No. 14-50042

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

v.

GOVERNOR 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
Civ. No. 5:11-cv-788-OLG-JES-XR

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CERTIFICATE OF INTERESTED PERSONS

No. 14-50042

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

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

Respectfully submitted,

/s/ J. Gerald Hebert
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STATEMENT REGARDING ORAL ARGUMENT

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

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STATEMENT OF JURISDICTION

In this case involving claims under the Voting Rights Act and the Constitution, the three-judge district court (Circuit Judge Smith, District Judges Garcia and Rodriguez) had jurisdiction pursuant to Article III and 28 U.S.C. § 1331 to: (1) permanently enjoin Texas's 2011 enacted State Senate map (S148); (2) declare the benchmark map enacted prior to 2011 (S100) unconstitutionally malapportioned; and (3) order in place an interim map (S172) for the 2012 Texas Senate elections. The district court likewise had jurisdiction pursuant to Article III and 28 U.S.C. § 1331 to declare Plaintiffs prevailing parties for securing this relief and to award attorneys' fees and costs. This Court has jurisdiction to review the district court's award of attorneys' fees and costs pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that Plaintiffs were prevailing parties because they succeeded in having Texas's 2011 enacted Senate redistricting map permanently enjoined, having the prior 2003 Senate map declared unconstitutionally malapportioned, and obtaining an order imposing Plaintiffs' preferred map for the 2012 elections, resulting in Senator Davis's reelection?

2. Does this Court lack jurisdiction to vacate, as Texas has requested, the three-judge district court's orders granting Plaintiffs relief, given that 1) only the Supreme Court has jurisdiction to vacate such orders, 2) Texas forfeited its ability to seek vacatur by failing to request that relief from the district court; and 3) the district court properly dismissed the case as moot?

3. Can Texas rely on *Shelby County* to circumvent this Court's lack of jurisdiction to vacate the interim relief, where Texas is procedurally barred by failing to raise *Shelby County*'s arguments below, where it is raising them for the first time on collateral review, and where the interim relief is either explicitly based upon independent legal claims or could have, absent the application of constitutional avoidance, been premised on such claims?

4. Did the district court properly enter a "Final Judgment" given that Fifth Circuit precedent permits it to do so in declaring prevailing party status, and given that it extensively considered Texas's prevailing party arguments?

STATEMENT OF THE CASE

Following the 2010 Census, Texas enacted a new State Senate redistricting map on June 17, 2011, and later filed a declaratory judgment action before a three-judge district court in the District of Columbia, seeking judicial preclearance of the map under Section 5 of the Voting Rights Act. Plaintiffs below intervened as defendants in the D.C. case to oppose preclearance of the State Senate map. *See* Motion to Intervene, *Texas v. United States*, No. 1:11-cv-01303-RMC-TBG-BAH (D.D.C. July 21, 2011) (ECF No. 5).

Shortly thereafter, on September 22, 2011, Plaintiffs filed suit before a three-judge district court in San Antonio (Circuit Judge Smith, District Judges Garcia and Rodriguez), seeking to: (1) enjoin Texas from using its 2011 enacted Senate map (S148), because it had not, and likely would not, receive Section 5 preclearance from the D.C. court; (2) enjoin Texas from using its 2011 enacted map (S148), because it violated Section 2 of the Voting Rights Act, as well as the Fourteenth and Fifteenth Amendments; (3) enjoin Texas from using its old State Senate map (S100—the map in effect prior to the 2010 Census) because it was malapportioned in violation of the Fourteenth Amendment; and (4) impose a new map that remedied these violations. *See* ROA.47-48.

On September 29, 2011, the district court issued an order stating that "[b]ecause the redistricting plan for the Texas Senate has not been precleared

pursuant to Section 5 of the Voting Rights Act, the plan may not be implemented." ROA.78. The court's order further stated that it was "effective as a permanent injunction, subject to being lifted by order of the Court as appropriate." ROA.79. Thus, the court permanently enjoined Texas from using the 2011 enacted Senate map (S148) in any future election.

On November 23, 2011, because the State had been enjoined from using its Senate map and because using the prior map (enacted in 2003) would have violated the Fourteenth Amendment's one-person one-vote requirements, the three-judge court adopted an interim Senate map for use in the 2012 Senate elections. ROA.1680-82. The court-adopted plan was the exact remedy Plaintiffs sought in the litigation. Whereas the Senate map adopted by the Texas legislature in 2011 (S148) had carved up Senate District 10, *see* ROA.37—the district from which Plaintiff Senator Wendy Davis had been elected by a coalition of minority voters—the interim Senate plan (S164) restored Senate District 10 to its prior configuration, *see* ROA.1682. In adopting the interim plan, the three-judge court stated that "the Court's map, as an interim map, simply maintains the status quo as to the challenged district pending resolution of the preclearance litigation, while giving effect to as much of the policy judgments in the legislature's enacted map as possible." ROA.1682.

The State appealed the three-judge court's November 23, 2011 order imposing the interim map to the Supreme Court. The State *did not appeal* the three-judge court's September 29, 2011 order permanently enjoining the State from using its enacted Senate map (S148). *See* ROA.1893. Texas argued to the Supreme Court that the district court was required to impose its 2011 enacted plan (S148) as an interim remedy and not impose its own plan (S164) to govern the 2012 elections. *See* Br. of Appellants at 63, *Perry v. Perez*, 132 S. Ct. 934 (2012) (Nos. 11-713, 11-714, 11-715), 2011 WL 6468711.

The Supreme Court rejected Texas's position, and instead remanded the case for the district court to develop an interim map consistent with two newly announced standards. *See Perry v. Perez*, 132 S. Ct. 934 (2012) (*per curiam*); ROA.1929-43. First, for the Section 2 and constitutional claims, the district court was to impose an interim map that departed from the State's enacted plan if the "legal challenges are shown to have a likelihood of success on the merits." *Perry*, 132 S. Ct. at 942; ROA.1935-36. Second, for the claim that the State had not received Section 5 preclearance of the 2011 map by the D.C. court, the district court was to impose an interim map that departed from those aspects of the enacted map that "stand a reasonable probability of failing to gain § 5 preclearance," *id.*; ROA.1936, that is, where the Section 5 challenge was "not insubstantial," *id.*; ROA.1936.

Upon remand, Plaintiffs and Texas came to an agreement with respect to the State Senate map and proposed to the district court again a map that restored Senate District 10 entirely to its pre-2011 configuration (the exact configuration sought by Plaintiffs in their lawsuit). *See* ROA.6002-03. The district court approved the agreement, and on February 28, 2012 ordered the map (S172) to be used for the 2012 State Senate elections. ROA.2305-06. Texas conceded that the interim remedy addressed all of Plaintiffs' claims in the case, as well as those in the preclearance case in D.C. *See* ROA.3482, 2070.

In imposing the interim map, the district court stated that "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 2306. The district court noted that "[a]n opinion will follow at a later date." ROA.2305.

Nearly three weeks later, on March 19, 2012, the district court issued another order (under the docket entry "OPINION AND ORDER," *see* ROA.23), to "explain" the interim plan imposed "[o]n February 28, 2012." ROA.2530. The district court explained that the map imposed on February 28, 2012 "reflects changes to the legislatively enacted Texas Senate plan that are appropriately designed to address Plaintiffs' not insubstantial claim that SD 10 reflects a

prohibited purpose under Section 5 of the Voting Rights Act" and that it "also remedies the unconstitutional malapportionment of the state senate districts." ROA.2531. The district court's March 19, 2012 opinion and order did not disturb the conclusion in its February 28, 2012 order that the interim map was also a "result of preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in this case." ROA.2306.

Under the map (S172) proposed by Plaintiffs that restored the coalition of minority voters in Senate District 10, consented to by the State, and ordered in place by the district court, minority voters in Senate District 10 reelected Senator Davis in November 2012.

Shortly before the 2012 elections, the D.C. court, on August 28, 2012, denied preclearance to Texas's 2011 enacted map. *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated by*, 133 S. Ct. 2885 (2013). In doing so, the D.C. court found that "[i]n 2011, the State Senate cracked SD 10 and removed most of its minority populations, spreading them into predominately Anglo districts and effectively dismantling the coalition that had elected Senator Davis," *id.* at 229, and that "the dismantling of SD 10 will have a disparate and negative impact on minority groups in the District," *id.* The court concluded that as a factual matter, "the record demonstrates *purposeful discrimination* in the re-drawing of SD 10." *Id.* at 225 (emphasis added). Texas appealed the decision of

the D.C. court to the Supreme Court. Texas's Jurisdictional Statement, *Texas v. United States*, 133 S. Ct. 2885 (2013) (No. 12-496), 2012 WL 5267659.

