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

APPELLANTS' REPLY BRIEF

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The State's opening brief explained that the award of attorneys' fees should be vacated for three independent reasons. First, an unconstitutional district-court order cannot supply a basis for attorneys' fees. Second, the district court was obligated to vacate its unconstitutional interim-relief orders after *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), and after the State mooted the case by repealing the 2011 Senate map. Third, *Shelby County* renders the State the "prevailing party" on the section 5 and malapportionment claims, and the plaintiffs cannot be "prevailing parties" on their section 2 and constitutional claims because they never secured *any* type of relief (even preliminary relief) on those claims.

The plaintiffs acknowledge that *Shelby County* applies retroactively to this case. *See* Appellees' Br. at 16 ("Undoubtedly *Shelby County* applied retroactively to all cases open on direct review, and undoubtedly this case was still open on direct review when the decision was announced."); *see also* ROA.3485, RE at Tab 8 (acknowledging that section 5 "was, in retrospect, unconstitutionally applied to Texas"). But that appears to be the only point of agreement between the plaintiffs and the State.

I. The Plaintiffs Are Not "Prevailing Parties" On Any Of Their Claims.

Whether the plaintiffs qualify as "prevailing parties" is a question of law reviewed de novo. *See Dearmore v. City of Garland*, 519 F.3d 517, 520 (5th Cir. 2008). The plaintiffs imply that deferential review should apply by noting that a fee award is reviewed for abuse of discretion. *See* Appellees' Br. 18. But

an error of law is *per se* an abuse of discretion. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *Arete Partners, L.P. v. Gunnerman*, 643 F.3d 410, 412 (5th Cir. 2011). And the only issues on this appeal are questions of law; the State is not appealing any aspect of the fee award that would trigger deferential review.

The plaintiffs say they are entitled to attorneys' fees because they "obtained everything they sought in this litigation." Appellees' Br. 19. But that is not the test for prevailing-party status. *See Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 610 (2001) (rejecting the "catalyst theory"). A prevailing party must secure a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 605. *Buckhannon* provides two examples of such "judicially sanctioned change": a "judgment[] on the merits" and a "settlement agreement[] enforced through a consent decree." *Id.* at 604.

The plaintiffs do not rely on the putative "final judgment" in this case. Instead, they rely on the injunction of September 29, 2011, which enjoined the State from implementing its 2011 Senate map because it had not received "preclearance," and the interim-relief order of February 28, 2012, which imposed S172 as an "interim map" for the 2012 Senate elections. *See* Appellees' Br. 22-28; *see also* ROA.78-79, RE at Tab 4; ROA.2305-06, RE at Tab 5. The problem for the plaintiffs is that each of these orders violated the Constitution. *See Shelby County*, 133 S. Ct. at 2622-30; ROA.3485, RE at Tab 8 (acknowledging that section 5 "was, in retrospect, unconstitutionally applied to

Texas"). A district-court order enforcing an unconstitutional "preclearance" regime cannot confer "prevailing party" status.

A. The district court's interlocutory orders were unconstitutional.

The plaintiffs acknowledge that *Shelby County* applies retroactively, and they do not deny that the injunction of September 29, 2011, violated the Constitution. But they contend that this unconstitutional injunction can nevertheless confer "prevailing party" status because "Texas never appealed or sought to dissolve that permanent injunction." Appellees' Br. 22. That the State chose not to immediately appeal the injunction is of no consequence. *Shelby County* declared the injunction unconstitutional while this case remained pending in the district court. The district court was obligated to implement the ruling in *Shelby County*, recognize the unconstitutionality of its injunction, and recognize further that an unconstitutional injunction cannot justify an award of attorneys' fees.

What's more, Texas *has* appealed the "final judgment," which announces that the "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." ROA.2786, RE at Tab 7; *see also* ROA.3530-32, RE at Tab 2; ROA.3547-49, RE at Tab 3.[1] This judgment not only reiterates the previous injunction—

[1] The plaintiffs do not contest this Court's jurisdiction to review the final judgment, and there is no basis for doing so. The State filed a timely notice of appeal from the judgment, and its notices of appeal from the fee awards encompass "any and all orders and rulings

