No. 14-5151

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

THE 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, *et al.*,
Defendant-Intervenor-Appellees.

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

JOINT RESPONSE BRIEF OF DEFENDANT-INTERVENOR-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties, intervenors, and *amici* appearing before the district court and this Court are listed in the Brief for Appellant. References to the ruling at issue appears in the Brief for Appellant. This case was not previously before this Court.

A related case is currently pending before the United States Court of Appeals for the Fifth Circuit, *Davis v. Perry*, No. 14-50042.

CORPORATE DISCLOSURE STATEMENT

There is only one corporate party to this appeal. The Texas State Conference of NAACP Branches is a 501(c)(4) affiliate of the NAACP, which is a 501(c)(3) organization. No parent company or publicly-held company has ten percent or greater ownership.

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INTRODUCTION

Following a full trial, the three-judge district court in the District of Columbia denied the State of Texas preclearance for its congressional, house, and senate redistricting maps under Section 5 of the Voting Rights Act, concluding that Texas had purposefully discriminated against minority voters in drawing district boundaries. That final judgment was in full force and effect when Texas, fearing that a different three-judge district court in San Antonio was poised to rule against the State in a separate Section 2 challenge brought against the same discriminatory redistricting maps, legislatively repealed those maps. The district court's decision granting Intervenor-Appellees[1] attorneys' fees as prevailing parties under these circumstances was entirely consistent with the precedent of this Court, which has repeatedly held that a prevailing party remains entitled to fees when the party defeated at trial acts to moot a case during the pendency of its appeal. And that rule is fully applicable even though the final judgment in this case was vacated after the case became moot.

[1] There are three groups of Intervenor-Appellees who were awarded attorneys' fees as prevailing parties and who are jointly filing this response brief. These three Intervenor-Appellee parties are referred to herein as the Davis Intervenors (consisting of Wendy Davis, Marc Veasey, John Jenkins, Vicki Bargas, and Romeo Munoz), the Gonzales Intervenors (consisting of Greg Gonzales, Lisa Aguilar, Daniel Lucio, Victor Garza, Blanca Garcia, Josephine Martinez, Katrina Torres, and Nina Jo Baker), and the NAACP Intervenors (consisting of the Texas State Conference of NAACP Branches, Juanita Wallace, Rev. Bill Lawson, Howard Jefferson, Ericka Cain, Nelson Linder, and Reginald Lillie).

The Intervenor-Appellees relied on this rule in the motions for attorneys' fees that they filed below. Texas chose not to file an opposition to those motions. Instead, Texas filed an "Advisory," informing the district court that it had no intention of responding to the fees motions due to the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). Enforcing its well-established local rules, the district court concluded that Texas had waived any response to Intervenor-Appellees' argument that they remained prevailing parties when the legislation mooting the case was enacted (prior to vacatur) and that Texas had offered no response to Intervenor-Appellees' citation to this Court's precedent supporting the fee awards.

Through this appeal, Texas impermissibly seeks a second bite at the apple, making arguments that rest on either (1) a legal contention that it has waived and that directly contradicts its own prior arguments in this case, or (2) a gross distortion of a single sentence from the district court's dismissal order. The district court's order awarding fees should be affirmed.

STATEMENT OF THE ISSUES

1. Is Texas, like all other litigants, bound by the district court's enforcement of its local rules providing that the failure to respond to a motion results in the motion being conceded? Having failed to argue before the district court that *Shelby County* alone mooted the case regardless of Texas's legislative

enactment, and having previously successfully taken the opposite position on mootness before the district court, has Texas waived this argument on appeal?

2. Did the district court correctly conclude, applying this Court's controlling precedent, that Intervenor-Appellees were entitled to attorneys' fees because the Supreme Court did not vacate the three-judge district court's order denying Texas preclearance until *after* Texas's legislative enactment mooted the case?

3. Is Texas's argument that the decision in *Shelby County* precludes an award of attorneys' fees misplaced, given that Texas would have been procedurally barred from relying upon *Shelby County* on remand from the Supreme Court because Texas expressly declined to challenge the constitutionality of preclearance at trial?

4. Are the Intervenor-Appellees nonetheless entitled to fees because their effort in the D.C. preclearance action resulted in judicial orders in the San Antonio court requiring Texas to hold the 2012 elections under court-imposed remedial maps—including an order that has already been found to trigger prevailing party status—where Texas has conceded this argument by failing to respond below?

STATEMENT OF THE CASE

Intervenor-Appellees are two groups of Texas voters and office-holders (the "Davis Intervenors" and the "Gonzales Intervenors") and the Texas Conference of

NAACP Branches ("NAACP Intervenors") (collectively "Intervenor-Appellees") who intervened as defendants before the three-judge district court seeking to preclude Texas from obtaining preclearance of its congressional, state house, and state senate redistricting maps drawn following the 2010 Census.

At the time it enacted its new redistricting maps, Texas was subject to the preclearance requirements of Section 5 of the Voting Rights Act. Rather than submit its plans to the Department of Justice ("DOJ") for administrative preclearance and thus avoid the potential exposure to attorneys' fees in litigation, Texas voluntarily chose to bring an action against DOJ before a three-judge district court in the District of Columbia seeking a declaratory judgment that the maps complied with Section 5. JA[2] 66. In that action, Texas expressly declined to challenge the constitutionality of Section 5's preclearance requirement. JA 66-67. DOJ opposed preclearance of the congressional and state house maps, but did not oppose preclearance of the state senate map. JA 221, 246.

The district court permitted Intervenor-Appellees to intervene as defendants to oppose preclearance. JA 201. Although the NAACP Intervenors opposed preclearance of all three maps, the Gonzales Intervenors focused on opposing preclearance of the congressional map, JA 217-18, raising several arguments that were not pursued by DOJ or by any other party to the action, including that the

[2] Citations to the Joint Appendix are labeled "JA __."

benchmark Congressional District 25 ("CD 25") was a minority-ability crossover district, and the loss of that district in the new plan rendered it retrogressive. *See* JA 217-18. The Davis Intervenors took the lead in opposing preclearance of the state senate map, arguing it was retrogressive with respect to Senate District 10 ("SD 10"), which contradicted DOJ's position that the map was not retrogressive and should be precleared. JA 221.[3]

The three-judge district court conducted a two-week trial, with expert and lay witnesses presented by DOJ and by Intervenor-Appellees. JA 248. On August 28, 2012, the court entered final judgment denying preclearance to all three maps. JA 398. The court found that the congressional map was retrogressive with respect to three districts, JA 271, and also "was motivated, at least in part, by discriminatory intent," JA 285. The Gonzales Intervenors prevailed on a number of arguments that were not raised by any other party, including specifically that CD 25 was a minority-ability crossover district and its elimination violated Section 5. JA316. Likewise, the court concluded, as the Davis Intervenors had contended, that "the Senate Plan was enacted with discriminatory purpose as to SD 10." JA 294. The court thus sided against DOJ, which had neither argued that CD 25 was subject to VRA protection nor opposed preclearance of the state senate map. As

[3] Neither the Davis Intervenors nor the Gonzales Intervenors took a position regarding preclearance of the state house plan, but all Intervenor-Appellees opposed preclearance of the congressional plan.

for the state house map, the court concluded that it had a retrogressive effect in four districts, JA 294, and that "the full record strongly suggests that the retrogressive effect . . . may not have been accidental." JA 314. 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.

