No. 22-5207

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMPHIS A. PHILLIP RANDOLPH INSTITUTE, et al.,
Plaintiffs-Appellees,

v.

TRE HARGETT, in his official capacity as Secretary of State for the State of Tennessee, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the
Middle District of Tennessee
(No. 3:20-cv-00374)

BRIEF OF DEFENDANTS-APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

This appeal involves the question whether a district court may award attorneys' fees under 42 U.S.C. § 1988 to plaintiffs who received only a preliminary injunction that was later vacated by this Court for failure to establish a substantial likelihood of subject-matter jurisdiction. Because of the importance of that question, Defendants-Appellants request oral argument and submit that argument will aid the decisional process.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction under 28 U.S.C. §§ 1331, 1343, 1357, and 42 U.S.C. § 1983. It entered an order awarding attorneys' fees to Plaintiffs on February 25, 2022. (Mem. Op., R. 169, PageID# 3512–23.) Defendants appealed that order on March 16, 2022. (Notice of Appeal, R. 170, PageID# 3524–26.) This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Plaintiffs challenged the constitutionality of a Tennessee election law, and they sought and obtained a preliminary injunction barring Defendants from enforcing that law. On appeal, this Court vacated the injunction, concluding that Plaintiffs were not entitled to a preliminary injunction because they had not established a substantial likelihood of success in demonstrating subject-matter jurisdiction. On remand, the district court awarded attorneys' fees to Plaintiffs under 42 U.S.C. § 1988.

The question presented is whether the district court erred in concluding that Plaintiffs were prevailing parties entitled to recover their attorneys' fees under § 1988.

STATEMENT OF THE CASE

Plaintiffs—two individual voters and five voter-outreach organizations—filed a complaint on May 1, 2020, challenging several of Tennessee's absentee-voting laws. (Compl., R. 1, PageID# 1–33.) Six weeks later, on June 12, 2020, Plaintiffs amended their complaint to add a challenge to Tenn. Code Ann. § 2-2-115(b)(7)—a provision that requires voters who registered to vote by mail to appear in person when they vote for the first time. (Am. Compl., R. 39, PageID# 123–59.) Plaintiffs argued that this provision "severely burdens the fundamental right to vote" and sought preliminary and permanent injunctive relief, as well as a declaration that the provision was unconstitutional. (*Id.* at PageID# 149, 156–57.)

The district court granted a preliminary injunction on September 9, 2020, enjoining enforcement of the first-time-voter provision. (Prelim. Inj. Order, R. 80, PageID# 2636–38.)[1] The court concluded that it had jurisdiction to issue the injunction because one Plaintiff organization—the Tennessee Conference of the NAACP—had associational standing through a single identified member: Corey Sweet. (Mem. Op. Granting Prelim. Inj., R. 79, PageID# 2596.)

[1] The district court had previously denied Plaintiffs' request for a preliminary injunction of this law for the August 2020 Primary Election, concluding that it was barred by laches. (Mem. Op. Den. Mot. for Prelim. Inj., R. 55, PageID# 2194–2213.)

Defendants moved to stay the injunction pending resolution of their previously filed motion to dismiss for lack of subject-matter jurisdiction. (Mot. to Stay, R. 83, PageID# 2650–52.) Defendants also filed a motion to reconsider the preliminary-injunction decision. (Mot. for Recons., R. 87, PageID# 2672–74.) The district court denied both motions. (Mem. Op. Den. Mot. for Recons., R. 103, PageID# 2754–79; Order Den. Mot. to Stay, R. 107, PageID# 2788–90.)

Defendants then appealed to this Court and simultaneously asked the district court to stay the injunction pending appeal. (Notice of Appeal, R. 108, PageID# 2791–93; Mot. to Stay, R. 109, PageID# 2794–2808.) The district court denied that request. (Mem. Op. Den. Mot. to Stay, R. 113, PageID# 2829–32.) Defendants next sought a stay from this Court. *See Memphis A. Philip Randolph Inst. v. Hargett*, 977 F.3d 566, 568 (6th Cir. 2020). This Court, too, declined to issue a stay. *See id.* at 569.

