No. 14-5151

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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
Defendant-Intervenor-Appellees.

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

DAVIS APPELLEES' RESPONSE TO THE STATE OF TEXAS'S MOTION FOR SUMMARY REVERSAL

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Appellees Wendy Davis, et al. (the "Davis appellees") hereby respond to the Motion for Summary Reversal filed by appellant the State of Texas. As we show, the questions presented here are far from simple enough to be addressed summarily. Indeed, in its ruling below, the district court noted that "[a] quick search of the Federal Reporter reveals the complexity of [the] narrow question" addressed by the court in its ruling for appellees. Tex. Ex. A at 1-2. That complexity plainly precludes summary disposition of this case.

Texas's motion for summary reversal is all the more remarkable in light of its disregard for the district court's rules—which apply to all litigants—and its attendant waiver of nearly all the arguments raised by the fee applicants before the district court. Before the district court, Texas did not file a brief in opposition to the fee applicants' motions, instead it filed a three page (including caption and signature block) "Advisory" informing the district court that *Shelby County v. Holder*, 133 S. Ct. 2612 (2013) settled this matter entirely, and that it would not bother responding further "unless requested . . . by the Court." Tex. Ex. F at 3. It offered no response to the fee applicants' arguments that *Shelby County* did not affect their entitlement to fees. This led the district court to conclude:

> Such an opposition is insufficient in this jurisdiction. Circuit precedent and the Local Rules of this Court provide that the failure to respond to an opposing party's arguments results in waiver as to the unaddressed contentions, and the Court finds that Texas's "Advisory" *presents no opposition on the applicable law*. Accordingly, the Court will award the requested fees and costs.

Tex. Ex. A. at 2 (emphasis added); *see* D.D.C. Local Rule 7(b). Although Texas is wrong on the merits, its appeal can be disposed of quickly by its failure to respond below. "Where the district court relies on the absence of a response as a basis for treating the motion as conceded, we honor its enforcement of the rule." *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997). Texas's motion must be rejected.

BACKGROUND

A recitation of the factual background in this case alone suffices to demonstrate how ill-conceived Texas's motion is. 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 that map, along with its other enacted maps, under Section 5 of the Voting Rights Act. The Davis appellees, led by Texas State Senator Wendy Davis, intervened in the case as defendants to contest preclearance of Texas's redistricting maps, in particular the state senate redistricting 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. The Department of Justice Department ("DOJ") took the position that the state senate plan complied with Section 5 of the Voting Rights Act ("VRA"), *see id.*, Answer ¶ 28, ECF No.

45, and thus the Davis appellees took the lead in opposing preclearance of the state senate plan.[1]

Concurrently, the Davis appellees filed suit before a three-judge district court in San Antonio, contending that the state senate map could not be implemented because it had not received (and would not receive) preclearance, that the map violated Section 2 of the VRA, and that the map enacted after the previous Census was unconstitutionally malapportioned. The Davis appellees requested that the San Antonio court impose a new state senate map that corrected those violations. *See* Complaint, *Davis v. Perry*, No. SA-11-CA-788 (W.D. Tex. Sept. 22, 2011), ECF No. 1.

After the D.C. court conducted a trial on the Section 5 case, but before it entered judgment, the San Antonio court entered an order imposing an interim map to govern the 2012 elections, following the standard set out by the Supreme Court in *Perry v. Perez*, 132 S. Ct. 934 (2012). In *Perez*, the Court held that local district courts should impose interim maps that depart from the State's enacted map when the Section 2 and constitutional claims have "a likelihood of success on the merits." *Id.* at 942. The Court noted that when Section 5 challenges to a redistricting plan are pending, only the D.C. court has jurisdiction to decide the merits of preclearance, *id.*, and thus the local district court is to impose an interim

[1] The Davis appellees also challenged preclearance of the congressional map.

map that departs from the enacted map if "the § 5 challenge is not insubstantial," that is if the enacted plan "stand[s] a reasonable probability of failing to gain § 5 preclearance," *id.*

The San Antonio court imposed an interim state senate map that was exactly the remedy the Davis appellees sought—restoring Senate District 10, from which Senator Davis had been elected by a coalition of minority voters. The court imposed the interim plan as "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." February 28, 2012 Order, *Davis v. Perry*, No. SA-11-CA-788 (W.D. Tex.), ECF No. 141. In a subsequent order and opinion, the court explained that, in concluding that the Section 5 claim was "not insubstantial," it "received and partially reviewed the trial transcripts and documentary evidence that are a part of the record in the preclearance action [in D.C.]." *Id.*, Mar. 19, 2012 Order at 1-2, ECF No. 147.

