No. 14-5151

# In the
# United States Court of Appeals
# for the District of Columbia Circuit

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STATE OF TEXAS,
*Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA; ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States,
*Defendants*,

WENDY DAVIS; MARC VEASEY; JOHN JENKINS; VICKI BARGAS; ROMEO MUÑOZ; GREG GONZALES; LISA AGUILAR; DANIEL LUCIO; VICTOR GARZA; BLANCA GARCIA; JOSEPHINE MARTINEZ; KATRINA TORRES; NINA JO BAKER; TEXAS STATE CONFERENCE OF NAACP BRANCHES; JUANITA WALLACE; BILL LAWSON; HOWARD JEFFERSON; ERICKA CAIN; NELSON LINDER; REGINALD LILLIE
*Intervenors for Defendants-Appellees*

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

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**TEXAS'S REPLY IN SUPPORT OF THE MOTION FOR SUMMARY REVERSAL**

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The attorneys'-fees order and the Intervenors' responses defending that order suffer from a fundamental and fatal flaw: they seek to impose upon Texas a substantial present-day burden on the basis of the preclearance provisions of the Voting Rights Act. *Shelby County* precludes the imposition of that unconstitutional burden. The responses to Texas's motion for summary reversal neither justify the district court's judgment nor warrant the Court taking this case to full briefing and oral argument. The Court should grant Texas's motion.

## ARGUMENT

### I. THE INTERVENORS' RESPONSES CANNOT JUSTIFY THE DISTRICT COURT'S DEPARTURE FROM *SHELBY COUNTY*

As Texas explained, *Shelby County* precludes any further attempt to impose burdens associated with preclearance on the previously covered States. *See* The State of Texas's Motion for Summary Reversal (Motion for Summary Reversal) at 6–9. Rather than confront the *Shelby County* decision, the Davis Intervenors argue that it doesn't apply, *see* Davis Appellees' Response to the State of Texas's Motion for Summary Reversal (Davis Response) at 8–14, and the Gonzales Intervenors virtually ignore the decision, *see* Gonzales Appellees' Response in Opposition to State of Texas's Motion for Summary Reversal (Gonzales Response) at 5–10. Neither strategy can overcome the effect that *Shelby County* has on the Intervenors' requests for attorneys' fees.

1. The Supreme Court's disposition of Texas's preclearance appeal demonstrates that the Supreme Court understood that the *Shelby County* decision —not any action taken by the State of Texas—mooted this case. The Davis Intervenors argue otherwise, but the Davis Intervenors (1) misunderstand the Supreme Court's disposition of Texas's appeal and (2) mischaracterize their own participation in that appeal when they suggest that the Supreme Court's order vacating the district court's denial of preclearance somehow supports the award of attorneys' fees.

A few hours after the Supreme Court issued its decision in *Shelby County* (and *before* Governor Perry signed the legislation enacting the 2013 districting plans), the Davis Intervenors moved to dismiss Texas's appeal in the Supreme Court. Critically, the Intervenors argued that Texas's *appeal* was moot, not that the case was moot. *See, e.g.*, Motion of Appellee-Intervenors to Dismiss Appeal as Moot at 1, *Texas v. United States*, No. 12-496 (U.S.) (Exh. G)[1] ("Appellee-Intervenors respectfully move this Court to dismiss *this appeal* as moot, allow the decision below to stand, and remand this case to the three-judge court for the United States District Court for the District of Columbia for further proceedings.") (emphasis added); *id.* at 10–11 (same); *id.* at 5 ("[T]his appeal is moot . . . ."); *id.* at 10 ("Texas . . . has made a choice to moot this appeal . . . ."). And the Intervenors repeatedly urged the Supreme Court to "allow the decision below to stand." *Id.* at 1; *id.* at 5, 10; *see also id.* at 9 (arguing that the Supreme Court "should preserve the decision below").

Texas's response noted, however, that "[t]he critical intervening event for purposes of Texas's appeal is not any forthcoming action of the Governor but today's [*Shelby County*] decision." Appellant's Opposition to Appellee-Intervenors' Motion to Dismiss Appeal as Moot at 1, *Texas v. United States*, No.

