IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA; ERIC HOLDER in his official capacity as Attorney General of the United States, Defendants, and WENDY DAVIS, *et al*., Defendant-Intervenors.	Civil Action No. 1:11-cv-1303 (RMC-TBG-BAH)

DEFENDANT-INTERVENORS' MEMORANDUM IN OPPOSITION TO PLAINITFF STATE OF TEXAS' MOTION TO DISMISS

Defendant-Intervenors the Texas State Conference of Branches of the NAACP, *et al.*, Wendy Davis, *et al.*, LULAC, the Texas Legislative Black Caucus, and Greg Gonzalez, *et al.*, respectfully submit this memorandum in opposition to the State of Texas' motion to dismiss (Dkt. #239).

ARGUMENT

The Plaintiff State of Texas has filed a motion under Federal Rule of Civil Procedure 41(a) "to dismiss all claims asserted in its Original Complaint." Motion at 1. According to Texas, in light of the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. _____, 2013 U.S. LEXIS 4917 (June 25, 2013), and the Supreme Court's subsequent order vacating this

Court's judgment, "Texas is no longer subject to preclearance, [and] its claims in this Court are now moot." Motion at 1.

Texas filed its motion to dismiss on July 3, 2013, shortly after the Defendant-Intervenors sent a "meet and confer" request to the State with respect to a motion that Defendant-Intervenors intended to file seeking leave to amend their answers and assert counterclaims.[1] Defendant-Intervenors filed their motion seeking leave to amend their answers just minutes later that same day.

There are at least two reasons why Texas' motion to dismiss should be denied.

A. The Court Should Not Dismiss This Case Because the Action Has Not Yet Become Moot

Contrary to the Plaintiff's assertions in its motion to dismiss, this case has not yet been rendered moot by the Supreme Court's decision in *Shelby County*. "[T]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 22 (1994). Had this case been rendered moot by *Shelby*, the Supreme Court would have followed its "established practice" of remanding with a direction to dismiss. It did not so.. Instead, the Court "remanded *for further consideration* in light of [*Shelby*], and the suggestion of mootness of appellees Wendy Davis, et al." *Texas v. United States*, 570 U.S. _____, 2013 U.S. LEXIS 4927 (U.S., June 27, 2013)[2] (emphasis added). The clear directive from the Supreme Court was for this Court to fully consider the mootness issues raised by

[1] It is noteworthy that Texas, aside from a reference to the decision in *Shelby County v. Holder*, failed to cite a single authority in support of its motion to dismiss.

[2] Several of the Defendant-Intervenors had, on June 24, 2013, after the enactment of new redistricting plans for Congress, State House and State Senate in Texas, filed with the Supreme Court an advisory pointing out the mootness of the appeal. Those Defendant-Intervenors stand by that claim, that Texas' unilateral actions did moot its appeal of this Court's decision. However, the action itself is not moot, because of the manner in which the Supreme Court remanded and because of the counterclaims that Defendant-Intervenors seek to assert.

Defendant-Intervenors. Defendant-Intervenors respectfully submit that this Court should determine the mootness issues first (along with the Defendant-Intervenors' pending motion seeking leave to amend answers) before it can rule on Texas' motion to dismiss.

Texas' adoption of new redistricting plans also does not render this action moot. Texas' Motion to Dismiss notes that on June 23, 2013, before the decision in *Shelby County v. Holder* and the Supreme Court's order in this case, "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 Supreme Court has made clear that "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave the defendant . . . free to return to his old ways." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (internal quotations omitted). Texas was found to have intentionally discriminated against minority voters, and it cannot now avoid the consequences of its illegal conduct through its modified redistricting plans—two of which (the House and Congress) leave unchanged large swaths of the invidiously discriminatory 2011 plans.

Perhaps Texas took this action in a quickly called special session, and the Governor signed the bills before the Supreme Court's decision in the *Shelby County v. Holder* case to gain some perceived tactical advantage. Or Texas may have believed its actions unilaterally mooting the appeal (by repealing the original plans that were the subject of this action and quickly adopting the plans ordered for interim use in 2012) would give it some advantage in this Court to dismiss this case as moot.

