No. 14-5151

In the
United States Court of Appeals
For the District of Columbia Circuit

THE STATE OF TEXAS,
Plaintiff Appellants,

v.

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

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

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

TEXAS'S OPENING BRIEF

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

Adam W. Aston
Deputy Solicitor General

ARTHUR C. D'ANDREA
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1896
[Fax] (512) 370-9191
jonathan.mitchell@texasattorneygeneral.gov

Final (December 15, 2014)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties, Intervenors, and Amici

Plaintiffs
The State of Texas

Defendants
United States of America; Eric H. Holder, Jr.

Defendant Intervenors
Wendy Davis; Marc Veasey; John Jenkins; Vicki Bargas; Romeo Muñoz; Mexican American Legislative Caucus of the Texas House of Representatives, Greg Gonzales; Lisa Aguilar; Daniel Lucio; Victor Garza; Blanca Garcia; Josephine Martinez; Katrina Torres; Nina Jo Baker; Texas Legislative Black Caucus; Texas Latino Redistricting Task Force; Texas State Conference of NAACP Branches; Juanita Wallace; Rev. Bill Lawson; Howard Jefferson; Ericka Cain; Nelson Linder; Reginald Lillie; League of United Latin American Citizens; Texas Democratic Party; Boyd Richie, Chair of the Texas Democratic Party; Michael Idrogo

(B) Rulings Under Review

Texas appeals from a single-judge order awarding attorneys' fees in a redistricting case. JA 837.

(C) Related Cases

None.

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INTRODUCTION

The defendants in this case suffered a historic loss in October Term 2012, when the Supreme Court dismantled the preclearance regime in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). At the time, this case was being held in the Supreme Court for *Shelby County*, as Texas also was arguing that preclearance was unconstitutional. After the Supreme Court vacated the lower court's judgment in this case and remanded in light of *Shelby County*, the trial court gave the defendants a consolation prize, declaring them "prevailing parties" for purpose of attorneys' fees and awarding them over $1 million. JA 813, 837. Trial courts have discretion when it comes to fee awards, but they do not have discretion to make winners out of clear losers. The fee award is unprecedented, unlawful, and should be vacated.

STATEMENT OF JURISDICTION

The trial court had jurisdiction under 28 U.S.C. § 1331. This Court has jurisdiction of the trial court's order awarding a fixed amount of attorneys' fees under 28 U.S.C. § 1291. The trial court entered the order granting fees on June 18, 2014. JA 813, 837. Texas timely filed notice of appeal on June 23, 2014, JA 839, in compliance with the federal rules. FED. R. CIV. P. 4(a)(1).

STATEMENT OF THE ISSUES

1. After the Court's decision in *Shelby County* mooted this case, the Texas Governor signed a bill repealing the redistricting maps that were the subject of this dispute. When a case becomes moot on appeal because of a judgment of the Supreme Court, can subsequent action by a party make it "more moot"?

2. Texas lost in the trial court, appealed to the Supreme Court, argued that preclearance was unconstitutional, and had its appeal held for *Shelby County*, which eventually embraced Texas's arguments, vacating the lower court's judgment and remanding in light of *Shelby County*. On remand, does the trial court have discretion to deem the defendant intevenors "prevailing parties"?

STATEMENT OF THE CASE AND FACTS

When Texas enacted districting plans for Congress and the Texas Legislature following the 2010 census, the State was subject to the preclearance provisions of the Voting Rights Act. Texas filed suit in the U.S. District Court for the District of Columbia seeking preclearance of the plans adopted by the Legislature in 2011. JA 66. Soon thereafter, 27 private parties sought and obtained permissive intervention as *defendants* in the dispute. JA 145, 153, 196. A three-judge district court conducted a two-week trial and denied preclearance of the plans. *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012). But Texas appealed to the Supreme Court arguing, among other things, that the preclearance regime was unconstitutional. *Texas v. United States*, No. 12-496, Appellant's Jurisdictional Statement (Oct. 19, 2012) at i ("Questions Presented . . . 4. To the extent that the district court did not err in construing section 5, whether the 2006 reauthorization of Section 5, as so construed, is constitutional"). While Texas's appeal was pending in the Supreme Court, the Court issued its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), striking down the coverage formula of the Voting Rights Act and thereby eliminating the preclearance requirement for covered states like Texas.