[1] Citations of Exhibits A–F will refer to the Exhibits attached to Texas's motion for summary reversal. Exhibits G–H are attached to this reply.

12-496 (U.S.) (Exh. H). Thus, the Supreme Court "should dispose of Texas's appeal in light of *Shelby County*," and "the proper course of action is to vacate the district court's order." *Id.* at 2; *see also id.* at 4 ("[T]he Court should deny Intervenors' motion to dismiss, and [the Court] should vacate the district court's judgment in light of *Shelby County*"). Finally, Texas explained that "[t]he transparent purpose behind Intervenors' motion is to preserve a claim to attorneys' fees based on the district court's judgment. But if Texas was not validly subject to the preclearance process in the first place—as the Court made clear in *Shelby County*—then Texas surely cannot be compelled to pay the Intervenors' fees arising from litigation under that now-invalidated statute." *Id.* at 3.

By vacating the district court's judgment, just as Texas had requested, the Supreme Court's judgment makes clear that it rejected the Intervenors' argument that Texas had mooted its own appeal. *See* Exh. C. When a case becomes moot through happenstance or through no act of the appellant, "[t]he established practice" of the Supreme Court is to vacate the judgment below. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). But when mootness arises due to the appellant's actions, the decision of the lower court is permitted to stand. *U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) ("The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action."); *see also Karcher v.*

*May*, 484 U.S. 72, 83 (1987) ("This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party . . . declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case."); *Alvarez v. Smith*, 558 U.S. 87, 94 (2009).

If the Supreme Court had "credit[ed] the Davis [Intervenors'] argument regarding the mootness caused by the Texas legislative enactment," Davis Response at 5–6; *see also id.* at 13, then the Supreme Court would not have vacated the district court's preclearance judgment. The Supreme Court has expressed the view that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur," *U.S. Bancorp*, 513 U.S. at 26 (quotation omitted)—indeed, the Davis Intervenors argued as much in their unsuccessful motion to dismiss Texas's appeal, Exh. G at 9–10 (citing *U.S. Bancorp*). Guided by those principles, the Supreme Court vacated the district court's preclearance judgment. Exh. C.

The Davis Intervenors' response is thus premised upon a fundamental misunderstanding of the Supreme Court's disposition of Texas's preclearance appeal. The Supreme Court's vacatur of the district court's judgment—especially when the Intervenors explicitly urged the Supreme Court to preserve that

judgment—confirms that the Supreme Court deemed *Shelby County* to nullify this and all other preclearance matters in their entirety.

2. This litigation became moot when Texas "no longer ha[d] a personal stake in the [preclearance] claim," *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826 (8th Cir. 2008), which occurred when *Shelby County* declared that Texas was no longer required to obtain preclearance before implementing its voting changes. "There is no such thing as being a little bit moot." *In re Scruggs*, 392 F.3d 124, 129 (5th Cir. 2004). So once *Shelby County* "alone" mooted this case by "dismantl[ing] the legal framework that called for preclearance of Texas's redistricting plans in the first place," Exh. E at 4, the case could not become "more moot" by virtue of any subsequent action of the Texas Legislature. *See In re Scruggs*, 392 F.3d at 129 ("it is axiomatic that the controversy between these parties could not have become 'more moot' as a result of subsequent [action]"). The district court's explanation that *Shelby County* "alone" mooted this case recognizes this mootness principle upon which Texas was entitled to rely.

Moreover, the argument that Governor Perry mooted this case when he signed the legislation enacting the 2013 plans is disingenuous coming from the Davis and Gonzales Intervenors. That's not what they told the Court below. *See* Defendant-Intervenors' Memorandum in Opposition to Plaintiff State of Texas'[s] Motion to Dismiss at 3, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C.), ECF

No. 252 (a filing on behalf of all Intervenors urging that "Texas'[s] adoption of new redistricting plans . . . does not render this action moot"); *id.* at 2 n.2 ("stand[ing] by [their] claim[] that Texas'[s] unilateral actions did moot its *appeal*" but urging that "the *action* itself is not moot"). And that's not what the counsel who are here seeking attorneys' fees repeatedly told the U.S. District Court for the Western District of Texas when they explained their views that Governor Perry's signature on the legislation enacting the 2013 plans *could have no immediate effect*.[2]

Finally, the Davis Intervenors note that the Western District of Texas found that *Shelby County* does not preclude an award of fees under section 2 of the Voting Rights Act. But the suggestion that this supports a fee award here is a red herring. *See* Davis Response at 7, 15, 17–18. *Shelby County* did not "dismantle[] the legal framework" of section 2 of the Voting Rights Act, so naturally that decision was not dispositive of all claims before the Western District of Texas.