reminding the State that it has been "permanently enjoined from implement[ing]" that map notwithstanding *Shelby County*—but also relies on that unconstitutional injunction in pronouncing the plaintiffs "prevailing parties" entitled to "reasonable attorneys' fees." ROA.2786-87, RE at Tab 7. An appeal from a final judgment permits appellate review of any earlier district-court rulings—regardless of whether the party took an interlocutory appeal from those orders. *See Exxon Corp. v. St. Paul Fire and Marine Ins. Co.*, 129 F.3d 781, 784 (5th Cir. 1997) ("It is a well-settled rule of law that an appeal from a final judgment raises all antecedent issues previously decided."); *Trust Co. of La. v. N.N.P, Inc.*, 104 F.3d 1478, 1485 (5th Cir. 1997) ("[A]n appeal from a final judgment sufficiently preserves all prior orders intertwined with the final judgment."); *Dickinson v. Auto Ctr. Mfg. Co.*, 733 F.2d 1092, 1102 (5th Cir. 1983) ("Under the final judgment appealability rule, a party may obtain review of prejudicial adverse interlocutory rulings upon his appeal from adverse final judgment"). The plaintiffs are therefore wrong to say that "Texas never appealed or sought to dissolve that permanent injunction." Appellees' Br. 22. Texas has appealed the final judgment, which permits appellate review of the injunction.

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that were adverse to [the State], whether or not subsumed within the September 4, 2013 Final Judgment." ROA.3547, RE at Tab 3. The "final judgment" is either a "final decision" appealable in its own right, or it is a non-final order that can be reviewed on appeal from the "final" fee awards. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988). Either way, the State preserved its appellate remedies by filing timely notices of appeal. *Cf. Hammond v. Pub. Fin. Corp.*, 568 F.2d 1362, 1363-64 (5th Cir. 1978) (per curiam).

The interim-relief order of February 28, 2012, was also unconstitutional, because the district court had no authority to supplant the legislatively enacted Senate map with a court-drawn map on account of the State's failure to obtain "preclearance." *See Shelby County*, 133 S. Ct. at 2631. The plaintiffs contend that the order of February 28, 2012, is "unaffected by *Shelby County*" because it "had an independent legal basis—section 2 and the Fourteenth and Fifteenth Amendments." Appellees' Br. 43. That is wishful thinking. The district court made clear—both in its order of March 19, 2012, and in its order of January 8, 2014—that its interim-relief order of February 28, 2012, rested *solely* on section 5 and not on section 2 or the Constitution. *See* 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."); ROA.3480, RE at Tab 8 ("[B]ecause 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); *see also* Appellants' Br. 25-26 & n.8. The district court's order of January 8, 2014, is especially significant because the plaintiffs had submitted a brief arguing that the interim-relief order *had* relied on the section 2 and constitutional claims. *See* ROA.3210, 3211-12, 3213. Yet the district court, having considered the plaintiffs' arguments, emphatically rejected that characterization of its interim-relief order. *See* ROA.3480, RE at Tab 8.

The plaintiffs acknowledge that the district court rejected their characterization of its interim-relief order. But they ask this Court to disregard the district court's characterization in favor of their own. *See* Appellees' Br. at 45-46. That is not tenable, and the plaintiffs cite no authority that allows an appellate court to push aside a district court's order explaining an earlier order issued by that court. Cases holding that conflicts between *judgments* and *opinions* must be resolved in favor of the judgment have no bearing on this situation, as the plaintiffs allege a conflict between two *orders* of the district court—each of which stands on a level playing field. And in all events, the plaintiffs are wrong to accuse the district court of manufacturing a "conflict" between its orders. The plaintiffs seize on the following sentence in the order of February 28, 2012: "[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. That is nothing more than a statement of the rule established in *Perry*: that court-drawn "interim maps" may depart from a legislatively enacted plan only when necessary to address "not insubstantial" section 5 claims, or section 2 or constitutional claims that are likely to succeed on the merits. *See Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (per curiam). The order nowhere states that any of the plaintiffs' section 2 or constitutional claims *satisfy* this "likelihood of success on the merits" standard. Nor does it say that it any of its departures from the legislatively enacted

Senate map were caused by the section 2 or constitutional claims rather than section 5. And even if this were not the most obvious interpretation of that passage, an appellate court should adopt any plausible interpretation that reconciles the district court's interim-relief order with its explanation of that order in the ruling of January 8, 2014. No appellate court should lightly accuse a district court of talking out of both sides of its mouth.

So the interim-relief order of February 28, 2012, rests solely on the plaintiffs' section 5 claims, and that makes the interim-relief order unconstitutional under *Shelby County* and incapable of conferring "prevailing party" status. Yet the plaintiffs contend that the order of February 28, 2012, can *still* supply a basis for attorneys' fees because the district court *could* have based its interim-relief order on the plaintiffs' section 2 and constitutional claims—even though the district court disavowed any reliance on those claims. *See* Appellees' Br. 46-48. This is wrong for at least three reasons.