At the same time the preclearance proceedings were taking place before the three-judge district court in D.C., a different three-judge district court in San Antonio was considering Section 2 and constitutional challenges to all three of the redistricting maps.[4] After the D.C. preclearance trial, but before the D.C. court entered judgment, the San Antonio court entered orders imposing interim plans for the senate, house, and congressional districts to govern the 2012 elections, following the standards set out by the Supreme Court in *Perry v. Perez*, 132 S. Ct. 934 (2012). JA 247-48. In *Perez*, the Court held 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 (in this case, the San Antonio court) is required to impose an interim map that departs from the enacted

[4] The Section 2 and constitutional challenges to Texas's maps were heard in two separate cases in San Antonio. The Davis Intervenors challenged the state senate map in one proceeding, *see Davis v. Perry*, No. SA-11-CA-788 (W.D. Tex. 2011), while the Gonzales and NAACP Intervenors, among others, challenged the congressional and state house maps in another proceeding, *see Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex.).

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* at 942.

The San Antonio court, applying the 'not insubstantial' standard from the Supreme Court's *Perez* case, concluded that the Davis Intervenors' Section 5 preclearance claims in the D.C. court were not insubstantial and imposed an interim senate redistricting plan as "a result of preliminary determinations regarding the merits of the Section 2 and constitutional claims presented in this case." February 28, 2012 Order at 2, *Davis v. Perry*, No. SA-11-CA-788 (W.D. Tex.), ECF No. 141. In a subsequent order and opinion regarding the senate map, 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. The interim state senate map imposed by the San Antonio court was exactly the remedy the Davis Intervenors sought from that court—restoring Senate District 10, from which Senator Davis had been elected by a coalition of minority voters. The 2012 elections occurred under the court-imposed senate map, and the minority voter coalition once again elected Senator Davis to represent SD 10.

The San Antonio court issued that same determination with respect to the pending challenges of the state house and congressional maps. *Perez v. Perry*, No.

5:11-cv-00360-OLG-JES-XR (W.D. Tex.), ECF Nos. 681, 682, 690, 691. Similarly, with respect to the interim state house and congressional plans ordered by the San Antonio court, minority voters were able to elect the candidates of their choice in newly formed districts.[5]

After the D.C. court concluded that the State had purposefully discriminated in enacting its 2011 redistricting maps, and while Texas's appeal from that ruling was still pending, Governor Perry called a special session of the Texas Legislature specifically to repeal and replace the redistricting maps that had been denied preclearance. JA 447. On June 23, 2013, the Texas Legislature adopted as permanent the exact same state senate and congressional map that the San Antonio court had imposed on an interim basis and adopted a state house map favored by many of the Intervenors. JA 404, 433, 447. Following adoption of the plans by the Legislature, Governor Perry signed the bills into law on June 26, 2013.[6]

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[5] Because the interim plans ordered into effect for the 2012 elections with respect to the state house and congressional districts did not fully cure the discriminatory purpose and effects of the State's 2011 maps (according to allegations of the plaintiffs in the San Antonio litigation), challenges to those two plans remain pending in the San Antonio court. With regard to the interim state senate plan, later enacted as a permanent plan by the Texas Legislature in 2013, that plan resolved the San Antonio litigation because it fully remedied the alleged statutory and constitutional challenges to the state senate plan that had been mounted by the Davis Intervenors in that court.

[6] *See* S.B. 2 (state senate map), *available at* https://webservices.sos.state.tx.us/legbills/files/CS/SB2.pdf; S.B. 3 (state house map), *available at* https://webservices.sos.state.tx.us/legbills/files/CS/SB3.pdf; S.B. 4 (congressional map), *available at* https://webservices.sos.state.tx.us/legbills/files/CS/SB4.pdf.

On June 24, 2013, Intervenor-Appellees filed a motion with the Supreme Court seeking to dismiss Texas's appeal as moot based on the Legislature's adoption of new maps and repeal of the maps challenged in this action, which had failed to obtain preclearance. JA 433. On June 25, 2013, one day before the Governor signed the new maps 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, four days after the Legislature enacted new redistricting maps and one day after the Governor signed those maps into law, 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); JA 431. In doing so, the Court rejected Texas's plea that it remand *only* in light of *Shelby County*, *see Texas v. United States*, No. 14-5151 (D.C. Cir.), June 26, 2013 Letter from Texas to Supreme Court (attached as Exhibit A to Intervenors' Opposition to Texas's Motion for Summary Reversal) (Document No. 1509160), instead crediting Intervenor-Appellees' argument

regarding the mootness caused by the Texas Legislature's enactment of new redistricting maps.

Texas then filed a motion with the D.C. district court seeking to have all claims in the preclearance action dismissed as moot. JA 403. This motion made two arguments. First, it argued that *Shelby County* rendered the case moot. JA 403. Second, it argued that the Legislature's enactment of the new maps on June 23, 2013, had "eliminat[ed] any basis for this Court's jurisdiction." JA 404. The district court granted the motion, agreeing with Texas that any claims before the court "were mooted by *Shelby County and the adoption of superseding redistricting plans*." JA 434 (emphasis added).[7] The court noted that Intervenor-Appellees would "remain free to seek attorneys' fees after dismissal," JA 435, and later entered an order dissolving the three-judge court and remanding the case to the Honorable Rosemary Collyer for disposition of the "pending motions for attorneys' fees," JA 811.

