No. 15-522

In the Supreme Court of the United States

STATE OF TEXAS, PETITIONER

v.

WENDY DAVIS, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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This much is uncontested: In *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), this Court held that the Voting Rights Act imposed unconstitutional federalism costs by forcing States like Texas to seek preclearance of changes to their voting laws. In defiance of that ruling, the intervenors requested attorneys' fees for their role in aggravating those unconstitutional federalism costs. Nearly a full year after *Shelby County* held that Texas could not be subjected to *any* of the costs of preclearance, the district court nonetheless held that Texas *could* be forced to pay over $1 million to the litigants who subjected it to the unconstitutional costs of preclearance.

And this much should be uncontested: From the very beginning, Texas has asserted that *Shelby County* renders any fee award in this case unconstitutional. The

court of appeals expressly recognized that Texas properly preserved that argument. Pet. App. 15a. And the intervenors themselves conceded before the court of appeals that Texas preserved its *Shelby County* argument. Joint Resp. Br. of Def.-Interv'r-Appellees at 14, *Texas v. United States*, No. 14-5151 (D.C. Cir. Jan. 14, 2015) ("Intervenors' CADC Br.").

Against that backdrop, the intervenors' present claims of "waiver" ring hollow, and they depend on mischaracterizations and selective misquotations of the record. As the intervenors previously conceded and the court of appeals held, Texas preserved the argument that *Shelby County* renders the fee order unconstitutional. The intervenors offer no plausible response to that argument on the merits, nor could they. This case presents an ideal vehicle to reach the questions presented and reverse.

A. The Fee Order Is Unconstitutional.

As Texas previously explained, the district court had no authority to award attorneys' fees to the intervenors in 2014, nearly a full year after the Court declared unconstitutional the statute on which the intervenors' illusory district-court victory depended. *See* Pet. 11, 13–18. The intervenors offer no rationale for how a court can enter a remedy based on a statute this Court has nullified as unconstitutional. Nor do they dispute Texas's observation that the court of appeals never found that the intervenors were prevailing parties. *See* Pet. 26; *see also* Pet. for a Writ of Cert., *Shelby County v. Lynch*, No. 15-

583 (U.S. Nov. 3, 2015) (challenging the D.C. Circuit's refusal to award attorneys' fees to Shelby County even though it prevailed in *Shelby County*).

The intervenors nevertheless offer three arguments obliquely addressing the merits of Texas's first question presented. Br. in Opp. 23–26. None is persuasive.

First, the intervenors erroneously classify *Shelby County* as merely a Tenth Amendment ruling, *id.* at 23–24, overlooking the Court's references to the Fourteenth Amendment, the Fifteenth Amendment, and the principle of equal sovereignty. *See Shelby County*, 133 S. Ct. at 2622 & n.1, 2629. In all events, it is irrelevant whether *Shelby County* invoked one or more constitutional provisions. What matters is that *Shelby County* unquestionably invalidated as unconstitutional a statute that forced States to justify their sovereign lawmaking decisions; the Court held that section 5 of the Voting Rights Act could not be constitutionally applied to any State that was subject to preclearance under section 4(b)'s coverage formula. *Id.* at 2631. *Shelby County* therefore also precludes ancillary remedies such as attorneys' fees in preclearance proceedings in which States were unconstitutionally haled into court.

Second, the intervenors claim that forcing a State to pay over $1 million in attorneys' fees in preclearance litigation "does nothing to preclude a state from enacting its preferred voting laws." Br. in Opp. 24. But it is well established that Congress imposes on a State's sovereign dignity by forcing the State to pay large sums of money to exercise sovereign prerogatives. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 750–51 (1999). Monetary payments from preclearance litigation are a particularly vivid form

of the unconstitutional federalism costs that this Court addressed in *Shelby County*, 133 S. Ct. at 2621, 2627.

Third, the intervenors note that when a court enters a final judgment and appellate remedies are exhausted, res judicata still applies even if the statute on which the judgment depends is later declared unconstitutional. Br. in Opp. 25–26. But that observation does not help the intervenors here. The merits of the intervenors' case were on direct appeal to this Court when *Shelby County* was decided in June of 2013, and the issue of attorneys' fees remained open and was not adjudicated until June of 2014. *See* Pet. 17–18. Moreover, to the extent this final objection boils down to a reassertion of waiver, *see* Br. in Opp. 26, it fails for the reasons explained below.

B. The Questions Presented Are Properly Before The Court.

Unable to defend the court of appeals' reasoning on the merits, the intervenors rest on an assertion that Texas waived its opposition to the fee award at every stage of this litigation. *See id.* at i. That assertion is conspicuously flawed.

1. In the court of appeals, the intervenors conceded that Texas had preserved its *Shelby County* argument. Their response brief acknowledged that

> Texas's "Advisory" in response to the fee petitions in the district court raised only one argument—the argument presented in Part II of its appellate brief that fees should *never* be awarded where prevailing party

> status is based on prevailing under a statute later held to be unconstitutional.

