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-Intervenor,

GREG GONZALES, *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.

Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH)
Three-Judge Court

UNITED STATES' RESPONSE TO TEXAS'S MOTION TO DISMISS

The State of Texas filed this declaratory judgment action against the United States and Attorney General Eric H. Holder, Jr. (collectively "the United States") seeking preclearance—pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c—of its 2011 redistricting plans. The State now seeks voluntary dismissal of its outstanding Section 5 claims. For the reasons that follow, the United States does not oppose voluntary dismissal of the State's remaining preclearance claims.

I. Background

On July 19, 2011, the State of Texas filed a complaint in this Court seeking Section 5 review of recently-enacted redistricting plans for the Texas delegation to the U.S. Congress, the Texas Senate, the Texas House of Representatives, and the Texas State Board of Education. *See* Compl. ¶¶ 39-49 (Dkt. No. 1). On September 22, this Court granted preclearance to the State Board of Education plan. *See* Minute Order (Sept. 22, 2011); *see also Texas v. United States*, 887 F. Supp. 2d 133, 138 n.1 (D.D.C. 2012) (three-judge court), *vacated*, 570 U.S. ___, 2013 WL 3213539 (U.S. June 27, 2013). On August 28, 2012, after having conducted a two-week bench trial, this Court denied preclearance of the Congressional, Senate, and House plans (collectively "the 2011 plans") and specifically concluded that the State had failed to carry its burden to establish the absence of discriminatory intent regarding the Congressional and Senate plans. *See Texas v. United States*, 887 F. Supp. 2d at 138, 159-65. After entry of judgment, Texas appealed the denial of preclearance to the U.S. Supreme Court. *See* Notice of Appeal (Dkt. No. 234).

On June 23, 2013, while that appeal was pending, the State of Texas enacted legislation containing new redistricting plans for its Congressional delegation, the Texas Senate, and the Texas House of Representatives (collectively "the 2013 plans"). *See* Tex. S.B. 2, 83d Leg., 1st

Called Sess. (enacting 2013 Senate plan); Tex. S.B. 3, 83d Leg., 1st Called Sess. (enacting 2013 House plan); Tex. S.B. 4, 83d Leg., 1st Called Sess. (enacting 2013 Congressional plan). The statutes enacting these new maps expressly repealed the 2011 plans. *See* Tex. S.B. 2, *supra*, § 3; Tex. S.B. 3, *supra*, art. III, § 3; Tex. S.B. 4, *supra*, § 3. Pursuant to the Texas Constitution, these bills will go into effect on September 23, 2013, ninety days after the conclusion of the special session in which they were passed. *See* Tex. Const. art. III, § 39. Texas has not implemented, and no longer intends to implement, the 2011 redistricting plans remaining at issue in this litigation.

Two days after Texas enacted the 2013 plans, the U.S. Supreme Court announced its decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In *Shelby County*, the Supreme Court held that the coverage formula in Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), as reauthorized by the Voting Rights Act Reauthorization and Amendments Act of 2006, is unconstitutional and can no longer be used as a basis for determining that particular jurisdictions need to submit voting changes to the Attorney General or to this Court for Section 5 review. *See* 133 S. Ct. at 2631. The Court did not address the constitutionality of Section 5 itself. *See id.* On June 27, 2013, the Supreme Court entered an order vacating the judgment of this Court and remanding for further consideration in light of *Shelby County* and "the suggestion of mootness" made in a filing concerning the 2011 plans. *Texas v. United States*, 570 U.S. ___, 2013 WL 3213539 (U.S. June 27, 2013).

On July 3, the State of Texas filed the motion to dismiss now at issue. The State has moved to voluntarily dismiss "all claims asserted in its Original Complaint" on the basis that *Shelby County* has rendered those claims moot. Mot. to Dismiss at 1 (Dkt. No. 239).

II. The United States Does Not Oppose Texas's Motion for Voluntary Dismissal of the Preclearance Claims.

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that:

> Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Dismissals under Rule 41(a)(2) "generally [are] granted in the federal courts unless the defendant would suffer prejudice other than the prospect of a second lawsuit or some tactical disadvantage." *Conafay v. Wyeth Labs.*, 793 F.2d 350, 353 (D.C. Cir. 1986). Prior to dismissal, "the Court must determine: (1) whether plaintiffs' motion for voluntary dismissal was sought in good faith; and (2) whether the defendants would suffer 'legal prejudice' from a dismissal at this stage in the litigation." *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 304 (D.D.C. 2000); *see also Busby v. Capital One, N.A.*, 841 F. Supp. 2d 49, 55 (D.D.C. 2012) (defining legal prejudice to include "defendant's trial preparation efforts, any excessive delay or lack of diligence by the plaintiff in prosecuting the action, an insufficient explanation by the plaintiff for taking nonsuit, and the filing of motions for summary judgment by the defendant"). Rule 41(a)(2) dismissal is subject to a district court's discretion. *See, e.g.*, *Taragan v. Eli Lilly & Co., Inc.*, 838 F.2d 1337, 1339 (D.C. Cir. 1988).

The United States does not oppose Texas's motion for voluntary dismissal of its remaining claims for preclearance of the 2011 plans. The State no longer intends to implement the redistricting plans that remain at issue in this litigation; thus, the dismissal causes no

prejudice to the United States. In turn, there is no need for this Court to address the impact of *Shelby County* on these proceedings.

On July 3, 2013, Intervenors also filed a motion for leave to file an answer and counterclaim in this matter. *See* Mot. for Leave (Dkt. No. 240). Although dismissal under Rule 41(a)(2) is not available when a counterclaim is pending unless that counterclaim can be independently litigated, a motion for leave to file a counterclaim is insufficient to trigger that bar. *See S.C. Johnson & Son, Inc. v. Boe*, 187 F. Supp. 517, 520 (E.D. Pa. 1960); *cf. Chinook Research Labs., Inc. v. United States*, 22 Cl. Ct. 853, 855 n.1 (1991) (applying same construction to a parallel rule for the U.S. Claims Court). Rule 41(a)(2) therefore does not bar voluntary dismissal of Texas's claims.

III. Conclusion

For the reasons set out above, the United States does not oppose voluntary dismissal of the State's remaining preclearance claims.

Date: July 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2013, I served a true and correct copy of the foregoing via the Court's ECF system on the following counsel of record:

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