First, the district court could not have granted *any* relief on the plaintiffs' section 2 and constitutional claims because those claims were unripe. *See McDaniel v. Sanchez*, 452 U.S. 130, 146 (1981). *Perry* allowed the district court to consider the strength of the plaintiffs' unripe section 2 and constitutional claims, but only in fashioning the *remedy* to be imposed for the State's alleged violation *of section 5*—its failure to secure "preclearance" of the 2011 Senate map. *See Perry*, 132 S. Ct. at 942. If, for example, the district court had found that the plaintiffs' section 2 or constitutional claims were likely to succeed, it could not have awarded a preliminary injunction (or any type of re-

lief) on those claims. All that the district court could have done was impose an interim map in response to the State's failure to obtain preclearance of its 2011 Senate map and the resulting malapportionment in the old Senate map. *Perry* instructs that in the course of awarding relief on *those* claims, a court-imposed map must hew to the State's legislatively enacted (but non-precleared) redistricting plan, departing from that plan only in response to a "not insubstantial" section 5 claim[2] or a section 2 or constitutional claim that is likely to succeed on the merits. But regardless of the remedy imposed, the only *claims* on which the district court could have issued relief were the plaintiffs' section 5 failure-to-obtain-preclearance claim against the 2011 Senate map (S148), and the plaintiffs' malapportionment claim against the old Senate map (S100).[3]

Second, *Perry* established a much more demanding standard for the plaintiffs' section 2 claims than the section 5 claims. A court-imposed interim map may depart from a legislatively enacted map in response to a "not insubstantial" section 5 claim (alleging either discriminatory purpose or retro-

[2] "Section 5 claim" can refer either to the failure-to-obtain-preclearance claim that the plaintiffs brought in this case, or to the claims that the plaintiffs brought as intervenors in the district court for the District of Columbia, asking the court to withhold preclearance on the ground that S148 was enacted with a racially discriminatory purpose or constitutes "retrogression." Joint Trial Brief of Defendant-Intervenors at 8, 10, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Jan. 13, 2012). In this sentence, "section 5 claim" has the latter meaning.

[3] The district court incorrectly stated that *Perry* "expressly directed that this Court could grant relief on [the section 2 and constitutional] claims under the familiar preliminary injunction standard." ROA.3485 n.9, RE at Tab 8. As explained above, the district court could not have granted relief *on those claims*, which remained unripe.

gression). *See Perry*, 132 S. Ct. at 942. But no such departure may be made in response to a section 2 or constitutional claim absent a finding that those claims are *likely to succeed*. *See id.* The district court found *only* that the plaintiffs' section 5 discriminatory-purpose claims were "not insubstantial"; it did not find that the discriminatory-purpose claims brought under section 2 could meet the more demanding "likelihood of success on the merits" standard. *See* ROA.2531-32, RE at Tab 6. Indeed, the district court *specifically avoided* the need to resolve the more difficult question of whether the plaintiffs' section 2 or constitutional claims were likely to succeed on the merits. *See* ROA.3480, RE at Tab 8 ("[B]ecause 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).

The plaintiffs claim that the district court's *decision to avoid* this question makes them "prevailing parties" entitled to attorneys' fees. *See* Appellees' Br. 46-48. The plaintiffs say they are entitled to fees if the unresolved section 2 and constitutional claims are "substantial" (meaning non-frivolous, *see Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 551 (5th Cir. 2003) ("A claim is substantial if it supports federal question jurisdiction")) and "arose from the same nucleus of operative facts" as their unconstitutional section 5 claims—even if the plaintiffs are unable to show these claims were likely to succeed on the merits. The plaintiffs' position is absurd. One cannot *assume* that the plaintiffs would have prevailed on an issue that the district court declined to

reach—especially when the plaintiffs faced a more daunting burden of proof on their section 2 and constitutional claims. *See* Appellees' Br. 50 (acknowledging that *Perry* established a "less taxing 'not insubstantial' standard" for the plaintiffs' section 5 claims).

More importantly, the cases that have awarded fees on this "pendent claim theory" have all involved plaintiffs who brought *successful* pendent claims alongside *unresolved* fee-eligible claims. *See, e.g.*, *Sw. Bell*, 346 F.3d at 549-52; *Espino v. Besteiro*, 708 F.2d 1002, 1009 (5th Cir. 1983). Here, the plaintiffs' unresolved section 2 and constitutional claims were brought alongside two *losing* claims: a section 5 failure-to-obtain-preclearance claim and a malapportionment claim—both of which became losers when the Supreme Court announced its ruling in *Shelby County*. We are aware of no authority allowing a plaintiff to recover attorneys' fees under the "pendent claim theory" when his pendent claims are rejected by the Supreme Court before the case proceeds to final judgment. The plaintiffs' argument, if accepted by this Court, would mean that a party that brings a losing state-law tort claim alongside a non-frivolous (but unresolved) section 1983 claim is a "prevailing party" entitled to attorneys' fees—so long as the claims arise from the "same nucleus of operative facts." That is not a tenable construction of "prevailing party."

