No. 14-50042

In the United States Court of Appeals for the Fifth Circuit

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

v.

GOVERNOR RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS; JOHN STEEN; THE STATE OF TEXAS,
Defendants-Appellants.

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

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY; THE STATE OF TEXAS,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
Case No. 5:11-cv-788

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Certificate of Interested Persons

Counsel of record certifies that the following persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Statement Regarding Oral Argument

The State respectfully requests oral argument. The issues in this case are sufficiently important and complex to warrant oral argument.

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Defendants-Appellants Rick Perry, Nadita Berry, and the State of Texas (collectively, "the State") respectfully appeal the district court's judgment of September 4, 2013; the district court's order of January 8, 2014, awarding the plaintiffs $360,659.68 in attorneys' fees and costs; and the district court's supplemental order of January 15, 2014, awarding the plaintiffs an additional $2,718.75 in fees. *See* ROA.2786-87, Record Excerpts ("RE") at Tab 7; ROA.3472-3529, RE at Tab 8; ROA.3540-43, RE at Tab 9. The State also respectfully asks this court to vacate the district court's order of September 29, 2011, which permanently enjoined the State from implementing its 2011 Senate redistricting plan on the ground that it had not been "pre-cleared" by federal officials, and the district court's order of February 28, 2012, which imposed a court-drawn redistricting plan for the State's 2012 Senate elections. *See* ROA.78-79, RE at Tab 4; ROA.2305-06, RE at Tab 5.

Statement of Jurisdiction

The district court entered a final judgment on September 4, 2013, that declared the plaintiffs "prevailing parties" entitled to "reasonable attorneys' fees and costs." ROA.2786-87, RE at Tab 7. The State filed a notice of appeal on September 26, 2013. *See* ROA.3038-39. But a motions panel of this Court (over dissent) dismissed the State's appeal as premature because the district court had not yet entered an award of attorneys' fees. *See* ROA.3470-71; *cf. Southern Travel Club, Inc. v. Carnival Air Lines, Inc.*, 986 F.2d 125, 131 (5th Cir. 1993) (per curiam) ("[A]n order awarding attorney's fees or costs is not reviewable on appeal until the award is reduced to a sum certain").

On January 8, 2014, the district court awarded the plaintiffs $360,659.68 in attorneys' fees and costs. See ROA.3472-3529, RE at Tab 8. The State filed its timely notice of appeal on January 9, 2014. *See* ROA.3530-31, RE at Tab 2. On January 15, 2014, the district court issued a supplemental order awarding the plaintiffs an additional $2,718.75 in attorneys' fees, and on January 31, 2014, the State filed a timely amended notice of appeal. *See* ROA.3540-43, RE at Tab 9; ROA.3547-48, RE at Tab 3. The notice appealed from "any and all orders and rulings that were adverse to [the State], whether or not subsumed within the September 4, 2013 Final Judgment, including—without limitation—this Court's Order of January 8, 2014 . . . and its Supplemental Order on Attorneys' Fees of January 15, 2014." ROA.3547, RE at Tab 3. This Court has jurisdiction to review the district court's judgment and fee award under 28 U.S.C. § 1291.

The district court's subject-matter jurisdiction rested on Article III and 28 U.S.C. § 1331. The district court had subject-matter jurisdiction at the outset of this lawsuit, but the case became moot after the State repealed the 2011 Senate redistricting plan that the plaintiffs challenged in this case. *See McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) ("Suits regarding the constitutionality of statutes become moot once the statute is repealed."). Although the district court lacked jurisdiction to enter the judgment under review, that does not deprive this Court of appellate jurisdiction to review the improperly entered judgment. *See Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999). Nor does the mootness of this case deprive this Court of ju-

risdiction to review the order awarding attorneys' fees. *See Campanioni v. Barr*, 962 F.2d 461, 464 (5th Cir. 1992).

Statement of the Issues

1. The plaintiffs obtained interim relief on claims brought under section 5 of the Voting Rights Act, but before the plaintiffs could secure a final judgment the Supreme Court ruled that Texas was unconstitutionally subjected to section 5's requirements. *See Shelby County v. Holder*, 133 S. Ct. 2612 (2013). The district court nevertheless declared the plaintiffs "prevailing parties" and ordered the State to pay $363,378.43 in attorneys' fees and costs. Can the plaintiffs be deemed "prevailing parties" based on the unconstitutional interim relief they obtained under an unconstitutional federal statute?

2. This case became moot when the State repealed the 2011 Senate redistricting plan that the plaintiffs challenged in this case. The district court, however, entered a "final judgment" that recounted interim relief that it previously granted and declared that "as prevailing parties, Plaintiffs are awarded their reasonable attorneys' fees and costs." ROA.2786-87, RE at Tab 7. Did the district court err by entering a "judgment" rather than an order dismissing this case as moot?

Statement of the Case

In 2006, Congress enacted the Voting Rights Act Reauthorization And Amendments Act. This legislation reauthorized and extended for 25 years the "preclearance" requirement that Congress had previously imposed on Texas and a handful of other jurisdictions. The preclearance regime, codified in section 5 of the Voting Rights Act, prohibited covered jurisdictions from enforcing any new voting-related law without first obtaining approval from the Attorney General or a federal district court in Washington, D.C. *See* 42 U.S.C. § 1973c. The Supreme Court later held that Congress violated the Constitution by reauthorizing section 5's preclearance requirement under a coverage formula that bore no relationship to current political conditions. *See Shelby County*, 133 S. Ct. at 2622-30.

Because of this unconstitutional congressional enactment, Texas was unable to implement its 2011 redistricting plan for the state Senate. Although Texas filed for preclearance on July 19, 2011, with a federal district court in Washington, D.C., that court did not issue its decision until August 28, 2012—long after the State's scheduled primary elections.[1] That meant that Texas would be stuck with its old Senate map while preclearance proceedings were unfolding in court. But because that old Senate map had been enacted more than ten years earlier and did not rely on 2010 census data, it was malapportioned and impermissible under *Reynolds v. Sims*, 377 U.S. 533 (1964).

