No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2011, Texas sought preclearance of certain redistricting plans under Section 5 of the Voting Rights Act. A three-judge district court denied preclearance, and Texas appealed to this Court. While that appeal was pending, the Court decided *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), declaring the coverage formula in Section 4(b) of the Act unconstitutional and thus establishing that Texas's plans were never subject to Section 5's preclearance requirement in the first place.

A year later, a single-judge district court nevertheless entered an order awarding attorneys' fees to several intervenors in the preclearance suit based on the initial ruling in their favor. The D.C. Circuit affirmed, reasoning that Texas mooted the case the day after *Shelby County* was decided by adopting new redistricting plans. To reach this conclusion, the D.C. Circuit held that *Shelby County* did not take effect the day the Court decided it—but only after the Clerk sent the lower court a certified copy of the judgment several weeks later.

The questions presented are:

1. Whether the Constitution allows attorneys' fees to be awarded to parties who obtained a victory under a statute that this Court held unconstitutional before the fee order was entered.

2. In the alternative, whether this Court's decisions take effect the day they issue, such that the intervenors here cannot be "prevailing parties" because *Shelby County* took effect before Texas adopted new redistricting plans.

PARTIES TO THE PROCEEDING

Petitioner is the State of Texas.

Respondents who were appellees in the court of appeals are the United States of America and Loretta E. Lynch, in her official capacity as Attorney General of the United States.

Respondents who were intervenors in support of the appellees in the court of appeals are Wendy Davis, Senator; John Jenkins; Vicki Bargas; Romeo Munoz; Greg Gonzales; Lisa Aguilar; Daniel Lucio; Victor Garza; Blanca Garcia; Josephine Martinez; Katrina Torres; Nina Jo Baker; the Texas Legislative Black Caucus; the Texas Latino Redistricting Task Force; the Texas State Conference of Branches of the NAACP; Juanita Wallace; Rev. Bill Lawson; Howard Jefferson; Ericka Cain; Nelson Linder; Reginald Lillie; and Marc Veasey.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General of Texas, on behalf of the State of Texas, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–21a) is reported at 798 F.3d 1108. The opinion of the district court (App. 22a–50a) is reported at 49 F. Supp. 3d 27.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

1. 42 U.S.C. § 1988(b) provides:

Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

2. 52 U.S.C. § 10310(e) provides:

Attorney's fees

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

STATEMENT

A. Texas's Preclearance Lawsuit

1. After the 2010 census, Texas redrew its plans for state and congressional voting districts. *See* App. 23a. The coverage formula of Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b) (2012), was unconstitutional when reenacted in 2006. *Shelby County*, 133 S. Ct. at 2630–31. But the federal courts and the Department of Justice continued to enforce Section 5's preclearance requirement. *See* 42 U.S.C. § 1973c(a) (2012); App. 4a–5a. Because the coverage formula included Texas, the State was required, as a practical matter, to seek preclearance of its newly enacted redistricting plans. Texas therefore filed suit in the United States District Court for the District of Columbia, naming the United States and the Attorney General as defendants and requesting a declaration that its plans complied with Section 5. *See* App. 24a.

The United States opposed preclearance of two of the four plans at issue. *See id.* Various voters, state representatives, and advocacy groups intervened as defendants, and each opposed preclearance of at least one plan. *See* App. 24a–25a.

The preclearance claims were tried before a three-judge district court. *See* App. 25a. Because no party objected to one of the four plans, the district court entered judgment in favor of Texas with respect to it. *See id.* But the court denied preclearance of the remaining three plans, including a plan that the United States had not challenged. *Texas v. United States*, 887 F. Supp. 2d 133,

178 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013) (mem.); *see* App. 6a.

2. Texas appealed to this Court. *See* App. 56a. While that appeal was pending and shortly thereafter, several events occurred in close succession:

- On June 21 and 23, 2013, the Texas Legislature passed bills to enact new redistricting plans that would replace the ones on which the district court had ruled. *See* App. 27a. Those bills would not become law, however, until they were signed by the Texas Governor. *See* Tex. Const. art. IV, § 14.
- On June 24, 2013, the intervenors filed a motion asking this Court to dismiss Texas's appeal as moot in light of the Legislature's passage of the bills, which had not yet become law. *See* App. 56a.
- Most importantly, on June 25, 2013, the Court decided *Shelby County*, holding that Section 4(b) of the Voting Rights Act was unconstitutional. 133 S. Ct. at 2631; *see* App. 69a (*Shelby County* judgment dated June 25, 2013). That same day, Texas responded to the intervenors' motion to dismiss in this Court, asserting that "[t]he critical intervening event for purposes of Texas's appeal is not any forthcoming action of the Governor but today's decision [in *Shelby County*]." Appellant's Opposition to Appellee-Intervenors' Motion to Dismiss Appeal as Moot at 1, *Texas v. United States*, No. 12-496 (U.S. June 25, 2013).
- A day after *Shelby County* was decided, on June 26, 2013, the Texas Governor signed into law the

Legislature's redistricting bills of June 21 and 23, 2013. *See* App. 28a.

- On June 27, 2013, this Court vacated the district court's judgment denying preclearance of Texas's redistricting plans, remanding the case "for further consideration in light of *Shelby County* . . . and the suggestion of mootness of [the intervenors.]" *Texas*, 133 S. Ct. at 2885.
- On July 3, 2013, in the district court, Texas moved to dismiss its preclearance suit based on *Shelby County*. App. 66a–68a (further advising the court of the Legislature's actions of June 21 and 23, 2013).

3. In its order granting Texas's motion to dismiss, the three-judge district court recognized that "*Shelby County* relieved Texas of the need to seek preclearance." App. 58a. The court rejected the intervenors' effort to invoke the voluntary-cessation exception to the mootness doctrine based on Texas's adoption of new redistricting plans the day after *Shelby County* was decided. As the district court explained:

> [T]here is more at work here than the Texas legislature's decision to abandon the 2011 plans. The decision in *Shelby County* dismantled the legal framework that called for preclearance of Texas's redistricting plans in the first place. That alone rendered Texas's claim for declaratory relief moot.

App. 59a; *see* App. 57a (noting that *Shelby County* "remov[ed] all previously covered jurisdictions, including Texas, from the preclearance regime of Section 5"). The

district court did not resolve the question of whether the intervenors were entitled to fees, however, and stated that the issue would remain open after dismissal. App. 59a.

B. The Intervenors' Motions For Attorneys' Fees

1. A subset of the intervenors claimed prevailing-party status and moved for attorneys' fees under 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e). *See* App. 6a, 9a, 29a. Texas objected based on *Shelby County*. It raised its objections in a five-paragraph memorandum of points and authorities opposing the motions for attorneys' fees, which was labeled as an "Advisory." App. 62a–65a.

First and foremost, the State argued that *Shelby County* was the constitutional law of the land—at the time of the State's opposition to the fee request, it had held that status for nearly six months. That meant that at the time the district court considered the intervenors' fee request, it was indisputable that the Act's preclearance regime imposed unconstitutional federalism costs on States like Texas. *See Shelby County*, 133 S. Ct. at 2627.

The State thus argued that awarding attorneys' fees to the intervenors would exacerbate those unconstitutional federalism costs:

> 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.

App. 63a (citing *Shelby County*, 133 S. Ct. at 2631, and also *Norton v. Shelby County*, 118 U.S. 425, 442 (1886), for the proposition that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed"). Therefore, the State explained, "*Shelby County* requires immediate denial of all motions for fees and costs." App. 64a.

Second, the State argued that "[t]he intervenors cannot be the 'prevailing party'" under either of the two attorneys' fees statutes at issue. *Id.* That is so, the State argued, because the intervenors "prevailed" only in securing a judgment that was unsustainable the moment *Shelby County* was decided: "The intervenors' attempt to recover attorneys' fees and costs from the State of Texas disregards the holding of *Shelby County* . . . ." *Id.*

2. After the parties filed their briefs on attorneys' fees, the three-judge court dissolved, leaving the case to a single district judge who had served on the three-judge panel that granted Texas's motion to dismiss. App. 53a–54a.

On June 18, 2014—almost one year after this Court issued its decision in *Shelby County*—the single-judge district court concluded that the intervenors satisfied the statutory definition of "prevailing party." App. 29a–50a,

51a–52a. The court conceded that the State properly preserved its *Shelby County* arguments against the intervenors' fee applications. In particular, the district court acknowledged that "Texas rests entirely on *Shelby County*" and had asserted that under *Shelby County*, "the entirety of the preclearance process, including this Court's denial of preclearance, was a constitutional 'affront' and nullity." App. 38a.

Despite that acknowledgment, the district court never explained how it had the constitutional authority to enter a fee award predicated on a statute that this Court declared unconstitutional a year earlier. The district court never addressed how it could award attorneys' fees to preclearance intervenors without aggravating the unconstitutional federalism costs that this Court identified in *Shelby County*, 133 S. Ct. at 2627. And the single-judge district court never explained how its fee award could be reconciled with the three-judge district court's holding that this Court's constitutional "decision in *Shelby County* dismantled the legal framework that called for preclearance of Texas's redistricting plans in the first place." App. 59a.

Instead, the district court concluded that the intervenors became "prevailing parties" under 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e) on June 26, 2013. App. 45a–46a. That was the day *after* this Court decided *Shelby County*—the day that the Texas Governor signed into law the new redistricting plans that repealed the plans that the intervenors had challenged in this preclearance suit. *See* App. 43a. The district court reasoned as follows: (1) on August 28, 2012, the intervenors "prevailed" in opposing preclearance of Texas's plans (albeit

under an unconstitutional preclearance regime); (2) on June 26, 2013, the intervenors "prevailed" in getting the plans changed; and (3) "[a]lthough the Supreme Court ultimately vacated this Court's [August 28, 2012,] opinion, neither *Shelby County* nor the vacatur erased the real-world vindication that [the intervenors] had achieved." *Id.*

The district court faulted the State for purportedly "waiving" arguments. For example, it faulted the State for waiving any challenge to "the applicability of *Buckhannon* [*Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001)], or the prevailing-party status of [the intervenors] at the time the Court denied preclearance to Texas and thereafter, when Texas enacted new redistricting [plans]." App. 41a; *but see* App. 64a (preserving Texas's objection that "[t]he intervenors cannot be the 'prevailing party'").

Based on this reasoning, the district court awarded over $1 million in attorneys' fees and costs to the subset of intervenors that sought them. App. 51a–52a.

3. The D.C. Circuit affirmed. Like the district court, the court of appeals conceded that Texas properly preserved its opposition, based on *Shelby County*, to the district court's fee award. App. 15a. And also like the district court, the court of appeals said *nothing* about Texas's constitutional challenge to the district court's authority in June 2014 to issue its fee award based on a statute that had been declared unconstitutional a year earlier. Rather, the D.C. Circuit treated Texas's *Shelby County* arguments as entirely dependent on this Court's "June 27, 2013 order that vacated the district court's

judgment denying Texas preclearance" in this case. App. 15a (citing the vacate-and-remand order in *Texas v. United States*).

The court of appeals then identified five reasons for rejecting that straw man. First, even though 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e) each require the movant for fees to be a prevailing party, the court analyzed whether Texas (the non-moving party opposing fees) was a prevailing party and concluded that it was not. App. 15a. Second, the court stated that this Court's June 27, 2013, vacate-and-remand order in this case had "no precedential weight and d[id] not dictate how the lower court should rule on remand." App. 16a. Third, the court rejected the idea that "the import of *Shelby County* [was] obvious," again referencing the June 27 vacate-and-remand order. App. 17a–18a. Fourth, the court defended the district court's application of circuit precedent on mootness in the attorneys' fees context to the Governor's June 26, 2013, act of signing the new redistricting plans into law, stating that Texas was "wrong to argue now that its legislative adoption of new voting districts did not contribute to mooting the case." App. 18a–19a. Finally, the court of appeals concluded that *Shelby County* became effective not on June 25, 2013, when the Court's decision issued, *see* App. 69a, but rather more than a month later, when the Clerk issued a certified copy of the judgment in lieu of a formal mandate. App. 19a.

Without ever finding that the district court had constitutional authority to ignore *Shelby County* in June *2014*, and without ever finding that the intervenors were prevailing parties under any statute, the court of appeals affirmed the fee award. *See* App. 21a.

REASONS FOR GRANTING THE PETITION

This is a case about the Court's authority to establish the supreme law of the land through its constitutional rulings. Both questions presented implicate the precedential effect of this Court's ruling in *Shelby County*. And although the opinions below criticize Texas for deciding not to make certain arguments, they acknowledge, as they must, that Texas *did* preserve its opposition based on *Shelby County*.

The district court was bound by the constitutional law in effect at the time it awarded fees to the intervenors. In June 2013, this Court declared that the Voting Rights Act's preclearance regime imposed unconstitutional federalism costs on States like Texas. Whether that ruling went into effect in June 2013 or (as the court of appeals would have it) in July 2013, it unquestionably was the law of the land in June *2014*—when the district court erroneously granted the intervenors' motions for attorneys' fees. Nothing in the opinions below provides any justification for a district court to enter a fee award to parties who "prevailed" under a statute that was irrefutably unconstitutional.

Yet the courts below never addressed Texas's constitutional argument that attorneys' fees could not be awarded because doing so would impose the same unconstitutional federalism costs that the Court had already recognized in *Shelby County*. It was error for the lower courts to award fees in contravention of this Court's constitutional ruling, and it was doubly erroneous for the lower courts to do so without addressing the constitutional argument that Texas preserved. That alone merits this Court's intervention.

Even beyond that constitutional argument, no attorneys' fees could be awarded for the alternative reason that the intervenors could not be prevailing parties as of the moment *Shelby County* was decided because *Shelby County* nullified the preclearance framework. This separate question also warrants further review, as the D.C. Circuit's contrary decision creates a split of authority with various courts of appeals that have correctly recognized that this Court's opinions have binding effect in other pending cases the day they issue. Although examples abound, lower courts' recognition of the immediate effect of this Court's recent decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), illustrates the point. Just as *Obergefell* was the supreme law of the land the day it was decided, so was *Shelby County*.

The D.C. Circuit saw fit to affirm the district court's fee award because the Texas Governor signed new redistricting plans into law between the day *Shelby County* was decided and the day the Clerk issued a certified copy of the *Shelby County* judgment. The Clerk's ministerial act of issuing a mandate or a certified copy of the judgment is necessary to transfer jurisdiction back to a lower court in the same case. But numerous lower courts have correctly held, contrary to the D.C. Circuit's erroneous conclusion in this case, that this Court's opinions have binding effect in other pending cases the day they issue.

The Court should grant certiorari to confirm that (1) the Constitution does not permit attorneys' fees to be awarded based on a lower-court victory predicated on an unconstitutional statute, and (2) lower courts cannot refuse to apply this Court's precedents for nearly a month after they issue.

A. The Court Should Confirm That District Courts Cannot Enter Fee Awards Predicated On Unconstitutional Statutes.

For the same reason that *Shelby County* invalidated the Voting Rights Act's preclearance framework, the Constitution does not permit Congress to authorize an award of attorneys' fees predicated on a victory under that nullified preclearance statute. Such an award exacerbates the unconstitutional federalism costs the Court recognized in *Shelby County*, 133 S. Ct. at 2627.

1. a. It is blackletter law, almost as old as the nation itself, that each court must apply the law as it stands at the time of the court's decision. Chief Justice Marshall explained the rule in *United States v. Schooner Peggy*: "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 5 U.S. (1 Cranch) 103, 110 (1801). Thus, "the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id.*; *see also, e.g.*, *Vandenbark v. Owens-Ill. Glass Co.*, 311 U.S. 538, 543 (1941) (explaining that all federal courts sitting in diversity must follow state law in effect at the time of the federal decision). It is clear, under *Schooner Peggy*, that a district court cannot render a decision in the first place on the basis of a statute that this Court declared unconstitutional *before* the district court's ruling.