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[2] *E.g.*, Joint Motion for Leave to Amend Complaint at 4, 7, *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex.), ECF No. 776 (arguing that the litigation was not moot because the 2013 legislation could not take effect until 90 days after enactment, pursuant to the Texas Constitution); Reply to State's Opposition to Plaintiffs' Motions for Leave to Amend at 3–4, *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex.), ECF No. 832 ("[T]he challenges to the 2011 plans remain live challenges . . . . The current 2011 challenges are not moot."); Response to State's Section 3(c) Brief and State's Motion to Dismiss 2011 Challenges as Moot at 2, 3, *Perez v. Texas*, No. 5:11-cv-00360 (W.D. Tex.), ECF No. 839 (arguing that the 2013 legislation could not yet have any effect, so the 2011 plans were not "moot right now").

## II. THE INTERVENORS' RESPONSES FAIL TO JUSTIFY THE SINGLE JUDGE'S MODIFICATION OF THE FINAL JUDGMENT

Texas's motion demonstrated that, in addition to the *Shelby County* decision, the three-judge district court's final judgment precluded this fee award. Motion for Summary Reversal at 9–15. The Intervenors do little to refute this; instead, they claim that Texas waived the argument. Davis Response at 18–19; Gonzales Response at 6. Not so.

First, the Intervenors claim that Texas cannot appeal from the single-judge district court's order modifying the three-judge district court's final judgment because Texas did not warn the single judge that modifying the final judgment would be improper. Davis Response at 18 ("Texas never argued in its 'Advisory' that the district court would impermissibly 'modify' the dismissal order by relying upon the mootness caused by Texas's legislative enactment."). But Texas need not have (indeed, it could not have) appealed the district court's error until after it was made. Unsurprisingly, the Intervenors cite no case supporting their argument that Texas waived its ability to appeal from an error by failing to guess in advance that the error would be committed. Moreover, this argument fails to appreciate (1) that the fee requests and Texas's advisory were filed well before the dismissal order became final (upon the expiration of the Intervenors' time for seeking certiorari review) and (2) that it was only after Texas filed its advisory that the three-judge district court remanded the case to a single judge. For both of these reasons also,

the argument that Texas should have preserved its ability to challenge the single judge's error before the error was committed must fail.

Second, the Gonzales Intervenors simply misunderstand Texas's argument. They claim (1) that Texas is challenging wholesale a single judge's ability to award attorneys' fees, *e.g.*, Gonzales Response at 5 (claiming that Texas argues "that only a panel of three judges may award fees"); *id.* at 6–8, and (2) that Texas waived the argument, *id.* at 5, 6. Texas makes no such argument regarding a single judge's general ability to review claims for attorneys' fees—Texas challenges only a single judge's ability to enter an order awarding fees that contradicts the three-judge district court's final judgment.

Finally, the Gonzales Intervenors question why Texas failed to address the reasoning employed by the district court in the fee order. *Id.* at 9–10. The district court's rationale must be considered only if this Court finds that the district court was correct that *Shelby County* permits attorneys' fees in a preclearance case. This is not an issue especially well-suited for summary reversal, so Texas will address it if this case proceeds to full briefing. *See* The State of Texas's Nonbinding Statement of Issues at 4 (Issue #3).

## CONCLUSION

The State of Texas respectfully requests that the Court summarily reverse the district court's order awarding attorneys' fees.

Respectfully submitted.

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I certify that, on September 3, 2014, this document was served through the Court's CM/ECF Document Filing System, https://ecf.cadc.uscourts.gov/, on:

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No. 14-5151

# In the
# United States Court of Appeals
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STATE OF TEXAS,
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On Appeal from the United States District Court
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No. 12-496

IN THE
# Supreme Court of the United States

STATE OF TEXAS,
*Appellants*,

v.

