IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA and ERIC H. HOLDER, JR., In His Official Capacity As Attorney General Of The United States, Defendants, WENDY DAVIS, *et al.*, Defendant-Intervenors, MEXICAN-AMERICAN LEGISLATIVE CAUCUS, Defendant-Intervenors, GREG GONZALEZ, *et al.*, Defendant-Intervenors, TEXAS LEGISLATIVE BLACK CAUCUS, Defendant-Intervenor, TEXAS LATINO REDISTRICTING TASK FORCE, Defendant-Intervenor, TEXAS STATE CONFERENCE OF NAACP BRANCHES, *et al.*, Defendant-Intervenors, League of United Latin American CITIZENS (LULAC)	)	No.1:11-CV-1303 (RMC-TBG-BAH) (three-judge court)

DEFENDANT-INTERVENORS WENDY DAVIS, ET AL.'S REPLY TO PLAINTIFF'S OPPOSITION TO THE MOTION FOR ATTORNEYS' FEES, COSTS, AND EXPENSES

Plaintiff, the State of Texas ("Plaintiff" or "Texas"), filed a three-page "Advisory" on December 20, 2013, arguing that *it* was the prevailing party in this case, not the Davis

Intervenors, because of the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In its "Advisory," Texas rested its case opposing the Davis Intervenors' fee motion entirely on the argument that "*Shelby County* requires the immediate denial of all motions for fees and costs," Pl.'s Advisory at 3 (ECF No. 259), and noted that "the State does not intend to respond unless requested to do so by the Court," *id.*

That is not the way this works. The Local Rules for the Court provide that

> [w]ithin 14 days of the date of service or at such other time as the Court may direct, 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) (emphasis added). The Rule does *not* say that a party may file an opposition brief masquerading as an "Advisory" in which it puts forth what it considers its best argument, wait for the Court to indicate whether it agrees, and then get an opportunity to file a *second* opposition brief in the event the Court disagrees with the arguments put forth in the first. If that were the rule, parties could always file piecemeal briefs presenting one argument at a time, defeating the purpose of the time limits in Rule 7(b) and needlessly prolonging the resolution of disputes.

This Court specifically invited the parties to seek fees in its December 3, 2013 order, noting that Intervenors were "free to seek attorneys' fees after dismissal." Dec. 3, 2013 Mem. & Order at 4 (ECF No. 255) (citing *Comm'rs Court of Medina Cnty., Tex. v. United States*, 683 F.2d 435, 438 (D.C. Cir. 1982)). Intervenors did so, and Texas had the chance to oppose Intervenors' motion. Texas gets one bite at the apple, which it took with its "Advisory." The burden is not on the Court to waste its resources "request[ing]" that the State of Texas oppose more of the arguments put forth in the Davis Intervenors' motion, nor would doing so be fair to

the Davis Intervenors. "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) (emphasis added); *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.")). "The premise of our legal system is 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) (emphasis added). "[W]here counsel has made no attempt to address [an] issue, [the Court] will not remedy the defect . . . ." *Id.* The Court should not entertain Texas's invitation that it "request" further arguments in opposition.

Because Texas is not permitted to file multiple piecemeal opposition briefs until it finds an argument that will stick, the Davis Intervenors thus treat the "Advisory" as Texas's sole permitted opposition brief, and submit the following in reply.

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

Texas contends that, as a result of *Shelby County*, "[t]he federal statute purporting to require preclearance was a nullity, and the entire exercise of subjecting Texas to 'preclearance' was an unconstitutional imposition on the State." Pl.'s Advisory at 2.[1] As a result, Texas

[1] Contrary to Texas's claim, *Shelby County* did not alter Section 5's preclearance requirement, only the coverage formula of Section 4 because it did not "speak[] to current conditions." *See Shelby County*, 133 S. Ct. at 2631. Texas's indignant protestations that it was "subject[ed]" to the "entire exercise" of preclearance are thus ironic, given this Court's finding that the State *intentionally* discriminated against minorities in crafting its electoral maps and thus the "current conditions" of racial discrimination in voting are certainly present in Texas. *See* Aug. 28, 2012 Memorandum Opinion at 46 (ECF No. 230).

contends, this Court's order denying preclearance cannot support a conclusion that the Davis Intervenors were prevailing parties because the Supreme Court's holding in *Shelby County* must be given "full retroactive effect in all cases still open on direct review." *Id.* (quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993)). This argument misses the mark for several reasons.

First, Texas seems to suggest that the Supreme Court's decision actually erased from history events that happened in the world pre-*Shelby County*. As a result of this Court's order denying preclearance, Texas was unable to use its enacted maps in the 2012 elections, to the benefit of the Davis Intervenors. The San Antonio Court imposed interim maps favorable to the Davis Intervenors, and Texas later enacted those maps as permanent. The maps Texas first enacted—which the Davis Intervenors opposed and this Court denied preclearance of—were never used in any election. This is precisely the type of real world victory that entitles the Davis Intervenors to attorneys' fees regardless of the later dismissal of the case as moot. *See Nat'l Black Police Ass'n v. D.C. Bd. of Elections & Ethics*, 168 F.3d 525, 528 (D.C. Cir. 1999) ("[P]laintiffs 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."). These historical facts are not erased from existence by *Shelby County*. *See Frazier v. Bd. of Trs. of Nw. Miss. Reg'l Med. Ctr.*, 765 F.2d 1278, 1294 (5th Cir. 1985) ("[A] subsequent change in law does not convert an otherwise 'prevailing' civil rights [party] into a nonprevailing party."). *Shelby County* did not undo the 2012 election.

