No. 14-50042

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WENDY DAVIS; MARC VEASEY; PAT PANGBURN; FRANCES DELEON; DOROTHY DEBOSE; SARAH JOYNER; VICKY BARGAS; ROY BROOKS,
Plaintiffs-Appellees,

v.

GOVERNOR GREG ABBOTT, In his Official Capacity as Governor of the State of Texas; CARLOS CASCOS; THE STATE OF TEXAS,
Defendants-Appellants.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS (LULAC); DOMINGO GARCIA,

Plaintiffs-Appellees,

v.

GREG ABBOTT, In his Official Capacity; THE STATE OF TEXAS,

Defendants-Appellants.

On Appeal From The United States District Court
For The Western District of Texas, San Antonio Division
Civ. No. 5:11-cv-788-OLG-JES-XR

APPELLEES' PETITION FOR PANEL REHEARING

J. GERALD HEBERT, P.C.
J. Gerald Hebert
191 Somervelle St., #405
Alexandria, VA 22304
(703) 628-4673

RICHARDS, RODRIGUEZ AND SKEITH, LLP
David R. Richards
816 Congress Ave., Suite 1200
Austin, TX 78701
(512) 476-0005

JENNER & BLOCK LLP
Paul M. Smith
Jessica Ring Amunson
Mark P. Gaber
1099 New York Ave., NW
Suite 900
Washington, DC 20001
(202) 639-6000

Counsel for Plaintiffs-Appellees Wendy Davis, et al.

Additional Counsel on Inside Cover

LAW OFFICES OF LUIS ROBERTO VERA & ASSOCIATES, P.C.
Luis Roberto Vera, Jr.
111 Soledad, Suite 1325
San Antonio, TX 78205
(210) 225-3300

Counsel for Plaintiffs-Appellees League of United Latin American Citizens (LULAC)

CERTIFICATE OF INTERESTED PARTIES

No. 14-50042

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Wendy Davis, Marc Veasey, Pat Pangburn, Dorothy DeBose, Sarah Joyner, Vicky Bargas, Roy Brooks, Frances DeLeon, Plaintiffs-Appellees;
2. Richards, Rodriguez and Skeith, LLP, Counsel for Plaintiffs-Appellees Wendy Davis, et al. (David Richards);
3. J. Gerald Hebert, P.C., Counsel for Plaintiffs-Appellees Wendy Davis, et al. (J. Gerald Hebert);
4. Jenner & Block LLP, Counsel for Plaintiffs-Appellees Wendy Davis, et al. (Paul M. Smith, Jessica Ring Amunson, Mark P. Gaber);
5. League of United Latin American Citizens (LULAC), Plaintiffs-Appellees;
6. Law Offices of Luis Roberto Vera & Associates, P.C., Counsel for Plaintiffs-Appellees LULAC (Luis Roberto Vera, Jr.);
7. Greg Abbott, Carlos Cascos, The State of Texas, Defendants-Appellants;
8. Office of the Attorney General, Counsel for Defendants-Appellants (Scott A. Keller, Matthew Hamilton Frederick);
9. Steve Munisteri, Defendant;
10. Eric Opiela PLLC, Counsel for Defendant Munisteri (Donna Garcia Davidson, Eric Christopher Opiela);
11. Boyd Richie, Defendant;
12. Brazil & Dunn, Counsel for Defendant Richie (Chad W. Dunn).

Respectfully submitted,

/s/ J. Gerald Hebert
J. Gerald Hebert
Counsel of Record for
Plaintiffs-Appellees Wendy Davis, et al.

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STATEMENT OF ISSUES MERITING PANEL REHEARING

1. Whether the panel's decision ("the Decision") conflates the legal claim before the D.C. court (whether preclearance should be granted) with the legal claims before the San Antonio court (whether preclearance is required, whether the plan has been precleared, whether there is a reasonable probability the plan will not be precleared, and if so how should a remedial court-imposed map be drawn), thereby causing the Decision to wrongly conclude the San Antonio court had not decided the merits of Plaintiffs' legal claim.

2. Whether the Decision improperly creates a conflicting standard for prevailing party status for the legal claim at issue in this case, departing from the test established for the very same legal claim in *Petteway v. Henry*, 738 F.3d 132 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014), and instead importing this Court's test for the award of attorneys' fees in the preliminary injunction context.

