No. 22-5207

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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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)

REPLY BRIEF OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

ARGUMENT

Plaintiffs here won a preliminary injunction and nothing more—and "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.'" (Br. Defendants-Appellants, 10 (quoting *McQueary v. Conway*, 614 F.3d 591, 604 (6th Cir. 2010).)

The preliminary injunction Plaintiffs obtained cannot render them prevailing parties. Defendants appealed that injunction, and when this Court vacated it, the Court held that Plaintiffs were "not entitled to a preliminary injunction" because they had failed to establish a likelihood of subject-matter jurisdiction. *See Memphis A. Phillip Randolph Inst. v. Hargett*, 2 F.4th 548, 561 (6th Cir. 2021).

To avoid this reality, Plaintiffs claim that Defendants waived this prevailing-party issue (Br. Plaintiffs-Appellees, 14–17), and then cling to a strained reading of this Court's prior decision, as well as a misinterpretation of the mootness doctrine (Br. Plaintiffs-Appellees, 17–21). The Court should reject Plaintiffs' efforts. First, the issue is not waived; and in any event, this Court can—and should—consider Defendants' argument that Plaintiffs are not prevailing parties. Second, this Court's prior decision can only be read to mean that the district court lacked jurisdiction when it issued the preliminary injunction, which necessarily means that the injunction cannot confer prevailing-party status.

I. Defendants Have Not Waived the Prevailing-Party Issue.

The issue Defendants raise on appeal is whether the district court erred in concluding that Plaintiffs were prevailing parties entitled to recover attorneys' fees under § 1988. Plaintiffs contend that Defendants failed to argue in the district court that Plaintiffs were not prevailing parties because the preliminary injunction was later undone on appeal, and, therefore, that Defendants have waived that "defense." (Br. Plaintiffs-Appellees, 2, 15–17.)[1]

But neither the issue nor the argument is waived. Defendants have challenged Plaintiffs' prevailing-party status at every turn, and they *did* make this argument in the district court. Even if this Court were to deem the argument waived, however, this Court may—and should—consider it.

A. Defendants did not fail to raise the issue in the district court.

Plaintiffs claim that Defendants waived the "defense" in two ways: first, by "failing to raise that defense before the magistrate court"; and second, by "failing to object to the magistrate court's ruling that Plaintiffs were prevailing parties on those grounds below." (Br. Plaintiffs-Appellees, 2; *see also id.* at 15–16.) Plaintiffs are wrong on both counts.

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[1] Plaintiffs use the term "waiver" in their briefing, but because they do not argue that Defendants "expressly abandon[ed]" the prevailing-party issue, "forfeiture" appears to be the more appropriate term. *See United States v. Russell*, 26 F.4th 371, 374 (6th Cir. 2022) (discussing the distinction between "forfeiture" and "waiver").

First, Defendants did raise the defense before the magistrate and the defense was considered by the magistrate. In their response to Plaintiffs' motion for attorneys' fees, Defendants argued that Plaintiffs "were not prevailing parties entitled to recover fees under Section 1988" "[b]ecause they did not obtain the permanent relief they sought *and because the preliminary injunction was vacated by [this Court]*." (Resp. to Mot. for Att'y Fees, R. 163, PageID# 3447 (emphasis added).) Defendants also pointed out that "a preliminary injunction does not establish prevailing-party status if it is reversed, dissolved, or otherwise undone by the final decision in the same case." (*Id.* (quoting *Jones v. Haynes*, 350 F.Supp.3d 691, 695 (M.D. Tenn. 2018)).) Indeed, the magistrate judge expressly acknowledged, though rejected, Defendants argument that the vacated injunction could not confer prevailing-party status. (R. & R., R. 166, PageID# 3483–84.)[2] Plaintiffs, then, are quite wrong to say that Defendants "fail[ed] to raise" the

[2] Addressing Defendants' opposition to the motion for attorneys' fees, the Report and Recommendation states: "Defendants disagree, arguing that 'while Plaintiffs secured a preliminary injunction, it was only for purposes of the November 3, 2020, general election, *and it was subsequently vacated by the Sixth Circuit*,' after which 'Plaintiffs voluntarily abandoned their claims and moved to dismiss their case.'" (*Id.* at PageID# 3483 (emphasis added) (internal citation omitted).) The Report goes on to conclude in part: "The fact that a permanent injunction was never granted *and the preliminary injunction was later vacated* has no effect on that reality [i.e., that votes cast in the November 2020 general election can never be uncast]." (*Id.* at PageID# 3484 (emphasis added).)

argument that the later-undone preliminary injunction could not confer prevailing-party status before the magistrate judge. (*See* Br. Plaintiffs-Appellees, 2.)

