No. 12-496

JUN 2 4 2013

IN THE

Supreme Court of the United States

STATE OF TEXAS,

Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

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

MOTION OF APPELLEE-INTERVENORS TO DISMISS APPEAL AS MOOT

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INTRODUCTION

Pursuant to Rule 21.2(b) of the Rules of this Court, the undersigned 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.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973c, prohibits covered jurisdictions from adopting or implementing changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States Attorney General or a three-judge court in the United States District Court for the District of Columbia by demonstrating that the proposed change "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c(a).

As a covered jurisdiction subject to Section 5, *see* 28 C.F.R. Pt. 51 App., Texas is required to preclear any voting change, including a statewide redistricting plan. After the 2010 decennial census, Texas redrew its statewide districting plans for Congress, the State Senate, and the State House of Representatives. Governor Rick Perry signed the bills enacting the redistricting plans between June 17 and July 18, 2011. J.S. App. 154, 209, 240.

In lieu of administrative preclearance from the Attorney General, Texas sought judicial preclearance of each plan by filing an action in the United States District Court for the District of Columbia on July 19, 2011. *Id.* at 4. The United States opposed preclearance of the Congressional and State House redistricting plans. *Id.* at 3. Appellee-Intervenors opposed preclearance of all three statewide plans. *Id.* A three-judge panel was convened.

On August 28, 2012, after a two-week trial, the three-judge panel denied preclearance to all three of Texas's proposed redistricting plans. *Id.* at 1. First, the panel concluded that Texas's Congressional plan was both retrogressive with respect to Latino voters and enacted with a discriminatory purpose with regard to Latino and African-American communities. *Id.* at 51. The court next denied preclearance to the State Senate plan, finding that "the Texas legislature redrew the boundaries for SD [Senate District] 10 with discriminatory intent." *Id.* at 58. Finally, the court determined that the State House plan was retrogressive because it would "have the effect of abridging minority voting rights in four ability districts." *Id.* at 69.

On October 19, 2012, Texas sought review of the three-judge panel's decision in this Court, asking the Court to "note probable jurisdiction and set this case for oral argument . . . so that Texas can implement its legislatively enacted plans for the next electoral cycle." J.S. 5. Texas's jurisdictional statement remains pending with this Court.

2. Because the redistricting plans that are the subject of this appeal were not precleared as required under Section 5 of the Voting Rights Act by the time the 2012 election process was beginning, a three-judge court in the United States District Court for the Western District of Texas that had been convened to adjudicate other constitutional and statutory challenges to the plans was left with the unwelcome task of implementing interim plans for the 2012 elections. After hearing evidence, and viewing proposed interim maps presented by all parties, the three-judge court promulgated its own interim redistricting plans for Congress, the Texas Senate, and the Texas House on November 23, 2011.

Texas subsequently filed an emergency application for a stay with this Court. On December 9, 2011, this Court granted the stay, treated the application for a stay as a jurisdictional statement, and noted probable jurisdiction. On January 20, 2012, this Court held that because it was unclear whether the District Court for the Western District of Texas followed the appropriate standards in drawing interim maps for the 2012 Texas elections, the orders implementing those maps should be vacated, and the cases remanded for further proceedings. *Perry v. Perez*, 132 S. Ct. 934 (2012).

The three-judge court for the Western District of Texas subsequently held further hearings and adopted revised interim plans on February 28, 2012. The 2012 primary and general elections for Congress, the Texas Senate, and the Texas House of

Representatives took place under these court-drawn interim plans.