UNITED STATES OF AMERICA, ET AL.,
*Appellees*.

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

## MOTION OF APPELLEE-INTERVENORS TO DISMISS APPEAL AS MOOT

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## INTRODUCTION

Pursuant to Rule 21.2(b) of the Rules of this Court, the undersigned Appellee-Intervenors respectfully move this Court to dismiss this appeal as moot, allow the decision below to stand, and remand this case to the three-judge court for the United States District Court for the District of Columbia for further proceedings.

## STATEMENT

1. Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973c, prohibits covered jurisdictions from adopting or implementing changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States Attorney General or a three-judge court in the United States District Court for the District of Columbia by demonstrating that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).

As a covered jurisdiction subject to Section 5, *see* 28 C.F.R. Pt. 51 App., Texas is required to preclear any voting change, including a statewide redistricting plan. After the 2010 decennial census, Texas redrew its statewide districting plans for Congress, the State Senate, and the State House of Representatives. Governor Rick Perry signed the bills enacting the redistricting plans between June 17 and July 18, 2011. J.S. App. 154, 209, 240.

In lieu of administrative preclearance from the Attorney General, Texas sought judicial preclearance of each plan by filing an action in the United States District Court for the District of Columbia on July 19, 2011. *Id.* at 4. The United States opposed preclearance of the Congressional and State House redistricting plans. *Id.* at 3. Appellee-Intervenors opposed preclearance of all three statewide plans. *Id.* A three-judge panel was convened.

On August 28, 2012, after a two-week trial, the three-judge panel denied preclearance to all three of Texas's proposed redistricting plans. *Id.* at 1. First, the panel concluded that Texas's Congressional plan was both retrogressive with respect to Latino voters and enacted with a discriminatory purpose with regard to Latino and African-American communities. *Id.* at 51. The court next denied preclearance to the State Senate plan, finding that "the Texas legislature redrew the boundaries for SD [Senate District] 10 with discriminatory intent." *Id.* at 58. Finally, the court determined that the State House plan was retrogressive because it would "have the effect of abridging minority voting rights in four ability districts." *Id.* at 69.

On October 19, 2012, Texas sought review of the three-judge panel's decision in this Court, asking the Court to "note probable jurisdiction and set this case for oral argument . . . so that Texas can implement its legislatively enacted plans for the next electoral cycle." J.S. 5. Texas's jurisdictional statement remains pending with this Court.

2. Because the redistricting plans that are the subject of this appeal were not precleared as required under Section 5 of the Voting Rights Act by the time the 2012 election process was beginning, a three-judge court in the United States District Court for the Western District of Texas that had been convened to adjudicate other constitutional and statutory challenges to the plans was left with the unwelcome task of implementing interim plans for the 2012 elections. After hearing evidence, and viewing proposed interim maps presented by all parties, the three-judge court promulgated its own interim redistricting plans for Congress, the Texas Senate, and the Texas House on November 23, 2011.

Texas subsequently filed an emergency application for a stay with this Court. On December 9, 2011, this Court granted the stay, treated the application for a stay as a jurisdictional statement, and noted probable jurisdiction. On January 20, 2012, this Court held that because it was unclear whether the District Court for the Western District of Texas followed the appropriate standards in drawing interim maps for the 2012 Texas elections, the orders implementing those maps should be vacated, and the cases remanded for further proceedings. *Perry v. Perez*, 132 S. Ct. 934 (2012).

The three-judge court for the Western District of Texas subsequently held further hearings and adopted revised interim plans on February 28, 2012. The 2012 primary and general elections for Congress, the Texas Senate, and the Texas House of

Representatives took place under these court-drawn interim plans.