But then, after full briefing and argument, this Court vacated the preliminary injunction. *See Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 553 (6th Cir. 2021). The Court concluded that as a result of the Tennessee Supreme Court's August 5, 2020 ruling in *Fisher v. Hargett*, 604 S.W.3d 381 (Tenn. 2020), Corey Sweet—the sole identified individual with standing at the time the complaint was filed—no longer qualified to vote absentee and thus had no actual, ongoing stake in

the case as of that date. *Memphis A. Phillip Randolph Inst.*, 2 F.4th at 558.[2] It followed that Plaintiffs' claims were moot. *Id.* at 558–59 (explaining that "because the organizational plaintiffs relied entirely on Sweet to establish their legal interest in this case, they have not shown a substantial likelihood that they continue to have a legally cognizable interest"). And because Plaintiffs' claims were moot, Plaintiffs had "not established a substantial likelihood of success in demonstrating subject matter jurisdiction" and were thus "not entitled to a preliminary injunction." *Id.* at 561.

After this Court vacated the preliminary injunction, Plaintiffs voluntarily abandoned their claims and moved to dismiss their complaint without prejudice. (Mot. for Voluntary Dismissal, R. 151, PageID# 3313–16.) The district court granted Plaintiffs' motion and dismissed the case without prejudice. (Order of Dismissal, R. 155, PageID# 3334–38.)

Plaintiffs then sought to recover $99,222.13 in attorneys' fees incurred in obtaining the preliminary injunction. (Mot. for Att'y Fees, R. 158, PageID# 3342–44.) Defendants opposed Plaintiffs' fee request, arguing that Plaintiffs were not prevailing parties and that, even if they were, Plaintiffs were not entitled to the full requested fee award. (Resp. to Mot. for Att'y Fees, R. 163, PageID# 3439–54.)

[2] Sweet had also transferred to an in-state university in July 2020, further depriving him of absentee-voting eligibility. *See id.*

The Magistrate Judge determined that Plaintiffs were prevailing parties and recommended that their motion for attorneys' fees be granted. (R. & R., R. 166, PageID# 3477–89.) Over Defendants' objections (Objs. to R. & R., R. 167, PageID# 3490–3501), the district court adopted the Magistrate Judge's Report and Recommendation in full (Mem. Op., R. 169, PageID# 3512–23). The court rejected Defendants' argument that Plaintiffs were not prevailing parties, reasoning that Plaintiffs had "requested a preliminary injunction that would specifically allow [them] to vote by mail in the August and November 2020 elections during the height of the COVID-19 pandemic." (*Id.* at PageID# 3519.) Because the preliminary injunction gave Plaintiffs "the ability to vote in the 2020 election" (*id.*), the district court concluded that this "court ordered, material, and enduring" relief rendered Plaintiffs prevailing parties entitled to recover their attorneys' fees under § 1988. (*Id.* at PageID# 3517 (cleaned up).)

It is this decision that Defendants now appeal to this Court. (Notice of Appeal, R. 170, PageID# 3524–26.)

SUMMARY OF ARGUMENT

This Court should reverse the district court's award of attorneys' fees to Plaintiffs under 42 U.S.C. § 1988. That statute permits plaintiffs to recover fees only when they are prevailing parties. The district court concluded that Plaintiffs prevailed because they obtained a preliminary injunction. But this Court has said

that when a claimant wins only a preliminary injunction, that will usually not suffice to obtain attorneys' fees. And the Supreme Court has held that a plaintiff who wins at the preliminary-injunction stage is not a prevailing party if that initial victory is later undone.