Intervenor-Appellees filed timely motions for attorneys' fees on December 17, 2013. JA 438, 630, 782. On December 20, 2013, Texas filed a three-page "Advisory" announcing to the district court and the parties that it did "not intend to

[7] Intervenor-Appellees had argued that the case not be dismissed as moot to allow them to amend their pleadings to include a counterclaim under Section 3c of the Voting Rights Act (that would continue preclearance in Texas due to the findings of purposeful discrimination). The district court denied that request, concluding that the San Antonio court was the more appropriate venue for such a claim. JA 435-36. That Section 3c claim remains pending in San Antonio.

respond" to the motions for attorneys' fees "unless requested to do so by the Court" because, in Texas's view, the motions "aggravate[d]" the "unconstitutional burdens" imposed on Texas when it had to participate in the preclearance process. JA 798-800. Texas cited *Shelby County* as evidence that Texas was the prevailing party, and noted that the district court's order denying preclearance was eventually vacated. JA 799. The Advisory never mentioned the legislative repeal of the maps and presented no response to Intervenor-Appellees' argument that this repeal, and the mootness it caused prior to the judgment being vacated, was the reason they should continue to be treated as prevailing parties.

The district court entered an order on June 18, 2014, awarding the requested attorneys' fees. JA 837. The court concluded that Texas's "Advisory" "present[ed] no opposition on the applicable law," JA 814, and applied the U.S. District Court for the District of Columbia's Local Civil Rule 7(b) to find that "Texas has waived any argument as to" "the eligibility of Fee Applicants for fee awards, the applicability of *Buckhannon* [*Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), which establishes the standard for evaluating motions for attorneys' fees], 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," JA 826-28.

Meanwhile, the San Antonio court likewise granted the Davis Intervenors' motion for attorneys' fees in that court—fees for work separate and apart from the work at issue in the D.C. court—concluding that the interim relief awarded in San Antonio with respect to the state senate plan 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 Intervenors 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).[8] Texas appealed the San Antonio court's award of attorneys' fees with respect to the state senate plan, and that appeal is pending before the Fifth Circuit. *See Davis v. Perry*, No. 14-50042 (5th Cir.).

Texas sought a stay of the D.C. court's order awarding fees, JA 924, which the district court granted, JA 983. In doing so, the district court noted:

> Defendant-Intervenors moved for attorney fees and costs and Texas filed a three-page 'Advisory' that ignored their legal arguments. Texas could have rebutted Defendant-Intervenors' claims for fees and costs, perhaps with the kinds of arguments it sets forth for the first time in its seventeen-page memorandum in support of its Motion to Stay. It did not. The question, therefore, is whether Texas is to be

[8] Motions for interim awards of attorneys' fees by plaintiffs in the San Antonio court with respect to the congressional and state house maps have been filed in that court and are being held in abeyance in light of ongoing proceedings. *See* Jan. 8, 2014 Order, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex.), ECF No. 951.

> held to the procedures and precedents that apply to other litigants. This Court had no reason to hold otherwise, and it awarded fees and costs to Defendant-Intervenors.

JA 982-83. Texas then appealed to this Court and moved for summary reversal of the fee award. This Court denied that motion. *See* Oct. 3, 2014 Order (*per curiam*).

SUMMARY OF ARGUMENT

The district court appropriately awarded Intervenor-Appellees attorneys' fees and costs. Texas does not dispute that Intervenor-Appellees played central roles in the district court proceedings that culminated in the denial of preclearance to all three of the State's redistricting maps. Nor can Texas argue that the district court's judgment denying preclearance was not in full force and effect at the time Texas acted to moot this case by enacting new redistricting plans. Moreover, Texas offers no explanation or excuse for its flagrant disregard of the court's well-established local rules requiring that those who want to oppose a motion must actually file a response. As the district court properly recognized, this sequence of events fully justifies an award of fees.

Texas makes two arguments on appeal. The first is a causation-based argument. Texas contends that *Shelby County*, and not Texas's legislative enactment, was the real cause of this case becoming moot pending appeal, and that fees are inappropriate if *Shelby County* alone caused the mootness. But Texas has

waived this argument. Texas's "Advisory" in response to the fee petitions in the district court raised only one argument—the argument presented in Part II of its appellate brief that fees should *never* be awarded where prevailing party status is based on prevailing under a statute later held to be unconstitutional. In its Advisory, Texas did not contend that *Shelby County* alone caused the mootness or that its legislative enactment therefore could not have been a cause of mootness. Texas did not even use the word "moot" or mention the legislative repeal in any way. The district court therefore concluded that Texas had waived any argument that Intervenor-Appellees were not prevailing parties as of the date of Texas's legislative enactment. This Court appropriately defers to the district court's enforcement of its local rules deeming unopposed arguments conceded. Texas's flagrant and cavalier disregard for the district court's rules and the orderly judicial process makes this the wrong case for this Court to depart from such deference. This is particularly so given that Texas's opening brief does not even challenge (or mention) the district court's enforcement of its rules; Texas has therefore waived its right to do so.

The argument for barring Texas from pursuing its causation argument is especially strong here because that argument expressly contradicts what Texas told the district court when it was seeking dismissal of the case, before the issue of attorneys' fees had been raised. At that earlier point, Texas cited the legislative

repeal as one of the two causes of the district court's loss of jurisdiction. It even argued that this loss of jurisdiction occurred when the Legislature voted for the repeal on June 23, 2013—two days *prior* to the Supreme Court's decision in *Shelby County*. The district court agreed with Texas and dismissed the case in part based on the legislative enactment. Now, faced with this Court's precedent supporting an award of attorneys' fees under that circumstance, Texas has made an about-face and seeks to disclaim any effect of its legislation.

Even if the causation argument were properly before this Court, Texas is wrong on the merits. Its argument depends on the assertion that the case became moot the instant the Supreme Court ruled in *Shelby County*, one day before the Governor signed the bills repealing the challenged maps and permanently adopting the maps imposed by the San Antonio court. But *Shelby County* was not a self-executing vacatur of judgments from this and other cases. The Supreme Court's vacatur of the district court's judgment in this case did not come until *after* Texas's legislative enactment mooted the case. Texas cites to no case prohibiting the award of fees where, as here, a favorable order was in full force and effect at the time of mootness caused by legislation.

That is especially true where, as here, Texas expressly declined to raise the constitutional claim at issue in *Shelby County* in the district court prior to the entry of the judgment on the merits. That failure raises a serious potential procedural

bar, which Texas only avoided having to address because it voluntarily repealed the discriminatory maps that had been denied preclearance. Under these circumstances, it makes no sense to argue that the repeals did not moot the case. They plainly did, as Texas itself has previously acknowledged, and as the district court concluded.