The day after *Shelby County* was announced and the judgment entered, the Texas Governor signed legislation replacing the redistricting maps that were the subject of this preclearance lawsuit with maps that had been drawn by the Western District of Texas. The Western District of Texas drew those maps to serve as interim maps pending a

lawsuit brought under section 2 of the Voting Rights Act, but the State chose to adopt those interim maps as it own. The following day, at Texas's request, the Supreme Court vacated the three-judge district court's judgment in this case, which had denied preclearance of the 2011 plans, and remanded the case to the district court. *Texas v. United States*, 133 S. Ct. 2885 (2013) (mem.) (JA 429).

Upon return to the trial court, Texas moved to dismiss its claims as moot in light of *Shelby County*, Plaintiff's Motion to Dismiss, *Texas v. United States*, No. 1:11-cv-1303, ECF No. 239 (JA 403), and the three-judge district court dismissed the case. Memorandum and Order at 4, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Dec. 3, 2013) (JA 435). The district court found that "*Shelby County* dismantled the legal framework that called for preclearance of Texas's redistricting plans in the first place. That alone rendered Texas's claim for declaratory relief moot." *Id.*

Some but not all of the defendant intervenors sought attorneys' fees. Texas filed an advisory in response to these motions, noting that Texas was the prevailing party because, as the three-judge court had held only weeks before, *Shelby County* dismantled the preclearance regime and mooted this dispute. *See* JA 798 ("The intervenors' attempt to recover attorneys' fees and costs from the State of Texas disregards the holding of *Shelby County* and the Supreme Court's disposition of the appeal in this case. *Shelby County* requires immediate denial of all motions for fees and costs . . . ."). The motions for attorneys' fees were entrusted to a single member of the three-judge court. Order, *Texas*

v. United States, No. 1:11-cv-1303 (D.D.C. Jan. 22, 2014), ECF No. 263 (remanding the motions from the three-judge court to Judge Rosemary Collyer). The single judge court awarded more than $1 million in attorneys fees to all the defendant intervenors who had applied. JA 813, 837.

SUMMARY OF THE ARGUMENT

I. Texas won this case the moment Shelby County declared the preclearance regime unconstitutional, and the trial court had no discretion to award attorneys' fees to the losing parties whose claims were based on an unconstitutional federal statute. The trial court's award of fees rests on two legal errors. First, the trial court incorrectly holds that Texas's case was not moot until the Governor of Texas signed redistricting legislation the day *after* the *Shelby County* decision. JA 832. That holding (1) ignores the Supreme Court's practice of entering judgment the same day that an opinion is announced, ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 823-24 (9th. ed. 2007); (2) forgets the principle that a mooted case cannot become "more moot," *In re Scruggs*, 392 F.3d 124, 129 (5th Cir. 2004) ("There is no such thing as being a little bit moot."); (3) conflicts with a prior decision of the three-judge court in this case, *see* Memorandum and Order at 4, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Dec. 3, 2013) (JA 835), which the single judge who awarded fees was powerless to overrule, *see, e.g.*, *Kenny v. United States*, 118 F. Supp. 907, 910 (D.N.J. 1954); and (4) ignores the Supreme Court's disposition of this case on appeal, which vacated the judgment over the defendant intervenors' objections that the case was not moot. Second, the trial court

incorrectly relies on cases awarding attorneys' fees to plaintiffs who win in the district court but whose cases become moot on appeal through happenstance or the action of a party. But the mootness in this case was the result of an unequivocal victory for Texas on appeal. No cases award attorneys' fees to eventual Supreme Court losers, no matter how many lower court victories they accumulate along the way.

II. Even if none of that were true, the district court still would have no discretion to award attorneys' fees under a statutory regime that was declared unconstitutional. The plaintiff in a constitutional challenge, like Texas, cannot be declared the loser because the United States and its intervenor allies succeeded in coercing compliance with the unconstitutional statute until the moment the statute was thrown out by the Supreme Court. "[A]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886). *Shelby County* holds that section 5's federalism costs are too great to permit the imposition of preclearance burdens on the previously covered jurisdictions. *Shelby County,* 133 S. Ct. at 2627–31. Yet the district court imposed upon Texas even more financial burdens on the basis of this unconstitutional statutory scheme.