The plaintiffs are also wrong to assert that their claims rest on the "same nucleus of operative facts." The section 5 claim brought in the San Antonio district court was *solely* a failure-to-obtain-preclearance claim; the district

court lacked jurisdiction to address the section 5 discriminatory-purpose claims pending in the court in Washington, D.C., or the merits of the unripe section 2 and constitutional claims. The *only* fact underlying the section 5 claim brought in San Antonio was that the State had not obtained preclearance. *See* ROA.3480, RE at Tab 8 ("Although Plaintiffs did not assert claims in this Court for violations of § 5, since those claims were within the exclusive jurisdiction of the D.C. Court, Plaintiffs did bring valid claims (under then-existing law) for injunctive relief against the enacted plan based on the lack of preclearance."). The malapportionment claim likewise did not share any facts with the plaintiffs' section 2 and constitutional claims; it relied solely on the fact that intercensal population shifts had made the State's pre-2011 Senate map non-compliant with *Reynolds v. Sims*, 377 U.S. 533 (1964). That facts surrounding the section 2 and constitutional claims became relevant to an interim *remedy* based on the section 5 failure-to-obtain-preclearance claim and the malapportionment claim does not mean that the claims themselves shared a common nucleus of operative fact.

Finally, *Buckhannon* forbids a court to confer "prevailing party" status when a litigant obtains no judicial relief whatsoever on his fee-eligible claims. *See Buckhannon*, 532 U.S. at 605 (requiring a "judicial imprimatur" and "a corresponding alteration in the legal relationship of the parties"). The "pendent claim theory" espoused by the plaintiffs is irreconcilable with *Buckhannon*, and the plaintiffs make no effort to explain how this Court could adopt their theory while remaining faithful to *Buckhannon*.

The plaintiffs make a last-ditch argument for fees based on policy considerations. *See* Appellees' Br. 48-51. But a litigant cannot rely on policy arguments to collect attorneys' fees; he must qualify as a "prevailing party" under 42 U.S.C. § 1973*l*(e) and the Supreme Court's case law. And in all events, the plaintiffs' desire to subsidize section 5 lawsuits must yield to the Supreme Court's determination that the "preclearance" regime was an unjustified and unconstitutional imposition on the States. *See Shelby County*, 133 S. Ct. at 2631. There is no policy justification for encouraging or rewarding lawsuits brought to enforce an unconstitutional federal statute.

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

The district court should have vacated its unconstitutional interim-relief orders after *Shelby County*, rather than acting as if it were powerless to do so. *See* Appellants' Br. 19-22. The plaintiffs contend that this Court lacks jurisdiction to vacate those orders and further contend that the State has forfeited its argument for vacatur. *See* Appellees Br. 28-36. Each of the plaintiffs' arguments is mistaken.

First, the plaintiffs claim that this court lacks jurisdiction to consider the State's request because the Supreme Court holds exclusive jurisdiction over appeals "from an order granting or denying … an interlocutory or permanent injunction." 28 U.S.C. § 1253; *see also* 28 U.S.C. §§ 1291, 1292; Appellees' Br. 29-30. But the State has not appealed from any of those *orders*. It has appealed the "final judgment" entered by the district court on September 4,

2013, and the subsequent award of attorneys' fees. *See* ROA.3530-32, RE at Tab 2; ROA.3547-49, RE at Tab 3. The Supreme Court lacks jurisdiction over this appeal, because neither the "final judgment" nor the fee award qualifies as an "order granting or denying … an interlocutory or permanent injunction."

The plaintiffs say that this Court cannot consider the district court's interlocutory orders because the State did not appeal *from* those orders. But the State appealed the district court's "final judgment," and an appeal from a final judgment confers appellate jurisdiction over any earlier interlocutory orders. *See Exxon Corp.*, 129 F.3d at 784; *Trust Co. of La.*, 104 F.3d at 1485; *Dickinson*, 733 F.2d at 1102. The plaintiffs' only response is to pretend that the district court never entered a "final judgment" and had instead entered an order dismissing the case for lack of subject-matter jurisdiction. *See* Appellees' Br. 30 n.6 ("Texas requested the court dismiss the case as moot, and cannot now appeal the dismissal it sought."). But as the plaintiffs later acknowledge, the district court did indeed enter a "final judgment" in this case. *See* Appellees' Br. 52 ("[T]he district court committed no error by entering the September 4, 2013 'Final Judgment.'"). That the "final judgment" was improper does not deprive this Court of jurisdiction to review that judgment or any of the previous interlocutory rulings. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998).