After the D.C. court concluded that the State had purposefully discriminated in enacting its State Senate map (S148), and while Texas's appeal from that ruling was still pending, Governor Perry called a special session of the Texas Legislature specifically for the purpose of making permanent the interim plan imposed by the district court on February 28, 2012 (S172).[1]

Between May 30 and June 12, 2013, the Legislature held hearings on S.B. 2, which would repeal the permanently enjoined 2011 enacted map and adopt as permanent the interim map ordered in place by the district court on February 28, 2012 (S172). Following adoption of the plan by the Texas Legislature, Governor Perry signed S.B. 2 into law on June 26, 2013.[2] The legislative history of S.B. 2 shows that the legislature adopted the plan in part because "the adoption of the district court's interim plan for Texas Senate districts as a permanent plan by the Texas Legislature will . . . diminish the expense of further time and money by all parties in Texas' ongoing redistricting litigation."[3]

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[1] *See* Press Release, Office of the Governor, Rick Perry, Gov. Perry Announces Special Session for May 27 (May 27, 2013) *available at* http://governor.state.tx.us/news/press-release/18575/.

[2] *See* S.B. 2, *available at* https://webservices.sos.state.tx.us/legbills/files/CS/SB2.pdf.

[3] *See* S.B. 2 § 2(3)(A), *available at* http://www.legis.state.tx.us/tlodocs/831/billtext/pdf/SB00002I.pdf#navpanes=0.

On June 25, 2013, one day prior to the Governor signing S.B. 2 into law, the Supreme Court announced its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In *Shelby County*, the Court held the coverage formula of the Voting Rights Act—Section 4(b)—unconstitutional, and instructed that "[t]he formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance." *Id*. at 2631. The Court stressed that it "issue[d] no holding on § 5 itself, only on the coverage formula." *Id*. Thus, the Court left Section 5 intact and held only that the coverage formula of Section 4(b) could "no longer be used" as a means to subject jurisdictions to the preclearance requirements of Section 5. Moreover, the Court expressly reaffirmed the validity of Section 2 of the Voting Rights Act, noting that "Section 2 is permanent, applies nationwide, and is not at issue in this case." *Id.* at 2619.

Following *Shelby County*, Texas did not return to the district court asking the Court to lift its permanent injunction against the 2011 enacted plan (S148). Instead, on July 31, 2013, Texas filed a proposed order with the district court requesting that it be "ORDERED ***ADJUDGED*** AND DECREED" that the Plaintiffs' case be dismissed as moot because

> as a result of the enactment of Plan S172 on a permanent basis, all claims against Plan S148, whether asserted under Section 2 of the Voting Rights Act . . . and the Fourteenth and Fifteenth Amendments to the United States Constitution, or any other theory, no longer present a live case or controversy, thus precluding a judgment on their merits[, and] . . . the only

> remaining issue to be adjudicated between the Parties is the issue of interim attorney's fees.

ROA.2773 (emphasis added).

Plaintiffs disagreed with Texas's proposed order, and instead submitted their own proposed judgment reflecting their success in gaining the relief they sought in the litigation, while agreeing that the Section 2 and constitutional claims should be dismissed as moot given that Texas had enacted a new Senate plan (S172) that included all of the relief Plaintiffs had sought, and that Texas was not seeking to reinstate its 2011 enacted plan (S148). ROA.2784-85.

The Court adopted neither party's proposal. Instead, it entered, on September 4, 2013, its own "Final Judgment" with two parts, set forth on two pages. On page one, the Final Judgment summarized what the district court had "*previously* ORDERED, ADJUDGED and DECREED." ROA.2786. These three paragraphs explain, by way of introduction, the procedural history of the case:

> 1) "Plaintiffs' requested declaratory relief *was* granted" when the State's 2003 enacted state senate redistricting plan was found to violate the Equal Protection Clause's one-person, one-vote requirement, *id.* (emphasis added);
>
> 2) "Plaintiffs' request for injunctive relief *was* granted" because the State's 2011 enacted plan "*has been* permanently enjoined from implementation and no elections have been or will be held thereunder," *id.* (emphasis added); and
>
> 3) Plaintiffs' preferred map "*was* to be used for the 2012 elections," *id.* (emphasis added).

On page two, the district court took two simple actions. First, it "DISMISSED AS MOOT" the remaining Section 2 and constitutional claims (at the suggestion of *both* Plaintiffs and Texas). Second, it "ORDERED, ADJUDGED and DECREED . . . that, as prevailing parties, Plaintiffs are awarded their reasonable attorneys' fees and costs." ROA.2787.

Texas prematurely appealed the Final Judgment, arguing that the district court had improperly entered a Final Judgment on the merits, when the case should have been dismissed as moot. *See Davis v. Perry*, No. 13-50927 (5th Cir. Nov. 5, 2013) (ECF No. 00512431049) at 6-7. Plaintiffs moved to dismiss the appeal for lack of jurisdiction, contending that the Final Judgment was a "judgment" only as to the prevailing party status and did nothing with respect to the merits, except to dismiss them as moot. *Id.* (ECF No. 00512438320) at 2-3. This Court granted Plaintiff's motion to dismiss the appeal for lack of jurisdiction. *Id.* (ECF No. 00512451313); ROA.3471.

On January 8, 2014, the district court awarded Plaintiffs $360,659.68 in attorneys' fees and costs. ROA.3522, 3529. In doing so, the court analyzed Texas's request that it reconsider its September 4, 2013 determination that Plaintiffs were prevailing parties. ROA.3476-86. In an extensive analysis, the court concluded that the relief it ordered, and to which Texas consented, was "essentially a judicially approved settlement or consent decree," which Texas itself

had agreed "'respond[ed] to all claims that are fairly at issue in this case or the Section 5 case. . . [and] addresse[d] Davis's Fourteenth Amendment and discriminatory purpose claims.'" ROA.3482 (citation omitted).[4] The district court rejected Texas's assertion that *Shelby County* affected Plaintiffs' status as prevailing parties, noting that after the decision was announced,

> instead 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 ensured that the interim relief will not be reversed, dissolved, or otherwise undone, but have also precluded Plaintiffs from obtaining a decision on the merits of their § 2 and Fourteenth Amendment claims from this Court.

ROA.3480-81 (footnote omitted). Moreover, the district court noted that Fifth Circuit precedent, *see Planned Parenthood of Houston & Southeast Texas v.*

[4] Despite the explicit statement in the district court's February 28, 2012 order that it was based in part on "preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in this case," ROA.2306, the district court's January 8, 2014 order awarding fees characterized its previous actions somewhat differently:

> [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. *See Maher*, 448 U.S. at 133 (noting the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues). . . . The Court enjoined implementation of Plan S148 and issued an interim plan that gave Plaintiffs all of their requested relief with regard to the 2012 elections.

ROA.3480.

Sanchez, 480 F.3d 734, 739 (5th Cir. 2007), permits the award of attorneys' fees for a claim that could have formed the basis of the relief granted, but over which the court exercised the constitutional avoidance doctrine.

> Recognizing that courts will often justifiably refrain from addressing a constitutional question where it can be avoided, we have held that such a plaintiff may obtain attorney's fees even though the § 1983 claim was not decided provided that 1) the § 1983 claim of constitutional deprivation was substantial; and 2) the successful pendant claims arose out of a common nucleus of operative facts.

ROA.3484 n.8 (quotation marks omitted). The district court concluded that an award of fees was appropriate despite *Shelby County*, "[g]iven Plaintiffs' assertion of other claims under § 2 and the Fourteenth Amendment, which could have supported the interim relief." ROA.3485. Finally, the district court assessed the reasonableness of the requested fees and costs, reducing the fees from the amount requested in several regards. ROA.3486-3529. On January 15, 2014, the district court issued a supplemental order awarding Plaintiffs an additional $2,718.75 in attorneys' fees. ROA.3543.

SUMMARY OF THE ARGUMENT

Plaintiffs achieved complete victory in their case against Texas. The district court permanently enjoined Texas from implementing its legislatively enacted Senate redistricting map, declared Texas's prior Senate map unconstitutionally malapportioned, and granted Plaintiffs the exact relief they were seeking. Its

remedial order imposed an interim map for the 2012 elections that restored Senate District 10 to the exact configuration advocated by Plaintiffs, resulting in minority voters once again electing their candidate of choice, Plaintiff Senator Wendy Davis. Texas then legislatively repealed the map the court had already permanently enjoined and enacted the court-ordered map under which the 2012 elections had taken place. Plaintiffs could not have achieved a more complete victory—the change in the parties' legal relationship was a full 180 degrees. Under the Supreme Court's and this Court's precedent, the three-judge district court properly awarded Plaintiffs their attorneys' fees and costs as prevailing parties in the litigation below.

Texas has only one response—that the Supreme Court's decision in *Shelby County v. Holder* somehow erased Plaintiffs' prevailing party status. As the State would have it, the Supreme Court waved a wand with *Shelby County*, undoing real-world past events, and absolving Texas of any obligation to persuade the district court to change course based on the Supreme Court's decision. Texas urges this Court to buy its view of *Shelby County*'s reach and, on review of a collateral determination regarding fees, vacate the orders in which the district court awarded Plaintiffs the relief they sought, all so that Texas can escape the obligation to pay fees based on those orders. The law does not work this way, however.

To begin, this Court has no power to vacate the merits relief awarded by the district court. Only the Supreme Court has jurisdiction to review merits rulings of three-judge district courts convened to review statewide redistricting maps. Moreover, Texas never asked the district court to vacate these orders—either before it mooted the case or when it sought dismissal of the case, and has thus forfeited its ability to seek vacatur. And even if the Supreme Court did not have exclusive jurisdiction and Texas's request were not forfeited, this Court still would lack jurisdiction to review the merits relief. Because the case was properly dismissed as moot, this Court has no jurisdiction, on collateral review of a fees award, to reach back and tinker with any prior district court orders that had previously been entered. For these reasons, *no* court has jurisdiction to vacate the district court orders, and thus Plaintiffs will forever have judicial relief entitling them to fees.