Thereafter, the D.C. court entered final judgment in the preclearance suit on August 28, 2012, concluding that Texas intentionally discriminated against minorities in drawing its 2011 state senate map. *Texas v. United States*, 887 F. Supp. 2d 133, 225 (D.D.C. 2012), *vacated by*, 133 S. Ct. 2885 (2013). Texas appealed the decision to the Supreme Court. *See* 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 2011 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, which resulted in the Legislature adopting as permanent the interim map ordered in place by the San Antonio 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]

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, but stressed that it "issue[d] no holding on § 5 itself, only on the coverage formula." *Id*. at 2631.

On June 27, 2013, one day *after* Governor Perry signed into law as permanent the court-imposed map favored by the Davis appellees, the Supreme Court vacated the D.C. court's order denying Texas preclearance, and remanded to the district court "for further consideration in light of *Shelby County v. Holder* . . . and the suggestion of mootness of [the Davis] appellees." *Texas v. United States*, 133 S. Ct. 2885, 2885 (2013). In doing so, the Court rejected Texas's plea that it remand *only* in light of *Shelby County*, instead crediting the Davis appellees'

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

argument regarding the mootness caused by the Texas legislative enactment. *See* Ex. A (June 26, 2013 Letter from Texas to Supreme Court).

Texas then filed a motion with the D.C. district court seeking to have all claims in the preclearance action dismissed as moot, and the court granted the motion, concluding that any claims before the court "were mooted by *Shelby County* and *the adoption of superseding redistricting plans.*" Tex. Ex. E at 3 (emphasis added). The court noted that the Defendant-Intervenors would "remain free to seek attorneys' fees after dismissal," *id.* at 4, and the court later entered an order dissolving the three-judge court and remanding the case to Judge Collyer for disposition of the "pending motions for attorneys' fees," Jan. 22, 2014 Order, ECF No. 263.

The Davis apppellees filed a motion for attorneys' fees on December 17, 2013. On December 20, 2013, Texas filed a three-page "Advisory" informing the district court that Texas did "not intend to respond" to the motion for attorneys' fees "unless requested to do so by the Court" because, in its view, *Shelby County* alone precluded attorneys' fees. *See* Tex. Ex. F. The district court concluded that binding D.C. Circuit precedent supported the Davis appellees' motion for attorneys' fees, *see* Tex. Ex. A at 16-20, and noted that Texas's "Advisory" "present[ed] no opposition on the applicable law," *id.* at 2, thus "waiv[ing] any argument as to" "the eligibility of Fee applications for fee awards, the applicability

of *Buckhannon*, or the prevailing-party status of Fee applicants at the time the Court denied preclearance to Texas and thereafter, when Texas enacted new redistricting maps," *id.* at 15-16. The court granted the Davis appellees' motion for attorneys' fees.

Meanwhile, the three-judge district court in San Antonio likewise granted the Davis appellees motion for attorneys' fees in that court—fees separate and apart from the fees awarded by the D.C. Court—concluding that the interim relief supported the award of attorneys' fees in light of Texas's adoption of the interim plans as permanent, forever precluding the interim relief from being "reversed, dissolved, or otherwise undone" and ensuring that the Davis appellees retained their prevailing party status indefinitely. *Davis v. Perry*, 991 F. Supp. 2d 809, 824 (W.D. Tex. 2014) (quotation marks omitted), *supplemented by*, 2014 WL 172119 (W.D. Tex. Jan. 15, 2014).

ARGUMENT

This case is particularly ill-suited for summary disposition—especially a summary *reversal*. "[A] party bears a heavy burden of showing that summary disposition is appropriate." *Sills v. Bureau of Prisons*, 761 F.2d 792, 793 (D.C. Cir. 1985) (citing *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969) (per curiam)). "[M]otions for summary reversal are rarely granted, and only where the merits are so clear, plenary briefing, oral argument, and the traditional collegiality

of the decisional process would not affect [the Court's] decision." *Am. Petroleum Inst. v. EPA*, 72 F.3d 907, 914 (D.C. Cir. 1996) (brackets in original) (quotation marks omitted); *see also* U.S. Court of Appeals for the D.C. Cir., *Handbook of Practice & Internal Procedures* at 35-36 (2013). Here, there is no justification for a reversal, let alone a summary reversal.