That result follows from this Court's power to say what the law is. Again to quote Chief Justice Marshall, "the theory of every [constitution-based] government must be[] that an act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And

> [i]f an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory.

Id.

To permit otherwise "would declare[] that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual." *Id.* at 178. This Court disclaimed that result in *Marbury* and has repeatedly repudiated it. *See, e.g.*, *Chi., I. & L.R. Co. v. Hackett*, 228 U.S. 559, 566 (1913) ("That [unconstitutional] act was therefore as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."); *Norton*, 118 U.S. at 442 ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."); *Ex parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

On June 18, 2014, the day the district court entered its fee award, this Court in *Shelby County* had already

exercised its prerogative "to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. And this Court did so by holding that the Voting Rights Act's preclearance regime imposed unconstitutional "federalism costs" on States like Texas. *Shelby County*, 133 S. Ct. at 2627 (internal quotation marks omitted). Regardless of whether *Shelby County* became effective "instantly" in June 2013 or a month later in July 2013, App. 19a, it unquestionably was this Court's final, authoritative, and controlling interpretation of the Constitution a full year later in June 2014. And that means the district court was bound to follow it.

The district court, however, disregarded the unavoidable import of *Shelby County*. In doing so, it gave effect to the Voting Rights Act's preclearance regime, "notwithstanding its invalidity." *Marbury*, 5 U.S. (1 Cranch) at 177. Indeed, the district court exacerbated the Act's unconstitutional "federalism costs" by awarding more than $1 million in attorneys' fees and costs. That flatly violates this Court's power to establish a controlling principle of federal constitutional law.

b. Even if *Shelby County* had been decided *after* the district court entered its fee award, the D.C. Circuit still would have been obligated to deny fees to the intervenors as long as this case was pending on direct appeal. As the Court has explained, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86,

97 (1993); *see also* App. 64a (quoting *Harper* to the district court).

Shelby County obviously was in effect before the district court entered its June 2014 fee award and before the court of appeals affirmed that award. *Harper* only further proves just how misguided the court of appeals was in fixating on whether *Shelby County* became the constitutional law of the land before Texas adopted new redistricting plans.

2. The district court's only justification for ignoring *Shelby County* was that the intervenors satisfied the statutory definition of "prevailing party" and that Texas waived any argument that the intervenors had done so. As explained below, the district court's blanket assertion of waiver, on which the court of appeals relied heavily, is insupportable. But in any event, the intervenors' satisfaction of the prevailing-party *statutes* would not make it *constitutional* for a court to award them fees.

Put differently, awarding fees to the intervenors after *Shelby County* was an unconstitutional application of 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e). If the Constitution prohibits Congress from haling States like Texas into federal court to justify their sovereign lawmaking decisions, *see Shelby County*, 133 S. Ct. at 2627–31, then the Constitution *also* must prohibit Congress from authorizing awards of attorneys' fees that "further aggravate [significant unconstitutional] burdens by seeking payment from the State of Texas for [the intervenors'] voluntary participation in a proceeding that never should have been held in the first place." App. 63a. This case is therefore a compelling example of what the Second Circuit had in mind when it recognized that "a

final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiffs prevailed . . . might make unjust the subsequent award of attorney's fees to plaintiffs who would no longer be entitled to prevail on their theory." *N.Y. State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998).

Limiting the application of 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e) to cases in which the underlying legal claims advanced by the "prevailing parties" do not conflict with the Constitution ensures that the fee statutes cannot be used to subvert this Court's decisions and constitutional limits on Congress's power. Failure to limit the fee statutes in this way would empower lower courts to breathe life into statutes declared unconstitutional by this Court, as happened here. *But see, e.g.*, *Norton*, 118 U.S. at 442. It also would enable Congress to enact other statutes that could be used to resurrect unconstitutional legal theories and causes of action. *But see Marbury*, 5 U.S. (1 Cranch) at 178 (rejecting the idea that "if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual"). After all, if relief under 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e) need not be tethered to a constitutionally valid litigation position, then the entitlement to relief under other statutes also could be found even when the Constitution demands otherwise.

3. When the Court declares a statute unconstitutional, it necessarily also declares unconstitutional any relief that later might be awarded based on that statute. That is why it is correct to say that a statute declared unconstitutional is a "nullity." App. 63a. To be sure, when

a statute is declared unconstitutional, that does not necessarily and retroactively nullify all final judgments previously entered under it and no longer pending on appeal; res judicata still applies. *See Chicot Cnty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 375 (1940). But it is equally obvious that a declaration of a statute's unconstitutionality does nullify all rulings that might be *subsequently* entered pursuant to that nullified statute. Denying the latter proposition requires open defiance of this Court's constitutional pronouncements.

In June 2014, this Court's controlling interpretation of the Constitution required the district court to recognize that the Voting Rights Act is unconstitutional insofar as it required Texas to engage in preclearance litigation. The exact same constitutional analysis also required the district court to recognize that it cannot force the State of Texas to pay over $1 million to the intervenors that opposed the State in that unconstitutional preclearance litigation. There is no dispute that the State expressly, emphatically, and repeatedly preserved that constitutional argument. And it warrants a grant of certiorari.

B. The Court Should Resolve The Conflict Of Authority Over The Important Issue Of When This Court's Decisions Take Effect.

The D.C. Circuit's conclusion that *Shelby County* did not have precedential effect in this case until the Clerk issued a certified copy of the judgment, App. 19a, conflicts with decisions of several federal courts of appeals and state high courts. Even beyond the constitutional argument that the lower courts never addressed, *see supra*

Part A, this argument about prevailing-party status is an independent, alternative basis for denying the award of attorneys' fees in light of *Shelby County*. That is so because "[t]he intervenors cannot be the 'prevailing party'" under the attorneys' fees statutes if *Shelby County* took effect the day it was decided—before Texas adopted new redistricting plans. App. 64a. This additional question presented also warrants a grant of certiorari because the D.C. Circuit's erroneous reasoning further undermines this Court's authority and introduces uncertainty into questions about what the supreme law of the land is on a given date.

1. Contrary to the D.C. Circuit's conclusion, other circuits and state high courts recognize that decisions of this Court are immediately binding in other pending cases. And this split of authority has implications far beyond the circumstances of this case.

a. Just five days after the Court decided *Obergefell*, and 27 days before the Clerk issued a certified copy of that judgment (*see* Docket, No. 14-574 (U.S.)), the Fifth Circuit stated in three decisions that "*Obergefell*, in both its Fourteenth and First Amendment iterations, is the law of the land and, consequently, the law of this circuit." *Campaign for S. Equality v. Bryant*, 791 F.3d 625, 627 (5th Cir. July 1, 2015); *De Leon v. Abbott*, 791 F.3d 619, 625 (5th Cir. July 1, 2015); *Robicheaux v. Caldwell*, 791 F.3d 616, 618 (5th Cir. July 1, 2015). The Fifth Circuit's decisions instructed the district courts to enter final judgments on the merits for the plaintiffs, who had challenged state laws prohibiting same-sex marriage, no later than July 17, 2015—eleven days before a certified copy of the judgment in *Obergefell* would issue. *Id.*

The Fifth Circuit is not alone in recognizing the immediate effect of this Court's decisions in pending cases. The Eleventh Circuit granted relief based on *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the day that opinion issued. *Eternal Word Tel. Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014). And several other circuits have recognized that decisions of this Court have precedential effect before the Clerk issues a certified copy of the judgment. *E.g.*, *Yarris v. County of Delaware*, 465 F.3d 129, 143 (3d Cir. 2006) (stating that the relevant law was clearly established on November 29, 1988, the day the Court decided *Arizona v. Youngblood*, 488 U.S. 51 (1988)); *United States v. Davis*, 397 F.3d 340, 341 (6th Cir. 2005) (vacating and remanding a criminal defendant's sentence in light of *United States v. Booker*, 543 U.S. 220 (2005), which had been decided the previous week); *see also, e.g.*, *N.Y. Progress & Prot. PAC v. Walsh*, 17 F. Supp. 3d 319, 322 (S.D.N.Y. 2014) (conceding, 22 days after the decision in *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), that *McCutcheon* was binding precedent even though the district court disagreed with it).

State high courts also recognize that they must follow this Court's decisions immediately. In *Loggins v. State*, for instance, the Alabama Court of Criminal Appeals ruled that a capital defendant's "death sentence must be vacated based on the authority of [this] Court's recent decision in *Roper v. Simmons*, 543 U.S. 551 . . . (2005)." 910 So. 2d 146, 154 (Ala. Crim. App. 2005); *accord, e.g.*, *State v. Wilson*, 899 So. 2d 551, 551 (La. 2005) (per curiam). *Loggins* was decided ten days after the Court's

March 1, 2005, decision in *Roper* and 21 days before the mandate issued. *See* Docket, No. 03-633 (U.S.).

b. Knowing when a decision of this Court establishes the law of the land is important in several contexts, including habeas corpus and qualified immunity. *See* 28 U.S.C. § 2254(d)(1) (precluding federal habeas relief for state prisoners unless the state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"); *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012) (explaining that "[q]ualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct").

In each of these contexts, federal law becomes clearly established through this Court's pronouncements in opinions, and the dates of those opinions can be determinative. *See, e.g.*, *Greene v. Fisher*, 132 S. Ct. 38, 45 (2011) (holding that a decision of this Court that issued three months after the last state-court adjudication on the merits of a habeas corpus petitioner's claim was not clearly established at the relevant time). Under the D.C. Circuit's reasoning, however, federal law as stated in an opinion of the Court would become clearly established only after the Clerk issued a mandate or a certified copy of the judgment, requiring reference to court dockets for information that is typically not made widely available.

The conflict of authority implicated by the second question presented thus has exceptional importance far beyond the precise facts of this case.

2. Under the correct understanding of when this Court's decisions become effective, *Shelby County* was the supreme law of the land the day it was decided. Indeed, the three-judge district court had previously recognized that "[t]he decision in *Shelby County* dismantled the legal framework that called for preclearance of Texas's redistricting plans in the first place." App. 59a.

a. Under *Shelby County*, Section 4(b) of the Voting Rights Act was an unconstitutional nullity since at least 2006, when it was most recently reauthorized. *See* 133 S. Ct. at 2630–31. Quoting this Court's precedent, Texas explained in its opposition to the intervenors' request for attorneys' fees that *Shelby County* "'must be given full retroactive effect in all cases still open on direct review.'" App. 64a (quoting *Harper*, 509 U.S. at 97).

The full retroactive effect of this Court's decisions does not await the Clerk's ministerial act, under Rule 45, of issuing a certified copy of the Court's judgment to a federal court of appeals or a mandate to a state court. *See, e.g.*, *Linkletter v. Walker*, 381 U.S. 618, 639 (1965) (stating that "[i]t was the judgment of this Court [in *Mapp v. Ohio*, 367 U.S. 643 (1961),] that changed the rule and the date of that opinion [rather than the date of the seizure in *Mapp*] is the crucial date"), *overruled on other grounds by Griffith v. Kentucky*, 479 U.S. 314, 320–28 (1987); *see also, e.g.*, *Chambers v. United States*, 22 F.3d 939, 942 n.3 (9th Cir. 1994) (recognizing that circuit decisions are binding precedent the day they are handed down, even though the mandate has not yet issued), *vacated on other grounds*, 47 F.3d 1015 (9th Cir. 1995); *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (same).

Contrary to the D.C. Circuit's suggestion, App. 19a–20a, the mere potential for rehearing does not deprive this Court's rulings of immediate effect. Although Rule 44 does introduce the possibility that a lower court could rely on a decision that this Court later vacates, that possibility is almost never realized. *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice 836–37 (10th ed. 2013). In any event, this Court's decisions have precedential effect while motions for rehearing are pending. *See, e.g.*, *Yarris*, 465 F.3d at 143 (concluding that *Youngblood* was effective on the day it was decided, even though rehearing was not denied in *Youngblood* until nearly two months later).

That this Court directs its judgments to issue forthwith in some cases, App. 20a, does not support the court of appeals' conclusion that decisions remain ineffective until the Clerk issues a certified copy of the judgment. The Court directs a judgment to issue forthwith when a lower court in the same case has an immediate need to reacquire jurisdiction and act. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (per curiam). And when the Court does not want its opinion to take effect immediately, it expressly says so by staying the judgment. *See, e.g.*, *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (staying the Court's judgment, and thus the effectiveness of its decision, *see United States v. Sec. Indus. Bank*, 459 U.S. 70, 74 n.5 (1982), to give Congress time to respond to the Court's decision).

These infrequently invoked procedures only underscore the immediate precedential effect of this Court's decisions in other pending cases. In such cases, lower courts do not go hunting for certified copies of the

Court's judgments; they simply read and apply the Court's holdings, which appear first in slip opinions available shortly after opinions are announced from the bench and are later published in the United States Reports. *See* 28 U.S.C. § 411(a).

Shelby County therefore took effect on June 25, 2013—as soon as it was decided.

b. The court of appeals' suggestions that Texas could not benefit from *Shelby County* because it declined to challenge the constitutionality of Section 5 in this case and because *Shelby County* invalidated only Section 4(b) of the Act merely highlight the weakness of the court of appeals' reasoning on the merits. *See* App. 20a (questioning whether "Texas could benefit from *Shelby County* in this case, given that Texas told the district court directly that it was not challenging the constitutionality of the preclearance regime" and stating that *Shelby County* "invalidated [only] the formula used to determine which jurisdictions would be required to seek preclearance," rather than Section 5 itself).

Shelby County held that the coverage formula in Section 4(b) was unconstitutional the moment it was reenacted in 2006. 133 S. Ct. at 2630–31. And again, Texas explained in its opposition to the intervenors' request for attorneys' fees that "'[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.'" App. 63a (quoting *Norton*, 118 U.S. at 442, with alteration added). Accordingly, when the Court declares a statute unconstitutional, the statute is—and always was—a nullity. It cannot be given force by any means,

much less by virtue of a party's mere failure to affirmatively challenge it in another pending case.

The D.C. Circuit's further suggestion that *Shelby County* could not have affected Texas's Section 5 preclearance suit because the decision invalidated only Section 4(b)'s coverage formula, App. 20a, is equally erroneous. In granting Texas's motion to dismiss, the three-judge district court correctly recognized that, "[o]n June 25, [2013,] the Supreme Court announced its opinion in *Shelby County*, holding the [Voting Rights Act]'s coverage formula unconstitutional, thereby removing all previously covered jurisdictions, including Texas, from the preclearance regime of Section 5." App. 57a. In other words, even though *Shelby County* did not invalidate Section 5, it invalidated the provision that required Texas to seek Section 5 preclearance and thus established that Texas never should have been forced to file its preclearance suit.

3. The D.C. Circuit's other four reasons for granting attorneys' fees are both flawed and irrelevant to the questions presented.

a. The court of appeals first concluded that Texas was not a prevailing party for purposes of 42 U.S.C. § 1988(b) and 52 U.S.C. § 10310(e). App. 15a. But those statutes require the *movant* for fees to be the prevailing party; whether the *non-movant* can also claim prevailing-party status is irrelevant. *See* 42 U.S.C. § 1988(b) ("prevailing party" may be entitled to "a reasonable attorney's fee as part of the costs"); 52 U.S.C. § 10310(e) ("prevailing party" may be entitled to "a reasonable attorney's fee").