The preliminary injunction Plaintiffs obtained here was indeed undone. This Court vacated the injunction, concluding that Plaintiffs had failed to establish a substantial likelihood of demonstrating subject-matter jurisdiction. Plaintiffs' claims became moot when the only identified member of a Plaintiff organization—and the sole basis of the district court's exercise of jurisdiction—lost any ongoing interest in the outcome of the case as a result of an August 5, 2020 decision by the Tennessee Supreme Court. This necessarily means that Plaintiffs' claims were moot when the district court issued the preliminary injunction on September 9, 2020. And this Court has recognized that decisions issued without subject-matter jurisdiction cannot confer prevailing-party status.

In dismissing the possibility that it lacked jurisdiction when it issued the injunction, the district court erred: it incorrectly interpreted this Court's holding that Plaintiffs had failed to establish a substantial likelihood of subject-matter jurisdiction, and it focused too narrowly on standing, rather than subject-matter jurisdiction more broadly.

STANDARD OF REVIEW

A district court's determination that a plaintiff qualifies as a prevailing party under 42 U.S.C. § 1988 is subject to de novo review. *Planned Parenthood Sw. Ohio Region v. DeWine*, 931 F.3d 530, 538 (6th Cir. 2019) (citing *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 619 (6th Cir. 2007)).

ARGUMENT

Plaintiffs Were Not Prevailing Parties Entitled to Recover Attorneys' Fees under 42 U.S.C. § 1988.

This Court should reverse the district court's ruling that Plaintiffs are prevailing parties entitled to recover their attorneys' fees because they obtained a preliminary injunction. (Mem. Op., R. 169, PageID# 3519–21.) A preliminary injunction does not confer prevailing-party status if it is undone by a later decision in the case. And here, this Court vacated the district court's preliminary injunction after determining that Plaintiffs' claims had become moot before the injunction issued.

A. A preliminary injunction that is later undone will not confer prevailing-party status.

There "is no common law right to attorney's fees." *McQueary v. Conway*, 614 F.3d 591, 596 (6th Cir. 2010). Instead, "[o]ur legal system generally requires each party to bear his own litigation expenses, including attorney's fees, regardless of whether he wins or loses." *Fox v. Vice*, 563 U.S. 826, 832 (2011). For that reason,

courts do not award fees—even to the winner—without "explicit statutory authority." *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Hum. Res.*, 532 U.S. 598, 602 (2001). Congress provided that authority when it enacted 42 U.S.C. § 1988, which permits courts to award attorneys' fees to the "prevailing party" in cases brought under 42 U.S.C. § 1983. *McQueary*, 614 F.3d at 597.

But not every victor is a "prevailing party." Indeed, in *McQueary*, this Court observed that "when a claimant wins a preliminary injunction and nothing more, that usually will not suffice to obtain fees under §1988." *Id.* at 604. In making this observation, this Court cited *Sole v. Wyner*, 551 U.S. 74 (2007), a case in which the Supreme Court held that a plaintiff who wins at the preliminary-injunction stage is not a "prevailing party" if that initial victory is later undone. 551 U.S. at 83.

The plaintiff in *Sole* wanted to stage a nude anti-war display on a Florida beach in violation of Florida's "Bathing Suit Rule," which prohibited nudity on the beach. *See* 551 U.S. at 78. To that end, the plaintiff sought both preliminary and permanent injunctive relief barring enforcement of the rule. *See id.* at 78–79. The court granted a preliminary injunction, *id.* at 79, and the plaintiff went forward with the planned display, *id.* at 80. But later, when faced with the plaintiff's request for permanent injunctive relief, the court changed course: it granted Florida's motion for summary judgment and upheld the challenged "Bathing Suit Rule." *Id.* at 80–81. The plaintiff nevertheless sought fees, claiming that the "two stages of the

litigation" should be viewed as "discrete episodes," and that a win at the first stage warranted fees no matter what happened at the second. *Id.* at 77.