3. On May 27, 2013, Texas Governor Rick Perry called a special session of the Texas Legislature specifically for the purpose of considering legislatively adopting the court-drawn interim plans. *See* Press Release, Office of the Governor, Rick Perry, Gov. Perry Announces Special Session for May 27 (May 27, 2013) *available at* http://governor.state.tx.us/news/press-release/18575/. The Legislature subsequently held hearings on this proposal. Between June 21 and 23, 2013, the Texas Legislature enacted three new statewide redistricting plans for Congress, the Texas Senate, and the Texas House, adopting by statute the same, or in the case of the Texas House, an amended version of, the redistricting plans that had been ordered into effect by the three-judge court. S.B. 2, 83rd Leg., 1st Sess. § 1 (Tex. as passed by House, June 21, 2013) (Texas Senate Plan); S.B. 3, 83rd Leg., 1st Sess. art. I, § 1 (Tex. as passed by Senate, June 23, 2013) (Texas House Plan); S.B. 4, 83rd Leg., 1st Sess. § 1 (Tex. as passed by House, June 21, 2013) (Congressional Plan). In addition to enacting these three new statewide redistricting plans, the statutes containing these plans expressly repeal the three statewide redistricting plans that are at issue in this appeal. S.B. 2, 83rd Leg., 1st Sess. § 2 (Tex. as passed by House, June 21, 2013); S.B. 3, 83rd Leg., 1st Sess. art. III, § 3 (Tex. as passed by Senate, June 23, 2013); S.B. 4, 83rd Leg., 1st Sess. § 3 (Tex. as passed by House, June 21, 2013). Governor Perry, who called the special session specifically for

redistricting, is expected to sign these bills. *See, e.g.,* Gromer Jeffers Jr., *Texas Senate Approves GOP Redistricting Plan,* TRAILBLAZERS BLOG, DALLAS MORNING NEWS (June 14, 2013, 12:40 PM), http://trailblazersblog.dallasnews.com/2013/06/texas-senate-poised-to-approve-gop-redistricting-plan.html. By their terms, these new redistricting plans replace and render irrelevant the three redistricting plans that were enacted by the Legislature in 2011 and that are the subject of this appeal.

ARGUMENT

Because the Texas Legislature has enacted three new statewide redistricting plans that repeal and replace the three statewide redistricting plans that are the subject of this appeal, this appeal is moot, and further review would be inconsistent with the jurisdictional requirements of Article III. The undersigned Appellee-Intervenors therefore respectfully request that this Court 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.

1. Review by this Court of the judgment below is no longer necessary because no active case or controversy currently exists. "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case." *Burke v. Barnes*, 479 U.S. 361, 363 (1987). There is "no case or controversy, and a suit becomes moot when the issues presented are no longer 'live' or

the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted). Here, because of the Texas Legislature's actions in enacting new redistricting plans and repealing the plans at issue in this appeal, there are neither "live" issues nor legally cognizable interests in the outcome at stake.

The issues presented in this litigation are no longer "live" because the redistricting plans at issue in this appeal will not be used by Texas in any future elections. Having enacted a new set of redistricting plans and repealed the plans at issue here, the State no longer seeks to implement any of the three plans that were the subject of this appeal.[1] Thus, the legal

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[1] The fact that the Texas Legislature's newly enacted redistricting plans are subject to preclearance review under Section 5 of the Voting Rights Act before taking effect does not affect the mootness of this appeal. Even if preclearance were denied as to the 2013 plans, the plans currently before this Court would still be obsolete. As noted, the bills containing the new redistricting plans also *expressly* repeal the 2011 plans at issue here. *See* S.B. 2, 83rd Leg., 1st Sess. § 2 (Tex. as passed by House, June 21, 2013); S.B. 3, 83rd Leg., 1st Sess. art. III, § 3 (Tex. as passed by Senate, June 23, 2013); S.B. 4, 83rd Leg., 1st Sess. § 3 (Tex. as passed by House, June 21, 2013). Thus, even upon a denial of preclearance, the State would not revert to the plans involved in this appeal, which have been repealed. *Cf. Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999) (revised redistricting plan enacted after district court determined that earlier plan violated Equal Protection Clause did not render appeal of court's determination moot because legislature expressly provided that state would revert back to earlier plan if determination was reversed on appeal).

status of the plans at issue – the question before this Court on appeal – has been rendered irrelevant by the State's own action. *See Brownlow v. Schwartz*, 261 U.S. 216, 217-18 (1923) ("To adjudicate a cause which no longer exists is a proceeding which this [C]ourt uniformly has declined to entertain.").