On September 22, 2011, a group of plaintiffs led by state Senator Wendy Davis sued the State's election officials. *See* ROA.36-49, RE at Tab 10.[2] Their complaint raised two claims. First, the plaintiffs sought to enjoin state officials from using the old Senate map (S100) because it was malapportioned. *See* ROA.39-42, 42-43, RE at Tab 10. We will refer to this as the plaintiffs' "malapportionment claim."[3] Second, the plaintiffs asked the court

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[1] The district court in Washington, D.C. denied preclearance to the State's 2011 maps, but the Supreme Court vacated that ruling after *Shelby County*. *See* ROA.2729; *see also United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013) (noting that when an opinion is vacated, its "ruling and guidance" are "erased").

[2] Another group of plaintiffs filed suit challenging the Senate map on October 17, 2011. *See* Complaint, *LULAC v. Texas*, No. 5:11-cv-00855 (W.D. Tex. Oct. 17, 2011), ECF No. 1. Their claims were similar to those brought by the initial group of plaintiffs and the cases were consolidated. *See* ROA.531; ROA.520-21 (district-court order consolidating the cases). We will refer to all of these litigants collectively as "the plaintiffs."

[3] The plaintiffs' malapportionment claim comprised two distinct legal theories, as they alleged that malapportioned districting violated both the equal-protection clause and the

to enjoin state officials from using the 2011 Senate map (S148) because it had not received preclearance. *See* ROA.43, RE at Tab 10. We will refer to this as the plaintiffs' "section 5 claim." Because section 5 and *Reynolds* prevented *any* legislatively approved map from being used for the 2012 Senate elections, the plaintiffs asked the district court to impose its own Senate redistricting plan for the 2012 election cycle. *See* ROA.48, RE at Tab 10.

The plaintiffs also alleged that the 2011 Senate map violated section 2 of the Voting Rights Act, as well as the fourteenth and fifteenth amendments, because it altered Senator Davis's district (Senate District 10) in a manner that made the electorate less likely to re-elect Senator Davis. *See* ROA.43-47, RE at Tab 10. But the plaintiffs acknowledged that these claims were unripe—and would remain unripe until the State secured preclearance for its 2011 redistricting plan. *See* ROA.47, 48, RE at Tab 10 (requesting relief on the section 2 and constitutional claims only "[i]n the unlikely event that Section 5 preclearance is obtained"); *see also* ROA.93-94 ("[T]he Court cannot resolve the merits of this case until there is a determination on preclearance."); *McDaniel v. Sanchez*, 452 U.S. 130, 146 (1981) ("A new reapportionment plan enacted by a State . . . will not be considered effective as law, until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court ad-

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privileges-or-immunities clause of the fourteenth amendment. *See* ROA.42-43, RE at Tab 10. Although the plaintiffs' district-court filings treated these as distinct claims, we will for the sake of simplicity refer to them as a single "malapportionment claim."

dress the constitutionality of the new measure." (citations and internal quotation marks omitted)).

On September 29, 2011, the district court issued an order enjoining the State's officials from using the 2011 Senate map because it had not been precleared. *See* ROA.78-79, RE at Tab 4. On November 23, 2011, the district court imposed a court-drawn plan (S164) as the "interim plan" to be used for the 2012 state Senate elections. *See* ROA.1680-82. This interim plan restored Senator Davis's district to its pre-2011 configuration, and altered five other Senate districts to accommodate that change. *See* ROA.1681 & n.2. When the State protested that the court could not impose these changes absent a finding that the 2011 Senate map violated (or likely violated) federal law, the district court insisted that it was not ruling or opining on the merits of the plaintiffs' claims. *See* ROA.1680-82 ("This interim map is not a ruling on the merits of any claims asserted by the Plaintiffs in this case . . . . [T]his is not a remedial map. The Court's configuration of Senate District 10 is not a merits determination on the challenges raised in this case . . . ."). Rather, the district court held that it was *compelled* to draw an interim Senate map that deviated from the 2011 legislatively enacted plan, *regardless* of how weak or meritless the plaintiffs' claims might be, because section 5 forbade the court to implement an unaltered legislatively enacted redistricting plan prior to preclearance. *See* ROA.1681-82 ("[T]he fact remains that the Legislature's enacted map has not been precleared . . . and thus may not be imple-

mented . . . . Using the State's unprecleared map in its entirety would improperly bypass the preclearance proceedings . . . .").

The State appealed, and the Supreme Court stayed the district court's order and noted probable jurisdiction. ROA.1915-16.[4] On January 20, 2012, the Supreme Court issued a *per curiam* opinion vacating the district court's interim order and remanding for further proceedings. *See Perry v. Perez*, 132 S. Ct. 934 (2012) (per curiam); ROA.1929-43. The justices held that a State's legislatively enacted (but non-precleared) redistricting plan must "serve[] as a starting point" for federal courts, and that interim relief may depart from the legislatively enacted plan only in limited situations. ROA.1935. If a litigant is challenging the State's legislatively enacted plan under section 2 or the Constitution, the district court's interim relief may depart from the legislature's non-precleared plan only "to the extent those legal challenges are shown to have a likelihood of success on the merits." *Perry*, 132 S. Ct. at 942. If litigants are bringing section 5 challenges, the district court's interim relief may alter only those aspects of the legislatively enacted plan that "stand a reasonable probability of failing to gain § 5 preclearance." ROA.1936. (The Supreme Court defined this "reasonable probability" standard to require a "not insubstantial" section 5 challenge to a State's legislatively enacted redistricting plan. *See* ROA.1936.) Because the district

[4] On December 16, 2011, the district court entered an order delaying the State's 2012 primary election from March 6, 2012, to April 3, 2012, and delaying the primary runoff election from May 22, 2012, to June 5, 2012. *See* ROA.1917-25; *cf.* Tex. Elec. Code §§ 41.007(a), (b).

court's interim relief had departed from the legislatively enacted map without finding that the plaintiffs' claims were likely to succeed or "not insubstantial," the Supreme Court vacated the interim-relief order and remanded the case.