Significantly, the court of appeals never found that the intervenors were prevailing parties. The closest it came was noting that the intervenors had argued for prevailing-party status and erroneously stating that Texas waived any opposition to that argument. App. 8a–10a, 18a–19a; *see* App. 64a (Texas's advisory: "The intervenors cannot be the 'prevailing party' . . . ."); *id.* ("*Shelby County* requires immediate denial of all motions for fees and costs . . . ."); *supra* Part A; *infra* Part C.2.

b. Second, the court of appeals concluded that Texas had "misconstrue[d]" this Court's June 27, 2013, vacate-and-remand order in this case. App. 16a–17a. But the argument that Texas advances here does not depend on that order. It is instead based on the Court's June 25 decision in *Shelby County*, which Texas has always contended immediately extinguished any "prevailing party" status. Even assuming *arguendo* that the D.C. Circuit was correct about this Court's June 27 vacate-and-remand order, that could not support the court of appeals' judgment if the decision in *Shelby County* had immediate effect on June 25.

c. Third, the court of appeals suggested that the import of *Shelby County* was not "obvious." App. 17a. But that suggestion also depended on this Court's June 27 vacate-and-remand order, which the court of appeals stated "did not dictate any particular result on remand" and "certainly did not declare Texas the victor." App. 18a. The fact that a vacate-and-remand order from this Court does not guarantee a specific result says nothing about whether *Shelby County* nullified the statutory basis for the intervenors' claim of prevailing-party status.

d. Fourth, the court of appeals rejected Texas's argument that "*Shelby County* mooted [this] case the moment the Supreme Court announced the opinion," inaccurately claiming that "Texas never made that argument in the district court." App. 18a; *see* App. 67a (Texas's motion to dismiss citing *Shelby County* and asserting that because "Texas is no longer subject to preclearance, its claims in this Court are now moot"); App. 59a (order granting Texas's motion to dismiss stating that the decision in *Shelby County* "rendered Texas's claim for declaratory relief moot"); App. 64a (Texas's advisory claiming that "*Shelby County* requires immediate denial of all motions for fees and costs"). In this portion of its analysis, the court of appeals also suggested that Texas's adoption of new redistricting plans could have "contribute[d] to mooting the case." App. 19a; *but see In re Scruggs*, 392 F.3d 124, 129 (5th Cir. 2004) (per curiam) (correctly explaining that, because "[t]here is no such thing as being a little bit moot," an action that postdates a mooting event cannot make a case "'more moot'").

Flawed though it is, none of that analysis bears on the questions presented. *Shelby County* rendered Section 4(b) "a nullity," making "the entire exercise of subjecting Texas to 'preclearance' . . . an unconstitutional imposition on the State." App. 63a. There is no legitimate argument that the three-judge district court's judgment against Texas remained valid for even a moment after this Court issued its decision, just as there is no legitimate argument that the single-judge district court's fee award was valid on the day it was issued. The Court should grant certiorari to confirm these points and resolve the circuit split that the court of appeals' erroneous decision created

by attempting to avoid the unavoidable effect of *Shelby County*.

C. This Case Is An Ideal Vehicle For Resolving The Questions Presented.

1. The timing of events in this case makes it an ideal vehicle to confirm this Court's power to establish the supreme law of the land.

The first question presented focuses on the single-judge district court's fee order, which was entered in June 2014. By that time, *Shelby County* had been the law of the land for almost a year. That timing squarely presents the question of whether the district court could nevertheless enter an order in direct contravention of this Court's constitutional pronouncement based on events that occurred before *Shelby County*.

The second question presented focuses on the precise date *Shelby County* became effective. *Shelby County* was decided on June 25, 2013. The next day, the Texas Governor signed into law bills that replaced the plans that Texas had sought to preclear. The day after that, the Court vacated the district-court judgment on which the intervenors' claims of prevailing-party status depended. Accordingly, the relevant dispute under the second question presented turns on whether Texas is correct that *Shelby County* had immediate effect in this case on June 25 (rather than June 27, when the Court issued its vacate-and-remand order in this case, or July 29, when the Clerk issued a certified copy of the *Shelby County* judgment, *see* Docket, No. 12-96 (U.S.)).

2. Contrary to the decisions below, waiver is no obstacle to resolution of the questions presented. In the opposition Texas filed in response to the intervenors' motions for attorneys' fees, the State expressly argued that "[t]he intervenors cannot be the 'prevailing party.'" App. 64a. The State posited that "[t]he intervenors' attempt to recover attorneys' fees and costs from the State of Texas disregards the holding of *Shelby County*." *Id.* And that opposition explained that *Shelby County* rendered "[t]he federal statute purporting to require preclearance . . . a nullity," made "the entire exercise of subjecting Texas to 'preclearance' . . . an unconstitutional imposition on the State," and thus "require[d] immediate denial of all motions for fees and costs." App. 63a–64a.

That Texas might have made additional arguments below is irrelevant. Texas's advisory did decline to respond to certain non-dispositive arguments based on circuit precedent, and it referred to the Court's vacate-and-remand order that disposed of the appeal in this case two days after *Shelby County* was decided. *See* App. 64a. But whether a petitioner waives other non-dispositive issues beyond the questions presented has no bearing on whether it properly raised the issues that actually are included in the questions presented. Accordingly, the court of appeals' extended discussion of waiver, App. 9a–15a, is a distraction. *See also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (stating that "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'" (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992))).

* * *

In derogation of its "sovereign dignity," *Alden v. Maine*, 527 U.S. 706, 715 (1999), Texas undertook the burdensome and costly task of seeking preclearance under the Voting Rights Act only because the coverage formula of Section 4(b) unconstitutionally forced it to do so. The intervenors' illusory "victory," secured under that unconstitutional statute, did not survive *Shelby County* and could not support a fee award the moment this Court invalidated the Act's preclearance regime. Texas should not be forced to pay the intervenors attorneys' fees for their voluntary participation in a lawsuit that, under *Shelby County*, never should have been filed in the first place.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 21, 2015 Decided August 18, 2015

No. 14-5151

STATE OF TEXAS,
APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia

(No. 1:11-cv-01303)

Matthew H. Frederick, Deputy Solicitor General, Office of the Attorney General for the State of Texas, argued the cause for appellant. On the briefs were *Ken Paxton*, Attorney General, *Scott A. Keller*, Solicitor General, *Adam W. Aston*, Deputy Solicitor General, and *Arthur C. D'Andrea*, Assistant Solicitor General.

Paul M. Smith argued the cause for appellees. With him on the brief were *Jessica Ring Amunson*, *Mark P. Gaber*, *John M. Devaney*, *Marc Erik Elias*, *Robert S. Notzon*, *J. Gerald Hebert*, *Renea Hicks*, and *Chad W. Dunn*.

Before: MILLET and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

MILLETT, *Circuit Judge*: The State of Texas appeals the district court's award of attorneys' fees to three intervenors in Texas's lawsuit under Section 5 of the Voting Rights Act, 52 U.S.C. § 10304. Rather than file a memorandum of points and authorities opposing the three separate motions for attorneys' fees as expressly required by court rules, Texas filed a three-page "Advisory" that presented only a brief contention that the Supreme Court's invalidation of Section 4 of the Voting Rights Act in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), automatically made Texas a "prevailing party." Beyond that, Texas offered no response to the arguments in the parties' motions and ignored complicating procedural factors in the case. In its "Advisory," Texas also declared that it would not participate any further in its own lawsuit unless "requested to do so" by the district court.

Applying one of its local rules, the district court held that Texas had conceded virtually all of the issues relevant to the motions for attorneys' fees by deliberately choosing not to address them. Rejecting Texas's cursory "Advisory" argument, the district court granted the motions and awarded fees. We affirm because "the discretion to enforce this rule lies wholly with the district court," *FDIC*

v. Bender, 127 F.3d 58, 68 (D.C. Cir. 1997), and Texas forfeited any challenge to the district court's exercise of that discretion by failing to even mention the issue in its opening brief in this court.

I

Legal Framework

District of Columbia District Court Rule 7(b)

District Court Local Rule 7(b) requires that any party opposing a motion must "serve and file a memorandum of points and authorities in opposition to the motion," and that "[i]f such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded." D.D.C. Local Rule 7(b). "The rule is understood to mean that if a party files an opposition to a motion and therein addresses only some of the movant's arguments, the court may treat the unaddressed arguments as conceded." *Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) (citing *Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003)). "Such a concession acts as [a] waiver, such that a party cannot raise a conceded argument on appeal." *Id.* (internal quotation marks and brackets omitted).

The Voting Rights Act

Congress enacted the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, "to banish the blight of racial discrimination in voting[.]" *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). Section 2 of the Act, which applies nationwide, bans any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen * * * to vote on account of race or color

[or membership in a language minority group]." 52 U.S.C. § 10301(a).

Section 5, which applies only to certain jurisdictions, provides that, "[w]henever" a covered jurisdiction seeks to change any voting procedure, it must first obtain administrative preclearance from the Attorney General or judicial preclearance from a three-judge court in the United States District Court for the District of Columbia. 52 U.S.C. § 10304. A jurisdiction may obtain preclearance only if it proves that its change in voting procedures "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color [or membership in a language minority group]." *Id.* § 10304(a). Section 4 provides criteria, commonly known as the "coverage formula," that determine which jurisdictions are subject to the preclearance requirement. *See id.* § 10303(b); *see also Shelby County*, 133 S. Ct. at 2619–2620.

In *Shelby County*, the Supreme Court declared Section 4's coverage formula unconstitutional. *See* 133 S. Ct. at 2630–2631. The Court was explicit that it was "issu[ing] no holding on § 5 itself, only on the coverage formula." *Id.* at 2631.

The Voting Rights Act also includes an attorneys' fees provision that states: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs." 52 U.S.C. § 10310(e).

Factual and Procedural Background

Following the 2010 census, the Texas Legislature enacted redistricting plans for the Texas House of Representatives, the Texas Senate, and the United States House of Representatives. At the time, Texas was a covered jurisdiction under Section 5 of the Voting Rights Act, so it had to obtain administrative or judicial preclearance before any redistricting plan could take effect. Texas chose to file suit before a three-judge panel of the United States District Court for the District of Columbia, rather than to seek administrative preclearance. *See Texas v. United States*, 887 F. Supp. 2d 133, 138 (D.D.C. 2012).

In its complaint, Texas sought a declaratory judgment that its redistricting plans complied with Section 5. Texas made no challenge to the constitutionality of either Section 5's preclearance requirement or Section 4's coverage formula. Complaint 1, J.A. 66 ("This complaint is filed under the assumption that Section 5 complies with the United States Constitution."). Texas purported initially to "reserve all applicable legal claims * * * pending" the district court's "decisions in *Shelby County, Ala. v. Holder*, No. 10-00651[] (D.D.C.), and *Laroque v. Holder*, No. 10-00561 (D.D.C.)," two cases in which different plaintiffs had challenged Section 5's constitutionality. Complaint 1–2, J.A. 66–67. But when the district court asked Texas whether it wanted to amend its complaint to include any constitutional claims, 12/7/2011 Tr. at 32, ECF No. 113, Texas told the court that it did not want to do so because it was "eager" to go to trial on its preclearance claim "as early as possible," 12/12/2011 Tr. at 6, 10, ECF No. 114.

The United States opposed preclearance of the congressional and state house plans, but not the state senate

plan. *Texas*, 887 F. Supp. 2d at 138. The district court permitted seven parties to intervene as defendants to oppose preclearance, and their objections collectively challenged all three plans. *Id.* at 138 & n.2. Three of those intervenors are appellees: two groups of Texas voters and office-holders and the Texas Conference of NAACP Branches (collectively, "Intervenors").

After conducting a two-week trial, the district court agreed with the Intervenors and denied preclearance of all three plans on August 28, 2012. *Texas*, 887 F. Supp. 2d at 138–139. The court found that Texas's congressional and state house maps both had a discriminatory effect in certain districts, *id.* at 153, and that the congressional map "was motivated, at least in part, by discriminatory intent," *id.* at 161, 166. Disagreeing with both Texas and the Justice Department, the court also concluded that the state senate map "was enacted with discriminatory purpose" as to a particular district. *Id.* at 166.

While the preclearance proceedings were ongoing, a different three-judge district court in the Western District of Texas was considering Section 2 and constitutional challenges to Texas's redistricting maps that had been brought by various plaintiffs, including three of the intervenor groups from the D.C. preclearance case. *See Davis v. Perry*, No. SA-11-CA-788 (W.D. Tex. 2011); *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. 2011). Because the D.C. preclearance suit was not resolved in time for the 2012 primaries and general election, the Texas district court imposed interim plans to govern those elections under the standards dictated by *Perry v. Perez*, 132 S. Ct. 934 (2012). *See Texas*, 887 F. Supp. 2d at 139; *see also Davis v. Perry*, No. SA-11-CV-788, 2011 WL

6207134, at *1 (W.D. Tex. Nov. 23, 2011); *Perez v. Perry*, 835 F. Supp. 2d 209, 211 (W.D. Tex. 2011).

After the D.C. district court denied preclearance of Texas's redistricting plans, and while Texas's appeal from that ruling was pending in the Supreme Court, Texas Governor Rick Perry called a special session of the Texas Legislature to repeal and replace the challenged plans. On June 23, 2013, the Legislature adopted plans largely mirroring those that the Texas district court had imposed on an interim basis. Governor Perry signed the new redistricting plans into law on June 26, 2013.

On June 24, 2013, one of the intervenor groups from the preclearance case filed a motion asking the Supreme Court to dismiss Texas's appeal as moot based on the Legislature's repeal of the maps that were the subject of the litigation. The next day—one day before Governor Perry signed those plans into law—the Supreme Court issued its opinion in *Shelby County*, holding unconstitutional the coverage formula contained in Section 4 of the Voting Rights Act. 133 S. Ct. at 2631.

On June 27, 2013—four days after the Texas Legislature's adoption of new redistricting plans and after those plans had already taken effect—the Supreme Court vacated the D.C. district court's order denying Texas preclearance, and "remanded for further consideration in light of *Shelby County v. Holder* * * * and the suggestion of mootness" of one of the intervenor groups. *Texas v. United States*, 133 S. Ct. 2885 (2013) (mem.); J.A. 431.

On remand, Texas filed a motion to dismiss the preclearance action as moot, arguing that both the enactment of new redistricting maps and *Shelby County* eliminated

any basis for the court's jurisdiction. The three-judge district court agreed and dismissed the case, concluding that Texas's "claims were mooted by *Shelby County* and the adoption of superseding redistricting plans." J.A. 434. The court added that the Intervenors would "remain free to seek attorneys' fees after dismissal." J.A. 435. The Intervenors did just that by promptly filing three separate motions for attorneys' fees.

Texas did not file an opposition to those motions. Instead, it filed a three-page "Advisory" declaring that it was the prevailing party based on *Shelby County* and that "the State d[id] not intend to respond" to the motions for attorneys' fees "unless requested to do so by the Court." J.A. 798–800. The Advisory did not mention the legislative repeal of Texas's redistricting plans and presented no response to Intervenors' argument that this repeal, and the mootness it caused before the judgment denying preclearance was vacated, rendered them prevailing parties. Following the dissolution of the three-judge district court, the pending motions for attorneys' fees were remanded to a single district judge for resolution.

The district court entered an order on June 18, 2014, awarding the requested attorneys' fees. The court concluded that Texas's "Advisory" "present[ed] no opposition on the applicable law," *Texas v. United States*, 49 F. Supp. 3d 27, 31 (D.D.C. 2014), and held that, under Local Rule 7(b), "Texas has waived any argument as to" "the eligibility of Fee Applicants for fee awards * * * or the prevailing-party status of Fee Applicants at the time the Court denied preclearance to Texas and thereafter, when Texas enacted new redistricting maps," *Texas*, 49 F. Supp. 3d at 39–40.