The Supreme Court disagreed. While the plaintiff obtained a preliminary injunction, that "fleeting success . . . did not establish that she prevailed on the gravamen of her plea for injunctive relief, i.e., her charge that the state officials had denied her . . . 'the right to engage in constitutionally protected expressive activities.'" *Id.* at 83. "Prevailing party status," the Court held, "does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." *Id.* at 83; *see also Schmitt v. LaRose*, No. 20-4025, 2021 WL 4592524, at *2 (6th Cir. June 15, 2021), *cert. denied*, 142 S. Ct. 466 (2021) (citing *Sole* and observing that the "traditional rule . . . is that temporary relief with respect to a specific event—an election day or Valentine's Day or some other day—does not justify fees if the legal premise of that decision is later reversed on appeal during the permanent injunction phase of the case").

B. The preliminary injunction Plaintiffs obtained was later undone.

Plaintiffs are not prevailing parties here because the preliminary injunction they obtained was later undone. On appeal, this Court vacated the injunction, holding that Plaintiffs had failed to establish a "substantial likelihood of success in demonstrating subject matter jurisdiction." *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 561 (6th Cir. 2021). And "[s]ince [P]laintiffs ha[d] not

established a substantial likelihood of success in demonstrating subject matter jurisdiction, they [were] not entitled to a preliminary injunction." *Id.* The preliminary injunction on which the district court based its award of attorneys' fees, then, was nothing more than a fleeting success which does not entitle Plaintiffs to an award of attorneys' fees. *See Sole*, 551 U.S. at 83.

1. The district court lacked jurisdiction to issue the preliminary injunction.

Importantly, the lack of subject-matter jurisdiction did not arise *after* the preliminary injunction had been issued. Corey Sweet, an alleged member of one Plaintiff organization, was the sole jurisdictional basis for the district court's preliminary injunction. But he—and thus all Plaintiffs—lost any interest in the case more than a month *before* the injunction issued, rendering Plaintiffs' claims moot. The district court therefore lacked subject-matter jurisdiction to issue the injunction.

As this Court observed, "[w]hen [P]laintiffs filed their amended complaint on June 12, 2020, [Corey] Sweet was eligible to vote absentee based on a June 4, 2020 State-court injunction of the first-time voter law." *Id.* That state-court injunction "construed Tenn. Code Ann. § 2-6-201(5) to permit 'any qualified voter who determines it is impossible or unreasonable to vote in person at a polling place due to the COVID-19 situation' to vote absentee." *Id.* (quoting *Fisher*, 604 S.W.3d at 392). But "[o]n August 5, 2020, the Tennessee Supreme Court vacated the June 4, 2020 injunction and imposed new, stricter guidelines." *Id.* (citing *Fisher*, 604

S.W.3d at 405). And under those new guidelines, only "individuals who have a 'special vulnerability to COVID-19 or are caretakers for persons with special vulnerability to COVID-19'" were permitted to vote absentee. *Id.* (quoting *Fisher*, 604 S.W.3d at 393).

"After *Fisher*," this Court reasoned, "Sweet no longer qualifies to cast an absentee ballot" because he did not "claim that he ha[d] a special vulnerability to COVID-19" or that he was a caretaker for someone with such a vulnerability. *Id.* It followed that "the relief [P]laintiffs [were] requesting no longer ha[d] a real impact on Sweet's legal interests." *Id.* "And because the organizational plaintiffs relied entirely on Sweet to establish their legal interest in this case, they have not shown a substantial likelihood that they continue to have a legally cognizable interest." *Id.* (citations omitted). Plaintiffs' claims, in other words, were moot. *See id.* at 558–59.

Because Plaintiffs' claims were moot, the district court lacked subject-matter jurisdiction to issue the preliminary injunction. "The issue of mootness," this Court has recognized, "implicates the court's subject matter jurisdiction inasmuch as federal courts are limited by Art. III of the Constitution to deciding cases and controversies." *Mosley v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990); *see also Harmon v. Holder*, 758 F.3d 728, 732 (6th Cir. 2014) (observing that "[m]ootness doctrine arises from the Article III requirement that courts may only consider a live

controversy"). And because Plaintiffs' claims were moot "[a]fter *Fisher*"—i.e., after August 5, 2020—the district court lacked subject-matter jurisdiction on September 9, 2020—the day that it issued the preliminary injunction. As of that date, Sweet (and all Plaintiffs) had lost any "ongoing legal interest in the outcome of [the] case." *Memphis A. Philip Randolph Inst.*, 2 F.4th at 561.