On February 28, 2012, the district court issued a new interim-relief order adopting Plan S172 as the map for the 2012 state Senate elections. *See* ROA.2305-06, RE at Tab 5. The district court once again insisted that it was not ruling on the merits of any of the plaintiffs' challenges to the 2011 Senate map:

> This interim plan is not a final ruling on the merits of any claims asserted by the Plaintiffs in this case or any of the other cases associated with this case. Nor is it intended to be a ruling on the merits of any claim asserted in the case pending in the United States District Court for the District of Columbia. Rather, this interim plan is a result of preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in this case, and application of the "not insubstantial" standard for the Section 5 claims, as required by the Supreme Court's decision in *Perry v. Perez*.

ROA.2305-06, RE at Tab 5.[5] Later, on March 19, 2012, the district court issued another order explaining that its interim relief rested *solely* on the plaintiffs' section 5 challenges to the 2011 Senate map—and not on their section 2 or constitutional claims. *See* ROA.2531, RE at Tab 6 ("[T]his Court has concluded that certain aspects of the State's enacted senate plan 'stand a rea-

[5] The next day, on March 1, 2012, the district court issued an order delaying the State's primary elections yet again, with the primary to be held on May 29, 2012, and the primary runoff election on July 31, 2012. *See* ROA.2516-17.

sonable probability of failing to gain §5 preclearance' and that the Section 5 challenge to those aspects of the plan is 'not insubstantial.' … Imposition of an interim plan is therefore appropriate."), ROA.2532, RE at Tab 6 ("[W]e have limited our changes in the State's enacted plan to those aspects of the plan 'that stand a reasonable probability of failing to gain §5 preclearance.' *Perry*, 132 S. Ct. at 941."). Had the district court based any of its interim relief on section 2 or the Constitution, it would have been required to show that the plaintiffs' claims were *likely* to succeed. *See Perry*, 132 S. Ct. at 942. Instead, the district court chose to rely exclusively on section 5 and the less-demanding "reasonable probability" standard. The State carried out its 2012 elections using this court-imposed Senate map, and Senator Davis was re-elected.

On June 25, 2013, the Supreme Court held in *Shelby County* that Congress violated the Constitution by re-authorizing section 5's "preclearance" requirement under an outdated coverage formula. This allowed the State's non-precleared 2011 Senate redistricting plan to take immediate effect. But the next day, on June 26, 2013, the governor signed a law repealing the 2011 Senate plan (S148) and replacing it with a plan that mirrored the court-imposed interim map (S172), mooting all claims that the plaintiffs had brought against the 2011 Senate redistricting plan. *See* ROA.2719-20. On June 27, 2013, the Supreme Court vacated the decision of the D.C. district court that had denied preclearance to the State's 2011 Senate map, and remanded for further consideration in light of *Shelby County*. *See* ROA.2729.

The D.C. district court later dismissed the preclearance case as moot because Texas had repealed the redistricting plan on which it had sought preclearance. *See* Three-Judge Court Memorandum and Order at 2, *Texas v. United States*, No. 1:11-cv-1303-RMC-TBG-BAH (D.D.C. December 3, 2013), ECF No. 255.

On July 1, 2013, the district court ordered the parties to "confer and submit a proposed form of judgment or dismissal order to the Court." ROA.2767. The parties were unable to agree on a judgment or order and submitted competing proposals. The plaintiffs asked the district court to enter a final "judgment" under Fed. R. Civ. P. 58, declaring that:

> JUDGMENT is entered in favor of Plaintiffs' claims that: that the pre-2011 state senate redistricting plan, Plan S100, violated the one-person, one-vote requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Claims I and II); the State of Texas' 2011 state senate redistricting plan, Plan S148, be enjoined because that plan did not receive preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (Claim III and Plaintiffs' Complaint at ¶ 7 at p. 13); and that a new redistricting plan should be imposed for the 2012 elections and thereafter (Plaintiffs' Complaint at ¶ 8 at p. 13).

ROA.2784. The plaintiffs' proposed "judgment" also declared that the plaintiffs' section 2 and constitutional challenges to the 2011 Senate redistricting plan would be "DISMISSED as moot" because Texas had repealed its 2011 Senate map. ROA.2784. The plaintiffs did not explain how their section 2 and constitutional challenges to the repealed Senate redistricting plan

could be moot, while their section 5 challenge to that map could simultaneously remain live and support entry of a judgment.

The State, by contrast, insisted that the district court must enter an order dismissing the case as moot; the district court could not enter a "judgment" because there was no longer an Article III case or controversy. *See* ROA.2775-80. The repeal of the 2011 Senate redistricting plan rendered moot all claims brought against that plan. *See McCorvey*, 385 F.3d at 849 ("Suits regarding the constitutionality of statutes become moot once the statute is repealed."). And *Shelby County* mooted the plaintiffs' malapportionment claim by removing any possibility that Texas might use its pre-2011 Senate map. The State also argued that if the district court retained jurisdiction to enter a judgment, it could not possibly enter judgment *for the plaintiffs* after the Supreme Court's ruling in *Shelby County*. *Shelby County* would compel judgment for the State on the malapportionment claim because the State was entitled to have its legislatively enacted redistricting plans take effect without awaiting preclearance. And the State would be entitled to judgment on the section 5 claims because the preclearance requirement violated the Constitution.