STANDARD OF REVIEW

This Court generally reviews the district court's decision on a motion for attorneys' fees for abuse of discretion, *see, e.g.*, *Brayton v. Office of the U.S. Trade*

Representative, 641 F.3d 521, 524 (D.C. Cir.2011) (reviewing an order denying fees); *Covington v. District of Columbia*, 57 F.3d 1101, 1112 (D.C. Cir. 1995) (reviewing an order granting fees). But a "district court abuses its discretion if it did not apply the correct legal standard . . . or if it misapprehended the underlying substantive law." *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1497 (D.C. Cir.1995). When the district court commits that sort of legal mistake, this Court will "'examine de novo whether the district court applied the correct legal standard.'" *Conservation Force v. Salazar*, 699 F.3d 538 (D.C. Cir. 2012) (quoting *Brayton*, 641 F.3d at 524).

ARGUMENT

I. TEXAS WON THIS CASE IN THE UNITED STATES SUPREME COURT.

The defendant intervenors lost this case and are not entitled to attorneys' fees. There is no bright side or silver lining for which they might claim credit as the "catalyst." After the defendant intervenors prevailed in the trial court, Texas appealed to the Supreme Court, arguing that the preclearance regime was unconstitutional, and won. JA 429. Because the Supreme Court dismantled the entire preclearance regime, Texas's victory came as mootness instead of an entry of judgment in its favor. But it was a Supreme Court victory nonetheless, and the trial court had no discretion whatsoever to hold otherwise.

The trial court declared victory for the defendant intervenors for two reasons. First, the trial court incorrectly claims that Texas's case was not moot until the Governor of Texas signed redistricting legislation the day *after* the *Shelby County* decision. Second, the trial court suggests that no matter what the source of mootness, the defendant intervenors are the prevailing parties because the trial court's original judgment (which was thrown out as unconstitutional by the Supreme Court) changed the legal status between the parties. Both holdings are legally incorrect.

A. The single-judge order awarding fees is founded upon the belief that the Governor's signature of the new maps is what mooted this case, not *Shelby County* alone. JA 818, 825, 828-29, 832. The trial court points to the "timing of events," JA 832,

claiming that Texas's case was not completely moot when *Shelby County* was announced, but instead would have became moot two days later when the Supreme Court vacated the judgment in this case for mootness and remanded in light of *Shelby County*. JA 832 ("[T]he Governor formally executed the legislation replacing the Plans one day *before* the Supreme Court vacated and remanded this Court's denial of preclearance."). According to the district court, the Governor's signature snatched defeat from the jaws of the next day's victory.

But *Shelby County* alone mooted this case. And that is true for three reasons. First, Supreme Court judgments are entered on the same day that the opinion is handed down; there is no delay for the mandate to issue. ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 823-24 (9th. ed. 2007) ("The Clerk enters the Court's judgments on the day of decision. . . . [A] formal mandate does not issue unless the Court specifically so directs."). And once Shelby County "alone" mooted the case, it could not become *more moot* by subsequent action of the Governor. "[I]t is axiomatic that the controversy between these parties could not have become 'more moot' as a result of subsequent [action]." *In re Scruggs*, 392 F.3d 124, 129 (5th Cir. 2004) ("There is no such thing as being a little bit moot.").

Second, we know that *Shelby County* is what mooted this case because that is what the three-judge court in this case previously held. *See* Memorandum and Order at 4, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Dec. 3, 2013) (JA 435) ("*Shelby County*

dismantled the legal framework that called for preclearance of Texas's redistricting plans in the first place. *That alone rendered Texas's claim for declaratory relief moot.*" (emphasis added)).

A single member of that three-judge court was powerless to contradict the three-judge court's earlier holding. Section 5 of the Voting Rights Act provides that litigation "under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28." 42 U.S.C. § 1973c(a). A single judge may not conduct "the trial" or "enter judgment on the merits," and "[a]ny action of a single judge may be reviewed by the full court at any time before final judgment." 28 U.S.C. § 2284(b)(3). The statute thus does not permit a single judge to issue a final judgment resolving all claims. *See, e.g.*, *LaRouche v. Fowler*, 152 F.3d 974, 981–86, 998 (D.C. Cir. 1998) (following a single judge's dismissal of Voting Rights Act claims, this Court remanded and required a three-judge district court: "both this court and the single-judge district court below largely lack jurisdiction to decide the merits of this issue because the question properly belongs before a three-judge district court"). Here, the three-judge district court issued its final order dismissing as moot Texas's claims on the ground that Shelby County "dismantled the legal framework" for preclearance and "[t]hat alone rendered Texas's claim for declaratory relief moot." JA 435. Upon the expiration of the time for parties to appeal that judgment, it became final and unreviewable. And in any event, at no time did a single judge have the authority to