3. Whether the Decision improperly rewrites federal law, which makes "*any* action or proceeding to enforce . . . voting guarantees," 52 U.S.C. § 10310(e) (emphasis added), eligible for attorneys' fees, by excepting an entire category of legal claims—claims in a local district court to enforce Section 5 of the Voting Rights Act where preclearance has not yet occurred—from eligibility for fees.

REASONS FOR GRANTING THE PETITION

The Decision makes fundamental errors of fact and law by misidentifying the legal claim at issue, adopting a test for prevailing party status that is inconsistent with the test previously adopted by this Circuit for the same legal claim at issue in this case, and rewriting federal law to except an entire category of legal claims Congress made eligible for attorneys' fees.

First, the Decision conflates the legal claim that only the D.C. court had jurisdiction to determine—whether or not to grant preclearance—with the separate legal claim the San Antonio court had jurisdiction to determine—whether preclearance is required, whether preclearance has occurred, if not, whether there is a reasonable probability the plan will fail to gain preclearance, and if so, what court-ordered interim plan to impose. Plaintiffs' legal claim in this case was not whether or not the map *should* be precleared, but instead that the map was *not* precleared and likely would not be in time for the election—and that a new map should be imposed that remedied Plaintiffs' claims. The Supreme Court made clear to the three-judge court below that the merits of *that* claim—an enforcement claim under Section 5—are based on a determination of whether the enacted map "stand[s] a reasonable probability of failing to gain § 5 preclearance," *Perry v. Perez*, 132 S. Ct. 934, 942 (2012), and if so, that the court should impose an interim map that departs from the enacted plan only to the extent of those

deficiencies, *id.* The claim before the San Antonio court was thus distinct from the claim before the D.C. court, and both involved their own separate "merits" questions and their own separate remedies.

Second, the Decision is inconsistent with this Court's decision in *Petteway v. Henry*, 738 F.3d 132 (5th Cir. 2013), which involved the exact same legal claim at issue here—an injunction to prevent a plan lacking preclearance from being implemented and a request for plaintiffs' preferred map to be imposed by the court—but where this Court applied a different test for prevailing party status, under which Plaintiffs here clearly would be entitled to fees. Rather than apply *Petteway*'s standard here, the Decision incorrectly imported the test announced in *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008), which was tailored specifically to the traditional preliminary injunction context and was specifically limited to that context. Its requirement that there be an "unambiguous indication of probable success on the merits of plaintiff's claims," 519 F.3d at 524, is merely a recitation of a prong of the traditional preliminary injunction test, and was adopted to prevent attorneys' fees from being awarded where an injunction is granted solely based upon the balancing of hardships, public interest, or irreparable harm prongs. It does not govern this context, nor does it establish a new prong requiring courts to assess the complexity of the merits question posed by a legal claim otherwise made eligible for fees by Congress. In any event, the Decision's

application of *Dearmore* is flawed because it is premised on the conflated understanding of the legal claims before the San Antonio court and the D.C. court.

Third, Congress explicitly made attorneys' fees available "[i]n *any* action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment," 52 U.S.C. § 10310(e) (emphasis added). Under the Decision's reasoning, a plaintiff who prevails on a legal claim to enforce Section 5 and seeks imposition of a court-imposed map could *never* be awarded attorneys' fees. The Decision therefore removes an entire category of voting rights legal claims—Section 5 enforcement actions—from the ambit of § 10310(e), despite the statute's plain text universally covering *any* voting rights enforcement action and despite this Circuit's precedent awarding fees to prevailing parties in Section 5 enforcement claims. Whether a given legal claim can give rise to an award of attorneys' fees is based on whether Congress has made it so eligible, not on whether the court considers the legal claim to present a sufficiently complex "merits" question.