Texas would have this Court bypass these jurisdictional barriers by accomplishing indirectly what it lacks the power to order directly—to find that *Shelby County* somehow made Plaintiffs' relief disappear. By Texas's account, when *Shelby County* was decided, it was as if an alternate universe were created in which Section 5 never existed and any order based in any way on Section 5 was suddenly rendered meaningless. This too, however, is not how the law works.

Texas is procedurally barred from raising arguments based on *Shelby County* for the first time on appeal—let alone on appeal of a collateral issue. Under this Court's clear precedent, a party is procedurally barred from relying upon an intervening Supreme Court decision on appeal when the party failed to make similar arguments before the district court. Texas never challenged the constitutionality of the Voting Rights Act's coverage formula below. This rule is all the more exacting when intervening Supreme Court precedent is raised for the first time on appeal of a collateral issue, as here.

The problems with Texas's reliance on *Shelby County* are not merely technical, however. 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. But the Supreme Court and this Court have made clear that retroactive application is not the same as outcome determination. This Court cannot assume, as Texas would have it do, that the district court would have vacated its permanent injunction against Texas's enacted Senate map in light of *Shelby County*. In fact, all indications are otherwise, and in any event, Texas failed to move for any such order.

First, the order imposing an interim Senate map in 2012 *expressly* stated it was based in part upon a preliminary determination of the merits of Plaintiffs' Section 2 and constitutional claims. *Shelby County* left these causes of action

undisturbed. Moreover, even if everything the district court did could be viewed as based solely on Section 5, the district court properly applied Fifth Circuit precedent permitting a court to award fees where a fee-eligible claim is left unresolved due to the court's application of constitutional avoidance and the fee-ineligible claim shares the same nucleus of operative facts. Even if Plaintiffs could not obtain fees for succeeding on the Section 5 claim, the presence of the constitutional claims, based on the same set of facts, permitted the district court to exercise its discretion to award fees.

Second, apart from this independent legal basis, as the Supreme Court has explained, an intervening Supreme Court decision is not automatically outcome determinative where parties rely on then-existing law to further important public policy interests. Courts universally recognize the importance Congress placed on encouraging private attorney general actions (like Plaintiffs' here) to vindicate civil rights.

Texas essentially asks this Court to adopt its preferred assumptions about what the district court would have done about *Shelby County* had Texas actually raised it before the district court. It is too late. This Court cannot disregard Texas's procedural missteps and decide for the first time on collateral appeal how the district court would have addressed the effect of *Shelby County* on its orders.

Finally, there is no merit to Texas's objections to the "judgment" the district court entered in this case. A district court may properly enter a judgment declaring prevailing party status—Texas offers no explanation for how it was harmed by that "judgment" simultaneously dismissing the moot claims. This district court considered and rejected Texas's arguments. That is not prejudice.

Texas had already lost Round 1 of this case months prior to *Shelby County*. The writing was on the wall that it would lose Round 2 on the merits of Plaintiffs' Section 2 and constitutional claims. Texas wisely relented. Having lost completely, Texas cannot now evade its obligation to pay fees by trumpeting *Shelby County* for the first time on collateral appeal. This Court is powerless to vacate Plaintiffs' judicial relief, and Texas points to nothing requiring Plaintiffs to achieve anything more than a judicially sanctioned change in the parties' legal relationship. The district court's award of fees must be affirmed.

ARGUMENT

I. Standard of Review

The district court's award of attorneys' fees and costs is reviewed for abuse of discretion. *Wilson v. Mayor & Bd. of Alderman of St. Francisville*, 135 F.3d 996, 998 (5th Cir. 1998). "The determination of a reasonable attorney's fee is left to the sound discretion of the trial judge" and such an award "should not be set aside unless there has been a clear abuse of discretion." *Weeks v. S. Bell Tel. &*

Tel. Co., 467 F.2d 95, 97 (5th Cir. 1972). Factual findings supporting an attorneys' fees award are reviewed for clear error. *Wilson*, 135 F.3d at 998.

II. Plaintiffs Are Prevailing Parties Entitled to Attorneys' Fees.

The district court properly concluded that Plaintiffs are prevailing parties. Plaintiffs obtained everything they sought in this litigation—the 2011 enacted map (S148) was permanently enjoined and never used, the old map (S100) from 2003 was declared unconstitutionally malapportioned, and Texas consented to the court imposing Plaintiffs' preferred map for the 2012 election, acknowledging that the map remedied *all* of Plaintiffs' claims. ROA.3476, 3482, 2070. Plaintiffs' preferred map was used in the 2012 elections, restoring a coalition of minority voters who reelected their candidate of choice. Texas then repealed the 2011 enacted map and enacted the agreed 2012 map permanently. Plaintiffs therefore left the courthouse with everything they sought when they entered it; Texas, to the contrary, left "the courthouse emptyhanded," *Sole v. Wyner*, 551 U.S. 74, 78 (2007), having never held an election under the defunct map it enacted in 2011 and having been enjoined from using its previously enacted map (S100) because it was declared unconstitutionally malapportioned.

Despite Plaintiffs' success, the State of Texas has contended that Plaintiffs are not entitled to fees and costs. But the case law decidedly shows otherwise. A plaintiff who prevails in a Voting Rights Act case "should ordinarily recover an

attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (*per curiam*); *Dean v. Riser*, 240 F.3d 505, 508 (5th Cir. 2001) ("[A] prevailing plaintiff in a civil rights action is presumptively entitled to reasonable attorney's fees . . . ."). As is well established, "[a] prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendent lite* or at the conclusion of the litigation." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989); *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Put differently, to achieve prevailing party status, one must obtain a "judicially sanctioned change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001).

In *Buckhannon*, the Supreme Court identified "judgments on the merits" and "settlement agreements enforced through a consent decree" as court orders that "may serve as the basis for an award of attorney's fees." *Id.* at 604. The Court noted, "[a]lthough a consent decree does not always include an admission of liability by the defendant, it nonetheless is a court-ordered chang[e] [in] the legal relationship between [the plaintiff] and the defendant." *Id.* (internal quotation marks omitted; brackets in original).

Since *Buckhannon*, this Court has clarified that judgments and consent decrees are non-exclusive examples of the types of judicial imprimatur sufficient to award fees, and that "a final judgment is not required" for the award of fees. *Dearmore v. City of Garland*, 519 F.3d 517, 521, 526 (5th Cir. 2008). Indeed, this Court has affirmed the award of attorneys' fees even for judicially sanctioned settlement agreements. Most recently, in *Salazar v. Maimon*, No. 13-20234, __ F.3d __, 2014 WL 1688197, at *6 (5th Cir. Apr. 29, 2014), this Court held that a settlement agreement approved by the court in a settlement order "memorializing the terms of [the parties'] agreement," *id.* at *1, was a sufficient judicial act to support an award of attorneys' fees, *id.* at *6-7. Citing *Buckhannon*, this Court concluded that the settlement order memorializing the parties' agreement was

> an affirmative action by the judiciary [that] reaches into the future and has continuing injunctive effects. The settlement order . . . arises from the pleaded case, furthers the objectives of the law upon which the complaint is based, and was sanctioned by the district court after careful scrutiny. Under these facts, the settlement order was an adjudication by the district court that authorized an award of attorneys' fees.

Id. at *6 (internal citation omitted).

In sum, three factors (all present here) must be satisfied for a plaintiff to be awarded fees as the prevailing party: 1) "the plaintiff must achieve judicially-sanctioned relief," 2) "the relief must materially alter the legal relationship between the parties," and 3) "the relief must modify the defendant's behavior in a

way that directly benefits the plaintiff at the time the relief is entered." *Petteway v. Henry*, 738 F.3d 132, 137 (5th Cir. 2013).

A. Plaintiffs Obtained Judicially Sanctioned Relief.

Plaintiffs obtained judicially sanctioned relief. Indeed, it is hard to imagine how Plaintiffs could have obtained more relief than they did.

First, the district court permanently enjoined the 2011 enacted map (S148) as Plaintiffs had sought. As the district court stated, this meant that "no elections have been or will be held thereunder." ROA.3476. Texas never appealed or sought to dissolve that permanent injunction. As the district court noted, "instead of returning to this Court to seek an order dissolving the injunction against Plan S148, Defendants … mooted Plaintiffs' remaining claims." ROA.3480. But Texas cannot avoid the payment of attorneys' fees just by mooting an action. *See Dearmore*, 519 F.3d at 524.

Second, the district court also declared the prior map (S100) unconstitutionally malapportioned, just as Plaintiffs had requested. As the district court stated, "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."

ROA.3476. Plaintiffs thus succeeded in obtaining exactly the declaratory relief they sought.

