no doubt on the appropriateness of the result in *PAPV*. *Singer* is simply another example of a Court of Appeals recognizing a contextual, case-specific approach for determining prevailing party status for preliminary injunctions, just as such an approach is used in determining nearly all legal questions.

The Circuits are neither conflicted nor confounded by preliminary injunctions in determining prevailing

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[19] In *PAPV*, the court found that:

> (1) the trial court, based upon a finding of a likelihood of plaintiffs' success on the merits, entered a judicially enforceable order granting plaintiffs virtually all the relief they sought, thereby materially altering the legal relationship between the parties; (2) the defendant, after opposing interim relief, chose not to appeal from that order and remained subject to its restrictions for a period of over two years; and (3) the defendant ultimately avoided final resolution of the merits of plaintiffs' case by enacting new legislation giving plaintiffs virtually all of the relief sought in the complaint. In these circumstances, we conclude that the District Court did not err in finding plaintiffs to be a "prevailing party" for purposes of § 1988(b)

520 F.3d 226, 233 (3d Cir. 2008).

party status, as the long-understood general principles for prevailing party status have been applied, consistently and appropriately , to the preliminary injunction context. In any event, there is no conflict between the approach used by the Tenth Circuit and any other Circuit, in general or with respect to the specific situation presented in this case.

II.

This Case Was Rightly Decided

The Tenth Circuit recognized and followed here the general standard for a prevailing party as set forth in *TSTA*: "'[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.'"App.9a-10a (*quoting TSTA*, 489 U.S. at 792-93). "'[A] material alteration in the parties' legal relationship occurs when 'the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit.'" App.10a (*quoting TSTA*, 489 U.S. at 791-92). For the alteration in the legal relationship to be material requires that """a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail."'" *Id.*(*quoting TSTA*, 489 U.S. at 792 (*quoting, in turn*, *Hewitt v. Helms*, 482 U.S. 755, 760 (1987))).

The Tenth Circuit has twice before considered whether a plaintiff securing a preliminary injunction could satisfy the *TSTA* standard.

In *Dahlem v. Board of Education*, 901 F.2d 1508 (10th Cir. 1990), the court observed that "nothing in *TSTA* or any other Supreme Court case precludes a plaintiff from obtaining [at least some relief on the merits of his claim] by some means other than a final judgment." App.11a (citation omitted). The court went on to hold that "[f]or the purpose of deciding whether a plaintiff is a prevailing party, a preliminary injunction is considered a decision on the merits so long as it represents an unambiguous indication of probable success on the merits, and not merely a maintenance of the *status quo*." App.11a (quotation marks and citation omitted).

Under the same reasoning, the court reached a different result in *Biodiversity Conservation Alliance v. Stem*, 519 F.3d 1226 (10th Cir. 2008). Under the *TSTA* standard, "[a] preliminary injunction that does not provide a plaintiff with relief on the merits of her claim cannot serve as the basis for prevailing party status." App.13a (citation omitted). Applying that rule, the court "held that the preliminary injunction obtained by BCA was insufficient to make BCA a 'prevailing party' because the injunction did not provide any of the relief that BCA sought in its complaint." App.13a (citation omitted). In dicta, the court also suggested that *Buckhannon*[20] and *Sole*[21] may have overturned aspects of *Dahlem*.

In this case, the Tenth Circuit carefully analyzed

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[20] *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598 (2001).

[21] *Sole v. Wyner*, 551 U.S. 74 (2007).

Buckhannon and *Sole*,[22] and held that the approach used in *Dahlem* (and here) survived those decisions. App.14a. In short, *Buckhannon* does not undermine attaining prevailing-party status on the basis of a preliminary injunction because it is a form of court-ordered relief, i.e., "'[a] preliminary injunction issued by a judge carries all the 'judicial imprimatur' necessary to satisfy *Buckhannon*.'" App.15a (citations omitted).

The court ruled that here, the preliminary injunction provided relief on the merits, as it "afforded [Respondents] relief that they specifically requested in their complaint." App. 18a. "Respondents sought preliminary and permanent injunctions that would prohibit the Commission from enforcing the canons against judicial candidates who responded to KJR's questionnaire. The preliminary injunction issued by the district court provided the second form of relief as long as it was in effect." App.18a.

Next, the court found, "the district court was clear about Appellants' ultimate likelihood of success on the merits." Indeed, "the court expressly concluded that those clauses were unconstitutional and that Appellants were substantially likely to succeed on the merits of their challenge to the clauses." App.18a. The court "found it difficult to imagine a more 'unambiguous indication of probable success on

[22] This Court's decision in *Sole* explicitly left unanswered the question presented here—a preliminary injunction that was not later undone on the merits.

the merits.'" App.19a.

Finally, as to the last prong of its analysis, the Tenth Circuit explained that it "dissolved the preliminary injunction only after the Kansas Supreme Court amended the challenged canons and rendered Appellants' claims against the Commission moot. Significantly, no court ever ruled against [Respondents] on the merits. Accordingly, the preliminary injunction was sufficient to confer prevailing-party status on [Respondents]." App.19a.

Basing its analysis on the general rules for determining prevailing party status under *TSTA* and *Hewitt*, the Tenth Circuit did not find this case to be a "close call." The preliminary injunction granted relief specifically sought in the complaint, made an unambiguous indication of probable success on the merits after an exhaustive review of the merits of Respondents' claims, and the injunction, in effect for three years, was dissolved only after the challenged canons were mooted by amendment. This case was rightly decided and the Petition should be denied.

Conclusion

For the reasons stated, this Court should deny this petition.

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