alter the three-judge district court's final judgment. *See, e.g.*, *Kenny v. United States*, 118 F. Supp. 907, 910 (D.N.J. 1954) (explaining that where a three-judge district court had determined that plaintiffs had a right to maintain an action, the single judge reviewing the claim for attorneys' fees had no power to reconsider that determination); *cf. Chapman v. Meier*, 420 U.S. 1, 13–14 (1975) (finding jurisdiction over an appeal under 28 U.S.C. § 1253 as a result of the requirement that only a three-judge district court convened under 28 U.S.C. § 2281 could amend the judgment of a similarly convened three-judge district court: "It would be highly anomalous if jurisdiction were not here, for then it would follow that a single judge could invalidate a reapportionment plan that had been evolved or approved, and was required so to be, by a three-judge court some time before.").

The order awarding attorneys' fees, however, is founded upon an impermissible modification of the three-judge district court's final judgment. The opinion of the single judge notes that the issue of attorneys' fees "is an ancillary matter" that may be left to a single judge, JA 819, but before proceeding to the issue of fees, the opinion erroneously claims that "both *Shelby County* and Texas's enactment of superseding redistricting plans" mooted Texas's claims, JA 818. According to the fee award, the new Texas statutes (which were not signed by the Governor and thus could not take effect until after the *Shelby County* decision) mooted Texas's claims. Perhaps the clearest demonstration of the fee-award opinion's error is in the suggestion that because the

Governor signed the legislation enacting new maps before the Supreme Court vacated the district court's preclearance decision, *Shelby County* cannot preclude a fee award. JA 832. This assertion is based upon a misunderstanding of mootness (which occurred, for all pending preclearance matters, upon the announcement of the *Shelby County* decision) and a misunderstanding of the nullification effect of the *Shelby County* decision (which detailed in great length that continued imposition of any of the burdens of the preclearance regime violated the covered jurisdictions' constitutional rights).

And it is only after modifying the three-judge court's mootness determination that the single judge fee award could purport to award fees based upon, for example (1) the district court's argument that the Governor's signature of Texas's 2013 districting plans "enshrined into law" the district court's denial of preclearance to the 2011 plans, JA 825; JA 826 (The defendant intervenors argue that they "achieved the relief they sought because Texas discarded the challenged Plans and adopted different redistricting plans."), (2) the suggestion that even after *Shelby County* was decided, the defendant intervenors retained prevailing-party status at the time the 2013 plans went into effect, JA 828, and (3) the belief that Shelby County could not erase "the real-world vindication that Fee Applicants had achieved," JA 829, and that fees could be awarded on a version of the "catalyst" theory, JA 822-25, as a way to sidestep *Shelby County*'s holding that the entire statute that the defendant intervenors relied on for this litigation is unconstitutional, JA 828-32. The fee award continues to give effect to a statutory

scheme that was invalidated for the very reason that imposing it against the States violated their constitutional guarantee of equal sovereignty. This fee award is incompatible both with the ruling and the reasoning of *Shelby County* and with the three-judge district court's final order.

Moreover, Texas was prejudiced by the untimely nature of the single judge's purported change of the basis for the district court's mootness ruling. First, had the three-judge court not determined that *Shelby County* "alone" mooted Texas's claims, Texas would have been afforded the opportunity to seek reconsideration of any erroneous ruling that the 2013 districting plans mooted the lawsuit. The State would have done so and urged the district court to dismiss, as Texas had in its motion, solely on the basis of *Shelby County*. JA 818 ("Texas moved to dismiss this lawsuit as moot in light of Shelby County."). Because the trial court's dual-ground mootness ruling arose in the first instance in the fee award, Texas was deprived of the opportunity to seek reconsideration from the three-judge court. And even if the reconsideration motion had been denied, that denial would have notified Texas that the three-judge court had left open the possibility of awarding attorneys' fees on an alternative theory of mootness. Second, by relying (correctly) on *Shelby County* "alone," JA 835, the three-judge court's dismissal invited the State to respond to the fee requests based upon *Shelby County* alone. Yet after Texas did exactly that, a single judge cast *Shelby County* aside as merely a "subsequent decision in a different lawsuit," JA 813, claimed that mootness rested on a

different ground, and relied on the new ground to provide the basis for fee awards totaling more than $1 million. That about-face imposed extreme prejudice on Texas and furthers the unconstitutional, and irreparable, burdens that this preclearance litigation has imposed on the State.