Second, the plaintiffs claim that Texas "forfeited" its request for vacatur of the district court's interlocutory orders, because Texas asked the district

court for a jurisdictional dismissal without specifically requesting vacatur of the interlocutory orders. *See* Appellees' Br. 31-32. This contention, too, is meritless. When a case becomes moot before a district court enters final judgment, a district court must dismiss the case for lack of subject-matter jurisdiction. *See In re Scruggs*, 392 F.3d 124, 129 (5th Cir. 2004) (per curiam). And a dismissal for lack of subject-matter jurisdiction entails vacatur of all previous orders entered in that case. *See, e.g.*, *Shirley v. Maxicare Tex., Inc.*, 921 F.2d 565, 568 (5th Cir. 1991) ("Unless a federal court possesses subject matter jurisdiction over a dispute, … any order it makes (other than an order of dismissal or remand) is void."); *Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 694 (5th Cir. 1995) (per curiam) ("The district court lacked subject matter jurisdiction over this action and was therefore without authority to enter its orders. The orders of the district court are vacated …"). The State's request for a jurisdictional dismissal logically included a request for vacatur of the district court's previous interim-relief orders. The State has fully preserved its request for a jurisdictional dismissal, which requires vacatur down the line of the district court's previous interlocutory orders. And in all events, the district court's obligations to dismiss the case for lack of subject-matter jurisdiction and vacate its interlocutory orders are jurisdictional obligations that cannot be waived or forfeited by the State. *See* Fed. R. Civ. P. 12(h)(3); *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).

The plaintiffs mislead this Court by citing cases such as *United States v. Munsingwear, Inc.*, 340 U.S. 36, 37, 40-41 (1950), and *Sossamon v. Lone Star*

State of Texas, 560 F.3d 316, 326 n.15 (5th Cir. 2009), which allow litigants (in limited situations) to avoid vacatur of district-court judgments when a case becomes moot *while on appeal*. *See* Appellees' Br. 31-32. None of those cases has relevance to this situation, where the case became moot *before* the district court entered its final judgment. When a case becomes moot before entry of final judgment, the duty to vacate is unflagging and cannot be "forfeited" by a litigant. *See Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999) ("If mootness occurred prior to the rendering of final judgment by the district court, *vacatur* and dismissal is automatic. The district court would not have had Article III jurisdiction to render the judgment, and we cannot leave undisturbed a decision that lacked jurisdiction."); *New Left Educ. Project v. Bd. of Regents of Univ. of Tex. Sys.*, 472 F.2d 218, 220 (5th Cir. 1973) (vacated on other grounds) ("If the case became moot before a final adjudication, we must vacate the judgment and direct that the case be dismissed. The district court has no power to decide moot causes."); *see also* Appellees' Br. 34 ("[T]he case did not become moot while on appeal, but rather *before* any appeal."). And this duty to vacate requires vacatur not only of the district court's improper "final judgment," but of all of its interlocutory orders as well. *See Shirley*, 921 F.2d at 568.

Third, the plaintiffs contend that this Court lacks jurisdiction to vacate the interlocutory orders because "the district court properly dismissed the case as moot." Appellees' Br. 33. The problem for the plaintiffs is that the district court did *not* dismiss the case as moot. It entered a "final judgment"

that recounted the interim relief awarded on the plaintiffs' section 5 and malapportionment claims, and dismissed as moot *only* the "[p]laintiffs' *remaining claims* under § 2 of the Voting Rights Act and the Constitution." ROA.2787, RE at Tab 7 (emphasis added). The State has appealed that "final judgment," and its appeal allows this Court to review and vacate the interlocutory orders. To be sure, the district court *should* have dismissed the case as moot rather than enter a "final judgment" recounting its earlier interlocutory orders. *See* Appellants' Br. 28-31. But had the district court entered a jurisdictional dismissal of that sort, it would have necessarily entailed vacatur of its previous interim-relief orders. *See, e.g.*, *Shirley*, 921 F.2d at 568; *Avitts*, 53 F.3d at 692-94. The plaintiffs want to have it both ways: they defend the district court's decision to enter a "final judgment," *see* Appellees' Br. 52-54, and urge this Court to leave the interlocutory orders in place, yet they simultaneously insist that the district court's "judgment" be treated as if it were a jurisdictional dismissal, *see* Appellees' Br. 33-34.[4]

Finally, even if the plaintiffs were correct to say that this Court lacks "jurisdiction" to vacate the district court's interlocutory orders, the State is *still* entitled to vacatur of the *fee award* because an unconstitutional district-court order cannot supply a basis for attorneys' fees. *See supra* at 3-12. That re-

[4] The plaintiffs are wrong to say that *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), forbids Rule 60 relief when a case is moot. If a district court improperly enters a final judgment in a moot case, a litigant may use Rule 60 to seek relief from that judgment (if he can otherwise satisfy the requirements of that rule). *McCorvey* holds only that a litigant may not use Rule 60 to revive cases or controversies that became moot after the judgment and appeals had become final. *Id.* at 848-49.

mains the case regardless of whether this Court decides to vacate those unconstitutional orders. The interlocutory orders *should* be vacated, but it is not necessary to vacate those orders to disapprove the district court's fee award.