The Decision reaches its result by misidentifying the legal claim at issue, disregarding the controlling test, and applying and misconstruing a test tailored to a different legal context. Under the controlling *Petteway* standard, Plaintiffs are plainly entitled to fees. The Decision makes these errors in the context of pro bono representation by civil rights attorneys who served as private attorneys general to

protect voting rights and succeeded in obtaining for their clients all the relief allowed by the claim at issue.[1]

I. The Decision Conflates the Section 5 Enforcement Action in San Antonio with the Section 5 Preclearance Action in D.C.

The Decision is fundamentally flawed because it misidentifies the legal claim at issue. The Decision holds that Plaintiffs did not obtain judicial relief on the merits of their claim because only the D.C. court had jurisdiction to decide whether preclearance should be granted. *See* Slip Op. at 17. This reasoning confuses the legal claims at issue in the D.C. and the San Antonio courts.

The fact that the San Antonio court did not decide the merits of whether the map *should* be precleared is irrelevant. Only the D.C. Court can make that determination. The San Antonio court was faced with its own merits questions regarding Plaintiffs' distinct Section 5 enforcement claim (a separate count in their Complaint, *see* ROA.43, Count III)—whether the challenged map was statutorily required to undergo preclearance, whether it had in fact obtained preclearance, if not whether it "stand[s] a reasonable probability of failing to gain § 5

[1] "Congress considered vigorous enforcement to vindicate civil rights a high priority and entrusted plaintiffs to effectuate this policy." *Dean v. Riser*, 240 F.3d 505, 507 (5th Cir. 2001). Enforcement of high-profile civil rights cases such as this one are especially taxing on *pro bono* counsel, involving as they do considerable time and significant out-of-pocket expenses. The Decision seems especially unjust, given that this case has now spanned four years of litigation activity and the vast majority of the fees were awarded to a solo practitioner (Mr. Hebert).

preclearance," *Perez*, 132 S. Ct. at 942, and if so, how to draw a court-imposed map to remedy the violations while still respecting the state's policy choices to the extent they do not violate the law. Here, the district court addressed all of these merits questions and imposed the exact remedial map Plaintiffs sought. Plaintiffs could not have more fully prevailed on the merits of their legal claim. Whether the enacted map should be precleared is an entirely different legal claim with different merits questions and a different remedy.

Contrary to the Decision's reasoning, it has long been the case that Plaintiffs who win actions to enforce Section 5 are eligible for "prevailing party" status even though only the D.C. court has jurisdiction to actually determine the substance of the preclearance question. *See, e.g.*, *Petteway*, 738 F.3d at 137 (concluding that plaintiffs in Section 5 enforcement action satisfied first prong (judicially-sanctioned relief) of three-prong prevailing party test even though court did not rule on whether preclearance should be granted); *League of United Latin Am. Citizens v. Roscoe Indep. Sch. Dist.*, 119 F.3d 1228, 1231 (5th Cir. 1997) (awarding attorneys' fees where plaintiff secured injunction requiring school district to seek preclearance without addressing the substantive preclearance question); *Flowers v. Wiley*, 675 F.2d 704, 705-06 (5th Cir. 1982) (awarding attorneys' fees to plaintiffs for obtaining injunction precluding implementation of change in voter registration law pending preclearance process, noting that only

D.C. district court or U.S. Attorney General could decide substantive preclearance question and that only question before Texas court was the applicability of Section 5, "an issue on which it [was] hardly conceivable that the plaintiffs could possibly lose").[2]

As the *Flowers* court suggests, it does not matter whether the merits of the question in these enforcement proceedings is a simple one. That is not the test for prevailing party status. In any event, the three-judge district court in San Antonio was faced with determining the difficult question of what modifications were necessary to the state's enacted map to ensure compliance with Section 5 until the D.C. court ruled on its preclearance case. That was a merits determination entirely and analytically distinct from what the D.C. Court had to decide. Here, the district court adopted the map suggested by Plaintiffs. Not only did Plaintiffs succeed in enforcing the application of Section 5 through injunctive relief like the cases addressed above, but Plaintiffs prevailed even further on the merits of their claim

[2] Nothing about the test the Supreme Court announced in *Perez* alters a plaintiff's entitlement to fees for these actions. In fact, the Supreme Court *added* merits questions for local district courts by requiring them to assess the probability of preclearance being granted and to more carefully design interim maps to align with the state's policy choices. This added work did not remove any of the preexisting merits determinations required in assessing whether and how Section 5 must be enforced by local district courts.

by winning the exact affirmative relief they sought in a court-imposed map.[3] The Decision's result rests on an analysis of the wrong legal claim.