3. On May 27, 2013, Texas Governor Rick Perry called a special session of the Texas Legislature specifically for the purpose of considering legislatively adopting the court-drawn interim plans. *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/. The Legislature subsequently held hearings on this proposal. Between June 21 and 23, 2013, the Texas Legislature enacted three new statewide redistricting plans for Congress, the Texas Senate, and the Texas House, adopting by statute the same, or in the case of the Texas House, an amended version of, the redistricting plans that had been ordered into effect by the three-judge court. S.B. 2, 83rd Leg., 1st Sess. § 1 (Tex. as passed by House, June 21, 2013) (Texas Senate Plan); S.B. 3, 83rd Leg., 1st Sess. art. I, § 1 (Tex. as passed by Senate, June 23, 2013) (Texas House Plan); S.B. 4, 83rd Leg., 1st Sess. § 1 (Tex. as passed by House, June 21, 2013) (Congressional Plan). In addition to enacting these three new statewide redistricting plans, the statutes containing these plans expressly repeal the three statewide redistricting plans that are at issue in this appeal. S.B. 2, 83rd Leg., 1st Sess. § 2 (Tex. as passed by House, June 21, 2013); S.B. 3, 83rd Leg., 1st Sess. art. III, § 3 (Tex. as passed by Senate, June 23, 2013); S.B. 4, 83rd Leg., 1st Sess. § 3 (Tex. as passed by House, June 21, 2013). Governor Perry, who called the special session specifically for

redistricting, is expected to sign these bills. *See, e.g.,* Gromer Jeffers Jr., *Texas Senate Approves GOP Redistricting Plan,* TRAILBLAZERS BLOG, DALLAS MORNING NEWS (June 14, 2013, 12:40 PM), http://trailblazersblog.dallasnews.com/2013/06/texas-senate-poised-to-approve-gop-redistricting-plan.html. By their terms, these new redistricting plans replace and render irrelevant the three redistricting plans that were enacted by the Legislature in 2011 and that are the subject of this appeal.

## ARGUMENT

Because the Texas Legislature has enacted three new statewide redistricting plans that repeal and replace the three statewide redistricting plans that are the subject of this appeal, this appeal is moot, and further review would be inconsistent with the jurisdictional requirements of Article III. The undersigned Appellee-Intervenors therefore respectfully request that this Court dismiss this appeal as moot, allow the decision below to stand, and remand this case to the three-judge court for the United States District Court for the District of Columbia for further proceedings.

1. Review by this Court of the judgment below is no longer necessary because no active case or controversy currently exists. "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case." *Burke v. Barnes*, 479 U.S. 361, 363 (1987). There is "no case or controversy, and a suit becomes moot when the issues presented are no longer 'live' or

the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted). Here, because of the Texas Legislature's actions in enacting new redistricting plans and repealing the plans at issue in this appeal, there are neither "live" issues nor legally cognizable interests in the outcome at stake.

The issues presented in this litigation are no longer "live" because the redistricting plans at issue in this appeal will not be used by Texas in any future elections. Having enacted a new set of redistricting plans and repealed the plans at issue here, the State no longer seeks to implement any of the three plans that were the subject of this appeal.[1] Thus, the legal

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[1] The fact that the Texas Legislature's newly enacted redistricting plans are subject to preclearance review under Section 5 of the Voting Rights Act before taking effect does not affect the mootness of this appeal. Even if preclearance were denied as to the 2013 plans, the plans currently before this Court would still be obsolete. As noted, the bills containing the new redistricting plans also *expressly* repeal the 2011 plans at issue here. *See* S.B. 2, 83rd Leg., 1st Sess. § 2 (Tex. as passed by House, June 21, 2013); S.B. 3, 83rd Leg., 1st Sess. art. III, § 3 (Tex. as passed by Senate, June 23, 2013); S.B. 4, 83rd Leg., 1st Sess. § 3 (Tex. as passed by House, June 21, 2013). Thus, even upon a denial of preclearance, the State would not revert to the plans involved in this appeal, which have been repealed. *Cf. Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999) (revised redistricting plan enacted after district court determined that earlier plan violated Equal Protection Clause did not render appeal of court's determination moot because legislature expressly provided that state would revert back to earlier plan if determination was reversed on appeal).

status of the plans at issue – the question before this Court on appeal – has been rendered irrelevant by the State's own action. *See Brownlow v. Schwartz*, 261 U.S. 216, 217-18 (1923) ("To adjudicate a cause which no longer exists is a proceeding which this [C]ourt uniformly has declined to entertain.").