Second, Defendants preserved the prevailing-party issue by objecting to the magistrate's Report and Recommendation. After the magistrate judge issued his Report and Recommendation, in which he concluded that Plaintiffs were prevailing parties entitled to recover their attorneys' fees under § 1988, Defendants timely filed their written objections. (Objs. to R. & R., R. 167, PageID# 3490–3501.) In those objections, Defendants asserted that attorneys' fees should not be awarded because "Plaintiffs are not prevailing parties entitled to recover their attorney's fees under 42 U.S.C. § 1988." (*Id.* at PageID# 3491, 3493–97.) This is enough to preserve the prevailing-party issue and Defendants' right to argue on appeal that the later-undone preliminary injunction cannot confer prevailing-party status. Especially so when the district court, recognizing that this Court had vacated the preliminary injunction, addressed the question "whether Plaintiffs should be denied prevailing-party status on the ground that . . . the Sixth Circuit found that in retrospect they should not have received [certain relief they were seeking]." (Mem. Op., R. 169, PageID# 3514, 3519 n.2.)

In arguing to the contrary, Plaintiffs either misread or read too much into this Court's prior decisions and ignore the policy behind the specific-objection requirement. For instance, Plaintiffs rely on *Duncan v. Minnesota Life Insurance*

Co., 845 F. App'x 392 (6th Cir. 2021), for the proposition that an appellate "argument that federal regulations demanded de novo review of [a] denial of benefits claim was waived where the only objection raised to the R&R was a general assertion that denial of benefits was not discretionary." (Br. Plaintiffs-Appellees, 16 (citing *Duncan*, 845 F. App'x at 399–400).) But this Court deemed the appellate argument waived because the plaintiff had failed to object *at all* to the magistrate's decision. *See Duncan*, 845 F. App'x at 398 (observing that the plaintiff "never objected to the magistrate's order").[3]

The remaining three decisions that Plaintiffs cite are similarly unhelpful to their position. In all three, this Court concluded that arguments on appeal were waived when they were almost entirely independent of the arguments raised in the parties' objections to a report and recommendation. *See Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 597 (6th Cir. 2006) (finding arguments waived when they arose under statutory provisions and legal doctrines different from those raised in the party's objections); *Moruzzi v. Comm'r of Soc. Sec.*, 759 F. App'x 396, 399 n.1 (6th Cir. 2018) (finding that the plaintiff had waived a challenge to the magistrate's weighing of a particular expert's testimony when the plaintiff had not objected at all to that

[3] The "general assertion that denial of benefits was not discretionary" to which Plaintiffs point was made by the plaintiff in *Duncan* in his argument *to the magistrate*—not in any objection raised to the report and recommendation. *See id.* at 399.

part of the magistrate's ruling); *Wright v. Holbrook*, 794 F.2d 1152, 1154–55 (6th Cir. 1986) (finding a plaintiff's arguments waived when they arose under legal authorities different from those relied on in the plaintiff's objections and "were not advanced or otherwise suggested by the complaint").

So here, where the Defendants have consistently maintained that Plaintiffs are not prevailing parties under § 1988, the specific-objection rule does not bar Defendants from explaining *why* Plaintiffs did not prevail under that statute. Under this Court's precedents, the specific-objection rule merely prevents parties from challenging new aspects of a magistrate's decision for the first time on appeal. *See Smith v. Detroit Fed'n of Tchrs. Loc. 231, Am. Fed'n of Tchrs., AFL-CIO*, 829 F.2d 1370, 1374–75 (6th Cir. 1987) (holding that "[s]ince no objection was taken [by the defendant] to the magistrate's recommendation that only counsel be assessed [attorney's fees], the question of whether the individual plaintiffs should have been held liable . . . was not properly preserved for appellate review"—*but also holding* that the defendant's failure to specifically object to the magistrate's bases for assessing fees against counsel did not preclude the defendant from arguing for an award of attorney's fees against counsel "under all the avenues available").

Indeed, consideration of Defendants' argument on appeal does not undermine the "overall policy of the objection requirement." *Vaughn v. Lawrenceburg Power Sys.*, 269 F.3d 703, 714 (6th Cir. 2001). That policy "is to conserve judicial

resources and focus the district court's attention for review on specific areas of disagreement between the parties." *Id.* at 714–15 (citing *Neuman v. Rivers*, 125 F.3d 315, 323 (6th Cir. 1997)). So when "the district court does not appear to have treated the argument as waived, and it made an independent review of the 'entire record' and report," it follows that "no judicial resources were wasted by the failure to object more specifically." *See id.* at 715. And "[w]hen the district court does not itself make use of the objection rule or rely upon it, much of the justification behind enforcement of the rule dissipates." *Id.* (citation omitted).