II. The Decision Disregards the Existing "Prevailing Party" Test for Section 5 Enforcement Actions and Adopts an Inconsistent Test Specifically Limited to the Traditional Preliminary Injunction Context.

The Decision is inconsistent with this Circuit's precedent because it disregards the test this Circuit announced just over a year ago for the exact same type of Section 5 enforcement claim at issue in this case. Instead, the Decision applies a test that is tailored, and limited, to the context of preliminary injunctions generally. The Decision thus creates a second prevailing party test for a single type of legal claim—one that yields a different outcome. *See Ford v. Cimarron Ins. Co.*, 203 F.3d 828, 832 (5th Cir. 2000) (stating that a subsequent panel may not disregard the decision of prior panel).

In *Petteway*, this Court reviewed a district court decision awarding attorneys' fees for the precise same legal claim at issue here. The *Petteway* plaintiffs sought a temporary restraining order to prevent implementation of a redistricting map that had not been precleared and proposed an interim map for the court to impose pending the outcome of the preclearance proceedings. 738 F.3d at

[3] In light of the different legal claims, it is neither surprising nor relevant that the district court noted it was not ruling on the merits of the claim in the D.C. court. *See* Slip Op. at 17. Nor does the fact that it did not issue a final judgment preclude the district court's award of fees, *see id.*, as the Decision itself recognized elsewhere, *id.* at 15.

135-36. Reviewing the award of attorneys' fees, this Court set forth the standard for "prevailing party" status in Section 5 enforcement proceedings:

> (1) the plaintiff must achieve judicially-sanctioned relief, (2) the relief must materially alter the legal relationship between the parties, and (3) the relief must modify the defendant's behavior in a way that directly benefits the plaintiff at the time the relief is entered.

Id. at 137. In *Petteway*, the Court noted that the first requirement was satisfied: "the Plaintiffs achieved judicially-sanctioned relief flowing from their complaint—a temporary, and then a permanent injunction." *Id*. But the Court found the latter two prongs unsatisfied. The Court concluded that injunction at issue did not alter the legal relationship of the parties or benefit the plaintiffs because the record was not clear that the county was planning to circumvent the preclearance process. *Id.* at 138-39. And although the district court had granted the injunctive relief, it declined to impose the map preferred by the plaintiffs in that case and instead imposed a map agreed upon between the Department of Justice and the county. *Id.* at 135-36. The Court thus concluded plaintiff's victory was *de minimis*. *Id.* at 138.

The Decision cites the *Petteway* test as controlling the "prevailing party" question in this Circuit, *see* Slip Op. at 11, and notes (without disagreeing) that the district court concluded the *Petteway* test was satisfied here in light of the court's adoption of Plaintiffs' preferred map for the 2012 elections, *id.* at 11-12. The Decision nowhere concluded that *Petteway* was not satisfied and did not even analyze Plaintiff's prevailing party status under *Petteway*. *See id*. at 12-20.

Instead of following the course set out by *Petteway*, the Decision analogized the Section 5 enforcement proceeding here to a preliminary injunction, and then mechanically applied the test this Court had adopted for (and expressly limited to) that context. *See id*. at 14-17. That test, adopted in *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008), is focused solely on the first *Petteway* prong—whether preliminary injunctions have sufficient "judicial *imprimatur*" to count as judicially-sanctioned relief, *id.* at 521-22.

The Decision's reliance on *Dearmore* is wrong for several reasons. First, *Petteway* explicitly dealt with the same legal claim at issue here—Section 5 enforcement and interim-imposed maps—and the Court concluded that the temporary and permanent injunctions issued there satisfied the first *Petteway* prong. 738 F.3d at 137. Here, not only was an injunction entered against implementation of the enacted map absent preclearance, but affirmative relief was granted imposing the maps preferred by Plaintiffs. If the *Petteway* Court found sufficient judicial imprimatur without resorting to the *Dearmore* test where plaintiffs did not obtain their preferred court-imposed map, then this case clearly satisfies the "judicial *imprimatur*" prong. And unlike *Petteway*, the remaining prongs are met here: Plaintiffs won more than an injunction, they obtained a district court order imposing their preferred map, which plainly altered the parties'

legal relationship to Plaintiffs' benefit. This is exactly what the *Petteway* plaintiffs were missing.