Texas's second argument based on *Shelby County*, presented in its Advisory below and in Section II of its brief on appeal, is that fees should not be awarded *even if* the legislative repeal left Intervenor-Appellees in the status of prevailing parties, because the whole case was premised on a statute subsequently found to be unconstitutional. Put differently, the argument is that fees would be improper even if *Shelby County* had been decided long after the case had ended with the repeal of the challenged maps. But that argument is equally misplaced. If the merits phase of a case ends with parties in a posture that justifies a fee award, subsequent legal developments cannot deprive them of that right, even if they show that the case had legal flaws not previously known or raised.

Finally, even if the Supreme Court's eventual vacatur of the district court's order precludes prevailing party status on the basis of the preclearance judgment, Intervenor-Appellees are still prevailing parties based on additional judicial orders in separate cases that required their victorious litigation efforts in this case. With respect to the state senate plan, the San Antonio three-judge district court imposed

an interim map for the 2012 elections, citing the Davis Intervenors' litigation efforts in the D.C. preclearance action as evidence a court-imposed map was necessary because of the reasonable probability that Texas would be denied preclearance. The San Antonio court awarded fees in that case based on this order. The San Antonio court similarly adopted interim congressional and state house plans as a direct result of the summary judgment and trial proceedings in this litigation. Courts routinely permit attorneys' fees for work in related cases, particularly when a party prevails in one case and such a victory enables it to obtain additional relief in a related case, as happened here. The district court did not need to reach this argument, but Texas presented no response to the argument in the district court. Thus, even if this Court were to disagree with the district court's order, it should nonetheless uphold the award of attorneys' fees on this basis, as Texas has conceded the issue.

ARGUMENT

I. Intervenor-Appellees are Prevailing Parties Entitled to Attorneys' Fees.

Intervenor-Appellees are prevailing parties entitled to attorneys' fees. This Court, in light of the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001), imposes a three-part test for a party to qualify as the prevailing party entitled to fees. First, "there must be a court-ordered change in the legal

relationship of the parties," second, "the judgment must be in favor of the party seeking the fees," and third "the judicial pronouncement must be accompanied by judicial relief." *Green Aviation Mgmt. Co., LLC v. FAA*, 676 F.3d 200, 203 (D.C. Cir. 2012) (quotation marks omitted). "Where a *defendant* is seeking fees, as here, the court has applied only the latter two prongs." *Id.* at 204. "[A] party need receive only some form of judicial relief, not necessarily a court-ordered consent decree or a judgment on the merits." *Turner v. Nat'l Transp. Safety Bd.*, 608 F.3d 12, 15 (D.C. Cir. 2010).

Intervenor-Appellees easily satisfy these requirements. The district court issued a judgment on the merits denying the declaratory relief that Texas sought, Texas's enacted maps were never precleared and the maps were never used in any election. In denying preclearance of Texas's enacted maps, the district court cited and relied upon the testimony and evidence put forth by Intervenor-Appellees. JA 270-314. Moreover, after the district court declined to grant summary judgment in Texas's favor, the San Antonio court, upon reviewing the D.C. court's proceedings, imposed interim plans for the house, congressional, and senate districts. And Texas never used any of its 2011 enacted maps because, after losing in court in D.C. and fearing an imminent loss in court in San Antonio, the State acquiesced and enacted new remedial maps. With respect to the senate map, the interim plan completely restored Senate District 10 to its prior configuration—the

exact remedy sought by the Davis Intervenors—allowing minority voters in 2012 to elect their candidate of choice (Senator Davis) once again. In these circumstances, where the Intervenor-Appellees obtained a judgment and secured judicial relief, Intervenor-Appellees plainly satisfy the requirements for prevailing party status entitling them to attorneys' fees.[9]

II. *Shelby County* Does Not Alter Intervenor-Appellees' Entitlement to Attorneys' Fees.

Shelby County does not alter Intervenor-Appellees' entitlement to attorneys' fees. Texas acknowledges that this Court permits the award of attorneys' fees where a court order is vacated as moot because the losing party enacted legislation acquiescing to a legal claim. *See* Tex. Br. at 17-19. That is exactly what happened here.

Texas raises two arguments for why this principle does not control the outcome here. First, Texas contends that its legislation was not the cause of mootness in this case because *Shelby County* was announced by the Supreme Court the day before the Governor signed legislation repealing the redistricting plans at issue. Texas contends that *Shelby County* was the sole cause of this case becoming moot and that it could not become "more moot" by the Governor's signing of the legislation the following day. *See id.* at 8-21. Second, Texas contends that even if

[9] Texas does not challenge the reasonableness of the amount of fees awarded on appeal.

its legislation was the cause of the mootness prior to the Supreme Court's vacatur of the district court's preclearance order, *Shelby County* still requires that it be relieved of paying fees because a law deemed unconstitutional may not be given any continuing effect and must be considered a nullity. *See id.* at 21-23. Neither argument has any merit.

Texas waived the causation argument by failing to raise it in its sole response to the fee motions, the so-called "Advisory." Moreover, the argument expressly contradicts what Texas told the district court when it was seeking to have the case dismissed (and not yet focusing on attorneys' fees). At that point, it successfully argued that the legislative enactment of June 23, 2013 stripped the court of jurisdiction. And in any event, both *Shelby County* arguments are incorrect on the merits.

A. Texas has Waived its Argument that Shelby County Alone Mooted the Case by Conceding the Issue in the District Court.

Texas has waived its argument that *Shelby County* alone mooted the case prior to the legislative enactment because it conceded the issue in the district court. "It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *Dist. of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984); *United States v. Gewin*, 759 F.3d 72, 78 (D.C. Cir. 2014) ("No procedural principle is more familiar than that a right may be forfeited in . . . civil cases by the failure to make timely assertion of the

right before a tribunal having jurisdiction to determine it." (quotation marks omitted)).

Under the district court's local rules, when a party files a motion for attorneys fees' (or any other motion, for that matter), "an opposing party shall serve and file a memorandum of points and authorities in opposition to the motion. If such a memorandum is not filed within the prescribed time, the Court may treat the motion as conceded." D.D.C. Local Rule 7(b). "The Rule is a docket-management tool that facilitates efficient and effective resolution of motions by requiring the prompt joining of issues." *Fox v. Am. Airlines, Inc.*, 389 F.3d 1291, 1294 (D.C. Cir. 2004); *see id.* at 1295 (quoting *English-Speaking Union v. Johnson*, 353 F.3d 1013, 1021 (D.C. Cir. 2004) ("Strictly enforcing procedural rules ensures both that cases are adjudicated efficiently and that litigants argue their cases on a level playing field.")).