Or perhaps it took this action because the State mistakenly believed that it would adversely affect Defendant-Intervenors' motions for attorneys' fees. To be sure, a number of the Defendant-Intervenors in this case intend to file motions for an award of attorneys' fees and expenses, having obtained a judgment from this Court that protected their rights under the Fourteenth and Fifteenth Amendments. This Court's judgment, which was issued months before *Shelby County v. Holder* and remained in full force and legal effect until vacated by the Supreme Court, denied preclearance to Texas' three statewide redistricting plans. This Court's judgment and decision enabled another three-judge federal court in San Antonio to impose new redistricting plans on Texas for the 2012 elections and blocked the three statewide plans enacted in 2011 from going into effect. As Defendant-Intervenors will demonstrate in greater detail in their motions seeking an award of fees and expenses, the fact that Texas has now repealed the three plans and enacted the 2012 interim plans does not change the fact that Defendant-Intervenors prevailed in this case and obtained a favorable judgment, one which altered the legal relationship between the State and the Defendant-Intervenors. As the D.C. Circuit has observed in another Section 5 preclearance case, to qualify as a prevailing party for attorney fee purposes, the party must show that the "final result represents in a real sense, a disposition that furthers their interests," the critical question being "whether fee claims have received any benefit at all." *Commissioners Court of Medina County, Texas v. United States*, 683 F.2d 435, 441 (D.C. Cir. 1982). And fees may be awarded even when such action stops short of final legal judgment due to intervening mootness. *Id.* at 440-41. See also, 1 Court Awarded Attorney Fees ¶ 8.03[2][a][i][B](Matthew Bender) ("The change in the legal relationship need not be of any particular duration, so that even if the judgment is vacated as moot by subsequent events on

appeal, the plaintiff is nevertheless the prevailing party for having changed the legal relationship while the judgment was valid.").

Regardless of the State's motives for attempting to unilaterally moot this case -- and Defendant-Intervenors have ample reasons for questioning the State's motives in light of pervasive and egregious intentional discrimination that Texas officials have used to target minority citizens for decades—Defendant-Intervenors respectfully submit that this Court has other matters it must consider before ruling on Plaintiffs' Motion to Dismiss.

Finally, if leave is granted to Defendant-Intervenors to amend their answers, this case is certainly not moot. Indeed, if leave is granted, Defendant-Intervenors will have a claim pending in this Court seeking to place the State of Texas under preclearance coverage pursuant to Section 3(c) of the Voting Rights Act. To support that relief, Defendant-Intervenors would offer a mountain of evidence that the State of Texas and its political subdivisions have engaged in intentional discrimination against Latino and African-American citizens. Some of that evidence is outlined in the pending motion seeking leave to amend, and includes this Court's findings of fact (and the evidence presented to this Court) supporting those findings.

In order for Defendant-Intervenors to prevail on their Section 3(c) counterclaim, a court must find that Texas' voting-related changes constituted intentional discrimination against a protected class. *See* 42 U.S.C. § 1973a(c). This three-judge Court unanimously found that the State of Texas engaged in intentional discrimination against African-American and Latino citizens in enacting the 2011 State Senate and Congressional redistricting plans. *Texas v. United States*, 887 F. Supp. 2d 133, 161, 166 (D.D.C. 2012). Because the Supreme Court remanded this case for further consideration of the specific issue of mootness, but did not disturb this Court's findings, those findings could remain binding on the parties under the law-of-the-case doctrine.

See Cowgill v. Raymark Industries, Inc., 832 F.2d 798, 802 (3d Cir. 1987) (according findings underlying partially reversed or vacated judgments continued vitality in the same proceeding in which they were made and noting that "[w]hen a court of appeals reverses a judgment and remands for further consideration of a particular issue, leaving other determinations of the trial court intact, the unreversed determinations of the trial court normally continue to work an estoppel. . . . When the estoppel is operative in proceedings in the same case on remand, courts frequently speak in terms of the law of the mandate or the law of the case rather than collateral estoppel but the underlying principle is the same."). *See also*, *Molinary v. Powell Mountain Coal Co.*, 173 F.3d 920, 923 (4th Cir. 1999) ("On remand, a lower court may decide matters left open only insofar as they reflect proceedings consistent with the appellate court's mandate"); *Sentinel Trust Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 221-22 (3rd Cir. 2003) (holding that a vacatur of judgment in that case should be "narrowly construed so as to grant validity to the findings of fact," and that the "concepts of equity and fair dealing enter into this determination"); *Bates v. Union Oil Co. of California*, 944 F.2d 647, 651-52 (9th Cir. 1991) (acknowledging that vacatur does not eliminate the risk of future collateral estoppel.).