Second, the *Dearmore* test was tailored, and specifically limited,[4] to the preliminary injunction context. The *Dearmore* Court was concerned that fees not be awarded if a plaintiff obtained a preliminary injunction based upon the three non-merits focused prongs of the preliminary injunction test (*i.e.*, irreparable harm, balancing of hardships, and public interest). *See Dearmore*, 519 F.3d at 524 (holding that to obtain fees for a preliminary injunction, it must be unambiguous that order was based on "probable success on the merits" prong of the test and not "mere balancing of the equities in favor of the plaintiff"); *see also id.* at 525 (awarding fees because "this is not a case where the preliminary injunction was based less on the district court's view of the merits than on a perceived hardship to the plaintiff").[5]

The *Dearmore* Court's statement that a preliminary injunction be "based upon an unambiguous indication of probable success on the merits" is therefore simply a recitation of the legal standard for that prong of the preliminary injunction

[4]The *Dearmore* Court cautioned that "the test we articulate here is only applicable in the limited factual circumstances" of the case. 519 F.3d at 526 n.4. If that limitation means anything, it means the test is at least limited to the legal context from which it arose—preliminary injunctions.

[5] Indeed, the *Dearmore* Court noted that the grant of the preliminary injunction was "merits-based" even though the district court was required to view the facts in the light most favorable to the plaintiff who won the injunction. 519 F.3d at 525.

test and not a new requirement that to "prevail" for purposes of fees, a plaintiff's legal claim must pose a difficult merits question, or that the merits analysis must meet some subjective standard of rigor. The preliminary injunction prongs and the *Dearmore* test are entirely irrelevant to whether attorneys' fees are available to plaintiffs who succeed in enforcing Section 5. Their only common feature is that they involve preliminary relief. But that is the character of *all* Section 5 enforcement claims. The legal claim *itself* is time-limited, and therefore its relief necessarily is. This Circuit has never before excluded Section 5 enforcement claims from attorneys' fees awards because the claims' life is limited to the preclearance process schedule, nor does the statute authorizing attorneys' fees permit it to be so excluded. It makes no sense to mechanically apply the *Dearmore* test to Section 5 enforcement actions for the first time in this case contrary to this Circuit's established precedent on attorneys' fees in the Section 5 enforcement context.

Third, even if *Dearmore* were applicable, Plaintiffs satisfy it because the district court did conduct the "searching . . . merits inquiry required to find prevailing-party status under *Dearmore*."[6] Slip Op. at 17. The Decision's contrary

[6] This too misstates *Dearmore*'s holding. *Dearmore* only requires that there *be* a merits basis for the injunction, however complex the question or rigorous the analysis.

conclusion is premised on the same conflation of the legal claims addressed above. *See supra* Part I.

III. The Decision Rewrites Federal Law to Create an Exception to the Attorneys' Fees Statute.

The Decision rewrites federal law to create an exception to the Congressional mandate permitting a district court to award attorneys' fees in <u>*any*</u> voting rights action. Congress has provided that "[i]n *any* action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendments, the court, in its discretion, may allow the prevailing party" an award of attorneys' fees. 52 U.S.C. § 10310(e) (emphasis added). One such "action or proceeding" is where a plaintiff asserts that a map has not been, and likely will not be, precleared, and on that basis requests that the court impose a new map in its place. The Supreme Court approved such an "action or proceeding" in *Perez v. Perry*, 132 S. Ct. 934 (2012), where (in this very case), it set out how the merits of the legal claim should be determined by the San Antonio court. The Supreme Court held that the local district court should determine whether the plan faced a "reasonable probability of failing to gain § 5 preclearance," *id.* at 942, and, if so, that the court would then be tasked with drawing a new map that remedied any deficiencies, *id.*

The Decision holds that, even where, as here, the Plaintiffs win this claim by convincing the court that the state's map faces a reasonable probability of failing to gain preclearance and that the court should instead adopt the exact plan Plaintiffs

prefer, Plaintiffs have not "prevailed." In doing so, the court has judicially amended the statute enacted by Congress to read: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendments, except those seeking to enforce Section 5, the court, in its discretion, may allow the prevailing party" an award of fees. Courts may not alter statutes in this manner.[7] "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002). Congress made "any action or proceeding" to enforce voting rights eligible for attorneys' fees. The Decision improperly alters that statute by excepting an entire category of legal actions from ever resulting in an award of attorneys' fees.