Second, Texas's "Advisory" conveniently ignores that both the Supreme Court, in its vacatur and remand order, and this Court, in its dismissal order, specifically cite to the Davis Intervenors' argument that this case was mooted by Texas's voluntary enactment of the San

Antonio court's interim maps as the State's permanent maps. *See Texas v. United States*, 133 S. Ct. 2885, 2885 (2013) (vacating and remanding "further consideration in light of *Shelby County v. Holder* . . . and the suggestion of mootness of [Defendant-Intervenors]"); Dec. 3, 2013 Order at 3-4 ("[T]he Court instructed us to consider *both* the effect of *Shelby County* and the mootness argument Defendant-Intervenors themselves had raised before the Court. Having followed that instruction, we conclude that Texas's claims are moot." (internal citations omitted)). As explained above, even if the Court had dismissed solely on the basis of *Shelby County*, the Davis Intervenors would still be entitled to fees based on the real world benefit they received in 2012. That position is all the more strengthened by both the Supreme Court and this Court pointing to the fact that Texas mooted the case by its voluntary action adopting the San Antonio Court's interim maps as permanent. *See Nat'l Black Police Ass'n*, 168 F.3d at 528; Davis Intervenors' Mot. at 16-17 (ECF No. 256) (collecting cases for proposition that subsequent mootness does not alter entitlement to attorneys' fees). And even if the Court concludes that the Davis Intervenors would be entitled to fees based on the mootness caused by the State's enactment of the plans, but *not* on the basis of the mootness caused by *Shelby County*, the balance of equities counsel in favor of granting fees. *See Parker v. Califano*, 561 F.2d 320, 330 (D.C. Cir. 1977) ("[T]he congressional policy of encouraging private enforcement of civil rights legislation require[s] a construction favoring wide availability of attorneys' fees . . . .").

Third, Texas entirely ignores that there is an independent judicial order (which was never vacated) that establishes the Davis Intervenors' prevailing party status—the San Antonio court's order imposing interim maps, which relied upon the record in *this* case in concluding the State stood a reasonable probability of failing to gain preclearance *See* Davis Intervenors' Mot. at 18-23. Texas does not even acknowledge this argument, other than to assert that this Court's

August 28, 2012 order was the only "conceivabl[e]" source of the Davis Intervenors' prevailing party status. But the San Antonio court's order, given the unique interplay of the two courts in the Voting Rights Act context, *see* Davis Intervenors' Mot. at 18-23, easily satisfies the requirement that the Davis Intervenors "receive *only some form* of judicial relief," *Turner v. National Transportation Safety Board*, 608 F.3d 12, 15 (D.C. Cir. 2010) (emphasis added).

The Davis Intervenors are entitled to attorneys' fees regardless of *Shelby County*; Texas's argument to the contrary should be rejected.

II. Texas Has Conceded All Other Argument in Opposition to the Fee Motion.

Texas has based its entire argument opposing fees on the effect of *Shelby County*. *See* Pl.'s Advisory. Texas has conceded all other arguments, including the reasonableness of the hourly rates sought by the Davis Intervenors, the reasonableness of the number of hours expended, the reasonableness of the costs and expenses sought, and any other arguments.

"[I]f 'a plaintiff files an opposition to a . . . motion and addresses only certain arguments made by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.'" *Slovinec v. Am. Univ.*, 520 F. Supp. 2d 107, 111 (D.D.C. 2007) (quoting *Buggs v. Powell*, 293 F. Supp. 2d 135, 141 (D.D.C. 2003)); *see also Burnett v. Sharma*, 511 F. Supp. 2d 136, 145 (D.D.C. 2007) (considering *res judicata* argument conceded where party failed to respond in its brief); *Watts v. United States*, No. 06-1531 (RJL), 2007 WL 2827917, at *1 (D.D.C. Sept. 26, 2007) (concluding argument conceded where brief failed to respond to issue). The D.C. Circuit "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. D.C.*, 117 F.3d 571, 577 (D.C. Cir. 1997); *see also Fox*, 389 F.3d at 1295; *FDIC v. Bender*, 127 F.3d 58, 67-68 (D.C. Cir. 1997); *Geller v. Randi*, 40 F.3d 1300, 1304 (D.C. Cir. 1994). The 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.

Enforcement of this rule is necessary here for reasons of basic fairness. The Davis Intervenors would not be able to add additional arguments to their fee motion after the fact. *See United States v. Van Smith*, 530 F.3d 967, 973 (D.C. Cir. 2008) (stating that parties must "raise all of their arguments in their opening brief" (quotation marks omitted)). "Strictly enforcing procedural rules ensures both that cases are adjudicated efficiently and that litigants argue their cases on a level playing field." *English-Speaking Union v. Johnson*, 353 F.3d 1013, 1021 (D.C. Cir. 2004). Courts are "arbiters of legal questions presented *and argued* by the parties before them," *Carducci*, 714 F.2d at 177 (emphasis added), and the Court should not "remedy the defect" in Texas's brief of failing to address certain arguments, *id.*

The Court should treat all of the Davis Intervenors' arguments not addressed by the State as conceded.

Conclusion

The Court should award fees to the Davis Intervenors in the amounts requested in the opening motion for attorneys' fees, costs, and expenses.

Dated: December 27, 2013

Respectfully submitted,

/s/ J. Gerald Hebert
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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of December, 2013, I served a copy of the foregoing Davis Intervenors' Reply in Support of the Motion for Attorneys' Fees, Expenses and Costs, on counsel who are registered to receive NEFs through the CM/ECF system. All attorneys who have not yet registered to receive NEFs have been served via first-class mail, postage prepaid.

/s/ J. Gerald Hebert
J. GERALD HEBERT