Moreover, because of the Texas Legislature's decision to adopt three new redistricting plans and repeal the plans at issue, Texas now lacks a "legally cognizable interest in the outcome" of this appeal. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quotation marks omitted). Indeed, granting Texas the relief it requested has become impossible. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012); *Mills v. Green*, 159 U.S. 651, 653 (1895) (holding that a case is moot where it becomes "impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever").

In its appeal, the State requested that this Court reverse the decision of the court below "so that Texas can implement its legislatively enacted plans for the next electoral cycle." J.S. 5. Yet by repealing the plans at issue and enacting a new set of plans, the Texas Legislature has affirmatively chosen *not* to implement its 2011 legislatively enacted plans for the next electoral cycle. The 2011 plans are now completely obsolete. Consequently, *even if* this Court were to overturn the decision below and hold that the plans at issue should be precleared, Texas would *still* seek to use its newly-enacted 2013 redistricting plans for the next electoral cycle. A

determination as to the validity of the now-repealed challenged maps would thus be purely advisory, and this Court is plainly "not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

2. Texas cannot avoid mootness by recasting its appeal as a constitutional challenge to Section 5. Although Texas's jurisdictional statement listed one of its questions presented as "whether the 2006 reauthorization of Section 5 . . . is constitutional," J.S. i, that question is not properly before this Court. As the court below found, "[t]he constitutionality of section 5 was neither briefed nor argued" by the parties and accordingly the court "express[ed] no opinion on this significant point." J.S. App. 24 n.11. Texas may not now attempt to keep its appeal alive by raising a question that was never "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted).

Nor can Texas argue that its interest in avoiding the cost of attorneys' fees provides it a sufficient stake in the outcome of this appeal. This Court has held that an outstanding claim for attorneys' fees "is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). Lacking any sufficient continuing interest in this case, Texas must concede its mootness.

Indeed, in similar circumstances, where statutes at issue are repealed or superseded during the pendency of an appeal for declaratory or injunctive relief, this Court regularly dismisses a pending appeal or petition for certiorari as moot. *See, e.g., Burke,* 479 U.S. at 363 (case mooted when challenged statute expired after lower court judgment); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972) (per curiam) (declaratory and injunctive "relief is, of course, inappropriate now that the statute has been repealed"). Here, where the redistricting plans at issue have been repealed and replaced by the State Legislature, this Court should follow its long-standing practice and dismiss on grounds of mootness.

3. Finally, upon dismissal of this appeal, this Court should allow the decision of the three-judge panel to stand. Under the circumstances, vacatur of the decision below pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is plainly unjustified. Because this case was mooted due to the unilateral action of the State – the party seeking review – this Court should preserve the decision below.

As this Court has held, "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26-27 (1994)

(quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). In assessing the appropriateness of vacatur upon a finding of mootness, "[t]he principal condition to which [this Court has] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24. Where the judgment of the lower court is "simply unreviewed by [the losing party's] own choice," this Court has denied vacatur. *Id.* at 25.

By enacting its new statewide redistricting proposals and simultaneously repealing its previously enacted plans, Texas – the party seeking review – has made a choice to moot this appeal, rendering a decision as to the validity of the legislatively enacted 2011 redistricting plans purely advisory. Given that "the party seeking relief" has "caused the mootness by voluntary action," vacatur is inappropriate under this Court's precedent. *Id.* at 24. As here, where the losing party "has voluntarily forfeited [its] legal remedy by the ordinary processes of appeal or certiorari" it "thereby surrender[s] [its] claim to the equitable remedy of vacatur." *Id.* at 25.

The Court should therefore allow the decision below to stand and remand to the three-judge court for further proceedings.

## CONCLUSION

For these reasons, the undersigned Appellee-Intervenors respectfully move this Court to dismiss this appeal, allow the opinion below to stand, and remand this case to the three-judge court for the

United States District Court for the District of Columbia for further proceedings.

June 24, 2013 Respectfully submitted,

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# H

No. 12-496

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

---

STATE OF TEXAS,

*Appellant*,

v.

UNITED STATES, *et al.*,

*Appellees*.