* * * * *

The Decision is based on a fundamental misunderstanding of the legal claim at issue, disregards the controlling Circuit test, and in the process judicially amends a federal statute entitling Plaintiffs to fees. With these errors, the Decision penalizes civil rights attorneys who represented citizens *pro bono*, who succeeded

[7] Moreover, under the Decision's reasoning, plaintiffs who obtain an injunction where a state or local government purposefully implements a plan without seeking preclearance would be ineligible for fees because the court had not decided *whether* preclearance should be granted. This is counter to the statutory text and this Circuit's precedent and demonstrates the Decision's flawed reasoning. *See supra* Part I.

in obtaining all the relief available under a recognized and Supreme Court-approved legal claim, and whose action ensured that the discriminatory map enacted by the State of Texas would never be implemented and instead that their clients' preferred map would be ordered into effect by the court.

CONCLUSION

For the foregoing reasons, the petition for panel rehearing should be granted, the Decision should be vacated, and the district court's orders granting attorneys' fees should be affirmed.

Dated: March 31, 2015

Respectfully submitted,

/s/ J. Gerald Hebert
J. Gerald Hebert
J. Gerald Hebert, P.C.
191 Somervelle Street, #405
Alexandria, VA 22304
Tel. (703) 628-4673

Paul M. Smith
Jessica Ring Amunson
Mark P. Gaber
Jenner & Block LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
Tel. (202) 639-6000

David Richards
State Bar # 16846000
Richards, Rodriguez and Skeith, LLP
816 Congress Ave.
Suite 1200
Austin, TX 78701
Tel. (512) 476-0005

Counsel for Plaintiffs-Appellees Wendy Davis, et al.

/s/ Luis Roberto Vera, Jr.
Luis Roberto Vera, Jr.
Law Offices of Luis Roberto Vera & Associates, P.C.
111 Soledad, Suite 1325
San Antonio, TX 78205-2260
Tel. (210) 225-3300

Counsel for Plaintiffs-Appellees LULAC

CERTIFICATE OF SERVICE

I certify that this document has been filed with the Clerk of Court and served by ECF on March 31, 2015, upon:

Scott A. Keller, Solicitor General
Matthew Hamilton Frederick, Deputy Solicitor General
Office of the Solicitor General for the State of Texas
209 W. 14th Street
Austin, TX 78701

Counsel for Defendants-Appellants

I certify that this document has been served by UPS Overnight Delivery on March 31, 2015, upon:

Donna García Davidson
Attorney at Law
1621 West 6th Street
Austin, TX 78703
donna@dglawfirm.com

Eric Christopher Opiela
Eric Opiela PLLC
1122 Colorado, Suite 2301
Austin, TX 78701
eopiela@ericopiela.com

Counsel for Defendant Munisteri

Chad W. Dunn
Brazil & Dunn
4201 Cypress Creek Parkway
Suite 530
Houston, TX 77068
chad@brazilanddunn.com

Counsel for Defendant Richie

/s/ J. Gerald Hebert
J. Gerald Hebert
Counsel for Plaintiffs-Appellees
Wendy Davis, et al.

CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on March 31, 2015, this petition was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that: (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the documents has been scanned with Malwarebytes Anti-Malware and is free of viruses.

/s/ J. Gerald Hebert
J. Gerald Hebert
Counsel for Plaintiffs-Appellees
Wendy Davis, et al.

CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Fed. R. App. P. 40(b) because it does not exceed 15 pages.

2. This petition 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 a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point typeface.

Date: March 31, 2015

/s/ J. Gerald Hebert

J. Gerald Hebert
J. Gerald Hebert, P.C.
191 Somervelle Street, #405
Alexandria, VA 22304
(703) 628-4673

Counsel for Plaintiffs-Appellees Wendy Davis, et al.