Here, the district court did not "make use of the objection rule or rely upon it." *Id.* As noted above, the district court "made an independent review of the 'entire record' and report" and considered the effect of this Court's vacatur of the preliminary injunction—the very basis for Defendants' argument on appeal. (Mem. Op., R. 169, PageID# 3519 n.2). Under these circumstances, this Court should not treat Defendants' arguments as waived. *See Vaughn*, 269 F.3d at 715 (considering a party's arguments on appeal when that party objected to the magistrate's ultimate conclusion, recognizing that "acceptance of the issue for appellate review does not undermine the policy or purposes of the Magistrate's Act, 28 U.S.C. § 636"); *see also Kelly v. Withrow*, 25 F.3d 363, 365–66 (6th Cir. 1994) (considering a party's arguments on appeal even though the party declined to "set[] forth specific objections" and instead "incorporated" arguments from earlier filings because "[t]he

district judge apparently had no problem in focusing on the specific areas of disagreement between the parties").

B. Even if Defendants waived the argument, the Court may—and should—consider it on appeal.

Even if this Court were to conclude that this argument is waived, the Court may—and should—still consider it on appeal. The general rule that "an argument not raised before the district court is waived on appeal" is "not jurisdictional." *Johnson v. Ford Motor Co.*, 13 F.4th 493, 503–04 (6th Cir. 2021) This Court has "discretion to review [issues] not presented to the district court," *Friendly Farms v. Reliance Ins. Co.*, 79 F.3d 541, 545 (6th Cir. 1996), in "'exceptional cases or particular circumstances' or when the rule would produce 'a plain miscarriage of justice,'" *Johnson*, 13 F.4th at 503 (quoting *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993)). And when the issue "is presented with sufficient clarity and completeness and its resolution will materially advance the progress of . . . already protracted litigation, [this Court] *should* address it." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1461 (6th Cir. 1988) (emphasis added).

Four factors "guide the exercise of [this Court's] discretion" to consider waived arguments. *Johnson*, 13 F.4th at 504. Those factors are: (1) "whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts;" (2) "whether the proper resolution of the new issue is clear and beyond doubt;" (3) "whether failure to take up the issue for the

first time on appeal will result in a miscarriage of justice or a denial of substantial justice;" and (4) "the parties' right under our judicial system to have the issues in their suit considered by both a district judge and an appellate court." *Friendly Farms*, 79 F.3d at 545 (citing *Taft Broad. Co. v. United States*, 929 F.2d 240, 245 (6th Cir. 1991)). Here, application of these factors leads to the conclusion that even if Defendants' argument is deemed waived, the Court should still consider it.

First, Defendant's argument—that the later-undone preliminary injunction cannot render Plaintiffs prevailing parties under § 1988—"is a question of law" and does not "require[] or necessitate[] a determination of facts." *Id.* Defendants ask this Court to confirm that its prior decision means that the case was moot, and that the district court therefore lacked jurisdiction, when it issued the preliminary injunction. It then follows that because the district court lacked jurisdiction to issue the preliminary injunction, Plaintiffs cannot be prevailing parties under § 1988.

Second, the "proper resolution" of the issue is "clear and beyond doubt." *Id.* As Defendants explained in their opening brief, this Court's prior decision necessarily means that the district court lacked jurisdiction at the time that it issued the preliminary injunction. (Br. Defendants-Appellants, 12–14.) And this Court has been clear that a decision cannot confer prevailing-party status if it was issued in the absence of jurisdiction. *See Lynch v. Leis*, 382 F.3d 642, 648 (6th Cir. 2004); *O'Neill v. Coughlan*, 490 F. App'x 733, 737–38 (6th Cir. 2012).

Third, the "failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice." *Friendly Farms*, 79 F.3d at 545. If this Court declines to consider Defendants' argument here, the result will be to permit Plaintiffs to collect a significant amount in attorneys' fees from a sovereign State based on an order issued without subject-matter jurisdiction.

Fourth, Defendants have a right "to have the issues in their suit considered by both a district judge and an appellate court." *Id.* As discussed, the district court has already considered whether this Court's vacatur of its preliminary injunction means that Plaintiffs cannot be prevailing parties for purposes of an attorneys' fee award—and has come to the wrong conclusion. Defendants are entitled to appellate review of that conclusion.

In short, and while Defendants maintain that their prevailing-party issue and argument were adequately raised below, this is one of those particular circumstances where consideration of Defendants' argument would be proper even if the issue and argument were deemed not to have been adequately raised below. The issue is also "presented with sufficient clarity and completeness" on appeal, and its "resolution will materially advance the progress of this already protracted litigation." *Pinney Dock & Transp. Co.*, 838 F.2d at 1461. For all these reasons, this Court should reject Plaintiffs' claims of waiver, and should consider Defendants' argument that the later-undone preliminary injunction could not confer prevailing-party status.