The district court properly concluded that Texas had waived all arguments to the award of attorneys' fees except for one—that *Shelby County* erased the Davis appellees' prevailing party status. Tex. Ex. A at 15-16. *See* D.D.C. Local Rule 7(b); *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004); *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997); *Twelve John Does*, 117 F.3d at 577. Indeed, Texas does not claim otherwise. As to the only argument not waived by Texas, the district court was correct to reject it. Moreover, Texas's argument that the district court somehow modified the three-judge court's dismissal order by awarding fees fails for two reasons: (1) Texas forfeited this argument by never raising it below; and (2) the three-judge court (and the Supreme Court) explicitly cited the State's legislative enactment of the interim plans as permanent plans as a source of mootness. Texas's motion must be rejected.

I. *Shelby County* Does Not Affect the Davis Appellees' Prevailing Party Status.

The Davis appellees are prevailing parties regardless of *Shelby County*. The only argument Texas made in its three-page "Advisory" was that *Shelby County*

precluded the award of attorneys' fees because, in its view, "[t]he only basis upon which the intervenors could conceivably have claimed prevailing party status—[the] Court's denial of preclearance—was vacated on appeal by the Supreme Court." Tex. Ex. F at 2. Texas argued that under *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993), "[w]hen [the Supreme] Court applies a rule of federal law to the parties before it, that rule is controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review," 509 U.S. at 97. This misses the mark.

A. Texas's Legislative Enactment Mooted the Case Prior to the Vacatur Based on *Shelby County*.

Texas's legislative enactment of the San Antonio's court's map mooted the case prior to any vacatur resulting from *Shelby County*. Under such circumstances, Circuit precedent supports an award of attorneys' fees despite the mootness and subsequent vacatur.

In *National Black Police Ass'n v. District of Columbia Board of Elections & Ethics*, 168 F.3d 525 (D.C. Cir. 1999), the district court granted an injunction against enforcement of a campaign finance initiative on First Amendment grounds. *Id.* at 526-27. While the case was on appeal, the city council repealed the initiative—fifty-two days after it was enjoined. *Id.* at 527. The D.C. Circuit thus held the case moot and vacated the injunction. *Id.* The D.C. Circuit upheld the district court's subsequent award of attorneys' fees, finding that "the subsequent

mootness of a case does not necessarily alter the plaintiffs' status as prevailing parties." *Id.* at 528.

> The fact that the case was moot by the time of the appeal does not alter the fact that the injunction altered the legal relationship between the parties when it was issued. The order was not moot when issued, and did not become so for 52 days. Accordingly, the plaintiffs secured a real-world vindication of their First Amendment rights, even if, as it proved, extraneous events would have given them the substantial equivalent 52 days later.

Id.; *see also Grano v. Barry*, 783 F.2d 1104, 1108-09 (D.C. Cir. 1986) (affirming award of attorneys' fees where party obtained a preliminary injunction pending the outcome of an election, despite the election subsequently being invalidated in local court); *Thomas v. Nat'l Sci. Found.*, 330 F.3d 486, 493 (D.C. Cir. 2003) ("The injunction [in *Grano*] produced a lasting change in the parties' legal circumstances and gave the plaintiffs the precise relief that they had sought" "despite a subsequent finding of mootness."); *see also, e.g.*, *Thomas v. Bryant*, 614 F.3d 1288, 1294 (11th Cir. 2010) (holding plaintiff prevailing party despite intervening event rendering the case moot); *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 454 (1st Cir. 2009) (same); *Palmer v. City of Chicago*, 806 F.2d 1316, 1321 (7th Cir. 1986) (same).

The denial of preclearance "produced a lasting change in the parties' legal circumstances and gave the [Davis appellees] the precise relief that they had sought." *Thomas*, 330 F.3d at 493. The State's 2011 enacted senate map was

blocked from use in the 2012 elections, and Senator Davis won re-election. As was the case in *National Black Police Ass'n*, the legislature took action that mooted the case, here by enacting as permanent the map imposed by the San Antonio court. The mootness caused by the legislative enactment does not erase the "real-world vindication" the Davis appellees obtained prior to the action by the Texas legislature and governor. 168 F.3d at 528.