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**APPELLANT'S OPPOSITION TO APPELLEE-INTERVENORS' MOTION TO DISMISS APPEAL AS MOOT**

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Yesterday, the Appellee-Intervenors in the above-captioned case, but not the Department of Justice, filed an extraordinary motion to dismiss Texas's appeal as moot. The motion should be denied for at least three reasons. First, the motion is premised on an alleged mooting event—the Governor's signing of certain legislative redistricting provisions—that has not yet occurred. Thus, the motion should be denied as premature. Second, both Texas's appeal and Appellee-Intervenors' mootness motion are premised on the notion that Texas is a covered jurisdiction under the Voting Rights Act, but as of this morning, that is no longer the case. *See Shelby County v. Holder*, No. 12-96 (slip op. June 25, 2013). The critical intervening event for purposes of Texas's appeal is not any forthcoming action of the Governor but today's decision. Accordingly, rather than take the extraordinary step suggested in the motion based on events that have not yet occurred, this Court

should dispose of Texas's appeal in light of *Shelby County*. Third, Appellee-Intervenors' motion is a transparent effort to attempt to preserve a claim to attorneys' fees based on the decision below that is the subject of Texas's still-pending appeal. That explains the rather unusual request for a finding of mootness without vacatur. Especially in light of *Shelby County*, there is no basis for facilitating that stratagem. Instead, the proper course of action is to vacate the district court's order.

**1.** Intervenors note (at 4-5) that the Texas Legislature has "enacted" new redistricting plans that would replace the plans at issue in this case. But they never mention that Governor Perry has not yet signed those plans into law. The Texas Constitution, no less than the U.S. Constitution, requires bicameralism *and* presentment before a bill becomes a law. Thus, the new plans have no legal effect until either: (a) the Governor signs them into law; (b) the Governor fails to take action for 20 days from the date of adjournment; or (c) the Governor vetoes the legislation and has his veto overridden. *See* Texas Constitution Art. 4, § 14. Unless and until the new plans actually become law, no mooting event has occurred and Texas may continue defending the validity of its pre-existing plans. Intervenors' motion to dismiss should be denied for this reason alone, but it suffers far greater flaws.

**2.** Intervenors' motion is premised on the notion that Texas is a covered jurisdiction under Section 5 of the VRA. *See* Mot. 1 ("As a covered jurisdiction subject to Section 5 … Texas is required to preclear any voting change"). But the

Court held in *Shelby County* that the coverage formula in Section 4(b) of the Act "can no longer be used as a basis for subjecting jurisdictions to preclearance." *Shelby County*, slip op. at 24. Thus, in the wake of *Shelby County*, there no longer are any covered jurisdictions that must seek preclearance and the premise for Appellee-Intervenors' motion no longer holds. The decision in *Shelby County* is the only relevant intervening event that should affect this Court's resolution of Texas's appeal.

**3.** The transparent purpose behind Intervenors' motion is to preserve a claim to attorneys' fees based on the district court's judgment. But if Texas was not validly subject to the preclearance process in the first place—as the Court made clear in *Shelby County*—then Texas surely cannot be compelled to pay the Intervenors' fees arising from litigation under that now-invalidated statute.

Indeed, the reality that covered jurisdictions—unlike other sovereigns—must endure the enormous costs of preclearance litigation, including the prospect of paying the other side's litigation costs if judicial preclearance is denied, is part and parcel of the enormous federalism costs that led to today's decision. *See Shelby County*, slip op. at 11 (noting that the preclearance process "can take years," and that covered States must "expend[] funds" just to "implement a validly enacted law"). Even in a world where a distinction remained between covered and non-covered jurisdictions, there would be persuasive reasons not to create a monetary disincentive for a State to democratically enact redistricting plans that ameliorate problems identified in prior plans. But in the wake of *Shelby County*, forcing Texas

to pay attorneys' fees for preclearance litigation because the State enacted new plans should be a non-starter.

For these reasons, the Court should deny Intervenors' motion to dismiss, and should vacate the district court's judgment in light of *Shelby County*.

Respectfully submitted,

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No. 12-496

**IN THE**
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STATE OF TEXAS,

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**CERTIFICATE OF SERVICE**

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I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Appellant's Opposition to Appellee-Intervenors' Motion to Dismiss Appeal as Moot were served on:

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