After considering these competing proposals, the district court entered a "final judgment" that says:

> This Court previously ORDERED, ADJUDGED and DECREED:

> that Plaintiffs' request for declaratory relief was granted to the extent that Senate plan S100, the benchmark plan, violates the one-person, one-vote requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and will not be used for any further elections;
>
> that Plaintiffs' request for injunctive relief was granted such that Senate plan S148, the 2011 enacted plan, has been permanently enjoined from implementation and no elections have been or will be held thereunder; and
>
> that Plan S172, which was reviewed under the standard set forth in *Perry v. Perez* and restored district 10 to near benchmark configuration and remedied the constitutional infirmities being asserted by Plaintiffs, was to be used for the 2012 election.
>
> It is further ORDERED, ADJUDGED and DECREED:
>
> that because (1) Plan S148 has been repealed, (2) Plaintiffs agree that Plan S172 does not violate the Voting Rights Act or the Constitution, and (3) Plaintiffs do not seek any further relief with regard to Plan S148, Plaintiffs' remaining claims under § 2 of the Voting Rights Act and the Constitution are DISMISSED AS MOOT; and
>
> that, as prevailing parties, Plaintiffs are awarded their reasonable attorneys' fees and costs.

ROA.2786-87, RE at Tab 7. On January 8, 2014, the district court awarded the plaintiffs $360,659.68 in attorneys' fees and costs, holding that the "interim relief obtained by Plaintiffs before Defendants mooted the case" rendered the plaintiffs prevailing parties entitled to attorneys' fees. ROA.3479, RE at Tab 8. Finally, on January 15, 2014, the district court issued a supple-

mental order awarding the plaintiffs an additional $2,718.75 in attorneys' fees. *See* ROA.3540-43, RE at Tab 9.

Summary of the Argument

The plaintiffs are not entitled to attorneys' fees because they cannot be deemed "prevailing parties" on any of their claims. The State has prevailed on both the section 5 and malapportionment claims, and became entitled to judgment on those claims the moment the Supreme Court issued its ruling in *Shelby County*. *See Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (holding that Supreme Court pronouncements must be given full retroactive effect in all cases open on direct review at the time of the Court's ruling). Texas did not violate section 5's requirements because the preclearance regime was unconstitutional; a State cannot "violate" an unconstitutional statutory requirement. And Texas did not violate *Reynolds v. Sims* because its reapportioned 2011 Senate plan was entitled to take effect without awaiting "preclearance" from federal officials. The Supreme Court decided *Shelby County* while the plaintiffs' malapportionment and section 5 enforcement claims were still pending in the district court; *Shelby County* immediately turned those into losing claims and rendered the State the "prevailing" party.

That the plaintiffs obtained preliminary relief before *Shelby County* torpedoed their claims does not make them "prevailing parties." *See Sole v. Wyner*, 551 U.S. 74 (2007) (preliminary relief insufficient to confer "prevailing party" status). If a plaintiff is awarded preliminary relief under an uncon-

stitutional federal statute, and the Supreme Court declares the statute unconstitutional before the case proceeds to final judgment, the plaintiff is a losing party, not a prevailing party—regardless of any preliminary relief he may have secured before the Supreme Court's decision. *Shelby County* further holds that the preliminary relief awarded to the plaintiffs was unconstitutional, and an unconstitutional remedy cannot serve as a basis for attorneys' fees. To say that the plaintiffs are "prevailing parties" on their malapportionment or section 5 enforcement claims is to deny the Supreme Court's ruling in *Shelby County*. The State has prevailed on those claims and it cannot be mulcted for attorneys' fees.

Nor can the plaintiffs be deemed "prevailing parties" on their section 2 or constitutional challenges to the 2011 Senate redistricting plan. The plaintiffs never secured any judicial relief on those claims because the claims were not ripe. And the interim relief awarded by the district court relied exclusively on the plaintiffs' section 5 claims and disclaimed any reliance on section 2 or the Constitution. *See* ROA.2531, 2532, RE at Tab 6; *see also* ROA.3480, RE at Tab 8 (admitting that "the Court did not reach the merits of" the "[p]lantiffs' § 2 and Fourteenth Amendment claims" in its interim-relief order). Although *Shelby County* removed the ripeness barrier on June 25, 2013, the governor signed a new Senate plan into law the next day, mooting the plaintiffs' section 2 and constitutional claims before they could get off the ground. The plaintiffs failed to secure *any* judicial relief on their section 2 and constitutional claims prior to *Shelby County*, and they failed to secure ju-

dicial relief during the one-day window in which their claims were ripe but not yet moot. A plaintiff cannot be deemed a "prevailing party" on a claim for which he has obtained no judicial relief. *See Buckhannon Bd. and Care Home, Inc., v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598 (2001).

Finally, the district court had no jurisdiction to enter a "judgment" in this case. All of the plaintiffs' claims became moot when the State repealed the 2011 Senate map on June 26, 2013, and the district court should have issued a jurisdictional dismissal rather than entering a judgment.

ARGUMENT

I. THE PLAINTIFFS ARE NOT "PREVAILING PARTIES" ON ANY OF THEIR CLAIMS.

A plaintiff that wins a preliminary injunction but loses at final judgment is not a "prevailing party" and cannot recover attorneys' fees. *See Sole*, 551 U.S. 74. The plaintiffs in this case secured interim relief on their section 5 claims after the district court deemed those claims "not insubstantial." *See* ROA.2305-06, RE at Tab 5; 2531-32, RE at Tab 6. But *Shelby County* instantly turned the plaintiffs' section 5 claims into losers. The plaintiffs cannot be deemed to have "prevailed" on these claims when the Supreme Court of the United States declared the preclearance regime unconstitutional—and did so while the plaintiffs' claims were still pending in the district court. *See Harper*, 509 U.S. at 97 (holding that Supreme Court's application of a rule of federal law to the parties before it requires that rule be given full retroactive

effect in all cases still open on direct review). The State has "prevailed" on the plaintiffs' section 5 and malapportionment claims.