Finally, the district court imposed Plaintiff's preferred map (S172) for the 2012 elections, after the State agreed to the imposition of that map. As the district court concluded, it was "essentially a judicially approved settlement or consent decree" that governed the 2012 elections upon being ordered in place by the court. ROA.3482. Because Texas consented to the map and the court ordered it in place, *Buckhannon*'s requirement that there be "judicial *imprimatur* on the change" is satisfied. 532 U.S. at 605. As in *Salazar*, the February 28, 2012 order was "[a]n affirmative action by the judiciary" that "reache[d] into the future"—with "continuing injunctive effects" through the 2012 elections. 2014 WL 1688197, at *6. Likewise, it "ar[ose] from the pleaded case, further[ed] the objectives of the law upon which the complaint [was] based, and was sanctioned by the district court after careful scrutiny." *Id.*[5] The three-judge district court properly awarded fees on that basis.

Texas disagrees with the district court's characterization of the interim map as "evidence that the State entered into a 'consent decree' that conclusively resolved the litigation and triggered liability for attorneys' fees." Tex. Br. 21-22.

[5] The district court heard arguments for two days on the interim plan. *See* ROA.2531.

But its objections fail and are contradicted by the record. First, the district court did not claim the interim map "conclusively resolved the litigation," nor was it required to. *See* ROA.3482-83; *Tex. State Teachers Ass'n*, 489 U.S. at 791-92. Second, Texas cites no authority for its assertion that a consent decree supporting a fee award cannot be time-limited in its scope. Tex. Br. 21. To the contrary, fee-supporting judicial relief need only "directly benefit[] the plaintiff *at the time the relief is entered*." *Petteway*, 738 F.3d at 137 (emphasis added). The interim map definitively resolved the case for the 2012 elections. Nothing more is required. Third, it is irrelevant that Texas claimed it was "not admit[ting] that any of Plaintiffs' claims against the legislatively enacted Senate plan have merit." Tex. Br. 21 (quotation marks omitted; brackets in original). A consent decree can authorize the award of attorneys' fees even where defendants do not admit fault. *See Buckhannon*, 532 U.S. at 604. The Supreme Court's observation in this regard belies Texas's objection that the "district court . . . [is] sandbagging the State by using its cooperation" against it in awarding attorneys' fees. Tex. Br. 21. Texas is certainly no stranger to attorneys' fees litigation arising from civil and voting rights cases; it cannot plausibly claim to be "sandbagged" by the district court's application of Supreme Court precedent from 2001.

Similarly unfounded is Texas's contention that the interim character of the court-ordered relief disqualifies Plaintiffs as prevailing parties under the Supreme

Court's decision in *Sole v. Wyner*. *See* Tex. Br. 14, 16, 24. In *Sole*, the Supreme Court stated that "[p]revailing party status, we hold, does not attend achievement of a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case." 551 U.S. at 83. But in so holding, the Court carefully noted, several times, that the reach of its holding was narrow: "Of controlling importance to our decision, the *eventual ruling on the merits for defendants*, after both sides considered the case *fit for final adjudication*, superseded the preliminary ruling." *Id.* at 84-85 (emphasis added). The Court highlighted that in some cases, preliminary relief will follow "searching" proceedings, but that in *Sole*, the proceedings were "necessarily hasty and abbreviated." *Id.* at 84. "A plaintiff who secur[es] a preliminary injunction, then loses on the merits as the case plays out *and judgment is entered against [her]*, has [won] a battle but los[t] the war." *Id.* at 86 (internal quotation marks omitted; brackets in original) (emphasis added). Finally, the Court concluded:

> We express no view on whether, in the absence of a final decision on the merits of a claim for permanent injunctive relief, success in gaining a preliminary injunction may sometimes warrant an award of counsel fees. We decide only that a plaintiff who gains a preliminary injunction does not qualify for an award of counsel fees . . . if the merits of the case are ultimately decided against her.

Id.

This case is nothing like *Sole*, as the district court correctly concluded. *See* ROA.3484. Texas never obtained a ruling in its favor on the merits. This case

involved a trial and two days of remedial hearings, *see supra* note 5; the interim map, imposed after Texas consented to use it in 2012, was the exact relief Plaintiffs sought, and minority voters re-elected Senator Davis as a result. Texas never held an election under its 2011 enacted map, instead later adopting as permanent the map imposed by the court, thus mooting Plaintiffs' Section 2 and constitutional claims before a final determination on the merits could occur. And the 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. None of the factors animating *Sole* are present here.

Plaintiffs obtained judicially-sanctioned relief that was never "reversed, dissolved, or otherwise undone by the final decision in the same case," *id.* at 83, and thus satisfy the first *Petteway* requirement.

B. The Relief Won Below Materially Altered the Parties' Legal Relationship.

As to *Petteway*'s second requirement, there can be no doubt that the relief Plaintiffs obtained materially altered the parties' legal relationship. By permanently enjoining the 2011 enacted map (S148) at Plaintiffs' request, declaring the benchmark map (S100) to be unconstitutionally malapportioned, and imposing Plaintiffs' preferred map (S172) for the 2012 election, *see* ROA.78-79, 2305-06, 2530, the district court reversed the parties' legal standing vis-à-vis each other—Texas was blocked from implementing its preferred map, and instead was

required to implement the map advocated by Plaintiffs. Texas even agreed that the interim map imposed by the district court "respond[ed] to all claims that are fairly at issue in this case or the Section 5 case." ROA.3482, 2070. As the district court concluded, ROA.3485, Plaintiff's victory was not "purely technical or *de minimis*," *Petteway*, 738 F.3d at 137. That Texas later acquiesced by repealing the already-enjoined 2011 map and enacting the court-imposed map only *underscores* the extent of Plaintiffs' victory.

Indeed, Texas does not contest that the relief Plaintiffs won below materially altered the parties' legal relationship. Nor could it. Plaintiffs thus easily satisfy *Petteway*'s second requirement.

C. The Relief Modified Texas's Behavior to Plaintiffs' Benefit.

The third requirement for prevailing party status—that the relief modify the defendant's behavior to the plaintiffs' benefit—is also easily established here. And again, Texas does not even argue otherwise. Texas's 2011 map (S148), which Plaintiffs challenged as harmful to them, was permanently enjoined. Furthermore, because of the court-ordered interim map, the 2012 elections took place with Senate District 10 restored to its prior configuration, as Plaintiffs had advocated, and minority voters once again formed a coalition and elected Senator Davis. The district court correctly concluded that "the interim plans gave Plaintiffs the relief they sought with regard to the upcoming election" and that Texas's later enactment

of the interim plan as a permanent plan to govern future elections ensured that "Plaintiffs were never subject to Plan S148." ROA.3485.

Plaintiffs satisfy all three requirements for obtaining prevailing party status. The unanimous conclusion of the three-judge panel should be affirmed.

III. This Court Has No Jurisdiction to Vacate the District Court's Orders that Granted Plaintiffs Interim Relief and Formed the Basis of Their Prevailing Party Status.

As established above, Plaintiffs are the prevailing parties. Texas knows that the only way to contest Plaintiffs' prevailing party status it to contest the validity of the orders that granted the relief Plaintiffs sought in that litigation. But the validity of those orders cannot be challenged in this appeal. Critically, the only appeal that is properly before this Court is that of the district court's award of fees to Plaintiffs as prevailing parties. Texas cannot collaterally attack the existence or validity of the orders that underlie the prevailing party determination. Texas's arguments that this Court should nonetheless vacate those orders fail on multiple levels. First, Texas's arguments are addressed to the wrong court as only the Supreme Court has jurisdiction over appeals of injunctive relief from a three-judge court. Second, Texas forfeited its arguments about vacatur by never asking the district court to vacate the very same orders it now asks this Court to vacate. Third, this Court has no jurisdiction to vacate the orders because the district court properly dismissed the case as moot.

A. Only the Supreme Court Has Jurisdiction to Vacate the Relief Mandated by the Three-Judge District Court.

This Court has no jurisdiction to vacate the district court's remedial orders. Texas asks this Court to vacate those orders, claiming that they are entirely based on Section 5 and thus "impermissible." Tex. Br. 22. But Texas's request is addressed to the wrong court. Congress expressly required that "[a]ny appeal" of a three-judge district court's determination under Section 5 "shall lie to the Supreme Court." 42 U.S.C. § 1973c(a). Likewise, "[a] district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of . . . the apportionment of any statewide legislative body," 28 U.S.C. § 2284(a); *see also* 28 U.S.C. 2284(b)(3), and appeals of orders granting or denying "an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a district court of three judges" "may be appealed to the Supreme Court," 28 U.S.C. § 1253.

Although Section 1253 says the suit "may" be appealed to the Supreme Court, two other sections of the U.S. Code make clear the "may" actually means "must." Under 28 U.S.C. § 1292(a)(1), courts of appeals have *no* jurisdiction over any appeal of "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing . . . or refusing to dissolve or modify injunctions . . . where a direct review may be had in the Supreme Court." Likewise, courts of appeals have *no* jurisdiction over "final decisions of the district courts of the United States . . .

where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. *Cf. Espronceda v. Krier*, No. 02-50154, 2003 WL 342582, at *1 (5th Cir. Feb. 6, 2003) (dismissing for lack of jurisdiction an appeal of a case involving Section 2, 5, and constitutional claims; "[a]ppeals from three-judge district courts created pursuant to section 5 must be brought in the Supreme Court of the United States.").[6] This Court has no jurisdiction to disturb the district court's remedial orders over which review lies exclusively with the Supreme Court.[7]

[6] Although this Court, rather than the Supreme Court, would have jurisdiction if a party were challenging the *mootness* determination of the district court, *see Ward v. Dearman*, 626 F.2d 489, 491 (5th Cir. 1980), that is not the case here. Texas requested the court dismiss the case as moot, and cannot now appeal the dismissal it sought. *Deposit Guar. Nat'l Bank, Jackson v. Roper*, 445 U.S. 326, 333 (1980); *see also United States v. Windsor*, 133 S. Ct. 2675, 2687 (2013); *Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011). Texas is instead challenging the validity of the *remedial orders* of the district court—orders only the Supreme Court has jurisdiction to review.