Intervenors' CADC Br. 14; *see* Texas's Opening Br. at 21–23 (Part II), *Texas v. United States*, No. 14-5151 (D.C. Cir. Dec. 15, 2014) ("Texas's Opening CADC Br.") (asserting that even if Texas had not appealed and won, *Shelby County* would preclude awarding attorneys' fees on the basis of an unconstitutional statute).

In addition to ignoring this concession, the intervenors also ignore the court of appeals' express recognition that Texas had preserved its *Shelby County* argument:

> The sole argument that Texas did present in its Advisory and in its opening brief here—and thus the only argument that is properly preserved for review—is that the Supreme Court's decision in *Shelby County* made Texas the prevailing party in this case as a categorical matter of law the instant the Supreme Court announced its decision.

Pet. App. 15a. Although the intervenors partially quote this passage from the court of appeals' opinion, they excise "decision in" before "*Shelby County*" and add "based on this Court's June 27, 2013 vacate-and-remand order," Br. in Opp. 10, incorrectly insinuating that Texas relied exclusively on that order.

Like the passage from the intervenors' appellate brief quoted above, this passage from the court of appeals' opinion was referring to Part II of Texas's opening brief, which asserted that the decision in *Shelby County* itself precluded any fee award to the intervenors as a matter of blackletter constitutional law. *See* Texas's Opening CADC Br. 21–23; *see also* Pet. 9–10 (noting the

court of appeals' insupportable attempt to limit the scope of this argument). And the court of appeals' express recognition that Texas presented its *Shelby County* argument "in its [district-court] Advisory," Pet. App. 14a, overruled the district court's statement—to which the intervenors still cling—"that 'Texas ma[de] no argument *whatsoever* that *Shelby County* upended the eligibility of [the intervenors] for fee awards.'" Br. in Opp. 16–17 (quoting Pet. App. 41a with alteration and emphasis added).

2. In an even bolder effort to establish waiver, the intervenors' brief in opposition alters the text of Texas's district-court opposition to the fee motions and omits that opposition's multiple references to the constitutional argument that Texas presses here.

Texas's opposition asserted that "[t]he intervenors cannot be the 'prevailing party'" and that "*Shelby County* require[d] immediate denial of all motions for fees and costs." Pet. App. 64a. And citing both *Shelby County* and *Norton v. Shelby County*, 118 U.S. 425, 442 (1886), it articulated the State's position as follows:

> The federal statute purporting to require preclearance was a nullity, and the entire exercise of subjecting Texas to "preclearance" was an *unconstitutional imposition* on the State. These proceedings have already imposed significant *unconstitutional burdens* on the State. The intervenors unnecessarily aggravated those *unconstitutional burdens* by injecting themselves into the State's then-compulsory preclearance lawsuit against the United States. They should not be allowed to further aggravate *those burdens* by seeking payment from the State of Texas for

> their voluntary participation in a proceeding that never should have been held in the first place.

Pet. App. 63a (emphases added) (citations omitted).

The brief in opposition never mentions those "unconstitutional burdens." It instead alters the final sentence of this passage, limiting it to the assertion that the intervenors "should not be allowed to further aggravate *[the preclearance]* burdens." Br. in Opp. 21 (emphasis added to bracketed text inserted by the intervenors). The Court should not be misled by that incomplete, altered passage. Texas's opposition to the fee motions raised Texas's *Shelby County* argument, as the intervenors conceded and the court of appeals found. Intervenors' CADC Br. 14; Pet. App. 15a.

Finally, although the intervenors accurately note that Texas's district-court opposition concluded by stating that Texas "d[id] not intend to respond unless requested to do so by the Court," Pet. App. 64a, the surrounding text makes clear that Texas *was* making a substantive response in opposition based on *Shelby County* that precluded any need to respond to the other arguments that the intervenors had advanced. Texas's waiver of any response to the other arguments does not mean that it failed to preserve its independently dispositive *Shelby County* point.

3. The intervenors' position is also foreclosed by this Court's precedent. The Court has made clear that "[p]arties are not confined . . . to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899); *see* Pet. 29. "A litigant seeking review in this Court of a claim properly raised in the

lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). Far from "never [having] set it up or in any way alluded to it," *Dewey*, 173 U.S. at 200, Texas presented its *Shelby County* argument at every stage below.

The intervenors' assertion (at 22 n.6) that Texas is attempting to present a new claim, rather than additional arguments in support of an existing claim, is both unsupported and insupportable. Texas's opposition expressly raised the claim that the fee motions should be denied because the intervenors were seeking to impose "unconstitutional burdens" and "cannot be the 'prevailing party.'" Pet. App. 63a, 64a. The Court has repeatedly rejected contentions similar to those raised by the intervenors. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330–31 (2010); *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); *Yee*, 503 U.S. at 534.

As the Court has explained, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). If anything, that rule has added vitality when the question is whether a lower court, in proceedings on remand from this Court, has followed or flouted the Court's precedents.