The district court thought that its interim-relief order could support an award of attorneys' fees. *See* ROA.3482-84, RE at Tab 8. That is mistaken for three independent reasons. First, the interim relief awarded by the district court was unconstitutional. Second, the district court's interim-relief order must be vacated in light of *Shelby County*. Third, even if the interim-relief order could somehow survive *Shelby County*, it cannot change the fact that the *State* has prevailed on every claim on which the plaintiffs secured interim relief.

A. The district court's interim-relief order was unconstitutional.

Shelby County holds that Congress did not have constitutional authority to subject Texas to the preclearance regime in the 2006 Voting Rights Act. *See* 133 S. Ct. at 2622-30. It follows that the district court lacked constitutional authority to enforce this unconstitutional preclearance regime against the State, by enjoining the use of the legislatively enacted Senate map based on nothing more than a "reasonable probability" that it would fail to obtain "preclearance" from federal officials. The district court never explained how its interim-relief order could be deemed constitutional in light of *Shelby County*. Indeed, the district court would not even say *whether* its interim-relief order was constitutional. All the district court said was: *"Shelby County does not automatically establish that* the interim relief in this case was incor-

rectly granted or could not support an award of fees because Plaintiffs also asserted § 2 and constitutional claims." ROA.3484 n.8, RE at Tab 8 (emphasis added).

Shelby County does, however, establish that the district court's interim-relief order was unconstitutional. The district court did not award interim relief on the plaintiffs' section 2 or constitutional claims, and it could not have done so without finding that those claims were *likely* to succeed on the merits—a far more demanding standard than the "not insubstantial" or "reasonable probability" test that the interim-relief order applied to the plaintiffs' section 5 claims. *See Perry*, 132 S. Ct. at 942. The district court's interim-relief order did not hold that any of the plaintiffs' claims were "likely" to succeed; it relied *exclusively* on a "reasonable probability" that the 2011 Senate map would fail to win preclearance under section 5. *See* ROA.2531-32, RE at Tab 6. That is not a constitutionally permissible basis on which to enjoin the enforcement of a State's legislatively enacted redistricting plan. *See Shelby County*, 133 S. Ct. at 2622-30. And an unconstitutional judicial order cannot serve as a basis for attorneys' fees.

The district court noted that its interim-relief order provided "relief consistent with then-existing law." ROA.3480, RE at Tab 8. But this alleged compliance with pre-*Shelby County* case law is irrelevant. The ruling in *Shelby County* applies retroactively to all cases "open on direct review" at the time of decision. *See Harper*, 509 U.S. at 97. And a ruling from the Supreme Court declaring a statute unconstitutional makes the statute unconstitutional

from the time of its enactment, not from the moment the Supreme Court announced its decision. *See Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("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."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("An act of the legislature, repugnant to the Constitution . . . is entirely void."). It is no defense that the district court issued its interim-relief order before the Supreme Court declared the preclearance regime unconstitutional; the order is as unconstitutional as the statute it claims to enforce.

B. The district court's interim-relief order must be vacated.

Shelby County also compelled the district court to vacate its interim-relief order, because the order purports to enforce a federal statute that the Supreme Court has declared unconstitutional. *See Harper*, 509 U.S. at 97 (holding that Supreme Court's application of a rule of federal law to the parties before it requires that rule be given full retroactive effect in all cases still open on direct review). Likewise for the district court's order of September 29, 2011, which enjoined the State's officials from using the 2011 Senate map on the ground that it had not been precleared by federal officials.

Yet the district court insisted (without any citation of authority) that its interim-relief order "cannot now be reversed, dissolved, or otherwise undone" because the State repealed its 2011 Senate plan and enacted the court-

imposed interim map into law. ROA.3482, RE at Tab 8; *see also* 3480-81. That is not correct. The State's decision to replace the 2011 Senate plan with the court-imposed interim map means that the case is moot, and that requires the district court to dissolve its interim-relief order because there is no longer an Article III case or controversy to support it. *See, e.g., Hispanic Interest Coalition of Ala. v. Governor of Ala.*, 691 F.3d 1236, 1242-43 (11th Cir. 2012). The State's decision to moot the case imposed an independent obligation on the district court to terminate its interim-relief order; it did not absolve the district court of its responsibility to implement *Shelby County* and vacate the injunctions that purported to enforce an unconstitutional preclearance regime.

By claiming that it was powerless to vacate the interim-relief order, the district court attempted to analogize its preliminary relief to a consent decree. *See* ROA.3482, RE at Tab 8 ("The interim relief was therefore essentially a judicially approved settlement or consent decree."); *see also Buckhannon*, 532 U.S. at 604 ("[C]ourt-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees.") (citation omitted).[6]

[6] The district court overstated matters when it claimed that "the Supreme Court made clear in *Maher v. Gagne*, 448 U.S. [122] [ ], 129 [1980], the fact that a plaintiff prevailed through a settlement rather than through litigation does not weaken the claim to fees." ROA.3482-83, RE at Tab 8. *Buckhannon* clarified that settlements can authorize an award of attorneys' fees only when the settlement takes the form of a consent decree or judicially approved settlement; private settlements do not confer prevailing-party status. *See Buckhannon*, 532 U.S. at 604 n.7 ("*Maher* only 'held that fees *may* be assessed . . . after a case has been settled by the entry of a consent decree.' *Evans v. Jeff D.*, 475 U.S. 717, 720