[7] Texas plainly understands the limits of this Court's jurisdiction. When the three-judge district court imposed its first interim map in November 2011, Texas filed a Jurisdictional Statement with the Supreme Court—correctly—rather than appealing the order to the Fifth Circuit. ROA.1893. If, rather than agreeing to the interim plan S172, Texas refused to consent, and the district court had nonetheless imposed S172, any appeal would have been to the Supreme Court, not to this Court. So too now that Texas seeks vacatur of that same order, it should have proceeded by seeking vacatur in the district court and then appealing any denial of vacatur to the Supreme Court.

B. Texas Forfeited Its Ability to Seek Vacatur of the District Court's Remedial Orders.

Even if this Court had jurisdiction to consider Texas's request that it vacate the orders upon which the district court based its prevailing party determination, the Court would still be required to reject Texas's request because Texas forfeited its ability to seek vacatur.

When Texas submitted its proposed dismissal order to the district court, it did not propose that the court's prior orders be vacated, *see* ROA.2772-73, and it filed no motion to that effect with the district court. Perhaps this was because Texas was under the (incorrect) impression that "[t]he State's decision to moot the case imposed an independent obligation on the district court to terminate its interim-relief order." Tex. Br. 20. Nevertheless, Texas failed to seek vacatur of these orders until the case reached *this* Court. *See* Tex. Br. 1, 19-22. But Texas's vacatur request to this Court comes too late.

The Supreme Court has held that a party forfeits its ability to obtain vacatur of underlying orders when it does not file a motion with the court from which dismissal for mootness is sought. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950). In *Munsingwear*, the United States lost a commodity pricing case against a corporation in the district court, and the case became moot while the appeal was pending because the regulations governing the suit were rescinded. *Id.* at 37. When the corporation filed a motion with the court of appeals

to dismiss the case as moot, the United States "acquiesced in the dismissal" and "made no motion to vacate the judgment." *Id.* at 40. The Supreme Court concluded that, having "slept on its rights," *id.* at 41, to avoid the ancillary legal effects of the underlying decision by not seeking vacatur from the court ordering dismissal, the United States had forfeited that ability on appeal, *id.*

So too here. Texas never sought vacatur of the district court's remedial orders, and it has therefore forfeited its ability to do so at this Court. *Munings*wear squarely rejects Plaintiff's suggestion that the district court is independently obligated to grant relief Texas never sought. *See also Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 326 n.15 (5th Cir. 2009) (noting that there is no automatic vacatur following mootness; "vacatur, which is an 'extraordinary' and equitable remedy, is to be granted only after a fact-specific balancing of the equities between the parties."), *aff'd*, 131 S. Ct. 1651 (2011); *cf. Staley v. Harris Cnty.*, 485 F.3d 305, 311 n.2 (5th Cir. 2007) (*en banc*) ("[I]n cases mooted by the voluntary actions . . . of a party, we have decided the vacatur question in favor of the party that did not cause the case to become moot."). If Texas wanted the orders vacated, it was required to seek that relief from the district court. This Court cannot entertain Texas's belated request. Because Texas failed to seek vacatur, there is no action of the district court in that regard for this Court to review.

C. This Court Has No Jurisdiction to Dissolve Relief Granted in a Moot Case.

An additional jurisdictional bar arises from the fact that the district court properly dismissed the case as moot. This court has no jurisdiction, on collateral review, to vacate the remedial orders from the merits phase of the case after the case was properly dismissed as moot.

Federal courts of appeals lack jurisdiction to decide moot cases. "We have no power under Article III to decide the merits of a case that is moot when it comes before us." *Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999). Texas asks this Court to create a new brand of roving jurisdiction to tinker with orders entered in a case properly dismissed by the district court as moot just so Texas can escape attorneys' fees liability. But no case supports Texas's theories of this Court's jurisdiction or suggests its exercise would be prudent. Rather, the case law is clear that appellate courts have only "limited jurisdiction," *id.* at 714, to vacate district court orders once a case becomes moot—and that jurisdiction extends only to two circumstances, and only to cases on direct appeal. First, if a district court enters an order *after* a case became moot, an appellate court reviewing that order may vacate it, despite lacking jurisdiction generally to hear the appeal, to "correct the error" of the district court. *Id.* Second, if a case becomes moot *after* the district court enters an order or judgment, but *during* direct appeal, the appellate court has the *discretion* to vacate the underlying order to prevent an unappealable order from

having preclusive effects. *Id.* at 718-19; *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994).

Neither of these circumstances is applicable here. The case did not become moot until over a year after entry of the orders at issue. Likewise, the case did not become moot while on appeal, but rather *before* any appeal. This Court thus has no jurisdiction, on collateral review, to vacate prior district court orders after the district court properly dismissed the case as moot.[8]

Texas takes issue with the district court's conclusion that, by mooting the case, Texas guaranteed that the district court's prior orders "[can]not now be reversed, dissolved, or otherwise undone," ROA.3480 (citing *Sole*, 551 U.S. at 83), Tex. Br. 22, because, in its view, the district court "retains the power to revoke or modify its earlier orders, even after a case proceeds to final judgment," citing Federal Rule of Civil Procedure 60. Tex. Br. 22, 24. As an initial matter, Texas

[8] Even if the Court had jurisdiction, Texas would not be automatically entitled to vacatur, as it suggests. Tex. Br. 20. Rather, "if the mootness can be traced to the actions of the party seeking *vacatur*, the *decision of the lower court will usually be allowed to stand*." *Goldin*, 166 F.3d at 719 (emphasis added). Likewise, if the mootness comes about because of settlement, a party "voluntarily forefeit[s] his legal remedy . . . thereby surrendering his claim to the equitable remedy of vacatur." *Bonner*, 513 U.S. at 25. And there is "no reason to vacate [a] district court's . . . interlocutory order that has lost its effectiveness" by becoming moot. *Marilyn T., Inc. v. Evans*, 803 F.2d 1383, 1385 (5th Cir. 1986), *abrogated on other grounds by Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190 (1991). All of these considerations are present here and would counsel rejection of Texas's position, even if this Court had jurisdiction to entertain it.

never filed a Rule 60 motion with the district court.[9] "To rely on relief [Texas] never requested on a claim [it] never made would be to conclude that zero plus zero equals more than zero." *NAACP, Jefferson Cnty. Branch v. U.S. Sugar Corp.*, 84 F.3d 1432, 1438 (D.C. Cir. 1996). More importantly, however, district courts lack jurisdiction to grant Rule 60 relief when a case is moot. Although it cited *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), *three times* in its brief, *see* Tex. Br. 2, 12, 29, Texas missed its central holding—or at least failed to alert this Court to it. *See McCorvey*, 385 F.3d at 848-49 (holding that case was moot and thus district court lacked jurisdiction to grant Rule 60 relief). The district court, therefore, like this Court and the Supreme Court, is without jurisdiction to disturb the remedial relief Plaintiffs won. The district court thus correctly concluded that *Sole v. Wyner* is inapposite because the relief can never be "reversed, dissolved, or otherwise undone." ROA.3484.

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Texas failed to alert the Court to any of these jurisdictional issues. Instead, it asks this Court to undo the interim results of a moot case—results that this Court has no power to disturb even if the case were *not* moot. And it does so for the *first*

[9] Texas's citation to *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *Horne v. Flores*, 557 U.S. 433 (2009), *see* Tex. Br. 22—cases involving appeals from denial of Rule 60 relief in the institutional reform context—makes scant sense here, where Texas never sought Rule 60 relief.

time on appeal of a collateral issue, with no opportunity for briefing or consideration of the issue by the district court. It is simply too late; this Court is without jurisdiction to entertain Texas's collateral attack on the validity of the "judicially sanctioned change in the [parties'] legal relationship," *Buckhannon*, 532 U.S. at 605, occasioned by the relief ordered by the district court.[10]

IV. The Supreme Court's *Shelby County* Decision Does Not Alter Plaintiffs' Status as Prevailing Parties.

Texas's position in this Court is based on a fundamental misunderstanding about the effect of the Supreme Court's decision in *Shelby County*. As Texas would have it, the moment the *Shelby County* decision was announced, all orders that were in any way based on Section 5 of the Voting Rights Act magically disappeared, thus transforming Plaintiffs from prevailing parties into non-prevailing parties. But the law does not work this way. Nor can this Court assume, as Texas would have it do, that if Texas had actually done what was required and asked the district court to vacate its prior orders in light of *Shelby County*, Texas would have succeeded. Moreover, even if this Court concludes that *Shelby County* operates as Texas contends, it should nonetheless uphold the

[10] There is no reason to remand to the district court to enter a fresh order from which Texas could appeal to the Supreme Court, *see Espronceda*, 2003 WL 342582, at *1. There is no order the district court would even have jurisdiction to enter; Texas is mounting an improper collateral attack against a moot case. All of which underscores the district court's point that the prior orders cannot *ever* be "reversed, dissolved, or otherwise undone." ROA.3480.

award of fees to Plaintiffs as prevailing parties because the district court exercised constitutional avoidance in ordering the interim 2012 map and it correctly found that "Plaintiffs' assertion of other claims under § 2 and the Fourteenth Amendment . . . could have supported the interim relief." ROA.3485. Finally, the Supreme Court has recognized that retroactive application of a law will not always control the outcome of a case where reliance on then-existing law coupled with an important public policy interest counsels otherwise.