Moreover, because of the Texas Legislature's decision to adopt three new redistricting plans and repeal the plans at issue, Texas now lacks a "legally cognizable interest in the outcome" of this appeal. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013) (quotation marks omitted). Indeed, granting Texas the relief it requested has become impossible. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012); *Mills v. Green*, 159 U.S. 651, 653 (1895) (holding that a case is moot where it becomes "impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever").

In its appeal, the State requested that this Court reverse the decision of the court below "so that Texas can implement its legislatively enacted plans for the next electoral cycle." J.S. 5. Yet by repealing the plans at issue and enacting a new set of plans, the Texas Legislature has affirmatively chosen *not* to implement its 2011 legislatively enacted plans for the next electoral cycle. The 2011 plans are now completely obsolete. Consequently, *even if* this Court were to overturn the decision below and hold that the plans at issue should be precleared, Texas would *still* seek to use its newly-enacted 2013 redistricting plans for the next electoral cycle. A

determination as to the validity of the now-repealed challenged maps would thus be purely advisory, and this Court is plainly "not in the business of pronouncing that past actions which have no demonstrable continuing effect were right or wrong." *Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

2. Texas cannot avoid mootness by recasting its appeal as a constitutional challenge to Section 5. Although Texas's jurisdictional statement listed one of its questions presented as "whether the 2006 reauthorization of Section 5 . . . is constitutional," J.S. i, that question is not properly before this Court. As the court below found, "[t]he constitutionality of section 5 was neither briefed nor argued" by the parties and accordingly the court "express[ed] no opinion on this significant point." J.S. App. 24 n.11. Texas may not now attempt to keep its appeal alive by raising a question that was never "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted).

Nor can Texas argue that its interest in avoiding the cost of attorneys' fees provides it a sufficient stake in the outcome of this appeal. This Court has held that an outstanding claim for attorneys' fees "is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). Lacking any sufficient continuing interest in this case, Texas must concede its mootness.

Indeed, in similar circumstances, where statutes at issue are repealed or superseded during the pendency of an appeal for declaratory or injunctive relief, this Court regularly dismisses a pending appeal or petition for certiorari as moot. *See, e.g., Burke,* 479 U.S. at 363 (case mooted when challenged statute expired after lower court judgment); *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972) (per curiam) (declaratory and injunctive "relief is, of course, inappropriate now that the statute has been repealed"). Here, where the redistricting plans at issue have been repealed and replaced by the State Legislature, this Court should follow its long-standing practice and dismiss on grounds of mootness.

3. Finally, upon dismissal of this appeal, this Court should allow the decision of the three-judge panel to stand. Under the circumstances, vacatur of the decision below pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is plainly unjustified. Because this case was mooted due to the unilateral action of the State – the party seeking review – this Court should preserve the decision below.

As this Court has held, "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26-27 (1994)

(quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). In assessing the appropriateness of vacatur upon a finding of mootness, "[t]he principal condition to which [this Court has] looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id.* at 24. Where the judgment of the lower court is "simply unreviewed by [the losing party's] own choice," this Court has denied vacatur. *Id.* at 25.

By enacting its new statewide redistricting proposals and simultaneously repealing its previously enacted plans, Texas – the party seeking review – has made a choice to moot this appeal, rendering a decision as to the validity of the legislatively enacted 2011 redistricting plans purely advisory. Given that "the party seeking relief" has "caused the mootness by voluntary action," vacatur is inappropriate under this Court's precedent. *Id.* at 24. As here, where the losing party "has voluntarily forfeited [its] legal remedy by the ordinary processes of appeal or certiorari" it "thereby surrender[s] [its] claim to the equitable remedy of vacatur." *Id.* at 25.

The Court should therefore allow the decision below to stand and remand to the three-judge court for further proceedings.

CONCLUSION

For these reasons, the undersigned Appellee-Intervenors respectfully move this Court to dismiss this appeal, allow the opinion 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.

June 24, 2013 Respectfully submitted,

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