This attempt to classify the interim-relief order as a consent decree is flawed for many reasons. First, as we have mentioned, the district court was wrong to assert that its interim-relief order "cannot now be reversed, dissolved, or otherwise undone." ROA.3482, RE at Tab 8. The district court had not only the power but the *obligation* to vacate the interim-relief order after *Shelby County*. Second, the interim-relief order expressly denied that it was imposing permanent relief or resolving the merits of the plaintiffs' claims. *See* ROA.2305, RE at Tab 5 ("The court adopts PLAN S172 as the *interim plan* for the districts *used to elect senators in 2012* to the Texas Senate.") (emphasis added); ROA.2305-06, RE at Tab 5 ("This interim plan is *not a final ruling* on the merits of any claims asserted by the Plaintiffs in this case or any of the other cases associated with this case.") (emphasis added). Third, although the State agreed not to object to the district court's imposition of S172 as an interim map, it did so on the understanding that it was "preserv[ing] all defenses for the final judgment stage of these proceedings" and "not admitt[ing] that any of Plaintiffs' claims against the legislatively enacted Senate plan have merit." ROA.2531, RE at Tab 6. The district court and the plaintiffs are sandbagging the State by using its cooperation in fashioning an interim map—cooperation that was needed to avoid even further delays of the State's 2012 primary elections—as evidence that the State en-

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(1986). Private settlements do not entail the judicial approval and oversight involved in consent decrees."). The statements in earlier cases suggesting that private settlements might supply a basis for attorneys' fees were dismissed as "dictum." *See Buckhannon*, 532 U.S. at 604 n.7.

tered into a "consent decree" that conclusively resolved the litigation and triggered liability for attorneys' fees. Fourth, to the extent that the State "consented" to this interim arrangement, that consent was induced by an unconstitutional federal statute, and therefore cannot be used to subject the State to an award of attorneys' fees. Finally, even if the interim-relief order could be equated with a consent decree, a consent decree must be modified or vacated if "one or more of the obligations placed upon the parties has become impermissible under federal law." *Rufo* v. *Inmates of Suffolk Cnty. Jail,* 502 U.S. 367, 388 (1992); *see also* Fed. R. Civ. P. 60(b)(5); *Horne v. Flores*, 557 U.S. 433, 447 (2009). The interim relief ordered by the district court became "impermissible" once the Supreme Court issued its ruling in *Shelby County*, and it could not be left in place even if it had been memorialized in a formal consent decree.

The interim-relief order should have been vacated in light of *Shelby County*. If the district court wants to claim that it is powerless to vacate an order that the Supreme Court has deemed unconstitutional, then this Court should vacate the interim-relief order itself.

C. The State has prevailed on every claim on which the plaintiffs obtained interim relief.

Even if the district court's interim-relief order could somehow survive *Shelby County*, it *still* cannot support an award of attorneys' fees because the State has prevailed on the plaintiffs' malapportionment and section 5 claims—and those were the *only* claims on which the district court purported

to award relief. *See* ROA.78-79, RE at Tab 4; 2305-06, RE at Tab 5; 2531-32, RE at Tab 6; 3480, RE at Tab 8.

If a litigant wins a preliminary injunction, but ultimately loses on the claims on which he secured preliminary relief, he is a losing party, not a prevailing party. *See Sole*, 551 U.S. at 78 ("[A] preliminary injunction holds no sway once fuller consideration yields rejection of the provisional order's legal or factual underpinnings.").[7] The plaintiffs suffered the most thorough defeat possible on their malapportionment and section 5 claims: a ruling from the Supreme Court of the United States declaring the preclearance regime unconstitutional.

The only difference between this case and *Sole* is that the State mooted the malapportionment and section 5 claims before the district court could enter a final judgment. That does not, however, make the plaintiffs "prevailing parties" on those claims. The State mooted the case *after* the Supreme Court's decision in *Shelby County*, which had transformed the plaintiffs' section 5 claims from "not insubstantial" into dead on arrival. The State's deci-

[7] The plaintiffs' district-court briefing ignored *Sole* and relied instead on *Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center*, 765 F.2d 1278, 1293-95 (5th Cir. 1985). *See* ROA.3213-14. The State respectfully submits that *Frazier* is irreconcilable with *Sole* and should be overruled. *See, e.g.*, *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999) (noting that "this panel is bound by the precedent of previous panels absent an intervening Supreme Court case explicitly or implicitly overruling that prior precedent"). The district court prudently declined to rely on *Frazier* after noting that "[t]he validity of *Frazier* after *Sole v. Wyner* . . . is uncertain." ROA.3481-82, RE at Tab 8. And the plaintiffs' district-court briefing made no effort to explain how *Frazier* could survive *Sole*. *See* ROA.3213-14.

sion to moot the case did not suddenly convert the plaintiffs' malapportionment and section 5 claims from losing claims into winning claims, and it did not render the plaintiffs "prevailing parties" on those claims.

The district court tried to distinguish *Sole* on the ground that the interim-relief order "cannot now be reversed, dissolved, or otherwise undone." ROA.3484, RE at Tab 8 (internal quotation marks omitted). That is wrong; a district court retains the power to revoke or modify its earlier orders, even after a case proceeds to final judgment. *See* Fed. R. Civ. P. 60(b); *In re Saffady*, 524 F.3d 799, 803 (6th Cir. 2008) (noting "the power explicitly granted by Rule 60 to reopen cases well after final judgment has been entered"). And, for the reasons we have already explained, the district court was not only permitted but obligated to vacate its interim-relief order in light of *Shelby County* and the State's decision to repeal its 2011 Senate map. *See* Part I.B, *supra*.

That leaves the plaintiffs' section 2 and constitutional claims as the only remaining bases on which the plaintiffs might try to claim "prevailing party" status. But the plaintiffs never obtained *any* judicial relief on those claims, and those claims did not even become ripe until the Supreme Court issued its ruling in *Shelby County*. *See McDaniel*, 452 U.S. at 146; ROA.47, 48, RE at Tab 10 (plaintiffs' complaint requesting relief on the section 2 and constitutional claims only "[i]n the unlikely event that Section 5 preclearance is obtained").