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

The plaintiffs *still* refuse to identify the claim (or claims) on which they have supposedly "prevailed." The plaintiffs cannot be said to have "prevailed" on their section 5 or malapportionment claims because *Shelby County* declared the preclearance regime unconstitutional. Nor have the plaintiffs "prevailed" on their section 2 or constitutional claims, because they never secured *any* judicial relief on those claims. *See Buckhannon*, 532 U.S. at 600-01.

Rather than identify the *claims* on which they have "prevailed," the plaintiffs rely on the repudiated "catalyst" theory, claiming that they should be deemed "prevailing parties" because their lawsuit to enforce an unconstitutional federal statute led the State to repeal its 2011 Senate map and replace it with a map favored by the plaintiffs. *See* Appellees' Br. 13-14; *id.* at 19 ("Plaintiffs obtained everything they sought in this litigation."). The plaintiffs make no effort to explain how this theory of prevailing-party status can be reconciled with *Buckhannon*'s rejection of the "catalyst" theory. And they have no answer to the fact that: (1) *Shelby County* rendered the *State* the "prevailing party" on the section 5 and malapportionment claims; and (2)

the plaintiffs never obtained a "judicial imprimatur" on their section 2 and constitutional claims.

1. The State is the "prevailing party" on the section 5 and malapportionment claims.

The State is the "prevailing party" on the section 5 and malapportionment claims because the statute subjecting Texas to the "preclearance" regime was declared unconstitutional. *See Shelby County*, 133 S. Ct. at 2631. The plaintiffs do not explain how they can be deemed "prevailing parties" on those claims given the ruling in *Shelby County*.[5]

Instead, the plaintiffs invite this Court to defy *Shelby County* by declaring that the plaintiffs have "prevailed" on claims that were based on an unconstitutional federal statute. The plaintiffs, for example, argue that the unconstitutional interim relief that they obtained qualifies them for "prevailing party" status because the district court never entered a final judgment *against* them after *Shelby County*. *See* Appellees' Br. 24-25 ("This case is nothing like *Sole* [*v. Wyner*, 551 U.S. 74 (2007)]" because "Texas never obtained a ruling in its favor on the merits."). But the absence of a final judgment against the plaintiffs does not make them "prevailing parties" on claims that cannot constitutionally be brought against state officials. Texas won something even

[5] The plaintiffs falsely assert that Texas is "raising arguments based on *Shelby County* for the first time on appeal." Appellees' Br. 16 (arguing that Texas is "procedurally barred" from relying on *Shelby County*). Texas argued before the district court that *Shelby County* precluded a finding of "prevailing party" status, and the district court considered and rejected the State's arguments. *See* ROA.3076; ROA.3480-82, RE at Tab 8.

better than a final judgment on the merits: a ruling from the Supreme Court declaring the preclearance regime unconstitutional. *Cf. National Rifle Ass'n of Am., Inc. v. City of Chicago*, 646 F.3d 992, 993 (7th Cir. 2011). For the plaintiffs to assert that the district court's interim-relief order was not "reversed, dissolved, or otherwise undone" when *Shelby County* knocked out the entire edifice supporting that order is to deny that *Shelby County* was ever decided.

The plaintiffs also argue that the interim-relief order of February 28, 2012, qualifies as a "consent decree" that triggers prevailing-party status under *Buckhannon*. *See* Appellees' Br. 23-24. The State has already explained the many reasons why this unconstitutional interim-relief order cannot be equated with a "consent decree." *See* Appellants' Br. 21-22. Consent decrees are final resolutions of the parties' claims that terminate the district-court litigation—not interim agreements to govern a single election cycle while the parties' dispute continues in court. The plaintiffs recognize that the district court's interim-relief order did not "conclusively resolve[] the litigation." Appellees' Br. 24 (quoting ROA.3482-83). That confesses that the interim-relief order is not a "consent decree." Nor can the interim-relief order be characterized as a "consent decree" that is "time-limited in its scope." Appellees' Br. 24. A consent decree represents *final* resolution of the parties' claims; the interim-relief order, by contrast, stated that it was "*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." ROA.2305-06, RE at Tab 5 (emphasis added). Finally, the plaintiffs never respond to the point that Texas's

alleged "consent" to the interim-relief order was induced by an unconstitutional federal statute. *See* Appellants' Br. 22.[6]

2. The plaintiffs failed to secure any judicial relief on their section 2 or constitutional claims.

The plaintiffs cannot be deemed "prevailing parties" on their section 2 or constitutional claims because they failed to secure *any* judicial relief—even preliminary relief—on those claims. Those claims remained unripe until *Shelby County* scrapped the "preclearance" regime, and they became moot when the governor signed a new Senate map into law. The plaintiffs try to characterize the interim-relief order of February 28, 2012, as awarding relief on their section 2 and constitutional claims, but we have already explained why that is wrong. *See supra* at 5-7.