2. A decision issued in the absence of jurisdiction cannot render a plaintiff a prevailing party.

The preliminary injunction in this case was "undone" by this Court's subsequent vacatur and, for that reason, it cannot be the basis of prevailing-party status for Plaintiffs. And as explained above, the preliminary injunction was issued when the district court lacked subject-matter jurisdiction. Decisions issued in the absence of subject-matter jurisdiction, this Court has recognized, cannot confer prevailing-party status.

In *Lynch v. Leis*, 382 F.3d 642 (6th Cir. 2004), for example, this Court reversed a district court's award of attorneys' fees because it lacked subject-matter jurisdiction from the outset. 382 F.3d at 643. The plaintiff in *Lynch* obtained permanent injunctive relief from the district court. *Id.* at 644. In issuing the injunction, though, the district court's finding of standing—and thus its exercise of subject-matter jurisdiction—rested on an "incorrect" factual premise. *Id.* Still, the district court concluded that the injunction meant that the plaintiff was a prevailing party entitled to recover his attorneys' fees. *Id.* at 645.

This Court reversed. If the plaintiff "never had standing to bring the case," this Court reasoned, "he is not a proper prevailing party." *Id.* at 646. And because the plaintiff did not have standing, this Court reversed the fee award. *See id.* at 648. Despite the "unfortunate" nature of the result, this Court explained that "an appellate court must vacate an award of attorney's fees if the district court did not have subject matter jurisdiction over the litigation." *Id.* (quoting *Greater Detroit Res. Recovery Auth. v. EPA*, 916 F.2d 317, 320 (6th Cir. 1990)).

O'Neill v. Coughlan, 490 F. App'x 733 (6th Cir. 2012), provides another example. In that case, the Court rejected a plaintiff's argument that he was a prevailing party entitled to recover fees "even though the district court should never have exercised jurisdiction." 490 F. App'x at 734. The plaintiff in *O'Neill*—a judge running for a seat on the Ohio Supreme Court—obtained a preliminary injunction permitting him to run despite allegations that his campaign literature violated several cannons of the Ohio Code of Judicial Conduct. *Id.* With the injunction in place, the plaintiff ran for election and lost. *Id.* The district court eventually entered summary judgment in the plaintiff's favor, concluding that the applicable cannons violated the First Amendment, and converted the preliminary injunction into a permanent one. *Id.*

On appeal, though, this Court "dissolved the injunction and vacated the judgment," *id.*, concluding that the district court "should have abstained from

deciding the merits of the case under the authority of *Younger v. Harris*," *id.* (quoting *O'Neill v. Coughlan*, 511 F.3d 638, 639 (6th Cir. 2008)). And that was true "even though [the defendant] had not raised that issue until late in the game (after the district court issued the preliminary injunction)." *Id.* at 734–35 (citing *O'Neill*, 511 F.3d at 642–43). After a remand, the district court dismissed the case. *Id.* at 735.

The plaintiff then sought to recover his attorneys' fees, arguing that he was a prevailing party under § 1988. *Id.* The district court denied the request, and this Court affirmed. The district court had "improperly retained jurisdiction in [the] case, and "[b]ecause the district court should have dismissed [the] case long ago, it [was] improper to consider [the plaintiff] a prevailing party for purposes of awarding attorney's fees." *Id.* at 737. In reaching this conclusion, this Court rejected the plaintiff's reliance on *McQueary* and other cases in which parties "received a significant amount of what they asked for, and were thereafter determined to be prevailing parties." *See id.* "The difference between th[o]se cases and [the plaintiff's]," this Court pointed out, is "that the district courts in those cases properly exercised the power to grant the relief requested." *Id.* at 738.