A. Intervening Supreme Court Decisions Are Not Automatically Outcome-Determinative.

Shelby County did not automatically undo the relief that was won in other cases. Texas contends that "even if the district court's interim-relief order could somehow survive *Shelby County*," Tex. Br. 22, Plaintiffs are still not prevailing parties because *Shelby County* somehow "unprevailed" them. *Id.* at 22-28. Texas arrives at this result by implying that this Court can simply *ignore* the district court's remedial orders (and this Court's lack of jurisdiction to undo them) in its "prevailing party" analysis. Apparently, Texas takes the position that there was no need for Texas to actually file any motion or take any action at all to dissolve the prior orders while the case was still pending. Somehow, *Shelby County* itself took care of all of these pesky procedural issues.

Not so fast. The problem is not that Texas simply overlooked some minor housekeeping task by failing to seek vacatur of the district court's orders on the

basis of *Shelby County* while the case was still live for adjudication. And Plaintiffs are not unfairly taking advantage of that oversight by gaining a windfall award of attorneys' fees on its back. Quite the opposite. Texas made a deliberate tactical decision to cede the case to Plaintiffs because it knew that *Shelby County* alone would not solve its problems. The State of Texas thought, rightly, that if it returned to the district court and asked the court to lift the permanent injunction on the 2011 enacted plan (S148), it would lose on Plaintiffs' Section 2 and constitutional claims against that plan. After all, the D.C. court had already found *intentional* discrimination in the enactment of the State Senate plan. *See supra*. Thus, Texas apparently thought that if it acted really quickly and bypassed the district court's consideration (and entry of an order) on the question of *Shelby County*'s application to Plaintiffs' case, Texas could just later invoke *Shelby County* to defeat Plaintiffs' claim for attorneys' fees for the relief they won below. In its haste, Texas guessed that *Shelby County* was a standalone, self-executing force of nature that could automatically—without motion by a party—undo prior court orders and thereby automatically strip Plaintiffs of their prevailing party status and entitlement to fees.

Texas guessed wrong on the law. It is true that when the Supreme Court "applies a rule of federal law[,] . . . that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct

review." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). That is not the end, however, but rather the beginning. *How* a case applies retroactively is a matter for each court to decide based on the circumstances of the case. "Not all cases concerning retroactivity and remedies are of the same sort." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755 (1995). Upon motion by a party, the court should consider whether, for example, the party seeking the benefit of the new rule is procedurally barred from relying upon it, *see Martinez v. Texas Dep't of Criminal Justice*, 300 F.3d 567, 574 (5th Cir. 2002), whether an independent legal basis supports the order, *Reynoldsville*, 514 U.S. at 759, whether the party seeking the benefit of the intervening decision is trying to re-open an issue that was "closed by compromise," *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 323 (5th Cir. 1999), or whether reliance on then-existing law coupled with "significant policy justifications" counsel against the intervening decision determining the outcome of an issue, *Reynoldsville*, 514 U.S. at 759. All of these questions affect the substantial rights of both parties, and their answers cannot be assumed absent actual consideration of them by a court with jurisdiction to do so.

But that is exactly what Texas seeks here. Texas asks this Court, in reviewing a collateral determination about attorneys' fees, to engage in a series of assumptions of what *would* have happened had Texas sought relief from the

district court based on *Shelby County*. Texas's reliance on *Shelby County* comes too late.

B. Texas Is Procedurally Barred from Arguing that *Shelby County* Undoes Plaintiffs' Prevailing Party Status Because It Never Challenged the Constitutionality of the Coverage Formula Below.

Texas is procedurally barred from arguing that *Shelby County* automatically undoes the interim relief supporting Plaintiffs' prevailing party status. This Court has held that a litigant cannot raise an argument based on intervening Supreme Court precedent "for the first time on appeal." *Martinez*, 300 F.3d at 574. In *Martinez*, the appellee failed to argue in the district court that a State's removal of a case to federal court waived its Eleventh Amendment defense. *Id.* at 573. While the case was on appeal, the Supreme Court decided *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002), which held that "a State's removal to federal court waived Eleventh Amendment immunity." *Martinez*, 300 F.3d at 573. The appellee then raised an argument based on *Lapides* on appeal. This Court rejected that attempt, holding that:

> Even if we were to adopt some form of the intervening decision doctrine, it would not excuse Martinez' procedural default. (Again, she failed to raise her waiver-by-removal claim in district court, raising it for the first time (as Appellee) in her response brief to this court). The law (this issue) was not so settled prior to *Lapides* that raising her waiver-by-removal claim in district court would have been pointless or futile. Accordingly, we will not consider her waiver-by-removal claim.

Id. at 574-75 (citations omitted); *see also Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 331-32 (5th Cir. 2002) (same); *cf. United States v. Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J., concurring in denial of reh'g *en banc*) ("It makes no . . . sense to say that a procedural bar should not be applied . . . because doing so undermines or frustrates retroactive application of a Supreme Court decision. . . .We routinely hold that constitutional issues based upon Supreme Court decisions applicable to trials occurring after those decisions are issues [that can be] procedurally barred.").

In the district court, Texas never contended that the coverage formula of the Voting Rights Act was unconstitutional. *See* ROA.104. Nor did Texas challenge the constitutionality of the Voting Rights Act in its preclearance suit. *See Texas v. United States*, 887 F. Supp. 2d 133, 147 n.11 (D.D.C. 2012), *vacated by*, 133 S. Ct. 2885 (2013). Texas's reliance on the constitutional arguments decided in *Shelby County* now—for the first time on appeal of the collateral issue of attorneys' fees—comes too late.[11]

[11] In the criminal *habeas* context, this Court has held that a party "may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error." *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). "This cause and actual prejudice standard presents a significantly higher hurdle than the plain error standard that we apply on direct appeal." *Id.* (internal quotation marks omitted). This standard applies "even when [a party] alleges a fundamental constitutional error. . . . [and] applies to inadvertent attorney errors as well as *deliberate tactical decisions.*" *Id.* (emphasis added).

This case is hardly an example of "extraordinary circumstances" counseling against application of *Martinez*'s procedural bar. *Martinez*, 300 F.3d at 574; *cf. Doleac ex rel. Doleac v. Michalson*, 264 F.3d 470, 492 (5th Cir. 2001) (finding extraordinary circumstances excusing procedural default where plaintiff lacked standing at the district court to raise challenge). Nor, as in *Martinez*, was the constitutionality of Section 4(b)'s coverage formula "so settled prior to" *Shelby County* that raising the constitutional challenge "would have been pointless or futile." *Martinez*, 300 F.3d at 574-75. Just two years prior, in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), the Supreme Court considered the constitutionality of Section 4(b) and 5, but ultimately declined to decide the question, applying constitutional avoidance. *Id.* at 205. Following the Supreme Court's decision in *Northwest Austin*, constitutional questions of Section 4(b) and Section 5 existed, and if Texas wants to rely on arguments about constitutionality now, it was required to raise them below. Thus, Texas is procedurally barred from relying on *Shelby County* for the first time on appeal.

C. Even if Texas Were Not Procedurally Barred from Relying Upon *Shelby County*, the Award of Fees Is Appropriate Because of the Independent Legal Basis Supporting the Relief Granted by the District Court.

Even if Texas were not procedurally barred from relying upon *Shelby* County on appeal, this Court must still affirm the district court's award of fees

because the relief Plaintiffs obtained was supported by an independent legal basis unaffected by *Shelby County*. And even if this Court adopts Texas's incorrect view that the relief was based solely on Plaintiffs' Section 5 claims, the district court must still be affirmed because it has the discretion to award fees where 1) a substantial fee-eligible claim is left unaddressed because of constitutional avoidance; and 2) that claim shares a common nucleus of operative facts with the fee-ineligible claim forming the basis of the decision.

1. The Interim Map Had an Independent Legal Basis Unaffected by *Shelby County*.

Even if Texas had requested relief from the district court based on *Shelby County*, it would have lost because *Shelby County* only invalidated Section 4(b) of the Voting Rights Act. It expressly left Section 2 intact as well as claims under the Fourteenth and Fifteenth Amendments of the Constitution. This matters because the February 28, 2012 order imposing the interim map had an independent legal basis—Section 2 and the Fourteenth and Fifteenth Amendments—and thus is unaffected by *Shelby County*'s invalidation of the coverage formula that subjected Texas to Section 5.