II

Analysis

Texas's Waiver and Double Forfeiture

We review the district court's decision enforcing its local rules for abuse of discretion. *Bender*, 127 F.3d at 67. We also review a district court's decision on a motion for attorneys' fees for abuse of discretion. *Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 524 (D.C. Cir. 2011). A "district court abuses its discretion if it did not apply the correct legal standard . . . or if it misapprehended the underlying substantive law." *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir. 1995) (internal quotation marks omitted; ellipsis in original). We examine any such legal questions *de novo*. *Brayton*, 641 F.3d at 524.

The Intervenors sought attorneys' fees under 52 U.S.C. § 10310(e), and 42 U.S.C. § 1988(b), both of which authorize fee awards in certain civil rights cases to the "prevailing party." *See Donnell v. United States*, 682 F.2d 240, 245 & n.7 (D.C. Cir. 1982) (both provisions "encourag[e] private litigants to act as 'private attorneys general' in seeking to vindicate the civil rights laws" and "should be construed similarly").

In its opening brief, Texas presents a bevy of arguments for why none of the Intervenors is a "prevailing party" within the meaning of those statutes. The problem is that Texas did not raise a single one of those arguments in the district court. Instead, its Advisory trumpeted *Shelby County* and declared that to be the end of the story, as a matter of law. Given that deliberate refusal to

join the issues raised by the motions, the district court applied Local Rule 7(b) and concluded that Texas had waived any argument that Intervenors were not prevailing parties "at the time the Court denied preclearance to Texas and thereafter, when Texas enacted new redistricting maps." *Texas*, 49 F. Supp. 3d at 40.

Local Rule 7(b) advises litigants that "the Court may treat [a] motion as conceded" if the party opposing a motion fails timely to "serve and file a memorandum of points and authorities in opposition to the motion." D.D.C. Local Rule 7(b). The rule "is a docket-management tool that facilitates efficient and effective resolution of motions by requiring the prompt joining of issues," *Fox v. American Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004), and judicious enforcement of the rule "ensures * * * that litigants argue their causes on a level playing field," *id.* at 1295 (quoting *English-Speaking Union v. Johnson*, 353 F.3d 1013, 1021 (D.C. Cir. 2004)). In applying Rule 7(b) to Texas's "Advisory," the district court explained that the rule "applies not only to instances where a litigant entirely fails to oppose a motion but also where a party files an opposition that addresses only *some* of the arguments raised in the underlying motion," and that in "the latter instance, * * * courts may deem the unaddressed arguments as conceded." *Texas*, 49 F. Supp. 3d at 39; *see, e.g., Institute For Policy Studies v. CIA*, 246 F.R.D. 380, 386 n.5 (D.D.C. 2007) ("[W]here a party files an opposition to a motion and addresses only certain arguments raised by the movant,

this court routinely treats the unaddressed arguments as conceded pursuant to Local Rule 7(b).").[1]

Had Texas bothered to challenge the district court's interpretation or enforcement of Local Rule 7(b) by arguing the issue in this court, it would have faced an uphill climb. Rules are rules, and basic fairness requires that they be applied evenhandedly to all litigants. Rule 7(b) (or its materially identical predecessor, Local Rule 108(b)) has been in force for nearly three decades, *see Graetz v. District of Columbia Public Schools*, Civ. A. No. 86-293, 1987 WL 8527, at *1 (D.D.C. March 3, 1987), so Texas was on full and fair notice of its application both when it initiated its preclearance lawsuit and when it chose to submit its "Advisory" at the attorneys' fee stage. Because a district court's local rules "have 'the force of law,'" *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010) (quoting *Weil v. Neary*, 278 U.S. 160, 169 (1929)), the State of Texas—like all lawyers and litigants—is "duty bound to comply with them," *In re Jarvis*, 53 F.3d 416, 422 (1st Cir. 1995).

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[1] A member of our court has questioned whether Local Rule 7(b) may properly be applied to deem as conceded an unopposed motion for summary judgment. *See Grimes v. District of Columbia*, No. 13-7038, 2015 WL 4430157, at *11–13 (D.C. Cir. July 21, 2015) (Griffith, J., concurring) (arguing that such an application of Rule 7(b) conflicts with Federal Rule of Civil Procedure 56 and that, in an appropriate case, reconsideration of circuit precedent may be warranted). That concern is not implicated here because this case does not involve a motion for summary judgment under Federal Rule of Civil Procedure 56 and, in any event, Texas has forfeited any similar challenge to the district court's interpretation or application of Local Rule 7(b), *see infra* pp. 13–14.

We have repeatedly held, moreover, that a material failure to follow the rules in district court can doom a party's case. *See, e.g., Geller v. Randi*, 40 F.3d 1300, 1303–1304 (D.C. Cir. 1994) ("When Geller failed to respond, he conceded a violation of Rule 11 under Local Rule 108(b) [Local Rule 7(b)'s predecessor]; he cannot now argue the merits of his Rule 11 defense."); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1033–1034 (D.C. Cir. 1988) (failure to designate and reference triable facts under Federal Rule of Civil Procedure 56(c) and Local Rule 108(h) was fatal to appellant's opposition to motion for summary judgment).

Local Rule 7(b) has received the same respect: "[A]s we have often observed, '[w]here the district court relies on the absence of a response as a basis for treating the motion as conceded, we honor its enforcement of the rule.'" *Fox*, 389 F.3d at 1295 (quoting *Twelve John Does v. District of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997)). "[T]he discretion to enforce this rule lies wholly with the district court." *Bender*, 127 F.3d at 68 (D.C. Cir. 1997). And "we have yet to find that a district court's enforcement of this rule constituted" an abuse of that discretion. *Wannall*, 775 F.3d at 428 (internal quotation marks omitted). We will not do so for the first time here.

In deferring to the district court's enforcement of its local rule requiring the timely filing of oppositions that actually address the contentions of the movant, we are in good company. Local Rule 7.1(b) of the Central District of Illinois, for example, is materially identical to the rule at issue here, and it too has been enforced by deeming as conceded any of a movant's arguments to which the opposing party fails to respond. *See Stanciel v. Gramley*, 267

F.3d 575, 578–580 (7th Cir. 2001) (district court "was well within its discretion" when it enforced its Local Rule 7.1(b) by deeming unaddressed issues to be conceded, which led to partial dismissal of plaintiff's claims). The district court in *Stanciel* explained—and the Seventh Circuit agreed—that the court had no obligation to "perform * * * legal research for [the opposing party]." 267 F.3d at 578. So too here.[2]

Texas's tactical choice in district court has distinct appellate repercussions as well. We are "a court of review, not one of first view," *United States v. Best*, 961 F.2d 964, 1992 WL 96354, at *3 (D.C. Cir. 1992) (unpublished), so we rarely entertain arguments on appeal that were not

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[2] Every circuit, in fact, defers to their district courts' interpretation and enforcement of local rules. *See, e.g.*, *Crowley v. L.L. Bean, Inc.*, 361 F.3d 22, 25 (1st Cir. 2004) (A district court's interpretation and application of local procedural rules receives "a special degree of deference—above and beyond the traditional standards of decisionmaking and appellate oversight[.]"); *Whitfield v. Scully*, 241 F.3d 264, 270–271 (2d Cir. 2001) ("We accord considerable deference to the district court's interpretation of its own Local Rule."); *Government of Virgin Islands v. Mills*, 634 F.3d 746, 750 (3d Cir. 2011) (same); *Bias v. Moynihan*, 508 F.3d 1212, 1223 (9th Cir. 2007) (same); *Jackson v. Beard*, 828 F.2d 1077, 1079 (4th Cir. 1987) (same); *In re Adams*, 734 F.2d 1094, 1102 (5th Cir. 1984) (same); *Martinez v. Thrifty Drug & Discount Co.*, 593 F.2d 992, 994 (10th Cir. 1979) (same); *Clark v. Housing Auth. of City of Alma*, 971 F.2d 723, 727 (11th Cir. 1992) (same); *S.S. v. Eastern Kentucky Univ.*, 532 F.3d 445, 451 (6th Cir. 2008) (similar); *Northwest Bank & Trust Co. v. First Illinois Nat'l Bank*, 354 F.3d 721, 725 (8th Cir. 2003) (similar); *Smith v. Village of Maywood*, 970 F.2d 397, 400 (7th Cir. 1992) (similar); *see also Genentech, Inc. v. Amgen, Inc.*, 289 F.3d 761, 774 (Fed. Cir. 2002) ("This court defers to the district court when interpreting and enforcing local rules[.]"). The federal court system could not fairly function otherwise.

first presented to the district court, *see, e.g., Pettaway v. Teachers Ins. & Annuity Ass'n of America*, 644 F.3d 427, 437 (D.C. Cir. 2011) (refusing to consider claim that district court violated a local rule because appellant failed to make that argument before the district court). And we can find no instance when we made an exception to that rule because the party's chosen strategy of backhanding the issues in district court backfired.

Texas's decision not to argue—or even mention—the Rule 7(b) issue in its opening brief has made an already arduous appellate climb Sisyphean. As an appellate court, we sit not "as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before [us]." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). Because Texas failed to challenge the district court's enforcement of Rule 7(b) in its opening brief, any challenge to the central ground on which the district court disposed of this case is forfeited and we will not address it. *See Fox v. Government of District of Columbia*, No. 14-7042, 2015 WL 4385290, at *4 (D.C. Cir. July 17, 2015) (appellant forfeited challenge to dispositive issue by failing to argue it in her opening brief); *Parsippany Hotel Mgmt. Co. v. NLRB*, 99 F.3d 413, 418 (D.C. Cir. 1996) (An issue is "barred from consideration by this court" when the appellant "d[oes] not raise the issue in its opening brief."); *Natural Resources Defense Council, Inc. v. EPA*, 25 F.3d 1063, 1071 n.4 (D.C. Cir. 1994) ("We have said before, and we say again, that ordinarily we will not consider arguments raised for the first time in a reply brief[.]") (quoting *Pennsylvania Elec. Co. v. FERC*, 11 F.3d 207, 209 (D.C.

Cir. 1993)). So the long and the short of it is that the bulk of Texas's arguments is waived and forfeited twice over.

***The Impact of Intervening Legislation and* Shelby County**

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. To support its claim, Texas points to the Supreme Court's June 27, 2013 order that vacated the district court's judgment denying Texas preclearance and "remanded * * * for further consideration in light of *Shelby County v. Holder* * * * and the suggestion of mootness of appellees[.]" *Texas*, 133 S. Ct. at 2885; J.A. 431. That order, Texas maintains, demonstrates that the Supreme Court decided that Texas had won its appeal and was necessarily the prevailing party for attorneys' fees purposes.

Texas is mistaken. *First*, Texas bears little resemblance to a prevailing party. Texas chose to seek judicial preclearance rather than administrative preclearance, and did so expressly on the assumption of the preclearance requirement's constitutionality. To say that Texas "prevailed" in this suit because a different litigant in a different suit won on different grounds that Texas specifically told the district court it would *not* raise is, to say the least, an unnatural use of the word "prevailing." It certainly is not a definition that the district court was legally bound to adopt without any elucidating argument by Texas.

Second, Texas's argument misconstrues the Supreme Court's June 27th order. Under the Supreme Court's "grant, vacate, and remand" ("GVR") practice, the Court issues a single order granting review, vacating the judgment below, and remanding for further consideration in light of some intervening development (often a Supreme Court decision). As the Supreme Court has explained, a GVR order is "potentially appropriate" when

> intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation[.]

Lawrence v. Chater, 516 U.S. 163, 167 (1996) (per curiam).

Importantly, it is well-settled that a GVR has no precedential weight and does not dictate how the lower court should rule on remand. *See Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) ("We also reject Tyler's attempt to find support in our [GVR] disposition. * * * Our order * * * was not a final determination on the merits."); *In re Sealed Case*, 246 F.3d 696, 699 (D.C. Cir. 2001) ("[A GVR order] may indicate a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, [but] it does not amount to a final determination on the merits.") (internal quotation marks and citations omitted); *see also Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964) ("The South Carolina Supreme Court correctly concluded that

our earlier [GVR] did not amount to a final determination on the merits.").

The Supreme Court's June 27th order is plainly a GVR. True, there is no "grant" of a certiorari petition by Texas, but that is only because Texas did not file a petition for writ of certiorari; it appealed directly to the Supreme Court. *See* 52 U.S.C. § 10304(a) (authorizing "appeal" of three-judge district court's judgment directly to the Supreme Court). The Supreme Court's order in this case mirrors precisely how vacate-and-remand orders have been framed in other direct appeals to the Supreme Court.[3]

Third, even if Texas thought the import of *Shelby County* obvious, the Supreme Court's disposition suggests otherwise. "It simply indicated that, in light of intervening developments, there was a reasonable probability that the Court of Appeals would reject a legal premise on which it relied and which may affect the outcome of the

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[3] *See, e.g., Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015) (mem.) ("On appeal from the United States District Court for the Eastern District of Virginia. Judgment vacated, and case remanded to the United States District Court for the Eastern District of Virginia for further consideration in light of *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. —— (2015)."); *James v. FEC*, 134 S. Ct. 1806 (2014) (mem.) ("Appeal from the United States District Court for the District of Columbia. Judgment vacated, and case remanded to the United States District Court for the District of Columbia for further consideration in light of *McCutcheon v. Federal Election Comm'n*, [134 S. Ct. 1434 (2014)]."); *Texas v. Holder*, 133 S. Ct. 2886 (2013) (mem.) ("On appeal from the United States District Court for the District of Columbia. Judgment vacated, and case remanded to the United States District Court for the District of Columbia for further consideration in light of *Shelby County v. Holder*, — U.S. ——, 133 S. Ct. 2612 (2013).").

litigation." *Tyler*, 533 U.S. at 666 n.6. Because that disposition "did not amount to a final determination on the merits," *Henry*, 376 U.S. at 777, it did not dictate any particular result on remand. It certainly did not declare Texas the victor.

Fourth, Texas assails the district court's reliance on the State's mooting of the case through legislative repeal and replacement of its redistricting plans. In so doing, the district court hewed to this circuit's caselaw authorizing the award of attorneys' fees to parties who obtain a favorable judgment that is vacated on appeal because a subsequent legislative enactment moots the case. *See National Black Police Ass'n v. District of Columbia Board of Elections & Ethics*, 168 F.3d 525, 528 (D.C. Cir. 1999) (upholding award of attorneys' fees where plaintiffs obtained a favorable district court judgment that was vacated as moot following legislative repeal of the law at issue while the appeal was pending). Texas argues that this case is different because *Shelby County* mooted its case the moment the Supreme Court announced the opinion, and so the Texas Legislature's repeal of the redistricting plans, which happened a day before *Shelby County* but did not take effect until signed by the Governor two days later, could not have mooted the case.

Texas never made that argument in the district court. The State's three-page Advisory did not cite *National Black Police Association* or any of the other cases on which the Intervenors based their claim of prevailing-party status and addressed the intervening legislative enactment. Indeed, the Advisory did not even mention mootness, the proper legal test for prevailing-party status, or a single precedent on attorneys' fees. The district court

thus applied Local Rule 7(b) and concluded that Texas had waived any argument that Intervenors were not prevailing parties as of the date of Texas's enactment of new redistricting plans. *Texas*, 49 F. Supp. 3d at 39–40. And Texas has not challenged that waiver finding on appeal.