The third and final reason we know that *Shelby County* alone is what mooted this case is that the Supreme Court has essentially said so. The Supreme Court's disposition of Texas's appeal in this case demonstrates that the Supreme Court understood that the *Shelby County* decision—not any action taken by the State of Texas—mooted this case. A few hours after the Supreme Court issued its decision in *Shelby County* (and before Governor Perry signed the legislation enacting the 2013 districting plans), the Davis Intervenors moved to dismiss Texas's appeal in the Supreme Court. Critically, the Intervenors argued that Texas's appeal was moot, not that the case was moot. *See, e.g.*, Motion of Appellee-Intervenors to Dismiss Appeal as Moot at 1, *Texas v. United States*, No. 12-496 (U.S.) ("Appellee-Intervenors respectfully move this Court to dismiss this appeal as moot, allow the decision below to stand, and remand this case to the three-judge court for the United States District Court for the District of Columbia for further proceedings.") (emphasis added); *id.* at 10–11 (same); *id.* at 5 ("[T]his appeal is moot . . . ."); *id.* at 10 ("Texas . . . has made a choice to moot this appeal . . . ."). And the Intervenors repeatedly urged the Supreme Court to "allow the decision below to stand."

Id. at 1; *id.* at 5, 10; *see also id.* at 9 (arguing that the Supreme Court "should preserve the decision below").

Texas's response noted, however, that "[t]he critical intervening event for purposes of Texas's appeal is not any forthcoming action of the Governor but today's [*Shelby County*] decision." Appellant's Opposition to Appellee-Intervenors' Motion to Dismiss Appeal as Moot at 1, *Texas v. United States*, No. 12-496 (U.S.). Thus, the Supreme Court "should dispose of Texas's appeal in light of *Shelby County*," and "the proper course of action is to vacate the district court's order." *Id.* at 2; *see also id.* at 4 ("[T]he Court should deny Intervenors' motion to dismiss, and [the Court] should vacate the district court's judgment in light of *Shelby County*"). Finally, Texas explained that "[t]he transparent purpose behind Intervenors' motion is to preserve a claim to attorneys' fees based on the district court's judgment. But if Texas was not validly subject to the preclearance process in the first place—as the Court made clear in *Shelby County*—then Texas surely cannot be compelled to pay the Intervenors' fees arising from litigation under that now-invalidated statute." *Id.* at 3.

By vacating the district court's judgment, just as Texas had requested, the Supreme Court's judgment suggests that it rejected the defendant intervenors' argument that Texas had mooted its own appeal. JA 429. When a case becomes moot through happenstance or through no act of the appellant, "[t]he established practice" of the Supreme Court is to vacate the judgment below. *United States v. Munsingwear, Inc.*, 340

U.S. 36, 39 (1950). But when mootness arises due to the appellant's actions, the decision of the lower court is permitted to stand. *U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) ("The principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action."); *see also Karcher v.May*, 484 U.S. 72, 83 (1987) ("This controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party . . . declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case."); *Alvarez v. Smith*, 558 U.S. 87, 94 (2009). If the Supreme Court had believed that the Governor's signature mooted this case, then it would have refused to vacate the district court's preclearance judgment.

B. The district court's fee-award opinion gives a second reason why the losing parties should be deemed winners. The district court suggests that no matter when this case became moot, the defendant intervenors are prevailing parties because they achieved "real world" gains by changing the legal relationship between the parties. JA 828. Specifically, the district court credits an unconstitutional statute and its now vacated judgment with coercing the State's compliance, specifically: (1) causing the Governor to sign new redistricting legislation and (2) causing the Western District of Texas to enter an interim order. Under the district court's approach, nearly every federal court loser would have a shot at attorneys' fees. That is why the district court's approach has never been the law, and it certainly cannot withstand the Supreme Court's decision to reject

the "catalyst" theory of fee awards. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 600 (2001) (holding that a party's change in conduct is not a sufficient basis to award fees to the other side and instead demanding judicial imprimatur on the defendant's change of conduct).