II. The Preliminary Injunction Could Not Confer Prevailing-Party Status on Plaintiffs.

A preliminary injunction that is later undone will not confer prevailing-party status. (*See* Br. Defendants-Appellants, 9–11 for a detailed discussion and citations.) And that rule applies with full vigor here, where the case was moot when the district court issued the preliminary injunction. (Br. Defendants-Appellants, 11–17.)

Plaintiffs counter that the case was not moot, and that the district court did have jurisdiction when the preliminary injunction was issued. (Br. Plaintiffs-Appellees, 17–21.) But that response is based on an erroneous reading of this Court's prior decision and a misinterpretation of the mootness doctrine.

Plaintiffs say that "this Court did not find that [their] claim was moot prior to the November 2020 election, such that the district court lacked jurisdiction to enter the preliminary injunction in the first instance." (Br. Plaintiffs-Appellees, 17.) But like the district court, Plaintiffs erroneously focus only on the perceived "tenor" of this Court's prior decision. (*See* Mem. Op., R. 169, PageID# 3520 n.2.) They ignore the jurisdictional reality that necessarily follows from this Court's holding that Corey Sweet, and therefore all Plaintiffs, lost any ongoing interest in the outcome of this case on August 5, 2020. *See Memphis A. Phillip Randolph Inst.*, 2 F.4th at 558–59.

As the Court made clear in its opinion, "[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," but "[a]fter" the Tennessee Supreme Court's August 5, 2020 decision in *Fisher v. Hargett*, "Sweet no longer qualifie[d] to cast an absentee ballot" and thus "no longer ha[d] an actual, ongoing stake in the litigation." *Id.* at 558. That inexorably meant that "Sweet's claim [was] moot." *Id.* at 559; *see also id.* at 571 (Moore, J., dissenting) (acknowledging the majority's "conclu[sion] that Sweet's own case would have become moot once he no longer qualified to vote absentee by mail, which occurred on August 5, 2020"). "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.* at 559. So when Sweet's claim became moot on August 5, all Plaintiffs' claims became moot as well. *See id.*

But according to Plaintiffs, "[e]ven assuming that Mr. Sweet's claim was moot as of August 5, that does not mean Plaintiffs' claim was moot at that time." (Br. Plaintiffs-Appellees, 19.) For this Court "to rule that Plaintiffs' claim was moot," Plaintiffs contend, it "was required to first determine whether the claim fit within [the capable-of-repetition-yet-evading-review] exception" to the mootness doctrine. (Br. Plaintiffs-Appellees, 20.) And since the Court did not address the applicability of that exception until June 22, 2021, Plaintiffs posit that their claims did not become moot until that date. (Br. Plaintiffs-Appellees, 18–19.)

But the capable-of-repetition-yet-evading-review exception is just that—an *exception*. It is not an inherent part of the mootness analysis itself; it has its own test, with its own independent requirements that must be met.[4] And, most importantly for present purposes, the exception has a different burden of proof. While the burden of demonstrating mootness rests on the party claiming mootness, *see Memphis A. Phillip Randolph Inst.*, 2 F.4th at 558, "[t]he party asserting that [the capable-of-repetition-yet-evading-review] exception applies bears the burden of establishing both prongs" of the exception, *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005) (citations omitted)).

So Plaintiffs are simply incorrect to say that *this Court* was required to first determine whether their claim fit within the exception before holding that the claim was moot as of August 5, 2020. Mootness affects a court's jurisdiction to hear a case. *See Memphis A. Phillip Randolph Inst.*, 2 F.4th at 558. And "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction." *Chevalier v. Est. of Barnhart*, 803 F.3d 789, 794 (6th Cir. 2015)

[4] *Compare Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 584 (6th Cir. 2006) (recognizing that a case is moot "[i]f 'the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome'" (citation omitted)) *with Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2005) (explaining that the capable-of-repetition-yet-evading-review exception "applies when '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again'" (citation omitted)).

(cleaned up). But there is no comparable obligation for courts to look for ways to *retain* jurisdiction once they have determined that a plaintiff no longer has any interest in the outcome of the case.

The bottom line is that Plaintiffs' claims became moot on August 5, 2020—more than a month before the district court issued the preliminary injunction. As the party asserting that the capable-of-repetition-yet-evading-review exception applies, Plaintiffs bear the burden of establishing that the exception applied to their claims. *Lawrence*, 430 F.3d at 371. Plaintiffs have not met that burden; indeed, they make no argument that both prongs of the exception applied in September 2020 when the preliminary injunction was issued.

CONCLUSION

For the reasons stated here and in Defendants' opening brief, 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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July 18, 2022

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 3,453 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/ Matthew D. Cloutier
MATTHEW D. CLOUTIER
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July 18, 2022

CERTIFICATE OF SERVICE

I, Matthew D. Cloutier, counsel for Defendants-Appellants and a member of the Bar of this Court, certify that, on July 18, 2022, a copy of the Reply 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/ Matthew D. Cloutier
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