The plaintiffs insinuate throughout their brief that Texas replaced its 2011 Senate map with the court-imposed interim map to stave off defeat on the section 2 and constitutional claims. *See, e.g.*, Appellees' Br. 26 ("[T]he D.C. Court's conclusion that Texas intentionally discriminated in its State Senate map very likely foreshadows what would have happened had the case proceeded to final judgment.") (emphasis removed); *id.* at 38. That is factually false and legally irrelevant.

[6] *Salazar v. Maimon*, 750 F.3d 514 (5th Cir. 2014), is no help to the plaintiffs, as it involved a *final* settlement agreement on the parties' claims that was incorporated into a judicial order. The interim-relief order of February 28, 2012, was not a final resolution of *any* of the plaintiffs' claims, and the relief that it awarded was declared unconstitutional by the Supreme Court before the case proceeded to final judgment.

The plaintiffs' allegations of intentional racial discrimination were baseless. The 2011 Senate map altered Senator Davis's district (Senate District 10) to make the electorate more Republican and therefore less likely to reelect Senator Davis, but that is not evidence of purposeful *racial* discrimination. The plaintiffs argued that these changes violated the Voting Rights Act and the Constitution because Senator Davis was the "preferred candidate of choice" of "minority voters." But some minorities vote Republican and oppose Senator Davis, and the changes in the 2011 map increased the ability of *these* minority voters to elect a representative of *their* choice. The plaintiffs' discriminatory-purpose claims sought to equate partisanship with racism. Yet it is perfectly lawful for a legislature to make partisan districting decisions, even when the changes adversely affect Democratic candidates supported by minorities. *See Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact."); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (discriminatory purpose requires an action to be taken "'because of,' not merely 'in spite of,'" racial considerations).

When Texas sought preclearance of its 2011 Senate map, the Department of Justice conceded that Texas was entitled to preclearance. *See Texas v. United States,* 887 F. Supp. 2d 133, 138, 162 (D.D.C. 2012), *vacated by Texas v. United States*, 133 S. Ct. 2885 (2013) ("The United States … has no quarrel with the plan for the Texas Senate") ("The United States has not objected to

this plan"). And the federal district court for the District of Columbia admitted that "there is no direct evidence" of racially discriminatory motive. *See id.* at 159, 163. The district court nevertheless withheld preclearance because it demanded that Texas *prove* the *absence* of racially discriminatory purpose—a near-impossible burden for any State to carry. *See Texas v. United States*, 887 F. Supp. 2d at 151-52 (holding that Texas must prove the absence of discriminatory purpose); *id.* at 162 (noting Texas's "fail[ure] to carry its burden to show that it acted without discriminatory purpose"); *id.* at 163 (considering "whether Texas has met its burden of disproving discriminatory intent"). The preclearance court's vacated ruling hardly portends that the plaintiffs would have succeeded in a case where *they* would bear the burden of proof. The plaintiffs expect this Court to treat the vacated opinion of the preclearance court as if it were infallible, yet the Solicitor General of the United States admitted that the preclearance court's discriminatory-purpose finding "amounts to clear error based on the explanation provided by the district court." Motion to Affirm in Part, *State of Texas v. United States*, No. 12-496, 2012 WL 6131636, at *28 (Dec. 7, 2012).

In the end, none of this matters because the plaintiffs never secured *any* judicial relief on their section 2 and constitutional claims, and a litigant cannot establish "prevailing party" status by imagining what might have happened if their claims had been adjudicated. *See Buckhannon*, 532 U.S. at 605. But no one should assume that the plaintiffs would have prevailed on their section 2 and constitutional claims, or that the State repealed its 2011 Senate

map because it thought or feared that the plaintiffs would prevail. And it made perfect sense for members of the 2013 legislature to replace the 2011 Senate map with the court-imposed map that its legislators had already run on, rather than force themselves to run on yet another new map for a third consecutive election cycle.