The February 28, 2012 order that imposed the interim map for the 2012 elections explicitly stated that it was "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. The text of the February 28 order demonstrates "a previously existing, independent legal basis" for Plaintiffs' prevailing party status that had nothing to do with Section 5. *Reynoldsville*, 514 U.S. at 759; *Shelby County*, 133 S. Ct. at 2619 ("Section 2 is permanent, applies nationwide, and is not at issue in this case."). From the face of the order, it is apparent that *Shelby County* did nothing to invalidate it.

The February 28, 2012 order stated that "[a]n opinion will follow at a later date." ROA.2305. On March 19, 2012, the district court, under the docket entry "OPINION AND ORDER," issued an order, stating that "[o]n February 28, 2012, this Court issued PLAN S172 as the interim plan for the districts used to elect senators in 2012 to the Texas State Senate. This order explains that plan." ROA.2530. The Opinion and Order of March 19, 2012 did not in any way undo or even address the February 28, 2012 order's statement that it had made a preliminary determination regarding the merits of the Section 2 and constitutional claims. "A court is not required, after disposing of all the issues in [an order], to explain its determination on each and every issue in an attached memorandum." *Rosas v. United States Small Bus. Admin.*, 964 F.2d 351, 358 (5th Cir. 1992) (citing *Murdaugh Volkswagon, Inc. v. First Nat'l Bank of S. Carolina*, 741 F.2d 41, 44 (4th Cir. 1984)). The March 19, 2012 opinion and order is thus not

inconsistent with the February 28, 2012 order's explicit consideration of the Section 2 and constitutional claims.[12]

Nonetheless, it is apparent that the district court offered various characterizations of the basis for its interim map. Although the February 28 and March 19, 2012 orders are not in direct conflict with each other, the February 28 order's characterization of the basis of the interim relief is different from the characterization in the January 8, 2014, fee award. This Court should resolve that difference in favor of the February 28, 2012 order's inclusion of the Section 2 and constitutional claims as a basis for the relief. "Basic to the operation of the judicial system is the principle that a court speaks through its judgments and orders." *Bell v. Thompson*, 545 U.S. 794, 805 (2005) (quoting *Murdaugh Volkswagon, Inc. v. First Nat'l Bank of S. Carolina*, 741 F.2d 41, 44 (4th Cir. 1984)). "Courts must speak by orders and judgments, not by opinions, whether written or oral . . . [w]hen the terms of a[n] [order] conflict with either a written or oral opinion or

[12] Both the February 28 and March 19, 2012 orders, along with the district court's January 8, 2014, order awarding fees, plainly establish that the relief was based (at least in part) on the "not insubstantial" standard for the Section 5 claim. Notably, had Plaintiffs not intervened as defendants in the D.C. court, they could never had made this claim here. DOJ did not oppose preclearance for the State Senate map in the D.C. court. As Texas has admitted, *see* ROA.123-24, without Plaintiffs' intervention in D.C., the district court here could not have relied on the Section 5 claim because the State Senate map would have been precleared. Plaintiffs are separately seeking fees from the D.C. court—that motion for fees is limited to Plaintiffs' work in litigating before that court, just as the district court here awarded fees based only on Plaintiffs' effort litigating this case.

observation, the [order] must govern." *Murdaugh Volkswagon, Inc. v. First Nat'l Bank of S. Carolina*, 741 F.2d 41, 44 (4th Cir. 1984); *cf. Duffer v. Am. Home Assur. Co.*, 512 F.2d 793, 799 (5th Cir. 1975) (crediting terms of judgment rather than inconsistent oral statements of the court). Under the circumstances present here, where there is a court order granting judicial relief for Plaintiffs explicitly incorporating an independent legal basis, and a different order is entered in a collateral proceeding nearly two years later, the original order should be credited. This is even more true where Texas explicitly acknowledged that the relief addressed *all* of Plaintiffs' claims. *See* ROA.3482, 2070.

2. Attorneys' Fees May Be Awarded When Fee-Eligible Claims Are Unaddressed Due to Constitutional Avoidance.

This Court need not resolve the different characterizations in the district court's orders, however, because even if the interim map were not based in part upon the Section 2 and constitutional claims, the district court correctly recognized that it could award attorneys' fees based on the presence of those claims. This is so because all the claims arose from the same nucleus of operative facts and—to the extent it did rely on Section 5—the district court applied the constitutional avoidance doctrine to do so. *See* ROA.3480, 3484. Under such circumstances, this Circuit permits an award of fees based on the claims that were constitutionally avoided. In *Southwest Bell Telephone Co. v. City of El Paso*, 346 F.3d 541, 551 (5th Cir. 2003), this Court explained that a court may award attorneys' fees even

where the fee-eligible claim does not form the basis of the decision if "1) the [fee eligible] claim . . . was substantial; and 2) the successful pend[e]nt claims arose out of a 'common nucleus of operative facts.'" (citation omitted). As the Supreme Court has explained,

> [a]lthough . . . the trial judge did not find any constitutional violation, the constitutional issues remained in the case until the entire dispute was settled by a consent decree. . . . Congress was not limited to awarding fees only when a constitutional or civil rights claims is actually decided. . . . [S]uch a fee award furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.

Maher v. Gagne, 448 U.S. 122, 131-33 (1980) (internal quotation marks omitted); *see also Sanchez*, 480 F.3d at 739 ("Recognizing that courts will often justifiably refrain from addressing a constitutional question where it can be avoided, we have held that such a plaintiff may obtain attorneys' fees even though the [fee-eligible] claim was not decided . . . ."); *Espino v. Besteiro*, 708 F.2d 1002, 1008 (5th Cir. 1983).

There is no dispute that the Section 2, constitutional, and Section 5 claims all arose from the same nucleus of operative facts—Texas having "cracked SD 10 and removed most of its minority populations, spreading them into predominately Anglo districts and effectively dismantling the coalition that had elected Senator Davis," *Texas*, 887 F. Supp. 2d at 229 (D.D.C. 2012), along with the State's "purposeful discrimination in the re-drawing of SD 10," *id.* at 225. Even Texas

acknowledged, at the time it consented to the interim map, that the map "'respond[ed] to all claims that are fairly at issue in this case or the Section 5 case . . . [and] addresse[d] Davis's Fourteenth Amendment and discriminatory purpose claims.'" ROA.3482, 2070. The district court indicated as much in concluding that an award of fees was not unjust despite *Shelby County*: "Plaintiffs' assertion of other claims under § 2 and the Fourteenth Amendment . . . could have supported the interim relief." ROA.3485. Given these findings, the district court acted within its sound discretion in awarding fees.[13]

D. *Shelby County* Cannot Undo Plaintiffs' Prevailing Party Status Because Intervening Decisions Applied Retroactively Do Not Determine the Outcome When Then-Existing Law Was Relied Upon in Furtherance of an Important Public Policy Goal, Such as Encouraging Private Attorney General Suits to Vindicate Civil Rights.

As noted above, the independent legal basis supporting (or potentially supporting) the district court's remedial orders is sufficient to affirm the district court's award of fees. In addition, however, *Shelby County* should not retroactively apply to invalidate the real-world relief Plaintiffs obtained for the 2012 elections—at least for fee purposes—because Plaintiffs filed suit in reliance on then-existing law, in accord with the overriding congressional policy favoring

[13] For the same reasons, although the September 2011 permanent injunction against use of the 2011 enacted map was expressly based on Section 5, the court had the discretion to award fees for time spent obtaining that injunction as well.

constitutional civil rights litigation by private attorneys' general. New federal law announced by the Supreme Court is not outcome determinative in a pending case if "a well-established general legal rule . . . trumps the new rule of law, which general rule reflects *both* reliance interests and other significant policy justifications." *Reynoldsville*, 514 U.S. at 759.

The Supreme Court and this Court have recognized the "significant policy justifications," *id.*, favoring the attorneys' fees awards in civil rights cases. "When a plaintiff succeeds in remedying a civil rights violation, we have stated, he serves 'as a "private attorney general," vindicating a policy that Congress considered of the highest priority.'" *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (quoting *Piggie Park Enters.*, 390 U.S. at 402 (per curiam)). "If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers." *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (quoting 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney)). "[T]he public as a whole has an interest in the vindication of rights . . . over and above the value of a civil rights remedy to a particular plaintiff." *Hensley*, 461 U.S. at 444 n.4. As this Court observed, "Congress considered vigorous enforcement to vindicate civil rights a high priority and entrusted plaintiffs to effectuate this policy." *Dean*, 240 F.3d at 507.

Plaintiffs brought this suit to protect the civil and constitutional rights of Texas voters. Plaintiffs succeeded in vindicating those rights for the 2012 elections by obtaining relief to which Texas consented and which Texas agreed satisfied *all* of Plaintiffs claims. *See* ROA.3482. The 2012 election happened under the redistricting map Plaintiffs had advocated, and minority voters elected their preferred candidate. The interim relief therefore obtained "finality" such that it was "closed by compromise," *Hulin*, 178 F.3d at 323, with respect to the 2012 elections, and thus *Shelby County*—decided more than a year-and-a-half after that real-world relief was obtained by Plaintiffs—"does not determine the outcome of the case," *Reynoldsville*, 514 U.S. at 759.