The district court's interim-relief order rested exclusively on the plaintiffs' section 5 claims, which the district court determined were "not insubstantial." *See* ROA.2531, RE at Tab 6 ("[T]his Court has concluded that certain aspects of the State's enacted senate plan 'stand a reasonable probability of failing to gain §5 preclearance' and that the Section 5 challenge to those aspects of the plan is 'not insubstantial.' . . . Imposition of an interim plan is therefore appropriate."); ROA.2532, RE at Tab 6 ("[W]e have limited our changes in the State's enacted plan to those aspects of the plan 'that stand a reasonable probability of failing to gain §5 preclearance.' *Perry*, 132 S. Ct. at 941."). The district court did not base any of its interim relief on the plaintiffs' section 2 or constitutional claims, and the district court never found that those claims had a "likelihood of success on the merits." *Perry*, 132 S. Ct. at 942. Finally, the district court's order awarding attorneys' fees acknowledged that its earlier interim-relief order "did not reach the merits of" the "[p]laintiffs' § 2 and Fourteenth Amendment claims." ROA.3480, RE at Tab 8. A plaintiff cannot be deemed a "prevailing party" unless it secures at least *some* type of judicial relief—and the plaintiffs failed to obtain even preliminary relief on their section 2 and constitutional claims. *See Buckhannon*, 532 U.S. at 600.[8]

[8] The plaintiffs' district-court briefing insisted that the interim-relief order *had* reached the merits of the section 2 and constitutional claims, because it included a statement that "[t]his interim plan is a result of preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in this case, and application of the 'not insubstantial' standard for the Section 5 claims, as required by the Supreme Court's decision in *Perry v. Perez*." ROA.2306, RE at Tab 5; *see also* ROA.3210, 3211-12, 3213. The

The district court complained that the State had mooted the section 2 and constitutional claims before the plaintiffs could obtain judicial resolution. *See* ROA.3480-81, RE at Tab 8 ("[I]nstead of returning to this Court to seek an order dissolving the injunction against Plan S148, Defendants adopted the Court's interim plan and mooted Plaintiffs' remaining claims. In doing so, Defendants have . . . precluded Plaintiffs from obtaining a decision on the merits of their § 2 and Fourteenth Amendment claims from this Court."); ROA.3484, RE at Tab 8 ("Following *Shelby County*, Defendants could have returned to this Court to allow Plaintiffs an opportunity to pursue their § 2 and Fourteenth Amendment claims to a final resolution. Instead, Defendants chose to moot the case before Plaintiffs could do so, by adopting the interim plan."). But *Buckhannon* holds that this cannot support an award of attorneys' fees.[9] A State that moots the plaintiffs' claims by repealing the

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district court's order awarding attorneys' fees emphatically rejected this characterization of its interim-relief order. *See* ROA.3480, RE at Tab 8 ("In addition, because this Court determined that Plaintiffs' § 5 claims were not insubstantial, and because the remedy for that finding also remedied Plaintiffs' § 2 and Fourteenth Amendment claims, *the Court did not reach the merits of those claims*.") (emphasis added). And rightly so. The district court's order of March 19, 2012, made clear that its interim relief relied exclusively on section 5 and the "not insubstantial" standard from *Perry*, 132 S. Ct. at 942. *See* ROA.2531-32, RE at Tab 6. It made no effort to explain whether *any* of the plaintiffs' claims had a "likelihood of success on the merits"—the standard that *Perry v. Perez* required for the consideration of section 2 or constitutional claims.

[9] The district court acts as though the State did something improper by codifying the Senate redistricting plan that the district court itself had imposed on the State. But Texas had every right to replace the 2011 Senate map with the court-imposed map that its legislators had already been elected under. To suggest that legislative reapportionment somehow interferes with federal litigation is backward. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("'[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' . . . [A] federal court must nei-

disputed legislation is immune from attorneys' fees—so long as the repeal occurs before the plaintiff secures judicial relief on those claims. *See Buckhannon*, 532 U.S. at 600-01. This remains true even if the plaintiffs' lawsuit served as the "catalyst" that brought about the repeal. *See id.* at 600 (holding that "prevailing party" excludes "a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct."). The plaintiffs cannot claim that they have "prevailed" on their section 2 or constitutional claims without embracing the "catalyst theory" that *Buckhannon* rejected.[10] And although the plaintiffs secured interim relief on *other* claims brought in this case, that does not distinguish *Buckhannon* because: (1) the interim relief was unconstitutional; (2) the interim-relief order should have been vacated after *Shelby County*; and (3) the State ultimately prevailed on every claim on which the

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ther affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975))).

[10] Indeed, the plaintiffs cannot even qualify for attorneys' fees under the repudiated "catalyst theory." The plaintiffs have no evidence that Texas replaced the 2011 Senate map with the court-ordered plan *because of* the plaintiffs' section 2 and constitutional challenges, rather than a desire to codify the status quo and avoid the need for its legislators to run on a new redistricting plan for a third consecutive election cycle. The "catalyst" was the district court's (unconstitutional) interim order that imposed S172 for the 2012 Senate elections—not the plaintiffs' section 2 and constitutional challenges to the 2011 Senate redistricting plan.

district court granted interim relief. The plaintiffs cannot recover attorneys' fees for securing an unconstitutional imposition on the State's officials.[11]

Finally, neither the district court nor the plaintiffs have ever identified the *claim* on which the plaintiffs have supposedly "prevailed." Doubtless this is because they cannot assert that the plaintiffs "prevailed" on their section 5 or malapportionment claims without defying *Shelby County* and *Sole*, and they cannot maintain that they have "prevailed" on their section 2 or constitutional claims without contradicting *Buckhannon*.