In this case, Texas unquestionably made a constitutional claim based on *Shelby County*, and it is free to present additional arguments to this Court in support of that claim. *See, e.g.*, *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 677–78 & n.27 (2001); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000). All the more so here, where the court of appeals' rejection of the petitioner's primary constitutional assertion led the court to introduce new error in conflict with numerous sister circuits and other lower courts. *See* Pet. 18a–21a; *see also City of St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988) (plurality opinion) ("It should not be surprising if petitioner's arguments in the District Court were much less detailed than the arguments it now makes in response to the decision of the Court of Appeals. That, however, does not imply that petitioner failed to preserve the issue raised in its petition for certiorari.").

The intervenors' heavy reliance (at i, 1, 7, 9, 10, 13–17, and 19) on the district court's local rule 7(b) is also misplaced. The district court explained that where a party's "opposition . . . addresses only *some* of the arguments raised in the underlying motion," Rule 7(b) allows "courts [to] deem the *unaddressed* arguments as conceded." Pet. App. 39a (second emphasis added). While it abandoned inessential arguments, Texas's opposition expressly addressed the question of whether the intervenors could obtain a fee award notwithstanding *Shelby County*. *Id.* at 63a–64a. The intervenors conceded, and the court of appeals acknowledged, that this language preserved *some* argument based on *Shelby County*. *See supra* Part B.1. Those observations necessarily refute

any suggestion that Texas preserved *no* argument based on *Shelby County*. *Cf.* Br. in Opp. 13–14.

Moreover, "[o]rderly rules of procedure" regarding preservation "do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). Without ever finding that the intervenors were prevailing parties, the D.C. Circuit contorted waiver principles to support a sizeable award of attorneys' fees more than eleven months after this Court invalidated the statute on which their claim depended. Texas should not be forced to pay that price, which exacerbates the unconstitutional federalism costs recognized in *Shelby County*.

C. The Conflict Over When This Court's Decisions Take Effect Is Both Real And Significant.

In an effort to avoid the immediate effect of *Shelby County*, the court of appeals broadly declared that "Supreme Court judgments on review of a federal court decision do not take effect until at least 25 days after they are announced." Pet. App. 19a. That statement is indefensible, *see* Pet. 22–25, and the intervenors make no effort to defend it. Numerous courts have recognized that this Court's declarations of the law take effect as soon as opinions are handed down from the bench. *See id.* at 18–21. The D.C. Circuit's opinion thus creates an intolerable split of authority with widespread implications. *See id.* at 21.

The intervenors do not deny those implications. They instead attempt to save the court of appeals' judgment by trying to distinguish this case from others in which "the lower courts had jurisdiction over the case at the

time the Supreme Court announced its decision." Br. in Opp. 27–28. But identifying which court in the judicial hierarchy had jurisdiction to act in a particular case on the day a decision of this Court was handed down has nothing to do with whether this Court's decisions have precedential effect the day they issue. *See* Pet. 19 (explaining that the intervenors could not be prevailing parties if *Shelby County* took effect on June 25, 2013—the day the Court issued both its decision and its judgment, *see* Pet. App. 69a, and one day before Texas adopted new redistricting plans). Regardless, the D.C. Circuit's unqualified statement that this Court's decisions "do not take effect until at least 25 days after they are announced," Pet. App. 19a, creates a conflict that should not be allowed to persist.*

Finally, although the intervenors also assert that the court of appeals' erroneous analysis of when *Shelby County* took effect was inessential to its judgment, that assertion likewise fails. If *Shelby County* had the imme-

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* Although it criticizes *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the press release issued by the Attorney General of Texas that the intervenors cite (at 27 n.8) does not deny *Obergefell*'s immediate effect. Indeed, the same day *Obergefell* was decided, the State declined to oppose a motion to lift the stay of an injunction against Texas's laws prohibiting same-sex marriage. *See De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. 2015). And counsel of record here informed the Fifth Circuit, just four days after *Obergefell* was decided, that the plaintiffs in the *De Leon* case were entitled to a judgment in their favor under *Obergefell*. *See id.*; Ltr. from Solicitor General of Texas, *De Leon v. Abbott*, No. 14-50196 (5th Cir. June 30, 2015).

diate effect of preventing an award of attorneys' fees dependent on the validity of the statute *Shelby County* retroactively nullified, the fee award could not be sustained even if the court of appeals were correct on each of the other four points it addressed. *Compare* Pet. 25–27 (explaining the irrelevance of those points if *Shelby County* had immediate effect), *with* Br. in Opp. 27 (wrongly characterizing the points as independent bases for affirmance).

* * *

At bottom, able counsel for the intervenors can muster no theory for how courts can enter remedies predicated on a statute this Court has declared an unconstitutional nullity, and they do not dispute that this Court's decisions take effect the day they are announced. Waiver is no obstacle, and certiorari is warranted.

Respectfully submitted.

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