This rule exists because it is a fundamental "premise of our adversarial system . . . that . . . courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). "[W]here counsel has made no attempt to address [an] issue, [the Court] will not remedy the defect . . . ." *Id.*; *see also Slovinec v. Am. Univ.*, 520 F. Supp. 2d 107, 111 (D.D.C. 2007) ("[I]f 'a [party] files an opposition to a . . . motion and

addresses only certain arguments raised by the [opponent], a court may treat those arguments that the [party] failed to address as conceded." (internal quotation marks omitted)). Thus, it was entirely appropriate for the district court to treat Texas as having waived the arguments it now raises for the first time on appeal. The district court was under no obligation to make Texas's arguments for it.

This Court universally "honor[s the] enforcement of the rule" when "the district court relies on the absence of a response as a basis for treating the motion as conceded." *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997); *see also Fox*, 389 F.3d at 1295. "[T]he discretion to enforce this rule lies wholly with the district court." *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997); *id.* ("[W]e have yet to find that a district court's enforcement of this rule constituted an abuse of discretion."); *see also Geller v. Randi*, 40 F.3d 1300, 1304 (D.C. Cir. 1994). The rule would have little effect if it were otherwise. This deference to the district court's discretion is not limited to scenarios where no opposition is filed at all. "A party's failure to pursue one of several available lines of argument is hardly an 'error' of the sort that would warrant exercising our narrowly circumscribed remedial authority." *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004). Moreover, the district court is not required to provide notice or give an opportunity for a hearing before

enforcing Rule 7(b); to require otherwise "would hinder effective docket management." *Fox*, 389 F.3d at 1295.

Here, Texas all but refused to participate in the fee proceedings below, raising only one argument—the one contained in the two pages that make up Section II of its appellate brief.[10] Texas never contended in response to the fee petitions that *Shelby County* was the first and only cause of mootness in this case. Its "Advisory" did not argue that *Shelby County* alone mooted the case, that the legislation was *not* the cause of mootness, or that *Shelby County* could dispose of the case without any action by the Supreme Court or the district court in this case. It did not even use the word "moot." JA 798-800. The district court, enforcing Local Rule 7(b), concluded that Texas had waived any argument that Intervenor-Appellees were not the prevailing parties "when Texas enacted new redistricting maps," JA 826-28, the day after *Shelby County* was announced. As this Court has held, the "discretion to enforce this rule lies wholly with the district court." *Bender*, 127 F.3d at 67-68.

This is not an "exceptional circumstance[]" where enforcement of this rule of waiver to bar consideration of the causation argument would result in a

[10] The fact that Texas's "Advisory" was premised on *Shelby County* is not sufficient to preserve specific legal theories, such as its "first-cause-of-mootness" argument. *See Hiner v. Deere & Co.*, 340 F.3d 1190, 1196 (10th Cir. 2003) ("[W]e have consistently rejected the argument that raising a related theory below is sufficient to preserve an issue for appeal." (quotation marks omitted)).

"miscarriage[] of justice." *Flynn v. Comm'r*, 269 F.3d 1064, 1068-69 (D.C. Cir. 2001). Texas could hardly have been more flippant in "advising" the district court that it was going to disregard the rules and not bother to file a substantive response to the motions for attorneys' fees. Nor was there an intervening change in law between the time the motions for fees were filed and the appeal. *Id.* And this case hardly presents a "recurring question[] of federal law," *id.*; indeed it is almost certain to never occur again, in light of *Shelby County*. Moreover, this case does not involve a *pro se* litigant who was excusably unaware of the rules of the district court or confused by a complicated sequence of motions. *See Malik v. Dist. of Columbia*, 574 F.3d 781, 786-87 (D.C. Cir. 2009); *Fox v. Strickland*, 837 F.2d 507, 508-09 (1988) (*per curiam*). Rather, Texas, a sophisticated party, knowingly and cavalierly "advis[ed]"[11] the district court that it was too indignant to participate in the proceedings. This case is far from an appropriate candidate for this Court to depart from its practice of "honor[ing the] enforcement of the [district court's] rule." *Twelve John Does*, 117 F.3d at 577. Litigants do not get to decide for themselves whether they are required to follow the rules. Texas has waived the ability to argue that *Shelby County* mooted the case before its legislative enactment or that Intervenor-Appellees were not still prevailing parties as of the date of that enactment.

[11] Texas could not even bring itself to label its filing an "opposition."

Moreover, Texas does not even suggest otherwise; its brief on appeal does not challenge the district court's enforcement of Rule 7(b) or its conclusions as to the arguments Texas had waived. Rather, it merely makes its new causation argument without mentioning that the district court concluded it had waived any challenge to Intervenor-Appellees' prevailing party status after *Shelby County* was announced. Texas therefore has not only waived the substance of its argument by failing to raise it at the district court, but it has also waived its ability to challenge the district court's enforcement of Rule 7(b) by failing to raise that argument in its opening brief. *See World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002) ("As we have said many times before, a party waives its right to challenge a ruling of the district court if it fails to make that challenge in its opening brief.").

Texas should also be barred from making this argument for the first time on appeal because the argument expressly contradicts what Texas was telling the district court in another context. On July 3, 2013, Texas filed a motion to dismiss the district court case that consisted of two paragraphs. In the first, Texas cited *Shelby County* and the Supreme Court's eventual vacatur of the preclearance denial order and stated that "[g]iven that Texas is no longer subject to preclearance, its claims in this Court are now moot." JA 403. In the second paragraph, Texas stated that

> The State of Texas further advises the Court that on June 23, 2013, the Texas Legislature enacted new electoral districts for the Texas Senate, the Texas House of Representatives, and the United States House of Representatives, and expressly repealed the redistricting statutes for which the State sought declaratory judgment in this case, *thus eliminating any basis for this Court's jurisdiction*. The State of Texas therefore respectfully requests that the Court enter an order dismissing all claims asserted in this case.

JA 404 (emphasis added).

Now that it is before this Court, Texas sharply reverses course. Texas's new position is that its legislative enactment was entirely irrelevant to the question of jurisdiction and mootness because *Shelby County* was announced before the Governor signed the legislation.[12] Texas now posits that the issuance of *Shelby County* was the first event triggering mootness and that any subsequent action by the Legislature or the Governor could make the case "more moot." Tex. Br. at 9. Yet, Texas itself previously invited the district court to consider both *Shelby County* and its legislative enactment. JA 403-04. More striking, Texas previously contended that the legislative enactment caused the district court to lose jurisdiction when the Legislature acted on June 23, 2013—two days *prior* to *Shelby County* being announced.[13] Texas's new position on appeal could not be

[12] The Governor called the special session of the Legislature expressly for the purpose of enacting the new redistricting bills. *See* http://www.lrl.state.tx.us/scanned/govdocs/Rick%20Perry/2013/proc052713.pdf.