Texas, moreover, is wrong to argue now that its legislative adoption of new voting districts did not contribute to mooting the case. Rather, Texas was right the first time when, in moving to dismiss its suit as moot following the Supreme Court's remand, it argued that both the state legislation and *Shelby County* mooted the case. J.A. 403–404 (arguing that the Texas Legislature's enactment of new redistricting plans "on June 23, 2013," combined with the *Shelby County* decision two days later, together eliminated "any basis for this Court's jurisdiction"). The three-judge district court agreed with Texas that its "claims were mooted by *Shelby County* and the adoption of superseding redistricting plans." J.A. 434. Beyond that, any questions concerning how the short time between those two events affected the Intervenors' status as prevailing parties is an issue that Texas chose to leave entirely unaddressed in district court, and thus it has forfeited its arguments on that issue here.

Fifth, *Shelby County* could not have instantly mooted Texas's case as a categorical matter of law. As a formal matter, Supreme Court judgments on review of a federal court decision do not take effect until at least 25 days after they are announced, when the Court issues a certified copy of its opinion and judgment in lieu of a formal mandate. *See* SUP. CT. R. 45. Parties may file a petition for rehearing during that 25-day period, SUP. CT. R. 44, which "result[s] in an automatic stay of judgment or mandate

unless the Court otherwise specifically directs," S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice 830 (10th ed. 2013); *see* SUP. CT. R. 45. When the Court wants its judgment to take effect sooner, it says so. *Perry*, 132 S. Ct. at 944 ("The judgment shall issue forthwith."); *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) ("Pursuant to this Court's Rule 45.3, the Clerk is directed to issue the judgment in these cases forthwith."). The judgment in *Shelby County* did not issue until July 29, 2013, over a month after Texas's new redistricting maps took effect. *See Shelby County v. Holder*, No. 12-96, Docket.

Nor was it at all settled that Texas could benefit from *Shelby County* in this case, given that Texas told the district court directly that it was not challenging the constitutionality of the preclearance regime. And even if Texas had preserved a challenge to Section 5, the Supreme Court did not invalidate Section 5; it only invalidated the formula used to determine which jurisdictions would be required to seek preclearance. It was thus an open question—one that Texas chose not to litigate and that the adoption of Texas's new maps mooted—whether Texas had waived the application of *Shelby County* to its case.[4]

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[4] After this case was briefed, the Fifth Circuit denied attorneys' fees in *Davis v. Abbott*, 781 F.3d 207 (5th Cir. 2015). Texas has not argued that the Fifth Circuit's decision bears on anything in this case. And that decision would be of no help to Texas had it tried. The Fifth Circuit grounded its decision on the district court's inability to decide the merits of the Section 5 claim because, on that issue, the court only "had jurisdiction to * * * defer to the district court in D.C." *Id.* at 217. Nor had that district court evaluated the merits of the plaintiffs' Section 2 or constitutional claims. Those plaintiffs thus were not prevailing parties eligible for attorneys' fees because they "failed to achieve

In short, various procedural and substantive complexities close the door on Texas's claim that *Shelby County* instantly resolved the attorneys' fees question in this case. Texas could have addressed those complexities by briefing them in an opposition to the Intervenors' motions for attorneys' fees, but chose not to do so. Texas also could have challenged the district court's enforcement of its local rule to bar consideration of those issues on appeal, but it chose not to do that in its opening brief either. Texas gets no second bite at the apple now. What little argument Texas did advance in its "Advisory" provides an insufficient basis for overturning the district court's award of attorneys' fees.

III

Conclusion

The district court's order awarding attorneys' fees to the Intervenors is affirmed.

So ordered.

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judicially-sanctioned relief that sufficiently addressed the merits of any of their claims." *Id.* at 219. Here, by contrast, the Intervenors obtained a final judgment on the merits, after a two-week trial and accompanied by a lengthy opinion, that was broader than even the Justice Department had sought. That is the type of judicial relief on the merits that provides a proper basis for an award of attorneys' fees. *See Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598, 605 (2001) (identifying judgments on the merits and court-ordered consent decrees).

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	
Plaintiff,	
v.	
UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR., in his official capacity as Attorney General of The United States,	**Civil Action No. 11-1303 (RMC)**
Defendants, and	
WENDY DAVIS, *et al*.,	
Defendant-Intervenors.	

OPINION

This matter presents a case study in how not to respond to a motion for attorney fees and costs. At issue is whether defendant-intervenors, who prevailed in Voting

Rights Act litigation before a three-judge panel, may recoup attorney fees and costs even though the Supreme Court vacated that opinion in light of the Supreme Court's subsequent decision in a different lawsuit that declared a section of the Voting Rights Act unconstitutional. A quick search of the Federal Reporter reveals the complexity of this narrow question. Yet, rather than engage the fee applicants, Plaintiff Texas basically ignores the arguments supporting an award of fees and costs. In a three-page filing entitled "Advisory," Texas trumpets the Supreme Court's decision, expresses indignation at having to respond at all, and presumes that the motion for attorney fees is so frivolous that Texas need not provide further briefing in opposition unless requested. Such an opposition is insufficient in this jurisdiction. Circuit precedent and the Local Rules of this Court provide that the failure to respond to an opposing party's arguments results in waiver as to the unaddressed contentions, and the Court finds that Texas's "Advisory" presents no opposition on the applicable law. Accordingly, the Court will award the requested fees and costs.

I. FACTS

Following the 2010 Census, Texas redrew its State and congressional voting districts to account for its growing population and new congressional seats, *see* U.S. Const. art. I, § 2, cl. 3; U.S. Const. amend. XIV, § 2, and to comply with the principle of one-person, one-vote, *see Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). The new voting districts could not take immediate effect, however. At the time the redistricting plans were enacted, the State fell within the coverage formula of Section 4(b) of the Voting

Rights Act of 1965 (VRA), 42 U.S.C. §§ 1973, *et seq.*, and, therefore, was required under Section 5 of the VRA to obtain approval, or "preclearance," of its redistricting plans from the Attorney General of the United States or a three-judge panel of this Court, *see id.* § 1973c(a). Texas did not seek administrative preclearance but instead filed suit in this Court on July 19, 2011. *See* Compl. [Dkt. 1]. The lawsuit sought approval for redistricting plans the Texas Legislature had drawn for the U.S. House of Representatives (Plan C185), the Texas House of Representatives (Plan H283), the Texas Senate (Plan S148), and the Texas State Board of Education. Texas sought a declaratory judgment that all Plans complied with Section 5 of the VRA because they neither had "the purpose nor . . . effect of denying or abridging the right to vote on account of race, color, or [language minority group]."[1] 42 U.S.C. § 1973c(a).

Properly convened as a three-judge panel, *id.*; 28 U.S.C. § 2284, this Court had jurisdiction pursuant to 42 U.S.C. § 1973c and 28 U.S.C. §§ 1346(a)(2), 2201. The United States opposed preclearance of Plans C185 and H283. In addition, seven parties intervened as defendants, each of whom opposed preclearance of one or more of

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[1] In 1975, Congress extended the VRA to cover members of language minority groups. *See* 42 U.S.C. § 1973b(f)(2); *see also id.* § 1973*l*(c)(3) (defining the terms "language minorities" and "language minority groups").

Texas's redistricting Plans.[2] No party, however, objected to the plan for the Texas State Board of Education. Therefore, on September 22, 2011, the Court entered judgment in favor of Texas on that Plan, permitting its immediate implementation. *See* Sept. 22, 2011 Minute Order; *see also Texas*, 887 F. Supp. 2d at 138 n.1.

After denying Texas's motion for summary judgment and ordering expedited discovery, the three-judge Court conducted a bench trial over a two-week period in January 2012. The United States and Defendant-Intervenors argued against preclearance, presenting evidence at trial and submitting post-trial briefing. *Texas*, 887 F. Supp. 2d at 139. The opposition to the Plans, however, was not uniform. For instance, the United States, the Texas Latino Redistricting Task Force, and the Gonzales Intervenors all presented expert reports and testimonies concerning retrogression. *Id.* at 141. Only the Davis Intervenors, Texas NAACP Intervenors, the League of Urban Latin

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[2] The parties intervened in their capacities as "individual voters, elected state representatives, or civil rights advocacy groups." *Texas v. United States*, 887 F. Supp. 2d 133, 138 n.2 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013). Specifically, they were Texas State senators and representatives from districts in the Fort Worth area (collectively, Davis Intervenors); two legislative caucuses of the Texas House of Representatives (the Mexican American Legislative Caucus and the Texas Legislative Black Caucus); a group of Hispanic and African-American voters in Texas (collectively, Gonzales Intervenors); and three organizations concerned about minority voting rights, redistricting, or voter registration (the Texas State Conference of NAACP Branches, the League of United Latin American Citizens, and the Texas Latino Redistricting Task Force). *Id.*

American Citizens, and the Texas Legislative Black Caucus argued that Plan S148 should be denied preclearance due to the retrogressive manner in which the Texas Legislature had drawn State Senate District 10 (Fort Worth).[3] *See id.* at 162. Texas presented its own expert testimony and argued vigorously for approval of all three Plans. The upshot was a "voluminous trial record" that fleshed out the controversies. *Id.* at 139.

The three judges of this Court were not the only judicial officers wrestling with redistricting Plans C185, H283, and S148. Several parties, including many of the Defendant-Intervenors in the instant litigation, had instituted suit against Texas in the Western District of Texas under Section 2 of the VRA, 42 U.S.C. § 1973(a).[4] Before a three-judge panel in the Western District of Texas, those parties argued that Plans C185, H283, and S148 violated Section 2 because all three Plans discriminated against minority voters by diluting their voting strength in certain areas of Texas. *Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (per curiam). Although the three-judge panel in Texas withheld judgment until this Court resolved the preclearance litigation, it adopted interim plans for the 2012 election because the redistricting Plans had not been

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[3] These Defendant-Intervenors also argued that Plan S148 was enacted with discriminatory intent. *Id.* at 162.

[4] Section 2 provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." 42 U.S.C. § 1973(a).

precleared and the State could not use its prior voting districts, now mal-apportioned because of population growth. *See id.* The Texas court imposed a set of interim maps, which were later adjusted after the Supreme Court vacated them due to various errors not pertinent here. *See id.* at 943-44.

On August 28, 2012, this Court denied Texas's motion for declaratory judgment, finding that Plans C185, S148, and H283 did not merit preclearance because Texas had not carried its burden of showing that those Plans did "not have the purpose or effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group under [S]ection 5 of [VRA]." *See Texas*, 887 F. Supp. 2d at 178. Specifically, the Court found that Texas had failed to overcome evidence of the retrogressive effect of Plans C185 and H283 and evidence of discriminatory purpose in enacting Plan C185 and Senate District 10 in Plan S148. *Id.* at 162, 178. Throughout its Opinion, this Court made clear that it was relying on the evidence offered at trial by all parties, including Defendant-Intervenors.

On October 19, 2012, Texas appealed this Court's decision to the Supreme Court. Thereafter, between June 21 and 23, 2013, the Texas Legislature repealed and replaced Plans C185, H283, and S148 with new maps. The Texas Legislature passed three separate statutes that redrew the State's voting districts in a manner that closely mirrored the second set of interim plans ordered by the *Perez* Court. *See* Davis Mot. for Fees [Dkt. 256] at 10. The Governor of Texas signed these new plans into law on June 26, 2013. *Id.* at 11.

On June 25, 2013, after Texas legislative action and one day before the Governor signed the three new redistricting plans into law, the Supreme Court issued *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). *Shelby County* involved a constitutional challenge to Section 4 of the VRA. The Supreme Court held that because the coverage formula in Section 4(b) was based on stale data and distinguished among the States in an unconstitutional manner, it "can no longer be used as a basis for subjecting jurisdictions to preclearance." *Id.* at 2631. Then, on June 27, 2013, one day *after* Texas replaced Plans C185, S148, and H283, the Supreme Court vacated and remanded this Court's opinion that had denied preclearance to Texas. The Davis Intervenors had immediately moved in the Supreme Court for dismissal of Texas's appeal as moot in light of the formal adoption of new voting plans by the Texas Legislature, and the Supreme Court instructed this Court to consider both *Shelby County* and the Davis Intervenors' "suggestion of mootness" on remand. *Texas*, 133 S. Ct. at 2885.

On July 3, 2013, Texas moved to dismiss this lawsuit as moot in light of *Shelby County*. *See* Pl. Mot. to Dismiss [Dkt. 239]. All Defendant-Intervenors argued against the motion, and several asked for leave to file a counterclaim against Texas under Section 3(c) of the VRA, 42 U.S.C. § 1973a(c). The Court found that both *Shelby County* and Texas's enactment of superseding redistricting plans mooted the controversy. *See* Dec. 3, 2013 Mem. & Order [Dkt. 255] at 4. It also noted that dismissal of the suit as moot would not preclude Defendant-Intervenors from seeking attorney fees. *See id.* Accordingly, the Court granted Texas's motion to dismiss and closed the case. On

January 22, 2014, the three-judge Court dissolved itself and remanded the matter to this single judge for further proceedings. *See* Jan. 22, 2014 Order [Dkt. 263].

The Davis Intervenors, Gonzales Intervenors, and Texas State Conference of NAACP Branches (collectively, Fee Applicants) now move for attorney fees and costs.[5] They contend that they are prevailing parties and are entitled to fees and costs under the VRA. The Davis Intervenors seek a total reimbursement of $466,680.36, *see* Davis Mot. for Fees at 2, the Gonzales Intervenors seek a total reimbursement of $597,715.60, *see* Gonzales Mot. for Fees [Dkt. 257] at 2, and the Texas State Conference of NAACP Branches seeks a total reimbursement of $32,374.05, *see* Texas State Conference of NAACP Branches Mot. for Fees [Dkt. 258] at 1.

Texas has not filed a brief in opposition to the pending motions. Instead, Texas filed a three-page "Advisory" that begins and ends with *Shelby County*. *See* Advisory [Dkt. 259]. Texas writes that, in light of *Shelby County*, the State was wrongly subjected to preclearance in the first place. As a result, Texas contends, the participation of Defendant-Intervenors in this VRA litigation only served to "aggravat[e] the unconstitutional burden of preclearance and delay[] [Texas's] reapportionment efforts following the 2010 Census." *Id.* at 2. Texas adds that "[t]he only basis upon which the Intervenors could conceivably have claimed prevailing-party status" was the three-judge Court's denial of preclearance, which the Supreme

[5] Fee Applicants timely filed their motions for attorney fees pursuant to the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 54(d)(2)(B)(i).

Court vacated on appeal. *Id.* Confident in its Advisory, Texas makes no additional arguments and asserts an intention to say no more unless required to do so. *Id.* at 3 ("*Shelby County* requires immediate denial of all motions for fees and costs, and the State does not intend to respond unless requested to do so by the Court.").

II. ANALYSIS

The merits of the instant litigation were tried to a three-judge Court under the VRA, and that Court fulfilled its mandate when it entered its judgment. Section 5 of the VRA requires matters to be "heard and determined by a court of three judges" only to the extent required by 28 U.S.C. § 2284, *see* 42 U.S.C. § 1973c(a). Section 2284, in turn, permits "[a] single judge . . . [to] conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as [otherwise] provided . . . ." 28 U.S.C. § 2284(b)(3). Here, the three-judge panel fulfilled its statutory purpose. The question of fees and costs is an ancillary matter and is properly resolved by the district court judge to whom the case was assigned initially. *See, e.g., Pub. Serv. Comm'n of Mo. v. Brashear Freight Lines, Inc.*, 312 U.S. 621, 625 (1941) (noting that a single district judge, rather than a three-judge panel, should have resolved a motion for damages that was filed after the three-judge panel had ruled on an injunction application for which the three-judge panel had been convened); *Hamilton v. Nakai*, 453 F.2d 152, 161 (9th Cir. 1971) (holding that a single judge could decide an ancillary issue because the three-judge court had issued its judgment and therefore "had fulfilled the statutory purpose for which the two additional judges had been called"); *Allen v. Cnty. Sch. Bd. of Prince Edward Cnty., Va.*, 249

F.2d 462, 464 (4th Cir. 1957) (finding post-judgment motion requesting deadline for compliance with three-judge court's desegregation order was properly resolved by single district court judge).