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

A district court cannot enter a "final judgment" in a moot case. *See, e.g.*, *Goldin*, 166 F.3d at 718 ("If mootness occurred prior to the rendering of final judgment by the district court, *vacatur* and dismissal is automatic. The district court would not have had Article III jurisdiction to render the judgment, and we cannot leave undisturbed a decision that lacked jurisdiction"); *New Left Educ. Project*, 472 F.2d at 220 ("If the case became moot before a final adjudication, we must vacate the judgment and direct that the case be dismissed. The district court has no power to decide moot causes."). The plaintiffs do not explain how a district court can enter a "final judgment" in a moot case.[7] Nor do the plaintiffs explain why they counseled the district court to enter a "final judgment" (rather than a jurisdictional dismissal) when they agree with the State that the case is moot. *See* Appellees' Br. 33-34.

[7] *Pechon v. Louisiana Department of Health and Hospitals*, 368 F. App'x 606 (5th Cir. 2010), on which the plaintiffs rely, does not hold that district courts may enter "final judgments" in cases that are moot.

Instead, the plaintiffs declare that this is "much ado about nothing" because Texas has not been "harmed" by the district court's decision to enter a judgment rather than a jurisdictional dismissal. *See* Appellees' Br. 52-53. The plaintiffs continue to misunderstand the nature of jurisdictional boundaries. A district court that enters a "final judgment" in a case in which it lacks subject-matter jurisdiction is committing an act of usurpation. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the power of the political branches."). That is why litigants cannot forfeit or waive jurisdictional objections, and why lawyers must bring to the court's attention any issue that might call into question the court's authority to decide a case. *See Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997). There is no such thing as a "harmless" jurisdictional error. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988) ("[A] litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court."); *United States v. Cromartie*, 267 F.3d 1293, 1298 (11th Cir. 2001) (per curiam) ("[J]urisdictional errors cannot constitute plain or harmless error.").[8]

[8] The plaintiffs are also wrong to deny that Texas has been "harmed" by this improper judgment. The judgment reiterates and incorporates the previous injunctive relief that the district court had entered against the State. *See* ROA.2786, RE Tab 7. A final judgment on the merits can also trigger prevailing-party status, so the district court's entry of judgment gave the plaintiffs a boost in their quest for attorneys' fees. *See Buckhannon*, 532

And if the plaintiffs really do believe that the decision to enter a judgment rather than a jurisdictional dismissal is "much ado about nothing," then one must wonder why the plaintiffs so vigorously opposed the State's request to enter an order of dismissal and insisted that the district court enter a final judgment instead. *See* ROA.2781-85. The plaintiffs *still* have not explained why they asked the district court to enter a "final judgment" in the teeth of cases holding that federal district courts cannot enter judgments in moot cases. *See Goldin*, 166 F.3d at 718; *New Left Educ. Project*, 472 F.2d at 220. If any such reason exists (apart from enhancing their ability to collect attorneys' fees), it is not apparent from any document that the plaintiffs have filed in this case.

Instead the plaintiffs try to change the subject by accusing Texas of "subverting" jurisdictional boundaries—as if that could somehow excuse or mitigate the plaintiffs' decision to ask the district court to enter a "judgment" when it transparently lacked jurisdiction to do so. *See* Appellees' Br. 53-54. The plaintiffs' contentions are meritless. To begin, Texas did not ask the district court to enter a "judgment"; it asked for a jurisdictional dismissal, and the State's proposed order of dismissal did not become a judgment simply because it mentions a verb ("adjudged") that contains the root word of "judgment." The plaintiffs disagree with positions that the State has taken on other jurisdictional issues in this case, but at least the State has supported

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U.S. at 604. The judgment also declared the plaintiffs "prevailing parties" before the State had an opportunity to brief the issue. *See* Appellants' Br. 30-31.

its views on those matters with argument and authorities. *See* Defendants' Opposition to Plaintiffs' Motion to Dismiss at 3, *Davis v. Perry*, No. 13-50927 (5th Cir. Nov. 5, 2013). The plaintiffs, by contrast, have provided *nothing* to support the notion that a district court can enter a "final judgment" in a moot case—even after the State criticized the plaintiffs for inducing the district court to take this improper (and unconstitutional) step. *See* Appellants' Br. 29-30. The case is moot, and the judgment should be vacated.

Conclusion

The district court's judgment, interlocutory orders, and fee award should be vacated, and the case remanded with instructions to dismiss the case as moot.

Respectfully submitted.

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Counsel also certifies that on June 25, 2014, this brief was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the court's CM/ECF document filing system, https://ecf.ca5.uscourts.gov/.

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No. 14-50042 Wendy Davis, et al v. Rick Perry, et al
USDC No. 5:11-CV-788
USDC No. 5:11-CV-855

Dear Mr. Mitchell,

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