Texas ignored *National Black Police Ass'n* and *Grano* in its "Advisory," saying nothing about this D.C. Circuit precedent supporting an award of attorneys' fees despite later mootness of a case. It continues to do so here. Instead, it argues that *Shelby County* alone stripped the Davis appellees of prevailing party status. That simply is not the case.

The governor signed the legislation enacting as permanent the maps advocated by the Davis appellees on June 26, 2007, thus mooting the case. At that time, the State's appeal to the Supreme Court was still pending; the Supreme Court did not vacate the district court's order denying preclearance until one day *later*—June 27, 2003. At the time the legislation was enacted as law, the Davis appellees had prevailed in the preclearance suit, winning a judgment in their favor that was in effect. It has long been settled that "until [a judgment] is vacated it remains in full force and effect." *Va. Fire & Marine Ins. Co. v. Bohnke*, No. 312, 1894 WL 12006, at *3 (D.C. Cir. Nov. 5, 1894). The Davis appellees thus had the requisite

"judicial pronouncement . . . accompanied by judicial relief," *Green Aviation Management. Co., LLC v. FAA*, 676 F.3d 200, 203 (D.C. Cir. 2012) (quotation marks omitted), at the time the enactment caused the case to become moot, eliminating jurisdiction over the case, *see Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983) ("Federal courts lack jurisdiction to decide moot cases."). This case is thus on all fours with *National Black Police Ass'n*, where the district court's injunction was vacated *after* the case became moot by legislative enactment, thus permitting an award of attorneys' fees. 168 F.3d at 527.

Texas does not take full account of this chronology, protesting instead that *Shelby County*, decided on June 25, 2013, was a self-executing force that—prior to the Supreme Court's order vacating the judgment—functioned to instantly vacate the judgment. That is not the way the law works.

First, the Supreme Court's order vacating the judgment and remanding the case contradicts Texas's position. The Supreme Court remanded the case "for further consideration in light of *Shelby County v. Holder* . . . and the suggestion of mootness of [the Davis] appellees." *Texas*, 133 S. Ct. at 2885 (emphasis added). When the Supreme Court issued its order vacating and remanding, it was aware that the governor had signed the legislation the day before its remand order (and the day *after Shelby County* was decided). *See* Ex. A (June 26, 2013 Letter from Texas to Supreme Court). Had the Court viewed *Shelby County* as a self-executing

force that extinguished the district court's judgment on June 25, 2013, it would not have credited the Davis appellees' argument that the case was mooted by the legislation signed into law the day after *Shelby County* was announced.

Second, if *Shelby County* functioned as a self-executing vacatur, there would have been no need for the Court to do *anything* on July 27, 2013. Why issue an order vacating and remanding if *Shelby County* took care of it on its own? In fact, however, "until [a judgment] is vacated it remains in full force and effect," *Va. Fire & Marine*, 1894 WL 12006, at *3, and thus some further action by the Court was required to dispose of Texas's appeal.

The reason why such a separate judicial action is required when a new, potentially controlling decision has just been issued is that the court adjudicating each pending case has to ascertain *how* that new decision affects the pending case. Sometimes there are issues about whether a particular argument has been sufficiently preserved. *See United States v. Baucum*, 66 F.3d 362, 364 (D.C. Cir. 1995); *United States v. Edmonds*, 69 F.3d 1172, 1177 (D.C. Cir. 1995); *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994). Here, such an issue could have arisen because Texas expressly said it was not challenging the constitutionality of Section 5 of the VRA in the D.C. preclearance suit. 887 F. Supp. 2d at 147 n.11. In other cases, there are questions about whether and how a new decision applies retroactively. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S.

749, 755 (1995). Here, the *Shelby County* Court held only that Section 4(b)'s coverage formula could "no longer be used," 133 S. Ct. at 2631, thus suggesting that it did not mean to undercut prior preclearance rulings. But these issues were never addressed because the district court had no jurisdiction to entertain further proceedings after Texas's legislative enactment mooted the case. *See Iron Arrow*, 464 U.S. at 70.