Turning to the first principles of attorney fee awards, parties in the United States ordinarily bear their own attorney fees regardless of the outcome of the litigation. *Fresh Kist Produce, LLC v. Choi Corp.*, 362 F. Supp. 2d 118, 125 (D.D.C. 2005) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 602-03 (2001), *superseded in part by statute*, Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (codified at 5 U.S.C. § 552(a)(4)(E) (2009))). There are exceptions, however, to this so-called "American Rule." For instance, the American Rule does not apply where there is an explicit statutory basis for awarding fees. *Id.* (citing *Alyeska Pipeline Serv. Co. v. The Wilderness Soc'y*, 421 U.S. 240, 257 (1975), *superseded by statute on other grounds*, Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 106-274, §4(d), 114 Stat. 803, 804 (codified at 42 U.S.C. § 1988(b) (2000))).

If a party establishes that it is entitled to attorney fees, then the question becomes whether the fees sought are reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), *abrogated on other grounds by Gisbrecht v. Barnhart*, 535 U.S. 789, 795-805 (2002). The standard metric for determining the reasonableness of a fee request is

the "lodestar method."[6] As discussed *infra*, such a calculation "produces an award that *roughly* approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010).

A. Fee Applicants' Entitlement to Fees and Costs

Fee Applicants contend that statutory fee shifting provisions apply here. Specifically, they seek attorney fees under § 1973*l*(e) of the VRA, 42 U.S.C. § 1973*l*(e), and subsection (b) of 42 U.S.C. § 1988. Both provisions contain similar language and identical legislative purposes. *See Donnell v. United States*, 682 F.2d 240, 245 n.7 (D.C. Cir. 1982). The former states that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs," 42 U.S.C. § 1973*l*(e), while the latter permits a court, "in its discretion, . . . [to] allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," 42 U.S.C. § 1988(b). Both provisions are designed to "encourag[e] private litigants to act as 'private attorneys general' in seeking to vindicate the civil rights laws." *Donnell*, 682 F.2d at 245. As a result, the two provisions are construed alike. *Id.* at 245 n.7 (citing *Riddell v.*

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[6] The "lodestar" approach to fee awards was established by the Supreme Court in *Hensley*, and is the approach followed by the federal courts in most fee award disputes. *See Gisbrecht*, 535 U.S. at 802.

Nat'l Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980)); *see also Buckhannon*, 532 U.S. at 603 n.4 (recognizing that § 1973*l*(e) and § 1988(b) have been interpreted in a consistent manner).

Requests for attorney fees pursuant to § 1973*l*(e) and § 1988(b) generally implicate two questions of law. The first is whether the party seeking recovery of attorney fees is a prevailing party. If so, then a fee award ordinarily should be granted. *See, e.g., Blanchard v. Bergeron*, 489 U.S. 87, 89 n.1 (1989) (observing that a party that prevails in § 1988 litigation "ordinarily" is entitled to attorney fees (internal quotations and citation omitted)); *Donnell*, 682 F.2d at 245 ("[T]he legislative history [of § 1973*l*(e)] makes clear that a prevailing party usually should recover fees."). The second is whether a court should exercise its discretion *not* to award attorney fees because there are "special circumstances [that] would render such an award unjust." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968).

1. Prevailing Party Precedent

The phrase "prevailing party" is a legal term of art, *Buckhannon*, 532 U.S. at 603, which has been addressed by the Supreme Court in multiple decisions. *See, e.g., Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989) ("A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendent lite* or at the conclusion of the litigation."); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("[P]laintiff [must] receive at least some relief on the merits of his claim before he can be said to prevail."). The Supreme Court most recently grappled with the concept in *Buckhannon*. There, interpreting the fee-shifting

provisions of the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12205,[7] the Supreme Court explained that a prevailing party is "one who has been awarded some relief by the court," *Buckhannon*, 532 U.S. at 603, resulting in a "judicially sanctioned change in the legal relationship of the parties," *id.* at 605.

Buckhannon excluded from its definition instances in which the objective of a lawsuit is achieved because a defendant voluntarily changes its conduct. Terming it the "catalyst theory" of fees recovery, *id.* at 601, the Supreme Court reasoned that such a basis for recovery is not connected to the clear meaning of "prevailing party," *id.* at 605. Neither the legislative history of similar fee-shifting provisions, such as the Civil Rights Attorney's Fee Awards Act, *id.* at 607, nor the Court's precedents supported a "holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties," *id.* at 605. Even more troublesome to the Supreme Court was the fact that the catalyst theory permits litigants to recover attorney fees for "nonfrivolous but nonetheless potentially meritless lawsuit[s]." *Id.* at 606. Not only are

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[7] The fee-shifting provisions of the Fair Housing Amendment Act and the Americans with Disabilities Act are similar to 42 U.S.C. § 1973*l*(e) and 42 U.S.C. § 1988(b). The Fair Housing Amendments Act provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee and costs", 42 U.S.C. § 3613(c)(2), while the Americans with Disabilities Act states that "the court . . . , in its discretion, may allow the prevailing party . . . a reasonable attorney's fee, including litigation expenses and costs," 42 U.S.C. § 12205.

such recoveries without "the necessary judicial *imprimatur*," *id.* at 605, but they discourage voluntary changes in conduct, *id.* at 608. Accordingly, the Supreme Court held that voluntary changes in conduct disassociated from judicial action are similar to a "reversal of a directed verdict," a finding of constitutional infirmity "unaccompanied by judicial relief," and other nonjudicial modifications of actual conditions, none of which permits recovery of attorney fees.[8] *Id.* at 605-06 (internal quotations and citations omitted).

Since *Buckhannon*, the D.C. Circuit has adopted a three-part test for adjudicating prevailing-party status. Prevailing-party status turns on whether there is "(1) . . . a court-ordered change in the legal relationship of the parties; (2) [a] judgment . . . in favor of the party seeking the fees; and (3) [a] judicial pronouncement . . . accompanied by judicial relief." *Green Aviation Mgmt. Co. v. FAA*, 676 F.3d 200, 203 (D.C. Cir. 2012) (internal quotation marks and citation omitted). Markedly, only the latter two prongs are relevant when a defendant is the party seeking attorney fees.[9] *Id.* at 204.

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[8] Through the Open Government Act of 2007, Congress superseded *Buckhannon* and reinstated the catalyst theory of attorney fee recovery only for fee awards under the Freedom of Information Act, 5 U.S.C. § 552. *See Brayton v. Office of the U.S. Trade Representative*, 641 F.3d 521, 525 (D.C. Cir. 2011).

[9] In *Oil, Chemical, & Atomic Workers International Union v. Department of Energy*, 288 F.3d 452 (D.C. Cir. 2002), *superseded by statute on other grounds*, Open Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, *as recognized in Summers v. Department of Justice*, 569 F.3d 500, 503 (D.C. Cir. 2009), the D.C. Circuit ruled that when interpreting a fee-shifting provision courts should give the

Buckhannon expressly recognized only two appropriate bases for awarding attorney fees—judgments on the merits and settlements enforced through consent decrees. *Buckhannon*, 532 U.S. at 605 ("We have only awarded attorney's fees where the plaintiff has received a judgment on the merits, or obtained a court-ordered consent decree." (internal citations omitted)). Prevailing-party status in this jurisdiction, however, is not so limited. Under the D.C. Circuit's construction of *Buckhannon*, a litigant in this jurisdiction need only establish that s/he received "some form of judicial relief, not necessarily a court-ordered consent decree or a judgment on the merits." *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12, 15 (D.C. Cir. 2010). The D.C. Circuit has recognized that, under certain circumstances, prevailing-party status may result from a favorable jurisdictional ruling, a grant of preliminary injunction, or even a judicially-sanctioned stipulation. *Id.* (citing with approval *District of Columbia v. Jeppsen ex rel. Jeppsen*, 514 F.3d 1287, 1290 (D.C. Cir. 2008); *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945 (D.C. Cir. 2005); *Carbonell v. INS*, 429 F.3d 894, 895-96, 899 (9th Cir. 2005)).

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phrase "prevailing party" the same construction as it does in other fee-shifting provisions "unless there is some good reason for doing otherwise," *id.* at 455. Overcoming this presumption is difficult. *Green Aviation*, 676 F.3d at 202 (explaining that this Circuit "has joined other circuits in acknowledging that the burden of establishing good reason not to apply *Buckhannon* is not easily met" (internal alterations, citation, and quotations omitted)). Neither Texas nor the Fee Applicants argue that *Buckhannon* should not control the meaning of "prevailing party" in 42 U.S.C. § 1973*l*(e) or 42 U.S.C. § 1988(b).

2. Fee Applicants' Arguments

Although each Fee Applicant moves separately for attorney fees, their arguments for prevailing-party status largely overlap and can be summarized.[10] Fee Applicants state that they joined the litigation to oppose preclearance for Plans C185, H283, and/or S148. This Court first denied preclearance to Texas on summary judgment, with the result that the District Court in the Western District of Texas imposed interim maps that re-drew some voting districts. Following a trial before this Court at which all parties presented demonstrative evidence, expert reports, and testimony, the Court found that Plans C185, H283, and S148 violated the VRA. It, therefore, denied preclearance. Fee Applicants argue that this result was enshrined into law in June 2013, when Texas repealed

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[10] Unlike the Davis Intervenors and the Texas State Conference of NAACP Branches, the Gonzales Intervenors rely primarily on *Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435 (D.C. Cir. 1982), in arguing their prevailing-party status. The Gonzales Intervenors contend that a judgment denying preclearance gives rise to a presumption that any defendants who intervened are prevailing parties. Further, the Gonzales Intervenors argue that, even without such a presumption, they fit within *Medina County*'s two-prong test for determining prevailing-party status. *Medina County*, however, is a "catalyst theory" fee award case that predates *Buckhannon*. *See* 683 F.2d at 440 (describing the applicable test for prevailing party status as whether "the party . . . substantially received the relief sought, and . . . [whether] the lawsuit . . . [was] a *catalytic, necessary, or substantial factor in attaining the relief*" (emphasis added)). Although neither the Supreme Court nor the D.C. Circuit has overruled *Medina County* explicitly, its continuing validity in light of *Buckhannon* is uncertain, and here, immaterial to the Court's determination of Fee Applicants' prevailing-party status.

Plans C185, H283, and S148 and enacted new redistricting plans that were substantially similar to the interim maps drawn by the three-judge panel in Texas. Because Texas never used Plans C185, H283, or S148 for any actual voting (primary or general election) and all Plans were rejected by the Court and replaced by Texas, Fee Applicants contend that they achieved not just *some* judicial relief, but rather, *all* of the relief that they sought.

Outraged that Fee Applicants would dare to request fees, Texas responds with its Advisory. Texas posits that the three-judge Court's denial of preclearance is "[t]he only basis upon which the intervenors could conceivably . . . claim[] prevailing-party status," Advisory at 2, but that the decision does not support a fee award because it "was vacated on appeal," *id.* Texas asserts that *Shelby County* must be given full retroactive effect and this Court has no choice but to deny Fee Applicants' motions for attorney fees. *Id.* at 2-3 (citing *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993); *Landsgraf v. USI Film Prods.*, 511 U.S. 244, 279 n.32 (1994)).

3. Fee Applicants Are Prevailing Parties

The Advisory filed by Texas has narrowed the dispute greatly. Texas rests entirely on *Shelby County*. Its sole contention is that the Supreme Court, as a matter of fact and law, erased the three-judge Court's opinion, and, consequently, Fee Applicants' successes before that Court. In essence, Texas believes that *Shelby County* establishes that the entirety of the preclearance process, including this Court's denial of preclearance, was a constitutional "affront" and nullity. In short, Texas points to *Shelby County* and declares checkmate. Texas does not address Defendant-Intervenors' argument that they achieved the

relief they sought because Texas discarded the challenged Plans and adopted different redistricting plans.

In fixating on *Shelby County*, Texas blinds itself to the procedures of this Court. The Local Rules of the Court provide that:

> Within 14 days of the date of service or at such other time as the Court may direct, an opposing party shall serve a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the court may treat the motion as conceded.

D.D.C. Local Civil Rule 7(b). This Rule "is a docket-management tool that facilitates efficient and effective resolution of motions by joining of issues." *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004). It applies not only to instances where a litigant entirely fails to oppose a motion but also where a party files an opposition that addresses only *some* of the arguments raised in the underlying motion. In the latter instance, it is well-established that courts may deem the unaddressed arguments as conceded. *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) ("It is well understood in this Circuit that when a [non-movant] files an opposition to a motion . . . addressing only certain arguments raised by the [movant], a court may treat those arguments that the [non-movant] failed to address as conceded." (citing *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997))); *CSX Transp., Inc. v. Commercial Union Ins., Co.*, 82 F.3d 478, 482-83 (D.C. Cir. 1996); *see also Twelve John Does v. District of Columbia*, 117 F.3d

571, 577 (D.C. Cir. 1997) (explaining that the Circuit "honors . . . [a district court's] enforcement of the rule" that "absence of a response [is] . . . a basis for treating the motion as conceded").

Texas does not dispute that Fee Applicants were prevailing parties prior to the Supreme Court's issuance of *Shelby County* and subsequent vacatur and remand of this Court's opinion denying preclearance. Notably, this Circuit has found that parties who intervene as defendants in VRA litigation are eligible for fee awards,[11] *see Medina Cnty.*, 683 F.2d at 440; *Donnell*, 682 F.2d at 246, and

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[11] Judge John D. Bates recently denied Shelby County's motion for attorney fees, finding that its (ultimately successful) lawsuit was at odds with the policy rationale of the VRA's fee-shifting provision. *Shelby Cnty. v. Holder (Shelby Cnty. II)*, Civ. No. 10-651, 2014 WL 2200898, at *10 (D.D.C. May 28, 2014). Assuming that Shelby County's lawsuit was the "sort of action or proceeding" for which § 1973*l*(e) permits attorney fee awards, *id.* (internal quotations omitted), Judge Bates determined that the County was not entitled to fees under the "demanding . . . standard" set forth in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), *Shelby Cnty. II*, 2014 WL 2200898, at *10. Judge Bates opined that "the purpose of section 1973*l*(e) is to encourage private attorneys general to bring lawsuits vindicating individual voting rights," *id.*, whereas Shelby County's suit sought to undermine VRA rights, *id.* at *16 (citing *Christiansburg*, 434 U.S. at 418).

Judge Bates' opinion is inapposite to the facts of this case. Fee Applicants intervened, in the manner of private attorneys general, to protect core rights established under the VRA prior to the Supreme Court's issuance of *Shelby County*. As the analysis in the text demonstrates, Fee Applicants were successful in preventing Texas's use of redistricting Plans C185, H283, and S148 and the State adopted three new redistricting plans for elections subsequent to June 2013.

Fee Applicants contend that the three-judge Court's denial of preclearance rendered them prevailing parties under *Buckhannon*, as interpreted by the D.C. Circuit. Texas makes no argument whatsoever that *Shelby County* upended the eligibility of Fee Applicants for fee awards, the applicability of *Buckhannon*, or the prevailing-party status of Fee Applicants at the time the Court denied preclearance to Texas and thereafter, when Texas enacted new redistricting maps. Thus, the Court finds that Texas has waived any argument as to these issues.