The district court relies on *National Black Police Association v. District of Columbia Board of Elections & Ethics*, 168 F.3d 525 (D.C. Cir. 1999) and *Grano v. Barry*, 783 F.2d 1104 (D.C. Cir. 1986), cases in which injunctions changed the legal relationship between the parties, even if only for a short while. Those courts awarded fees to parties that won below, thereby securing temporary relief, but had their cases mooted on appeal. But one significant and controlling difference between those cases and this one is that those cases were mooted on appeal either by happenstance or by the defendant's change in conduct. None of those cases (and we have found no such case) involve temporary relief afforded by an order or judgment that was eventually overturned on appeal.

The trial court's approach would produce thousands of unworthy winners. For example, district courts routinely issue preliminary injunctions against the government that are eventually (sometimes swiftly) reversed on appeal, and it would be outlandish if the plaintiffs could claim attorneys' fees for the period of time when the unlawful injunction stood. ALAN HIRSCH & DIANE SHEEHEY, AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION 8 (Federal Judicial Center 1994) (explaining that fees are not awarded in such situations). Imagine a First Amendment plaintiff who secures

a preliminary or permanent injunction in federal district court allowing her to speak despite a state law to the contrary. She has achieved a real world gain, at least for a time. In the district court's words, that injunction "changes the legal relationship between the parties." *See* Op. 16-17. But if the State gets that injunction thrown out on appeal, the plaintiff could not claim attorneys' fees for the period of time in which she was allowed to speak. *Sole v. Wyner*, 551 U.S. 74 (2007). Courts do not award fees to parties who lose on appeal, no matter how many undeserved gains they racked up in the lower courts. And none of the cases cited by the district court suggest otherwise. Indeed, the opposite may be true: the State might be free to bring criminal charges against the plaintiff for any speech made in reliance on the erroneously issued preliminary injunction. *See Edgar v. MITE Corp.*, 457 U.S. 624, 651 (1982) (Stevens, J., concurring) ("Since a final judgment declaring a state statute unconstitutional would not grant immunity for actions taken in reliance on the court's decision, certainly a preliminary injunction—which on its face does nothing more than temporarily restrain conduct—should not accomplish that result.").

Of course, this case was rendered moot on appeal, just like the cases cited by the trial court. But mootness in this case was not through happenstance or a change in conduct of any party. This case was rendered moot when the Supreme Court issued a judgment embracing an argument that Texas was making on appeal in a separate case before the Court, which the Court was holding for *Shelby County*. Because of the very

nature of the Supreme Court's holding in *Shelby County*, throwing out the preclearance regime as unconstitutional, Texas could only win through mootness. But it was a complete win nevertheless, which the Supreme Court recognized two days later when it vacated the trial court's unconstitutional judgment. Texas's victory came as mootness, but it was a mootness quite different from that in the cases cited by the district court.

2. What the trial court endorsed here is even more aggressive than what the losing plaintiff was seeking in *Sole v. Wyner*, 551 U.S. 74 (2007). Texas was the *plaintiff* complaining of unconstitutional action by the government, not a governmental defendant. A plaintiff subject to an unconstitutional statute, like Texas, cannot be declared the loser because the United States and its intervenor allies succeeded in coercing compliance with that unconstitutional statute until the moment the statute was thrown out by the Supreme Court. The United States did not prevail in the Pentagon Papers case because it succeeded in delaying publication until the Supreme Court could act. *New York Times, Co. v. United States*, 403 U.S. 713 (1971). Nor did the United States prevail in *Citizens United* because it succeeded in delaying electioneering communications until the Supreme Court intervened. *Citizens United v. F.E.C.*, 558 U.S. 310 (2010).

3. In any event, even if the district court were not misreading the attorneys' fees cases, its order still should be vacated because it rests on a shaky presentation of historical events. The district court claims that, despite Texas's victory in the courtroom, the defendant intervenors are prevailing parties because they achieved "real world"

success. JA 829. The trial court explains that the defendant intervenors are the real prevailing party because their lawsuit (which they had lost the day before) caused the Governor of Texas to sign a law replacing the plans that were the subject of this preclearance lawsuit with plans drawn by the Western District of Texas. JA 828 (holding that defendant intervenors "achieved the relief they sought because Texas discarded the challenged Plans and adopted different redistricting plans.").