[13] Texas' position in the district court was consistent with the Intervenor-Appellees' motion to dismiss the appeal to the Supreme Court as moot in light of the Legislature's action and the Governors' public expression of support, and the

more directly inconsistent with the position it took when it successfully sought dismissal. *See Moses v. Howard Univ. Hosp.*, 606 F.3d 789, 798 (D.C. Cir. 2010) (holding that a party should be estopped where the party "assumes a certain position in a legal proceeding, . . . succeeds in maintaining that position, . . . [and then,] simply because his interests have changed, assume[s] a contrary position." (internal quotation marks omitted) (alterations in original)).

B. This Court's Precedents Permit Attorneys' Fees Where an Order is Vacated After a Party's Legislative Enactment Renders a Case Moot.

Even if Texas had preserved its argument that *Shelby County* alone mooted this case, that argument should be rejected on its merits. This Court's precedent permits an award of attorneys' fees when an order is vacated after a party's legislative enactment renders a case moot. 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

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Supreme Court's remand order citing the Intervenor-Appellees' suggestion of mootness.

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*] . . . 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); *UFO Chuting of Haw., Inc. v. Smith*, 508 F.3d 1189, 1197 & n.8 (9th Cir. 2007) (same); *Dahlem v. Bd. of Educ.*, 901 F.2d 1508, 1512-13 (10th Cir. 1990) (same); *Palmer v. City of Chi.*, 806 F.2d 1316, 1321 (7th Cir. 1986) (same).

Here, the denial of preclearance "gave the [Intervenors] the precise relief that they had sought." *Thomas*, 330 F.3d at 493. Texas's enacted maps were never

used and the San Antonio court imposed interim maps as a result of the summary judgment and trial proceedings in this case, including the exact state senate map advocated by the Davis Intervenors. As was the case in *National Black Police Ass'n*, the legislature took action that mooted the case, here by enacting as permanent the remedial maps imposed by the San Antonio court. Thus, the mootness caused by the legislative enactment does not erase the "real-world vindication" Intervenor-Appellees obtained even prior to the action by the Texas legislature and Governor. 168 F.3d at 528.

Moreover, the *National Black Police Ass'n* rule is fully applicable here where the Supreme Court issued *Shelby County* the day before the new legislation was signed into law by the Governor. The issuance of that decision did not moot the case *instanter*. To the contrary, a change in the law announced in *a different case* only raises *questions* about whether and how it applies to a separate case. This should be self-evident, but is further demonstrated by the fact that the Supreme Court acted affirmatively to issue an order in this case vacating the judgment and explicitly instructing the district court on remand to consider both the effects of *Shelby County* and of the legislative repeal. *Texas v. United States*, 133 S. Ct. 2885 (2013). This remand—which did not take place until *after* the Governor signed the new maps into law—left the district court the authority to decide, for example, that Texas had waived any constitutional argument by failing

to raise it in the district court. *See United States v. Baucum*, 66 F.3d 362, 363-64 (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). But that issue was never briefed or contested because the case had been mooted by Texas's voluntary repeal of the very maps at issue.

Texas responds that the three-judge district court itself concluded that *Shelby County* "alone" mooted the case. Tex. Br. at 9-10. On that basis, Texas contends that the district court impermissibly modified the three-judge court's order in awarding fees. This is not so.

Texas has taken the three-judge court's statement entirely out of context. The district court's single statement that *Shelby County* "alone rendered Texas's claim for declaratory relief moot," JA 435, was not a conclusion that *Shelby County* was the sole cause of mootness. To the contrary, the district court plainly stated that the "claims were mooted by *Shelby County* and the adoption of superseding redistricting plans." JA 434 (emphasis added). Instead, the court was stating that even if the legislation had *not* caused mootness, *Shelby County* would have.[14] Intervenor-Appellees had sought to keep the case alive with a Section 3c

[14] The district court came to this conclusion without the benefit of briefing on whether Texas was procedurally barred from relying upon *Shelby County* by its failure to challenge the constitutionality of Section 5's preclearance requirement. Intervenor-Appellees had no occasion to address the issue because Texas's

claim added (that would have retained Section 5's preclearance requirements for Texas based on findings of intentional discrimination), citing case law about voluntary cessation aimed at evading review. JA 418, 420. The district court rejected this contention and the relevance of that case law, and made the point that "[i]n any event, there is more at work here than the Texas legislature's decision to abandon the 2011 plans." JA 435. The district court was simply making the point that regardless of whether the cases cited by Intervenor-Appellees applied, *Shelby County* would have rendered the case moot. This sentence can bear none of the weight that Texas places upon it.[15] Under Texas's own prior view of the facts and law, this case became moot *prior* to *Shelby County* and the decision in *Shelby County* is thus irrelevant to the applicability of this Court's precedent.

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legislative enactment rendered the case moot before the Supreme Court had even remanded the case.

[15] For this reason, Texas's contention that the district court's order awarding fees is premised on an improper modification of the three-judge court's order is incorrect. Moreover, Texas never argued to the district court that Intervenor-Appellees' motions would result in such a modification, *see Tarpley v. Greene*, 684 F.2d 1, 7 n.16 (D.C. Cir. 1982) ("[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."), and Texas *itself* invited the "dual-ground mootness" holding by *asking* the district court for it, *see supra* Part II.B. Texas's statement that it would have sought reconsideration of the dismissal order if only it had been aware of the "dual-ground mootness" issue and that it would have "urged the district court to dismiss . . . *solely* on the basis of *Shelby County*," Tex. Br. at 13 (emphasis added), is therefore peculiar—at best—considering that is the opposite of what its dismissal motion said.

The bottom line is that a judgment in Intervenor-Appellees' favor was still in full force and effect when Texas mooted the case by repealing the maps. The Legislature enacted the new maps on June 23 and Governor Perry signed the legislation on June 26, 2013. At the time both events occurred (and when *Shelby County* was announced), 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 June 27, 2003. At the time the legislation was enacted as law, Intervenor-Appellees had prevailed in the preclearance suit, winning a judgment in their favor that remained 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); *see also Walker v. City of Birmingham*, 388 U.S. 307, 314 (1967) ("[U]ntil [a court's] decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected . . . ." (quotation marks omitted)).