Having conceded that Fee Applicants were prevailing parties prior to *Shelby County*, Texas's only argument against an award of fees and costs here is that *Shelby County* effectively stripped Fee Applicants of their victory. Texas's opposition, however, overlooks *National Black Police Association v. District of Columbia Board of Elections & Ethics*, 168 F.3d 525 (D.C. Cir. 1999) and *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986). In *National Black Police Association*, various plaintiffs sought an injunction against campaign contribution limits for certain local elections. 168 F.3d at 526-27. The district court enjoined the initiative as violative of the First Amendment, and fifty-two days later, the D.C. City Council repealed the challenged contribution limits. *Id.* at 527. On appeal, the D.C. Circuit deemed the matter moot in light of the Council's repeal and vacated the district court's judgment. The district court then awarded attorney fees to plaintiffs, holding that "despite the eventual mootness of the case . . . . the injunction changed the legal relationship of the parties, and contributors were able to make substantial contributions that otherwise would not have been legal." *Id.* The D.C. Circuit agreed. "The fact that

the case was moot by the time of the appeal [did] not alter the fact that the injunction altered the legal relationship between the parties when it was issued . . . ." *Id.* at 528. It was of no moment to the D.C. Circuit that the plaintiffs would have realized their goal fifty-two days later when the Council repealed the initiative. "The plaintiffs secured a real-world vindication of their First Amendment rights" regardless of subsequent events. *Id.* Accordingly, the "district court properly found that the plaintiffs were prevailing parties because at the time judgment was entered, the injunction altered the legal relationship between the parties." *Id.* at 529.

Similarly, in *Grano*, plaintiffs obtained an injunction that delayed the demolition of an historical site pending a public referendum. 783 F.2d at 1107-08. The D.C. Circuit affirmed the district court's finding that the plaintiffs were prevailing parties despite the fact that the vote to preserve the site was invalidated. *Id.* at 1109. The Circuit reasoned that the public referendum would have had no chance to preserve the building at all if the building were razed before the election. In other words, the *Grano* plaintiffs "faced two hurdles[:] [t]hey successfully surmounted the first by holding off the demolition until the election . . . . [and] [a]lthough their goal of ensuring that the result of the election would have legal effect was subsequently blocked in another court, they nonetheless succeeded in the aspect of their claims that brought them into federal court . . . ." *Id.* Significantly, the D.C. Circuit subsequently has observed that "[t]he injunction [in *Grano*] produced a lasting change in the parties' legal circumstances and gave the plaintiffs the precise relief that they had sought."

Thomas v. Nat'l Sci. Found., 330 F.3d 486, 493 (D.C. Cir. 2003).

Here, Texas does not dispute that this Court's denial of preclearance altered the legal relationship between it and Fee Applicants. Nor does Texas dispute that on June 26, 2013, it repealed the very voting maps for which it had sought preclearance and replaced them with redistricting maps that were substantially similar to the voting districts ordered by the District Court in Texas. Although the Supreme Court ultimately vacated this Court's opinion, neither *Shelby County* nor the vacatur erased the real-world vindication that Fee Applicants had achieved. In line with this Circuit's precedents and those in other courts of appeals, the Court finds that Defendant-Intervenors did not lose prevailing-party status due to subsequent mootness. *See Thomas*, 330 F.3d at 493; *Nat'l Black Police Ass'n*, 168 F.3d at 528; *Grano*, 783 F.2d at 1108-09; *see also Thomas v. Bryant*, 614 F.3d 1288, 1294 (11th Cir. 2010) ("[W]hen plaintiffs clearly succeeded in obtaining the relief sought before the district court and an intervening event rendered the case moot on appeal, plaintiffs are still 'prevailing parties' for the purposes of attorney's fees for the district court litigation." (quoting *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 454 (1st Cir. 2009) (internal quotation marks omitted))); *Palmer v. City of Chicago*, 806 F.2d 1316, 1321 (7th Cir. 1986) (assuming without deciding that it is possible for a party to "win" even though "after some relief has been obtained[,] the case becomes moot—is in effect interrupted before it can reach its normal conclusion (unless the [prevailing party] caused it to become moot)"); cf. *UFO Chuting of Haw., Inc. v. Smith*, 508 F.3d 1189, 1197 (9th Cir. 2007) ("[W]hen 'a party . . .

achieves the objective of its suit by means of an injunction issued by the district court[, it] is a prevailing party in that court, notwithstanding the fact that the case becomes moot, through no acquiescence by the defendant, while the order is on appeal.'" (quoting *Dahlem v. Bd. of Educ. of Denver Pub. Sch.*, 901 F.2d 1508, 1512 (10th Cir. 1990))).

This result is not inconsistent with the analysis in *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). *Lewis* involved two Florida statutes that prohibited an out-of-state holding company from operating an industrial savings bank in Florida. Continental Bank challenged the statutes as unconstitutional under the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, and sought an injunction to order the State Comptroller to process its application for an industrial savings bank. *Lewis*, 494 U.S. at 475. The district court granted the relief requested, and Florida then amended the statutes, which materially altered the legal landscape. *Id.* Florida moved to amend the district court judgment on the grounds of mootness and Continental Bank moved for attorney fees under 42 U.S.C. § 1988. The district court denied both motions. *Id.*

On appeal, the Eleventh Circuit found that the case was not moot, affirmed the lower court decision on different grounds, and remanded for further analysis on the fee petition. *Id.* at 476. Shortly before the Eleventh Circuit decision issued, however, Congress adopted the Competitive Equality Amendments Act of 1987, Pub. L. No. 100-86, 101 Stat. 552, which expanded the definition of "bank" and distinctly mooted the Continental Bank lawsuit. *Lewis*, 494 U.S. at 476. Florida petitioned the Eleventh Circuit for rehearing, but the Circuit denied the request,

awarded attorney fees, and remanded to the district court to calculate the award. *Id.* at 476-77.

The Supreme Court granted *certiorari* to Florida and held that the federal legislation had mooted the case. *Id.* at 477-80. It found that Continental Bank no longer had any "stake in the outcome" because of changes in the law. *Id.* at 478. As to any fee recovery, the Supreme Court observed that "[s]ince the judgment below [was] vacated on the basis of an event that mooted the controversy before the Court of Appeals' judgment issued, Continental was not, *at that stage*, a 'prevailing party' as it must be to recover fees under § 1988." *Id.* at 483 (emphasis added). It added, "[w]hether Continental [could] be deemed a 'prevailing party' in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficultly that . . . . [w]e decline to resolve . . . . as well as the related question whether . . . fees are available in a Commerce Clause challenge." *Id.* (citation omitted).

As the Ninth Circuit has since observed, *Lewis* "did not hold that a party automatically loses its prevailing party status when the appeal becomes moot before a Court of Appeals reaches final judgment." *UFO Chuting*, 508 F.3d at 1197 n.8. "Rather, [it] . . . reaffirmed established case law requiring a prevailing party to obtain a direct and substantial benefit." *Id.* Fee Applicants obtained a direct and substantial benefit as well: redistricting Plans C185, H283, and S148 were never implemented; Texas repealed the challenged Plans and adopted new plans; and the Governor formally executed the legislation replacing the Plans one day *before* the Supreme Court vacated and

remanded this Court's denial of preclearance. Given this timing of events, *Shelby County* did not strip Defendant-Intervenors of their rights to seek fees. This conclusion is consistent with *Lewis* and follows the law of the D.C. Circuit and other courts of appeals that have found that subsequent mootness does not necessarily obviate a litigant's prevailing-party status.

4. Absence of Special Circumstances

Having found Fee Applicants are prevailing parties, the Court turns to whether special circumstances would render an award unjust. This question requires an evaluation of several factors. One consideration is "whether the net result is [such] . . . that it would be stretching the imagination to consider the result a 'victory' in the sense of vindicating the rights of the fee claimants." *Medina Cnty.*, 683 F.2d at 442-43. "If the victory can fairly be said to be only a pyrrhic one, then an award of fees would presumably be inappropriate." *Id.* at 443. A related consideration is the impact that the party seeking attorney fees had on the litigation. Where fee applicants are intervenors, a court considers whether they timely intervened,[12] whether their participation was necessary to protect their interests and further the policies embodied in the relevant statutory scheme, *Miller*, 706 F.2d at 343, and whether

[12] The D.C. Circuit has noted that the analysis of the contributions of an intervenor, for purposes of attorney fees, is akin to the analysis that is conducted when intervention is first sought. Accordingly, "the District Court should not reevaluate its decision on this issue unless new evidence has arisen." *Miller v. Staats*, 706 F.2d 336, 343 n.40 (D.C. Cir. 1983) (citing *Medina Cnty.*, 683 F.2d at 443).

they had an "independent impact on the particular outcome of the case," *Medina Cnty.*, 683 F.2d at 443.

The "special circumstances" exception to an award of fees is a gloss on § 1973*l*(e) and § 1988. That is, the exception is "a judicially created concept, not mentioned in any of the fee award statutes." *Maloney v. City of Marietta*, 822 F.2d 1023, 1027 (11th Cir. 1987). As a result, the exception is "narrowly construed so as not to interfere with the congressional purpose in passing [fee-shifting] statutes." *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985) (en banc), *abrogated on other grounds by Tex. State Teachers Ass'n*, 489 U.S. 782.

Fee Applicants set forth in detail the efforts that they undertook to oppose Plans C185, H283, and S148. They explain the necessity of their intervention, describe the resources that they expended at every stage in the proceedings, and recount the witnesses and evidence that they presented at trial. Texas makes no effort to rebut Fee Applicants' facts or arguments. Accordingly, the Court finds no special circumstances and that Texas concedes there are no special circumstances that would render an award of attorney fees to Fee Applicants unjust.[13]

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[13] Fee Applicants also argue an alternate theory of prevailing-party status, *i.e.*, because this three-judge Court denied summary judgment to Texas, the *Perez* Court imposed interim redistricting maps and Fee Applicants may recover fees and costs in this Court. Fee Applicants reason that "[n]othing in *Buckhannon* requires that the judicial relief relied upon for prevailing party status be received in the same case in which fees are sought . . . ." Davis Mot. for Fees at 21. In light of Fee Applicants' significant participation in this case and Texas's concessions, the Court has no need to rule on this argument.

See CSX Transp., Inc., 82 F.3d at 482-83; *Hopkins*, 238 F. Supp. 2d at 178.

B. Reasonableness of Defendant-Intervenors' Request

In this Circuit, "[t]he usual method of calculating reasonable attorney's fees is to multiply the hours reasonably expended in the litigation by a reasonable hourly fee, producing the 'lodestar' amount." *Bd. of Trs. of Hotel & Rest. Emps. Local 25 v. JPR, Inc.*, 136 F.3d 794, 801 (D.C. Cir. 1998). A fee applicant bears the burden of demonstrating that the claimed rate and number of hours are reasonable. *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C. Cir. 1995).

Fee applications must "include contemporaneous time records of hours worked and rates claimed, plus a detailed description of the subject matter of the work with supporting documents, if any." *In re Donovan*, 877 F.2d 982, 994 (D.C. Cir. 1989). A fee applicant may satisfy its burden of demonstrating that its time was reasonably spent by submitting "'sufficiently detailed information about the hours logged and the work done' that permits the district court to 'make an independent determination whether or not the hours claimed are justified.'" *Cobell v. Norton*, 231 F. Supp. 2d 295, 305 (D.D.C. 2002) (quoting *Nat'l Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982)). The applicant need not, however, "present the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney." *Id.* at 306. Billing descriptions can be read in context, with clarification coming from surrounding billing entries as well as the docket.

Heard v. District of Columbia, Civ. No. 02–296, 2006 WL 2568013, at *14-15 (D.D.C. Sept. 5, 2006).

The Court need not tarry long on the reasonableness of the fees sought because Texas has presented no argument contesting any aspect of them. Fee Applicants have submitted sufficiently detailed information about the hours their attorneys spent working on this matter as well as the specific work performed. *See* Davis Mot. for Fees at 24-35; *Id.*, Exs. A-L; Gonzales Mot. for Fees at 11-15; *Id.*, Decl. of John Devaney [Dkt. 257-3], Exs. A-C; *Id.*, Decl. of Renea Hicks [Dkt. 257-7], Ex. A; Texas State Conference of NAACP Branches Mot. for Fees at 2-3; *Id.*, Ex [Dkt. 258-1]. Further, they have adequately explained the hourly rates of their attorneys. Because Texas makes no argument whatsoever in opposition, the Court finds that Texas concedes the reasonableness of the attorney fees that Fee Applicants seek. *See CSX Transp., Inc.*, 82 F.3d at 482-83; *Hopkins*, 238 F. Supp. 2d at 178.

The Court likewise easily finds that Fee Applicants are entitled to recover the litigation costs that they request. *See* Davis Mot. for Fees at 36-37; *Id.*, Ex. M; Gonzales Mot. for Fees at 15-16; Texas State Conference of NAACP Branches Mot. for Fees at 3. Section 1973*l*(e) of the VRA explicitly permits prevailing parties to recoup costs. *See* 42 U.S.C. § 1973*l*(e) ("In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, . . . reasonable expert fees[] and other reasonable litigation expenses as part of the costs."). Texas mounts no challenge to the categories or amounts for which Defendant-Intervenors seek recovery. Nor does Texas argue that

such an award would be unreasonable. Accordingly, the Court finds that Texas also concedes the reasonableness of the costs and experts fees that Fee Applicants seek. *See CSX Transp., Inc.*, 82 F.3d at 482-83; *Hopkins*, 238 F. Supp. 2d at 178.

III. CONCLUSION

The Advisory submitted by the State of Texas fails to recognize that the limited holding of *Shelby County* did not resolve the issues here. The Advisory entirely ignores the legal arguments raised by Fee Applicants concerning their rights as prevailing parties. Confident in its position, Texas informs the Court that it will not further "respond unless requested to do so." Advisory at 3. The onus, however, is not on the Court to request opposition from a sophisticated party before rendering its decision. Texas has had every chance to oppose the fees and costs that Fee Applicants seek since the applications. It instead opted to file a three-page Advisory that ignored every argument of Fee Applicants except the applicability of *Shelby County*.

In accord with the precedents of this Circuit and others, the Court finds that Fee Applicants are prevailing parties before this Court and eligible to recover attorney fees and costs. The Court further finds that the fees and costs they seek are uncontested and reasonable. The Court will award $466,680.36 to the Davis Intervenors, $597,715.60 to the Gonzales Intervenors, and $32,374.05 to the Texas State Conference of NAACP Branches. A memorializing Order accompanies this Opinion.

/s/
ROSEMARY M. COLLYER
Date: June 18, 2014 United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	
Plaintiff,	
v.	
UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,	**Civil Action No. 11-1303 (RMC)**
Defendants, and	
WENDY DAVIS, *et al.*,	
Defendant- Intervenors.	

ORDER

For the reasons set forth in the Opinion filed simultaneously with this Order, it is hereby

ORDERED that the Motion for Fees, Expenses, and Costs of Defendant-Intervenors Wendy Davis, *et al.*, Dkt.

256, the Motion for Fees and Expenses of Defendant-Intervenors Greg Gonzales, *et al.*, Dkt. 257, and the Motion for Fees, Expenses, and Costs of Defendant-Intervenors Texas State Conference of NAACP Branches, *et al.*, Dkt. 258, are **GRANTED**; and it is

FURTHER ORDERED that Plaintiff must remit $466,680.36 to Defendant-Intervenors Wendy Davis for fees and costs, $597,715.60 to Defendant-Intervenors Greg Gonzales for fees and costs, and $32,374.05 to Defendant-Intervenors Texas State Conference of NAACP Branches for fees and costs; and it is

FURTHER ORDERED that all disbursements shall occur no later than July 2, 2014; and it is

FURTHER ORDERED this is a final appealable order. *See* Fed. R. App. P. 4(a).