But that "real world" success story has no correspondence with the real world. The district court makes the unsupportable assumption that the Governor of Texas was paying no attention to the work of the Supreme Court and that he would have signed the bill regardless of the outcome in *Shelby County*. There is no reason to assume that is true. The timing of the Governor's signature (one day later) suggests that he was waiting on the outcome of *Shelby County*. The timing and circumstances suggest that *Shelby County* caused him to sign the bill, not the plaintiffs' efforts in defense of a lawsuit — efforts that had gone down in flames one day before the Governors' signature. To be sure, the Texas Legislature passed the bill before they knew *Shelby County's* outcome (though nearly every observer was expecting the eventual result). But the legislature would have known that it had the Governor as a backstop, who could let the bill die on his desk if the result in *Shelby County* was a surprise.

The district court's counter-narrative makes little sense. By the time the Governor signed the bill, he would have known — he certainly knew — that the Supreme Court

had given Texas a victory on appeal, that the case was over and moot, and that on remand the trial court's opinion and judgment would not be long for this world. The only argument left for the defendant intervenors is to suggest that their loss in the Supreme Court somehow caused the Governor to sign the law, but we do not understand what shape that argument could take.

II. EVEN IF TEXAS HAD NOT APPEALED AND WON, *SHELBY COUNTY* WOULD PRECLUDE AWARDING ATTORNEYS' FEES ON THE BASIS OF AN UNCONSTITUTIONAL STATUTE.

Shelby County means what it repeatedly says: section 5's federalism costs are too great to permit the imposition of preclearance burdens on the previously covered jurisdictions. And the Supreme Court's decision forecloses any continued use of preclearance litigation to infringe upon Texas's sovereignty. *Shelby County*, 133 S. Ct. at 2627–31. Yet the defendant intervenors sought (and the district court obliged) to impose upon Texas even more financial burdens on the basis of this unconstitutional statutory scheme.

Federal statutes held unconstitutional may not continue to operate to the disadvantage of the States or the People. Rather, unconstitutional acts are treated as if they were never passed. "[A]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cnty.*, 118 U.S. 425, 442 (1886); *Hirsh v. Block*, 267 F. 614, 618 (D.C. Cir. 1920) *rev'd on other*

grounds, 256 U.S. 135 (1921) (quoting *Norton*, 118 U.S. at 442). As the Supreme Court explained two centuries ago, "the theory of every [constitution-based] government must be [] that an act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And "if an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory." *Id.* To permit otherwise "would declare[] that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual." *Id.* at 178.

The federal statute purporting to require Texas to file a federal lawsuit and to obtain preclearance prior to implementing the Legislature's districting plans was a nullity; the entire exercise of subjecting the State to the burdens associated with preclearance litigation was an unconstitutional imposition on the State's sovereignty. *See Shelby Cnty.*, 133 S. Ct. at 2631. This preclearance litigation imposed a significant number of unconstitutional burdens on Texas. The defendant intervenors unnecessarily exacerbated those burdens by voluntarily injecting themselves as defendants into Texas's then-compulsory lawsuit against the United States. The district court's fee order uses the unconstitutional preclearance statute to impose additional burdens on Texas (in the form of substantial attorneys' fees). The fee award thus further violates Texas's right to equal

sovereignty in clear disregard for *Shelby County* and the Supreme Court's disposition of Texas's appeal in this case.

CONCLUSION

The Court should vacate order awarding attorneys' fees to the defendant intervenors.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Solicitor General

ADAM W. ASTON
Deputy Solicitor General

ARTHUR C. D'ANDREA
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1896
[Fax] (512) 370-9191
jonathan.mitchell@texasattorneygeneral.gov

COUNSEL FOR STATE OF TEXAS

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 accompanying brief has been prepared in Word Perfect 12 using 14-point Garamond typeface and is double-spaced (except for headings, footnotes, and block quotations). I further certify that the brief is proportionally spaced and contains 5495 words, excluding the parts of the brief exempted by D.C. Circuit Rule 32(a)(1). Word Perfect 12 was used to compute the word count.

Dated: December 15, 2012 /s/ Jonathan F. Mitchell
Jonathan F. Mitchell

CERTIFICATE OF SERVICE

I certify that, on December 15, 2014, 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 documents will be hand-delivered to the Clerk of the Court.

/s/ Jonathan F. Mitchell
Jonathan F. Mitchell