Plaintiffs relied on the state of the law pre-*Shelby County* in pursuing their case. Texas never argued in this case or in the D.C. preclearance case that Section 4(b)'s coverage formula was unconstitutional. And even if the district court can be considered as having *only* addressed the Section 5 claim in its remedial orders, it did so as instructed by the Supreme Court, applying the reasonable approach of deciding the case on the less taxing "not insubstantial" standard set out by *Perry* and avoiding unnecessarily reaching constitutional claims. *See* ROA.3480.

Under these circumstances—particularly when Texas purposefully prevented the court from even having an opportunity to consider the effect of *Shelby County* on its interim relief by mooting the case *one day* after the decision

was announced, and where Plaintiffs had already prevailed with respect to the 2012 elections—the "reliance interests" and "significant policy justifications," *Reynoldsville*, 514 U.S. at 759, of encouraging private attorneys general suits in voting rights cases counsels heavily in favor of awarding fees. To decide otherwise would seriously chill the "high priority" of "vigorous enforcement . . . [of] civil rights," *Dean*, 240 F.3d at 507, by discouraging suits when federal appellate courts might possibly invalidate a law months to years after interim relief is imposed and expires, merely because another phase of the case is still proceeding.

***

Texas's *Shelby County* argument fails for all these reasons. Fundamentally, Texas uses *Shelby County* in an attempt to get this Court to ignore its lack of jurisdiction to undo Plaintiffs' interim relief. That is wrong. The Court may not "devise[] a remedy to accomplish indirectly what it . . . lacks the remedial authority to mandate directly," *Missouri v. Jenkins*, 515 U.S. 70, 92 (1995). Texas would have this Court strip Plaintiffs of prevailing party status—despite having obtained everything the Supreme Court and this Court have required for such status—because of its contention that *Shelby County* automatically dissolved all orders at issue in this case. That is wrong on the law, and is unfair to Plaintiffs. Texas cites no case to support imposing a heightened standard for *these* Plaintiffs to achieve

prevailing party status. This Court should not accept Texas's invitation to exceed its jurisdiction and accomplish indirectly what this Court cannot do directly.

V. The District Court Did Not Err by Entering a "Final Judgment."

Finally, contrary to Texas's contention, the district court committed no error by entering the September 4, 2013 "Final Judgment." *See* Tex. Br. 28-30. This is much ado about nothing. The district court's September 4, 2013 Judgment 1) dismissed the moot claims and 2) declared Plaintiffs the prevailing parties, setting a schedule for motions and responses for fees. *See* ROA.2787. There was nothing improper about entering a "judgment" that declared Plaintiffs the prevailing parties. "When the court chooses to bifurcate the issue of liability and amount [of attorneys' fees] . . . it may rule that the movant is entitled to fees and *may actually enter a judgment to that effect*." *Pechon v. La. Dep't of Health & Hosps.* 368 F. App'x 606, 610 n.7 (5th Cir. 2010) (quoting 10 James WM. Moore et al., *Moore's Federal Practice* ¶ 54.158 (3d ed.)) (emphasis added). Texas posits no argument for how it was harmed by having the dismissal of the moot claims occur in a document that properly was titled a "judgment" based on its remaining content. Instead, Texas accuses Plaintiffs' counsel of violating a supposed obligation to inform the court that it could not enter a "judgment" without violating the Constitution, and Texas further states that it "suspect[s] that the plaintiffs made this request [for a judgment] because the entry of judgment would strengthen their case

for 'prevailing party' status." Tex. Br. 29. "The constitutional and statutory limits," pontificates Texas, "on the federal 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." *Id*. at 29-30.

Texas should be more careful with its accusations. First, Texas itself asked for a judgment. Texas's own proposed dismissal order requested that it be "ORDERED ***ADJUDGED*** AND DECREED" that the claims be dismissed as moot. ROA.2773 (bolding added). Second, it does not violate the Constitution to call the document a "Judgment." *See Pechon*, 368 F. App'x at 610 n.7. Third, Plaintiffs have *never* contended that the September 4, 2013 Judgment was the source of the court-ordered relief in this case. To the contrary, Plaintiffs' briefing on their successful motion to dismiss Plaintiff's premature appeal of the Judgment for lack of jurisdiction plainly said the opposite: "[Texas] . . . misunderstand[s] the district court's judgment as being something more than it is. The district court's order is simply a judgment that Plaintiffs are prevailing parties, and an explanation for why that is the case. It simply cannot be construed as a judgment on the merits." *Davis v. Perry*, No. 13-50297 (ECF No. 00512438320) (5th Cir.).[14]

[14] Texas argues that the district court should have refrained from declaring Plaintiffs the prevailing parties until after briefing on the question. *See* Tex. Br. 30-31. But as Texas acknowledged, *see* Tex. Br. 31, the district court fully considered its request to reconsider the prevailing party determination, conducting an eight page analysis of the issue. *See* ROA.3477-86. Even if the court erred in

Finally, it is deeply ironic that Texas accuses Plaintiffs' counsel of not "respect[ing]" and of "subverting" the court's subject matter jurisdiction. Tex. Br. 29. Texas itself shows little "respect" for this Court's jurisdictional purview and seems to have no problem "subverting" such jurisdiction, as is evidenced by the following: (1) Texas insisted on appealing the district court's September 4, 2013 judgment, despite clear Fifth Circuit precedent that the court *lacked jurisdiction* until an amount of fees was determined, wasting this court's resources and time on an unnecessary piecemeal appeal; (2) Texas's opening brief invites this Court to vacate the three-judge district court's interim relief orders, despite the Supreme Court's *exclusive jurisdiction* to do so; (3) Texas makes no mention that this Court *lacks jurisdiction* to vacate prior orders when the district court properly dismissed the case as moot; and (4) Texas invites this Court to rely upon the district court's Rule 60 authority to dissolve the interim relief (despite never having moved for Rule 60 relief) and, remarkably, cites *McCorvey v. Hill* three times without mentioning its holding—that courts lack jurisdiction to grant Rule 60 relief when a case has become moot, *see* 385 F.3d at 848-49.

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declaring Plaintiffs the prevailing parties, any such error was harmless in light of the district court's full consideration of Plaintiffs' arguments. *Cf. Atkins v. Salazar*, 677 F.3d 667, 678 (5th Cir. 2011) (stating that district court's *sua sponte* grant of summary judgment without notice is harmless error if "the record is adequately developed to support a summary judgment decision").

* * * * * *

Texas made a strategic decision *not* to return to the district court seeking to have the permanent injunction against its 2011 enacted map dissolved. It undoubtedly thought that it could avoid paying attorneys' fees if it took quick action to prevent the court from entering yet another order in Plaintiffs' favor. Contrary to Texas's assertion, by awarding Plaintiffs attorneys' fees for having achieved all the relief they sought, the district court was not "act[ing] as though the State did something improper" by adopting as permanent the court-imposed plan and thereby "somehow interfer[ing] with federal litigation." Tex. Br. 26 n.9. The district court's point, rather, was that if Texas wished to avoid paying attorneys' fees after having lost Round 1 of the litigation, it could not achieve that result by mooting the case so as to deny Plaintiffs the opportunity to obtain further, permanent relief in Round 2. "*Buckhannon* does not stand for the proposition that a defendant should be allowed to moot an action to avoid the payment of the plaintiff's attorney's fees." *Dearmore*, 519 F.3d at 524.

If Texas wanted to avoid paying attorneys' fees, it should have pressed on and come up with evidence to defeat Plaintiffs' Section 2 and constitutional claims. Or it could have just not discriminated in the first place. Texas did neither. Of course, one three-judge district court had already decided that issue against Texas—concluding it *intentionally discriminated* in drawing Senate District 10 (in

violation of the Constitution). Texas reasonably decided to *limit* the amount of attorneys' fees it would pay by not proceeding on to Round 2, but instead by acquiescing. Now, Texas seeks to avoid the payment of attorneys' fees altogether.

Texas's scheme to avoid the payment of attorneys' fees depends on this Court either exercising jurisdiction it does not have to vacate the interim relief orders upon which Plaintiffs plainly prevailed, or to circumvent that lack of jurisdiction by creating an alternate universe in which Section 5 never existed and *Shelby County* has magical powers to erase and rewrite history. Under these circumstances, and given the presence of Plaintiffs' Section 2 and constitutional claims, unaffected by *Shelby County*, the three-judge district court properly concluded that "an award of fees is not unjust." ROA.3485.

CONCLUSION

For the foregoing reasons, the district court's orders awarding attorneys' fees and costs should be affirmed.[15]

[15] Texas has not appealed the reasonableness or amount of Plaintiffs' fees, merely Plaintiffs' entitlement to fees. Thus, Texas has waived any challenge to the amount of fees. *See United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005).

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CERTIFICATE OF ELECTRONIC COMPLIANCE

Counsel also certifies that on June 9, 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/.

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

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STATUTORY ADDENDUM

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28 U.S.C. § 1253

§ 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292

§ 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order

may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction--

> (1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and
>
> (2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

> (2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.
>
> (3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.
>
> (4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion

to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 1331

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 2284

§ 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications; procedure and appeal; purpose or effect of diminishing the ability of citizens to elect their preferred candidates

(a) Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited

approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

(c) The term “purpose” in subsections (a) and (b) of this section shall include any discriminatory purpose.

(d) The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.