Intervenor-Appellees thus had the requisite "judicial pronouncement . . . accompanied by judicial relief," *Green Aviation*, 676 F.3d at 203 (quotation marks omitted), at the time the enactment caused the case to become moot, eliminating jurisdiction over the case, *see Iron Arrow Honor Soc'y 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. Furthermore, Intervenor-Appellees' relied upon *National Black Police Ass'n* and the other precedent cited above in their fee petitions in the district court, but Texas failed to challenge the applicability of any of these cases in its "Advisory," JA 828-30, and therefore may not do so for the first time on appeal. *See, e.g.*, *Air Florida, Inc.*, 750 F.2d at 1084; *Gewin*, 759 F.3d at 78; *supra* Part II.A.

C. *Shelby County* Does Not Render Intervenor-Appellees' Section 5 Victory a "Nullity" Incapable of Supporting an Award of Attorneys' Fees.

Shelby County does not render Intervenor-Appellees' Section 5 victory a "nullity" incapable of supporting the district court's award of attorneys' fees. Texas contends, relying largely on broad quotes from nineteenth century cases, including *Marbury v. Madison*, *see* Tex. Br. 22, that the award of fees is inappropriate because it gives continuing effect to a law that has been deemed unconstitutional. Texas's reliance on such generalized statements from centuries ago is misplaced for a number of reasons.

First, the award of attorneys' fees does not improperly give continuing effect to Section 4(b)'s coverage formula. Instead, it simply recognizes that, long before *Shelby County* was announced, Intervenor-Appellees won this case obtaining a legal victory—a victory that was in full force and effect when Texas acquiesced

with its new legislation, thus mooting the case. The fee award does not require Texas to undergo future preclearance and thus does not impermissibly continue the effect of Section 4(b). Texas's citation to *Marbury v. Madison* is therefore misplaced. Moreover, Texas itself has conceded that the case became moot *prior* to *Shelby County*, JA 404, and this Court has held that an intervening decision will not alter a result on collateral review—such as an attorneys' fees case—unless the Supreme Court so specifies. *See In re Zambrano*, 433 F.3d 886, 887 (D.C. Cir. 2006).

Second, Texas cannot invoke the constitutional burdens of Section 5 when it never challenged the constitutionality of Section 5 in the proceedings below. This Court and others have repeatedly held that, where an issue is not preserved for appeal (such as the issue of Section 5's constitutionality in this case), a party cannot benefit from an intervening decision. *See Baucum*, 66 F.3d at 364; *Edmonds*, 69 F.3d at 1177; *Washington*, 12 F.3d at 1139; *Martinez v. Tex. Dep't of Criminal Justice*, 300 F.3d 567, 574 (5th Cir. 2002); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605-06 (4th Cir. 1999); *Brown v. M&M/Mars*, 883 F.2d 505, 512-13 (7th Cir. 1989). Texas had ample opportunity to raise the issue of Section 5's constitutionality below, yet expressly declined to do so. JA 66-67. And parties lose the right to rely on intervening decisions even where, as here, the intervening decision is on constitutional grounds. *See 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."). Texas's reliance on dicta from the nineteenth century is insufficient to overcome this precedent. Moreover, Texas's argument ignores this Court's precedent awarding fees where a case becomes moot prior to vacatur. *See supra* Part II.B. *Shelby County* does not bar the district court's award of fees in this case.

III. The San Antonio Court's Order Imposing Interim Maps Independently Supports Prevailing Party Status for Intervenor-Appellees in This Action.

Finally, Intervenor-Appellees' prevailing party status is independently established by court-ordered relief they obtained from the San Antonio court, which imposed interim maps under which the 2012 elections were held. The Section 2 and constitutional challenges to Texas's maps were heard in two separate cases in San Antonio. The Davis Intervenors challenged the state senate map in one proceeding, *see Davis v. Perry*, No. SA-11-CA-788 (W.D. Tex. 2011), while the Gonzales and NAACP Intervenors, among others, challenged the congressional and state house maps in another proceeding, *see Perez v. Perry*, No. 5:11-cv-

00360-OLG-JES-XR (W.D. Tex. 2011). In both cases, the San Antonio court imposed interim maps for the 2012 elections based upon the preclearance proceedings in the D.C. court.

Courts have recognized that fees may be awarded for litigants' effort in one case related to their victory in another 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); *N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 15 (1986) (fees and costs in related proceedings are recoverable if they are "both useful and of a type ordinarily necessary to advance the civil rights litigation to the stage it reached" (quotation marks omitted)); *see also N.C. Right to Life Pol. Action Comm. v. Leake*, 939 F. Supp. 2d 526, 531 (E.D.N.C. 2013) ("It is well established that in certain circumstances an award under § 1988 may include fees and costs for prior litigation."); *McDonald v. Armontrout*, 860 F.2d 1456, 1462 (8th Cir. 1988); *Stacy v. Stroud*, 845 F. Supp. 1135, 1143 (S.D. W. Va. 1993).

As their efforts litigating the D.C. case were integral to obtaining the relief from the San Antonio court, Intervenor-Appellees are entitled to fees based upon the court-ordered relief obtain in San Antonio—relief that meets this Court's test for obtaining a "judicial pronouncement . . . accompanied by judicial relief," *Green*

Aviation, 676 F.3d at 203 (quotation marks omitted), necessary for prevailing party status.

A. The Davis Intervenors Obtained Independent Judicial Relief in San Antonio Based Upon Their Effort in the D.C. Preclearance Case.

The Davis Intervenors are entitled to fees as prevailing parties in this case even if the D.C. court's order denying preclearance cannot on its own support a fee award. In addition to winning the preclearance case, the Davis Intervenors separately obtained judicial orders from the San Antonio court imposing interim maps for the 2012 elections for state senate—relief that can never be "reversed, dissolved, or otherwise undone," *Davis*, 991 F. Supp. 2d at 824 (quotation marks omitted), in light of Texas's legislative enactment that mooted the Davis Intervenors' claims in the San Antonio court and Texas's declaratory judgment action in the D.C. court. In particular, the San Antonio court's adoption of an interim Senate map was explicitly based in part on the Davis Intervenors' effort litigating *this* case. Because DOJ did not object to preclearance of the state senate plan in the D.C. Court, the plan would have obtained preclearance had the Davis Intervenors not intervened. Texas has 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.[16] Had the Davis Intervenors 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). JA 24.

Instead, the Davis Intervenors' 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 Intervenors not intervened in the D.C. court and successfully contested preclearance of the state senate map. But for the Davis Intervenors' effort litigating *this* case, they could not have obtained relief in the

[16] Texas' statement is also factually wrong. The Davis Intervenors were not just one state senator, but rather included local leaders of the minority voter coalition in Senate District 10 that had elected their preferred candidate (Senator Davis) to office.