/s/
ROSEMARY M. COLLYER
Date: June 18, 2014 United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	)	
Plaintiff,	)	
v.	)	
UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR., in his official capacity as Attorney General of The United States,	)	**Civil Action No. 11-1303 (TGB-RMC- BAH)**
Defendants, and	)	
WENDY DAVIS, *et al*.,	)	
Defendant- Intervenors.	)	

ORDER

Because the remaining issues in this case, including the pending motions for attorneys' fees, can be resolved by the single judge to whom the case was originally assigned, this three-judge court is no longer necessary.

See, e.g., *Bond v. White*, 508 F.2d 1397, 1400-01 (5th Cir. 1975); *Gerena-Valentin v. Koch*, 554 F. Supp. 1017, 1019 (S.D.N.Y. 1983), *aff'd*, 739 F.2d 755 (2d Cir. 1984); *cf. Krebs v. Ashbrook*, 275 F. Supp. 111, 119 (D.D.C. 1967), *aff'd*, 407 F.2d 306 (D.C. Cir. 1968). Therefore, it is

ORDERED that this three-judge district court is hereby dissolved and the case is remanded to the Honorable Rosemary M. Collyer for all further proceedings.

/s/
THOMAS B. GRIFFITH
United States Circuit Judge

Date: January 22, 2014

/s/
ROSEMARY M. COLLYER
United States District Judge

/s/
BERYL A. HOWELL
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS,	
Plaintiff,	
v.	
UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR., in his official capacity as Attorney General of The United States,	**Civil Action No. 11-1303 (TGB-RMC- BAH)**
Defendants, and	
WENDY DAVIS, *et al*.,	
Defendant- Intervenors.	

MEMORANDUM AND ORDER

Two motions are before the court. First, Plaintiff the State of Texas moves to dismiss as moot all claims asserted in its original complaint. Texas Mot. [Dkt. # 239]. Second, a number of the Defendant-Intervenors

have moved for leave to file amended answers containing a counterclaim based on Section 3(c) of the Voting Rights Act (VRA), 42 U.S.C. § 1973a(c). Def.-Intervenors Mot. [Dkt. # 241]. We grant Texas's motion to dismiss all of its claims and deny Defendant-Intervenors' motion for leave to amend their answers and assert a counterclaim.

Texas brought this action seeking a declaratory judgment that four proposed redistricting plans had neither the purpose nor the effect of denying or abridging the right to vote on account of race or language minority under Section 5 of the VRA, 42 U.S.C. § 1973c. *See Texas v. United States*, 887 F. Supp. 2d 133, 138-39 (D.D.C. 2012), *vacated and remanded*, 133 S. Ct. 2885 (2013). After a bench trial, we concluded that none of the three contested plans (the defendants did not object to the fourth) merited preclearance and therefore denied Texas its requested declaratory relief. *See id.* at 178. Texas appealed directly to the Supreme Court (per 42 U.S.C. § 1973c(a)), which was then considering *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), a facial constitutional challenge to the coverage formula defining which states and political subdivisions were subject to VRA Section 5.

On June 23, 2013, while Texas's appeal was pending and before the Supreme Court had announced its decision in *Shelby County*, the Texas legislature adopted a new set of redistricting plans supported by the Governor of Texas that replaced those challenged in this litigation. On June 24, Defendant-Intervenors asked the Supreme Court to dismiss Texas's appeal as moot in light of those superseding plans. *See* Mot. of Appellee-Intervenors To Dismiss Appeal as Moot, *Texas v. United States*, 133 S. Ct. 2885

(2013) (No. 12-496). On June 25, the Supreme Court announced its opinion in *Shelby County*, holding the VRA's coverage formula unconstitutional, thereby removing all previously covered jurisdictions, including Texas, from the preclearance regime of Section 5. *See* 133 S. Ct. at 2631. On June 27, the Supreme Court vacated our judgment and remanded this case to us "for further consideration in light of *Shelby County v. Holder* . . . and the suggestion of mootness of [Defendant-Intervenors]." *Texas v. United States*, 133 S. Ct. at 2885.

On July 3, 2013, Texas filed the motion before us, asking that we dismiss all claims in its original complaint. Noting that *Shelby County* removed the requirement of preclearance and that Texas had enacted new redistricting plans, Texas argues, much as Defendant-Intervenors had before the Supreme Court, that its claims before this court have become moot, "thus eliminating any basis for this Court's jurisdiction." Texas Mot. at 2. Within hours, Defendant-Intervenors filed a motion of their own that seeks "leave to amend their answers in this action and to assert a counterclaim against the [S]tate of Texas pursuant to Section 3(c) of the Voting Rights Act." Def.-Intervenors Mot. at 1. The United States does not oppose Texas's voluntary dismissal of its claims, *see* U.S. Resp. to Texas Mot. [Dkt. # 247], and suggests that ongoing litigation in the Western District of Texas (*Perez v. Perry*, No. 5:11-cv-360) is a better vehicle for Defendant-Intervenors' pursuit of Section 3(c) relief, *see* U.S. Resp. to Def.-Intervenors Mot. [Dkt. # 248].

We agree with Texas that its claims were mooted by *Shelby County* and the adoption of superseding redistrict-

ing plans. A claim becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*)). In this suit, Texas sought a declaratory judgment that its 2011 redistricting plans complied with Section 5 of the VRA. *See* Texas Compl. [Dkt. # 1] at 1. Of course, Texas did not implement those plans but replaced them, and *Shelby County* relieved Texas of the need to seek preclearance. The sole issue presented in this case ceased to be "live" in June. Neither party has a "legally cognizable interest" in our determining whether the superseded plans comply with the now-inapplicable Section 5. Indeed, answering that question now would entail "precisely the sort of advisory opinion against which the mootness doctrine sets its face, as we do ours." *Tenn. Gas Pipeline Co. v. Fed. Power Comm'n*, 606 F.2d 1373, 1381 (D.C. Cir. 1979).

Defendant-Intervenors offer several arguments against mootness, but none is persuasive. First, they emphasize that the Supreme Court did not order us to dismiss the case as moot. Def.-Intervenors Opp'n [Dkt. # 252] at 2. This reads too much into the Court's summary vacatur and remand of our judgment. In fact, the Court instructed us to consider both the effect of *Shelby County* and the mootness argument Defendant-Intervenors themselves had raised before the Court. *See* 133 S. Ct. at 2885. Having followed that instruction, we conclude that Texas's claims are moot.

Second, Defendant-Intervenors suggest we cannot rely upon the abandonment of the 2011 redistricting plans because "[m]ere voluntary cessation of allegedly illegal

conduct does not moot a case." Def.-Intervenors Opp'n at 3 (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968)). But that argument does not fit the facts of our case. The voluntary cessation of conduct challenged in a lawsuit is relevant to a suggestion of mootness when a *defendant* attempts to moot a *plaintiff's* claim, not when a plaintiff itself changes course in a manner that precludes it from obtaining any meaningful relief. *See Already, LLC*, 133 S. Ct. at 727. In any event, there is more at work here than the Texas legislature's decision to abandon the 2011 plans. The decision in *Shelby County* dismantled the legal framework that called for preclearance of Texas's redistricting plans in the first place. That alone rendered Texas's claim for declaratory relief moot.

Third, Defendant-Intervenors note that they intend to move for attorneys' fees. Def.-Intervenors Opp'n at 4-5. We fail to see how that speaks to mootness. As one of the cases cited by Defendant-Intervenors shows, they will remain free to seek attorneys' fees after dismissal. *See Comm'rs Court of Medina Cnty., Tex. v. United States*, 683 F.2d 435, 438 (D.C. Cir. 1982) (defendant-intervenors in VRA preclearance suit moved for attorneys' fees *after* district court dismissed suit as moot).

Our conclusion that we must dismiss Texas's claims—the only claims that presently exist in this action—in turn affects our consideration of Defendant-Intervenors' request for leave to amend their answers and assert a counterclaim. That request is effectively a request to initiate a new lawsuit in which Defendant-Intervenors are the plaintiffs and Texas the defendant. But while Texas was statutorily required to bring its preclearance action here in the District of Columbia, *see* 42 U.S.C. § 1973c(a), this

would not be the proper venue for Defendant-Intervenors to bring a VRA action against Texas, *see* 28 U.S.C. § 1391(b). Improper venue does not deprive a federal court of jurisdiction, but if Defendant-Intervenors brought the type of claim they wish to assert against Texas as an original action in this court, we would transfer it to the Western District of Texas per 28 U.S.C. § 1406(a). And even were venue not technically improper here, in these circumstances we would exercise our discretion under 28 U.S.C. § 1404(a) to effect the transfer, much as this court has done in other VRA cases. *See Reaves v. U.S. Dep't of Justice*, 355 F. Supp. 2d 510, 516-17 (D.D.C. 2005) (three-judge court) (transferring, *sua sponte*, VRA action against South Carolina to the District of South Carolina under § 1404); *cf. Little v. King*, 768 F. Supp. 2d 56, 64-68 (D.D.C. 2011) (granting Alabama Attorney General's motion to transfer VRA claim to the Middle District of Alabama under § 1404). Therefore, rather than grant Defendant-Intervenors' motion for leave to amend their pleadings only to immediately transfer the case, we will simply deny their motion. Defendant-Intervenors remain free to seek their desired relief in a more appropriate forum.

For the foregoing reasons, it is

ORDERED that Texas's motion to dismiss its claims [Dkt. # 239] is **GRANTED**; and it is

FURTHER ORDERED that Defendant-Intervenors' motion for leave to amend their answers and assert a counterclaim [Dkt. # 241] is **DENIED**. This is a final appealable order. *See* Fed. R. App. P. 4(a). This case is closed.

/s/
THOMAS B. GRIFFITH
Date: December 3, 2013 United States Circuit Judge

/s/
ROSEMARY M. COLLYER
United States District Judge

/s/
BERYL A. HOWELL
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, *Plaintiff,* v. UNITED STATES OF AMERICA; ERIC HOLDER in his official capacity as Attorney General of the United States, *Defendants*, and WENDY DAVIS, et al., *Defendant-Intervenors*.	CIVIL ACTION NO. 1:11-cv-1303 (RMC-TBG-BAH)

ADVISORY

The State of Texas moved to dismiss its complaint because the coverage formula in Section 4(b) of the Voting

Rights Act violates the Constitution and cannot be used to subject jurisdictions to preclearance. *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2631 (2013); Pls' Mot. to Dismiss (ECF No. 239) at 1. The United States did not oppose the State's motion, *see* United States' Resp. to Pls' Mot. to Dismiss (ECF No. 247), and the Court granted the motion and closed the case, Memorandum and Order (ECF No. 255). The subsequent motions for attorneys' fees filed by the Davis Intervenors, the Gonzales Intervenors, and the Texas NAACP Intervenors are frivolous and should be promptly denied.

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. *See Shelby County*, 133 S. Ct. at 2631; *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("[A]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."). 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.

The State of Texas is the "prevailing party" in this case because Congress violated the Constitution when it subjected Texas to preclearance in 2006—Texas never

should have been forced to pursue this litigation before implementing its legislatively enacted redistricting plans. The intervenors cannot be the "prevailing party" for their role in aggravating the unconstitutional burden of preclearance and delaying the State's reapportionment efforts following the 2010 Census.

The only basis upon which the intervenors could conceivably have claimed prevailing-party status—this Court's denial of preclearance—was vacated on appeal by the Supreme Court. *See* Judgment of the Supreme Court of the United States, *Texas v. United States*, No. 12-496 (ECF No. 253). It is well-established that "[w]hen [the Supreme Court] applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 279 n.32 (1994) (noting that under the "firm rule of retroactivity," the Supreme Court's holdings apply to all pending cases).

The intervenors' attempt to recover attorneys' fees and costs from the State of Texas disregards the holding of *Shelby County* and the Supreme Court's disposition of the appeal in this case. *Shelby County* requires immediate denial of all motions for fees and costs, and the State does not intend to respond unless requested to do so by the Court.

Dated: December 20, 2013 Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

J. REED CLAY, JR.
Special Assistant and Senior Counsel to the Attorney General

/s/ Matthew H. Frederick
MATTHEW H. FREDERICK
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Attorneys for the State of Texas

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, and ERIC H. HOLDER, JR. in his official capacity as Attorney General of the United States, Defendants, WENDY DAVIS, *et al.*, Defendant-Intervenors.	)	Case No. 1:11-CV-01303 (RMC-TBG-BAH) [Three-Judge Court]

PLAINTIFF'S MOTION TO DISMISS

Plaintiff the State of Texas hereby moves under Federal Rule of Civil Procedure 41(a) to dismiss all claims asserted in its Original Complaint. The Supreme Court

ruled in *Shelby County, Alabama v. Holder*, No. 12-96, 2013 WL 3184629 (U.S. June 25, 2013), *reversing* 679 F.3d 848 (D.C. Cir. 2012), that the coverage formula in Section 4(b) of the Voting Rights Act is unconstitutional and "can no longer be used as a basis for subjecting jurisdictions to preclearance." *Id.* at *18. The Supreme Court then vacated this Court's judgment. *See Texas v. United States*, No. 12-496, 2013 WL 3213539, *1 (U.S. June 27, 2013). Given that Texas is no longer subject to preclearance, its claims in this Court are now moot.

The State of Texas further advises the Court that on June 23, 2013, the Texas Legislature enacted new electoral districts for the Texas Senate[1], the Texas House of Representatives[2], and the United States House of Representatives[3], and expressly repealed the redistricting statutes for which the State sought declaratory judgment in this case[4], thus eliminating any basis for this Court's ju-

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[1] *See* Tex. S.B. 2, 83d Leg., 1st C.S. (enacting Plan S172).

[2] *See* Tex. S.B. 3, 83d Leg., 1st C.S. (enacting Plan H358).

[3] *See* Tex. S.B. 4, 83d Leg., 1st C.S. (enacting Plan C235).

[4] Tex. S.B. 2 § 3, 83d Leg., 1st C.S. ("Chapter 1315 (Senate Bill No. 31), Acts of the 82nd Legislature, Regular Session, 2011 (Article 193e, Vernon 's Texas Civil Statutes), is repealed."); Tex. S.B. 3, art. III, § 3, 83d Leg., 1st C.S. ("Chapter 1271 (H.B. 150), Acts of the 82nd Legislature, Regular Session, 2011 (Article 195a-12, Vernon 's Texas Civil Statutes), is repealed."); Tex. S.B. 4 § 3, 83d Leg., 1st C.S. ("Chapter 1 (Senate Bill No. 4), Acts of the 82nd Legislature, 1st Called Session, 2011 (Article 197j, Vernon 's Texas Civil Statutes), is repealed.").

risdiction. The State of Texas therefore respectfully requests that the Court enter an order dismissing all claims asserted in this case.

Dated: July 3, 2013

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Solicitor General

J. REED CLAY, JR.
Special Assistant and Senior Counsel to the Attorney General

ANGELA V. COLMENERO
Assistant Attorney General

MATTHEW H. FREDERICK
Assistant Solicitor General

* * *

APPENDIX H

Supreme Court of the United States

No. **12-96**

SHELBY COUNTY, ALABAMA,

Petitioner

v.

ERIC H. HOLDER, JR, ATTORNEY GENERAL, ET AL.

ON WRIT OF CERTIORARI to the United States Court of Appeals for the District of Columbia Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is reversed with costs.

IT IS FURTHER ORDERED that the petitioner Shelby County, Alabama recover from Eric H. Holder, Jr., Attorney General, et al. Six Thousand Two Hundred Eighty-seven Dollars and Thirty-six Cents ($6,287.36) for costs herein expended.

June 25, 2013

Printing of record:	**$5,987.36**
Clerk's costs:	**300.00**
Total:	**$6,287.36**