In both *Lynch* and *O'Neill*, then, that the plaintiffs got the court-ordered injunctive relief they wanted was not enough to render them prevailing parties

entitled to recover their attorneys' fees.[3] Whether the district court never had jurisdiction or simply lost jurisdiction before issuing a decision, the result is the same: the absence of jurisdiction "undercut[s] the validity of the initial injunction." *O'Neill*, 490 F. App'x at 737. Thus, a plaintiff who obtains a preliminary injunction in the absence of jurisdiction, much like any "plaintiff who achieves a transient victory at the threshold of an action," can "gain no award under [§ 1988's] fee-shifting provision if, at the end of the litigation, her initial success is undone and she leaves the courthouse emptyhanded." *Sole*, 551 U.S. at 78.

That is what happened here. Plaintiffs obtained a preliminary injunction, which barred the State from enforcing the first-time-voter provision during the November 2020 election. (Mem. Op., R. 169, PageID# 3519–21.) But Plaintiffs' claims were moot at that point, so the district court lacked subject-matter jurisdiction

[3] These decisions are not outliers; courts in other circuits have regularly recognized that decisions issued in the absence of jurisdiction cannot confer prevailing-party status. *See, e.g.*, *Fleming v. Gutierrez*, 785 F.3d 442, 448 (10th Cir. 2015) ("[A]ttorney's fees for a preliminary injunction granted by the district court when it was without jurisdiction would not be appropriate."); *Keene Corp. v. Cass*, 908 F.2d 293, 298 (8th Cir. 1990) ("[W]e agree with the district court that it lacked subject matter jurisdiction under section 1983. That lack of jurisdiction barred an award of attorneys fees under section 1988."); *Ward v. San Diego Cnty.*, 791 F.2d 1329, 1334 (9th Cir. 1986) ("Ward's lack of standing in her original challenge rendered illusory the practical outcome she temporarily received (the preliminary injunction). . . . An erroneously granted injunction cannot be the basis for an award of attorney fees as the prevailing party."); *Palmer v. City of Chi.*, 806 F.2d 1316, 1324 (7th Cir. 1986) ("If you lose a case because . . . the court lacked subject-matter jurisdiction . . . , still you've lost and are not the prevailing party.").

and therefore "[im]properly exercised the power to grant the relief requested." *O'Neill*, 490 F. App'x at 738.

3. The district court's prevailing-party conclusion was wrong.

The district court, for its part, considered the possibility that it lacked jurisdiction to issue the preliminary injunction (Mem. Op., R. 169, PageID# 3519 n.2), but it nevertheless concluded that Plaintiffs had prevailed. In reaching that conclusion, the district court erred.

First, the district court incorrectly interpreted this Court's decision vacating the injunction. In the district court's view, this Court "was not explicit about whether it took issue with the [district court] granting the preliminary injunction at the time it did so." (*Id.*) "[T]he majority opinion," the district court acknowledged, "clearly indicates that by that time, Sweet's claim was moot." (*Id.*) Still, the district court concluded that "the general tenor of [this Court's] opinion seems to be not so much that the preliminary injunction was improperly issued in the first place, but rather that the jurisdiction necessary to keep the injunction in place had thereafter disappeared via mootness." (*Id.* at PageID# 3520 n.2.)

Defendants disagree with this assessment of the "general tenor" of this Court's opinion. But even if the district court's assessment were correct, it would matter not. As discussed above, and as the district court itself conceded, this Court was clear that Plaintiffs' claims became moot *before* the preliminary injunction issued.

See Memphis A. Phillip Randolph Inst., 2 F.4th at 558 (concluding that "[a]fter *Fisher*," which was decided more than a month before the preliminary injunction issued, "Sweet no longer qualifies to cast an absentee ballot"); (*see also* Mem. Op., R. 169, PageID# 3520 n.2 (observing that this Court held "that Sweet's claim became moot on August 5")). And as the district court also recognized, "[i]t would seem to follow that [it] must have lacked jurisdiction at the time it issued the preliminary injunction." (Mem. Op., R. 169, PageID# 3520 n.2.) The district court, then, erred by relying on the perceived "tenor" of this Court's prior opinion, rather than the jurisdictional realities that necessarily followed from it.