II. The District Court Lacked Jurisdiction To Enter A "Judgment" In This Case.

The district court had no jurisdiction to enter a "judgment," as all of the plaintiffs' claims were moot. *Shelby County* mooted the malapportionment

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[11] In the district court, the plaintiffs relied on *Dearmore v. City of Garland*, 519 F.3d 517 (5th Cir. 2008), which allowed a plaintiff who secured a preliminary injunction to recover attorneys' fees after the city mooted the case by repealing the contested ordinance. *Dearmore*'s holding extends only to plaintiffs who "(1) must win a preliminary injunction, (2) based upon an unambiguous indication of probable success on the merits of the plaintiff's claims as opposed to a mere balancing of the equities in favor of the plaintiff, (3) that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits." *Id.* at 524; *see also id.* at 526 n.4 ("[T]he test we articulate here is only applicable in the limited factual circumstances described above."). *Dearmore* does not apply to this case because the plaintiffs did not win a preliminary injunction, and they did not win relief "based upon an unambiguous indication of probable success on the merits." They obtained an interim-relief order (which is *not* a preliminary injunction) and only after the district court deemed their section 5 claims "not insubstantial"—a far more permissive standard than the "clear showing" of likelihood of success on the merits required for a preliminary injunction to issue. *See Voting for Am., Inc. v. Steen*, 732 F.3d 382, 386 (5th Cir. 2013). *Dearmore* is further inapplicable because the interim relief obtained by the plaintiffs in this case was unconstitutional, and the State would have been entitled to final judgment on every claim on which the plaintiffs obtained interim relief. The district court correctly recognized that "*Dearmore*'s 'limited factual circumstances' are not controlling in this case." ROA.3484 n.8, RE at Tab 8.

claim because it eliminated any possibility that the State might use its pre-2011 Senate map. And the repeal of the 2011 Senate map removed any "injury in fact" that might have been imposed by that redistricting plan. *See McCorvey*, 385 F.3d at 849 ("Suits regarding the constitutionality of statutes become moot once the statute is repealed."). The district court should have issued an order dismissing the case as moot. Instead, the district court entered a "final judgment" that recounted the interim relief that it previously granted and declared that "as prevailing parties, Plaintiffs are awarded their reasonable attorneys' fees and costs." ROA.2786-87, RE at Tab 7. This "judgment" is improper and should be vacated.

The plaintiffs insisted that the district court should enter a judgment rather than a jurisdictional dismissal. ROA.2781-85. We suspect that the plaintiffs made this request because the entry of judgment would strengthen their case for "prevailing party" status. *See, e.g.*, *Buckhannon*, 532 U.S. at 604 ("[E]nforceable judgments on the merits . . . create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees.") (citation omitted). But an attorney cannot counsel a district court to enter a judgment when the court patently lacks jurisdiction to do so. *See BEM I, L.L.C. v. Anthropologie, Inc.*, 301 F.3d 548, 551 (7th Cir. 2002) ("[L]awyers who practice in federal court have an obligation to assist the judges to keep within the boundaries fixed by the Constitution and Congress; it is precisely to impose a duty of assistance on the bar that lawyers are called 'officers of the court.'"). The constitutional and statutory limits on the fed-

eral courts' subject-matter jurisdiction must be respected by judges and advocates alike, and cannot be subverted by lawyers who want to enhance their ability to collect attorneys' fees.

The district court's "judgment" is problematic for additional reasons. For one thing, it does not appear to award relief to the plaintiffs on any of their claims. It recites the relief that was *previously* awarded in the interim-relief orders, but it is not clear whether the judgment is adopting that as permanent relief, and it does not say whether it is awarding final judgment to the plaintiffs or the State on the malapportionment or section 5 claims. Describing the contents of an earlier preliminary-relief order is not the proper office of a judgment. *See Rush Univ. Med. Ctr. v. Leavitt*, 535 F.3d 735, 737 (7th Cir. 2008) ("Unless the plaintiff loses outright, a judgment must provide the relief to which the winner is entitled. That motions have been granted is beside the point."); *Soo Line R.R. Co. v. Escanaba & Lake Superior R.R. Co.*, 840 F.2d 546, 549 (7th Cir. 1988) ("The judgment entered in this case is defective because it does not specify the relief to which the prevailing parties are entitled. . . . [A] judgment must . . . specify the relief awarded.").

It was also inappropriate for the district court to resolve the plaintiffs' "prevailing party" status in the judgment, before the State had an opportunity to submit briefing on the question. Rule 54(d)(2) requires a claim for attorneys' fees to be "made by motion," which must "specify the judgment and the statute, rule, or other grounds entitling the movant to the award." Fed. R. Civ. P. 54(d)(2)(A), (B). The rule further requires the court to "give

an opportunity for adversary submissions on the motion." Fed. R. Civ. P. 54(d)(2)(C). By declaring the plaintiffs "prevailing parties" before the plaintiffs had moved for attorneys' fees and before the State had responded to the plaintiffs' arguments, the district court prejudged the question. True, the district court did consider the State's arguments against "prevailing party" status in its order awarding attorneys' fees and costs. *See* ROA.3477-86, RE at Tab 8. But the district court put itself in a situation in which it would have to confess error (and issue an amended judgment) to accept the State's arguments, and a reasonable observer might question whether this put a thumb on the scale in favor of finding "prevailing party" status. Questions surrounding a litigant's entitlement to attorneys' fees should be decided after receiving the motion required by Rule 54(d)(2); they should not be resolved *sua sponte* in the district court's judgment.

Conclusion

This court should vacate the district court's judgment; its order of September 29, 2011, enjoining the State's officials from enforcing the 2011 Senate map; its interim-relief order of February 28, 2012; and its orders of January 8, 2014, and January 15, 2014, awarding attorneys' fees and costs. The case should be remanded with instructions to dismiss the case as moot.

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