San Antonio court based in part upon the lack of preclearance.[17] The D.C. court likewise recognized this fact, noting in its opinion denying preclearance that its

> denial of Texas's motion for summary judgment required the district court in the section 2 litigation to draw interim maps for the State's fast-approaching primaries and the ensuing general election. After the Supreme Court invalidated those maps, *see Perry v. Perez*, 132 S. Ct. 934 (2012), the court issued a second set, which have not been challenged.

JA 247.

The San Antonio court has already concluded that its orders entitle the Davis Intervenors to attorneys' fees in *that* case, *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.*[18] The same reasoning applies here. To obtain the order upon which the San Antonio court has premised the Davis Intervenors' prevailing party status, it was necessary

[17] Over the years, the D.C. courts have consistently awarded attorneys' fees to Defendant Intervenors in Section 5 declaratory judgment cases where they can show they contributed substantially to the denial of preclearance. *See, e.g.*, *Donnell v. United States*, 682 F.2d 240 (D.C. Cir. 1982). The purpose of providing for an award of such fees and expenses to prevailing parties is to encourage "'private litigants to act as 'private attorneys general' in seeking to vindicate the civil rights laws. . . . 'Congress depends heavily upon private citizens to enforce the fundamental rights involved. The awards are a necessary means of enabling private citizens to vindicate these Federal rights.'" *Id.* at 245 (quoting S. Rep. No. 94-295 at 40 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 807). Given DOJ's position with respect to the senate map, it fell to the Davis Intervenors "to vindicate [their] Federal rights."

[18] 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.

for the Davis Intervenors to litigate in D.C. Under this Circuit's precedent, all that is required for prevailing party status is "*some form* of judicial relief," *Turner*, 608 F.3d at 15 (emphasis added); the San Antonio court's orders satisfy that requirement and entitle the Davis Intervenors to attorneys' fees for their work in this case. *See Parker*, 561 F.2d at 327-29; (D.C. Cir. 1977); *N.C. Dep't of Transp.*, 479 U.S. at 15; *Leake*, 939 F. Supp. 2d at 531; *McDonald*, 860 F.2d at 1462; *Stacy*, 845 F. Supp. at 1143.

The Davis Intervenors raised this same argument before the district court, JA640, but 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," JA 799. Having failed to respond to this argument in 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.

B. The Gonzales and NAACP Intervenors Obtained Independent Judicial Relief in San Antonio Based Upon Their Effort in the D.C. Preclearance Case.

Similarly, the Gonzales and NAACP Intervenors obtained independent judicial relief in San Antonio with respect to the congressional and state house

maps—relief that is attributable in part to their efforts opposing preclearance in the D.C. court. That relief independently supports their prevailing party status.

As it did in imposing an interim map in the state senate case, the San Antonio court reviewed the record from the D.C. court and concluded that the Gonzales and NAACP Intervenors' Section 5 challenges to the congressional and state house maps were "not insubstantial," requiring the court to impose interim maps for the 2012 elections. *See Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex.), ECF Nos. 681, 682, 690, 691; *see* JA 247 (D.C. district court attributing San Antonio court's action to the D.C. court's denial of summary judgment in the preclearance action). In particular, the Gonzales Intervenors submitted briefs and substantial evidence—including some not advanced by other parties to the litigation—opposing Texas's request that the district court preclear the State's congressional map. *See* Order at 16, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Nov. 26, 2011), ECF No. 544.[19] Given that the San Antonio court's Section 5 *Perez* analysis, which resulted in the imposition of interim congressional and state house maps, depended upon the Gonzales and NAACP Intervenors' effort in *this* case, it is only fair they be awarded fees for the time spent litigating the Section 5 case.

[19] Following the Supreme Court's order remanding the interim plan to be redrawn, the San Antonio court adopted C235, the same congressional plan subsequently adopted by legislative enactment. *See* Order, *Perez v. Perry*, No. 5:11-cv-00360-OLG-JES-XR (W.D. Tex. Feb. 28, 2012), ECF No. 681.

* * * * *

Texas flagrantly disregarded the district court's rules, fancying itself above the procedural requirements governing Intervenor-Appellees' motions for fees. Rather than respond to those motions, Texas made a tactical decision to submit a cursory "Advisory" statement, depriving the district court of the opportunity in the first instance to consider virtually all of the arguments that it now makes to this Court for the first time. As a result, the district court properly found that, pursuant to the court's rules, Texas waived any response to the argument that Intervenor-Appellees remained prevailing parties and offered no response to Intervenor-Appellees' citation to this Court's precedent supporting the fee awards. There is no reason for this Court to depart from its consistent precedent granting the district court complete discretion in enforcing its rules. More galling, Texas's case on appeal is premised on a full reversal of its prior position before the district court—a position that the district court adopted. Texas cannot reverse course now simply to avoid paying attorneys' fees.

Its waiver, concessions, and inconsistent positions aside, Texas's arguments are without merit. Texas lost at the district court and then mooted this case through legislation while its appeal was still pending. This Court's precedent is clear that under such circumstances, where vacatur occurs after legislation causes

mootness, fees are appropriate. *Shelby County* does not change the application of this rule.

Texas is not a victim here. The D.C. district court found that Texas discriminated against minorities, on purpose. The reason Texas rushed to enact new maps is that it knew these findings portended an imminent loss in the Section 2 proceedings in San Antonio, which would have moved forward as soon as *Shelby County* eliminated the preclearance requirement. Seeing the writing on the wall, Texas hoped that if it hurried and enacted legislation, it could avoid having to pay attorneys' fees in San Antonio and in this case. This Court should reject Texas's attempts to manipulate the judicial process so as to avoid paying fees to the very attorneys who worked to ensure that the State's citizens would not be forced to vote under racially discriminatory redistricting maps.

CONCLUSION

For the foregoing reasons, the district court's order awarding fees and costs should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a), I certify that the foregoing brief has been prepared in Microsoft Word 2010 using 14-point Times New Roman typeface and is double-spaced (except for headings, footnotes, and block quotations). I further certify that the brief is proportionally spaced and contains 10,765 words, excluding the parts of the brief exempted by D.C. Circuit Rule 32(a)(1). Microsoft Word 2010 was used to compute the word count.

Dated: January 14, 2015

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CERTIFICATE OF SERVICE

I certify that, on January 14, 2015, I electronically filed this brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that nine (9) paper copies of the document will be hand-delivered to the Clerk of the Court.

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