The upshot is that a court's consideration is required before a newly announced Supreme Court decision, without more, can serve to undo the victories earned by parties in *other* cases not immediately before the Supreme Court. *See Reynoldsville Casket*, 514 U.S. at 755 ("Not all cases concerning retroactivity and remedies are of the same sort."). Here, that consideration was short-circuited by Texas's actions legislatively mooting the case. Under the circumstances, *Shelby County* cannot be merely *assumed* to have stripped the Davis appellees of their victory—a victory in full force and effect at the time Texas caused the case to become moot. *See Nat'l Black Police Ass'n*, 168 F.3d at 528 ("[T]he subsequent mootness of a case does not necessarily alter the plaintiffs' status as prevailing parties."). Rather, the chronology and case law suggest the opposite. It follows that the district court faithfully followed this Court's case law in awarding fees.

B. The San Antonio Court's Order Imposing Interim Maps Independently Supports Prevailing Party Status in This Action.

Even if the Court were to conclude that the vacatur of the district court's judgment in the Section 5 suit precluded prevailing party status for the Davis appellees, they would still be prevailing parties because they obtained court-ordered relief from the San Antonio court imposing an interim map—relief that can never be "reversed, dissolved, or otherwise undone," *Davis*, 991 F. Supp. 2d at 824—and that was explicitly based in part on the Davis appellees' effort litigating *this* case. As such, the Davis appellees' have a "judicial pronouncement . . . accompanied by judicial relief," *Green Aviation*, 676 F.3d at 203 (quotation marks omitted), based on their litigation efforts in *this* case entirely independent from the district court's vacated judgment denying preclearance. The three-judge district court in San Antonio has already awarded attorneys' fees to the Davis appellees in *that* case based on that judicial relief, *see Davis*, 991 F. Supp. 2d at 824, reasoning that *Shelby County* did not require otherwise in light of Texas's action mooting the case and ensuring the interim relief could never be undone, *id.*[3] The same reasoning applies here.

Because DOJ did not object to the state senate plan, it would have obtained preclearance had the Davis appellees not intervened in the D.C. court. Texas has

[3] The San Antonio court did not award fees for time spent litigating the D.C. case, and thus awarding fees in this case based on the San Antonio order would not constitute double recovery.

conceded as much, complaining in its filings in San Antonio that "the lack of preclearance is only because one Senator objected to the map as an intervenor in the Section 5 court." Motion to Stay at 3-4, *Davis v. Perry*, No. SA-11-CA-788 (W.D. Tex. 2011), ECF No. 90. Had the Davis appellees not intervened, the state senate plan would have been precleared in 2011, along with the State Board of Education redistricting plan (which neither DOJ nor the intervenors contested). *See* Sept. 22, 2011 Minute Order.

Instead, the Davis appellees' participation in this case prevented Texas from obtaining preclearance. And the San Antonio court, applying the Supreme Court's standard in *Perez*, 132 S. Ct. at 942, specifically explained that it "received and partially reviewed the trial transcripts and documentary evidence that are a part of the record in the preclearance action [in D.C.]." Mar. 19, 2012 Opinion & Order at 1-2, *Davis v. Perry*, No. SA-11-CA-788 (W.D. Tex. 2011), ECF No. 147, and on that basis concluded that the Section 5 claim was "not insubstantial," *id.* The San Antonio court, of course, would have had no occasion to enter an order imposing an interim state senate map, based in part on the *Perez* Section 5 standard, had the Davis appellees not intervened in the D.C. court successfully contesting preclearance of the state senate map. But for the Davis appellees' effort litigating *this* case, they could not have obtained relief in the San Antonio court based in part upon the lack of preclearance.

Under this Circuit's precedent, all that is required for prevailing party status is "*some form* of judicial relief," *Turner v. National Transportation Safety Board*, 608 F.3d 12, 15 (D.C. Cir. 2010) (emphasis added). The San Antonio court's Section 5 *Perez* analysis was directly attributable to the Davis appellees' presence in *this* case. The Davis appellees have already been awarded fees for their effort litigating the San Antonio case, based upon the court-ordered interim map. Given that the San Antonio court's Section 5 *Perez* analysis depended upon the Davis appellees' effort in *this* case, it is only fair they be awarded fees for the time spent litigating the Section 5 case. *Cf. Parker v. Califano*, 561 F.2d 320, 327-29 (D.C. Cir. 1977) (awarding fees for effort necessarily expended in two fora—the judicial proceeding and the related administrative proceedings necessitated by Title VII exhaustion requirement).