Second, the district court focused too narrowly on standing, rather than subject-matter jurisdiction generally. In dismissing the possibility that this Court's prior decision meant that Plaintiffs could not be prevailing parties, the district court reasoned that "the applicable issue here on which Plaintiffs prevailed . . . (that Sweet had standing) was not one on which Plaintiffs lost on appeal, and the applicable issue on which Plaintiffs did lose on appeal (mootness) was not raised in [the] district court." (*Id.* at PageID# 3521 n.2.) "So Plaintiffs," in the district court's view, "never . . . ceased being the prevailing party with respect to the issue that allowed them to obtain the preliminary injunction." (*Id.*)

But standing is only part of the subject-matter-jurisdiction inquiry. As this Court previously observed, standing and mootness, while related, are distinct

doctrines, and "mootness pose[d] another Article III jurisdictional bar to [P]laintiffs' claim[s]." *Memphis A. Philip Randolph Inst.*, 2 F.4th at 557; *see also id.* at 559.[4] And because Plaintiffs' claims were moot, the district court lacked subject-matter jurisdiction.

It follows that the district court was wrong to deem inapplicable the "principle . . . that a party that prevails in the district court is no longer the prevailing party with respect to any issues on which the party lost on appeal." (Mem. Op., R. 169, PageID# 3521 n.2.) To secure preliminary injunctive relief, "a plaintiff must . . . show a likelihood of success of establishing jurisdiction." *Memphis A. Philip Randolph Inst.*, 2 F.4th at 554. Yet Plaintiffs here lost on appeal—and the relief they had obtained was vacated—because they failed to establish a substantial likelihood of *subject-matter jurisdiction*. *See id.* at 561. That loss on jurisdictional grounds means that Plaintiffs cannot be prevailing parties. *See Lynch*, 382 F.3d at 648 (reversing a fee award and focusing on the absence of subject-matter jurisdiction generally, rather than standing specifically); *Palmer*, 806 F.2d at 1324 ("If you lose a case because . . . the court lacked subject-matter jurisdiction . . . , still you've lost and are not the prevailing party.").

[4] Indeed, this Court did not need to decide the standing issue in the prior appeal precisely *because* mootness posed another jurisdictional bar. *See id.* at 557.

The bottom line is that a decision issued in the absence of jurisdiction cannot stand, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."), and "an appellate court must vacate an award of attorney's fees if the district court did not have subject matter jurisdiction over the litigation," *Lynch*, 382 F.3d at 648.

* * *

The preliminary injunction Plaintiffs obtained cannot render them prevailing parties for purposes of awarding attorneys' fees. When it vacated the district court's preliminary injunction, this Court held that Plaintiffs had failed to establish a likelihood of subject-matter jurisdiction. *Memphis A. Phillip Randolph Inst.*, 2 F.4th at 561. That was because Plaintiffs' claims were mooted by the Tennessee Supreme Court's August 5 decision in *Fisher*. *See id.* at 558. This necessarily means that when the district court subsequently issued the injunction on September 9, it lacked subject-matter jurisdiction. And it is well settled that a decision, no matter how favorable, cannot confer prevailing-party status if the court lacked jurisdiction to issue a decision at all. *See, e.g.*, *Lynch*, 382 F.3d at 648.

CONCLUSION

For the reasons stated, the judgment of the district court awarding attorneys' fees and costs to Plaintiffs under 42 U.S.C. § 1988 should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,572 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Janet M. Kleinfelter
JANET M. KEINFELTER
Deputy Attorney General

May 26, 2022

CERTIFICATE OF SERVICE

I, Janet M. Kleinfelter, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on May 26, 2022, a copy of the Brief of Defendants-Appellants was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I also certify that all parties required to be served have been served.

/s/ Janet M. Kleinfelter
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DESIGNATION OF DISTRICT COURT DOCUMENTS

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