The Davis appellees raised this same argument before the district court and Texas entirely ignored it in its "Advisory," contending instead that "[t]he only basis upon which the intervenors could conceivably have claimed prevailing party status—[the] Court's denial of preclearance—was vacated on appeal by the Supreme Court," Tex. Ex. F at 2. Having failed to respond to the Davis appellees' argument at the district court, Texas "may not now complain on appeal," *Weil v. Seltzer*, 873 F.2d 1453, 1459 (D.C. Cir. 1989), should the Court uphold the award of fees based on the San Antonio order.

The San Antonio court's order—which that court has recognized supports an award of attorneys' fees despite *Shelby County*—independently supports the Davis appellees' prevailing party status in *this* case. Texas has waived any response to this argument, and even if it had not, the unique interplay of two district courts, given the jurisdictional provisions of the VRA, make this a complex question. Texas's motion should be denied.

II. The District Court's Fee Award Does Not Contradict the Three-Judge Court's Dismissal Order.

The district court's fee award does not contradict the three-judge district court's dismissal order. Texas labors at length to make this argument, but it fails for two reasons.

First, 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. Mot. at 9-15. Texas was plainly on notice of this argument, given that it was made in the Davis appellees' motion for attorneys' fees. *See* Davis Appellees' Motion for Attorneys' Fees at 13-17, ECF No. 256. "[H]aving never brought [the argument] to the attention of the District Court in opposing appellees' motions for [attorneys' fees], appellant cannot rely on [it] on appeal to obtain a reversal." *Tarpley v. Greene*, 684 F.2d 1, 7 n.16 (D.C. Cir. 1982).

Second, Texas's position is based on a blatant mischaracterization of the district court's dismissal order. Texas blindly cites to a single sentence, where the district court notes that *Shelby County* alone would have mooted the case. Tex. Ex. E at 4. The district court did not conclude, however, that *Shelby County* was the *sole* cause of mootness, as Texas asserts. Instead, the district court, in its dismissal order, concluded that Texas's "claims were mooted by *Shelby County* and the adoption of superseding redistricting plans." *Id.* at 3 (emphasis added). Moreover, the court noted that the Supreme Court "instructed [the district court] to consider both the effect of *Shelby County* and the mootness argument Defendant-Intervenors themselves had raised before the Court. Having followed that instruction, we conclude that Texas's claims are moot." *Id.* at 3-4.

Clearly, the "dual ground mootness ruling" did *not* "ar[i]se in the first instance in the fee award," Mot. at 15, as Texas inexplicably claims. The Supreme Court, the three-judge district court, and the attorneys' fees motions themselves put Texas on notice. Its argument must be rejected.

* * *

Texas has waived most of its arguments by flaunting the district court's rules and resting its case on a three-page "Advisory" that ignores binding Circuit precedent, and the Davis appellees' arguments supporting the award of attorneys'

fees. Now it asks for summary reversal, despite the obvious complexity of the case. Summary disposition—at least summary *reversal*—is plainly inappropriate.

CONCLUSION

For the foregoing reasons, Texas's motion should be denied.

Dated: August 25, 2014

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that, on August 25, 2014, the foregoing document was served, via the Court's CM/ECF Document Filing System, https://ecf.cadc.uscourts.gov/, upon the following registered CM/ECF users:

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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
Defendant-Intervenor-Appellees.

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

EXHIBIT A TO DAVIS APPELLEES' RESPONSE TO THE STATE OF TEXAS'S MOTION FOR SUMMARY REVERSAL

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June 26, 2013

William K. Suter, Clerk of the Court
Supreme Court of the United States
1 First Street, N.E.
Washington, DC 20543-0001

By Electronic Mail and Hand-Delivery

Re: Texas v. United States, No. 12-496

Dear General Suter:

I write to apprise the Court of a recent development regarding the Intervenors' motion to dismiss the above-captioned case as moot. Earlier this afternoon, Governor Perry signed the new redistricting plans into law. Those plans had not been signed when Texas filed its opposition to the Intervenors' motion yesterday afternoon. For all of the reasons stated in points (2) and (3) of the opposition brief, Texas continues to believe that the Intervenors' motion should be denied, and that the district court's judgment should be vacated in light of *Shelby County*.

Sincerely,

Paul D. Clement
Counsel of Record
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cc: Counsel for Appellees