The law-of-the-case doctrine holds that "the same issue presented a second time in the same case in the same court should lead to the same result." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996). This doctrine applies to findings of fact as well as conclusions of law. *Thomas v. Gandhi*, 650 F. Supp. 2d 35, 39 n.2 (D.D.C. 2009) (stating that law of the case applies to factual issues). "The judicial system's interest in finality and in efficient administration dictates that, absent extraordinary circumstances, litigants should not be permitted to relitigate issues that they have already had a fair opportunity to contest." *Cowgill*, 832 F.2d at 802. Thus, this Court's findings of fact continue to have vitality notwithstanding the Supreme Court's order

vacating the judgment. Those findings amply support Defendant-Intervenors' Section 3(c) claims, and because of those counterclaims and the other reasons listed above, this action is not moot.

B. The Equitable Considerations Underlying Federal Rule of Civil Procedure 41(a)(2) Suggest This Case Should Not Be Dismissed at This Stage of the Litigation

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

> [A]n 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.

Fed. R. Civ. P. 41(a)(2). The purpose of Rule 41(a)(2) is to protect defendants from undue prejudice or inconvenience caused by a plaintiff's premature dismissal. *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 (D.C. Cir. 1981). In considering a motion to dismiss under Rule 41(a)(2), a court must look to (1) whether the plaintiff seeks the motion for voluntary dismissal in good faith, and (2) whether the dismissal would cause the defendant "legal prejudice." *Mittakarin v. InfoTran Sys.*, 279 F.R.D. 38, 41 (D.D.C. 2012). In determining whether a defendant would suffer legal prejudice, a court must consider four factors:

> (1) the defendants' effort and expense in preparation for trial; (2) excessive delay or lack of diligence on the plaintiffs' part in prosecuting the action; (3) the adequacy of the plaintiffs' explanation for voluntary dismissal; and (4) the stage of the litigation at the time the motion to dismiss is made.

Id. See also, *In re Vitamins Antitrust Litig.*, 198 F.R.D. 296, 304-06 (D.D.C. 2000). Courts generally grant dismissals under Rule 41(a)(2) unless the defendant would suffer prejudice other than the prospect of a second lawsuit or some tactical disadvantage. *Id.* While the United States

yesterday averred in its filing that it did not oppose Texas' motion for voluntary dismissal because the United States would not be prejudiced, Dkt. No. 247 at 4-5, the same is not true for Defendant-Intervenors, actual residents and organizations that have suffered greatly because of the state's intentionally discriminatory actions. Many of the markers of intentional discrimination identified by this Court are still present in the state's newly enacted plan. Dismissal should not be ordered in this case because of the prejudice that Defendant-Intervenors would suffer. The effort expended and expenses incurred by Defendant-Intervenors in this case have been great. Indeed, those efforts and expenses were critical to the outcome in this case.

The stage of the litigation at the time Texas moved to dismiss also supports the conclusion that the Court should deny the motion. *See Hartford Accident & Indem. Co. v. Costa Lines Cargo Services, Inc.*, 903 F.2d 352, 360 (5th Cir. 1990) ("Where the plaintiff does not seek dismissal until a late stage and the defendants have exerted significant time and effort, the court may, in its discretion, refuse to grant a voluntary dismissal."). The stage of litigation is critical to the resolution of Plaintiff's motion to dismiss in light of the unresolved issues stemming from the Supreme Court's remand of this case, *Texas v. United States*, No. 12-496, 2013 WL 3213539, *1 (U.S. June 27, 2013), in light of the Defendant-Intervenors' impending counterclaim, and in light of the motions for attorneys' fees that will be forthcoming.

Rule 41(a)(2) makes clear that where the defendant pleads a counterclaim prior to being served plaintiff's motion to dismiss, and that counterclaim could not otherwise remain pending in the Court's jurisdiction, the Court does not have discretion to grant plaintiff's request. Plaintiffs in this case filed their motion to dismiss through electronic case filing (ECF)—thereby serving Defendant-Intervenors—just moments before Defendant-Intervenors filed their motion for leave to file amended answer and counterclaim. While the timeline of filings in this case bars the

application of Rule 41(a)(2)'s provision limiting the discretion of the court to grant dismissal, the rule's purpose in protecting defendants from undue prejudice weighs in favor of denying dismissal and allowing Defendant-Intervenors to proceed with their counterclaim.

Rule 41(a)(2) allows courts to exercise discretion on a case-by-case basis as to whether dismissal would serve the interest of justice. *See Hudson Engineering Co. v. Bingham Pump Co.*, 298 F. Supp. 387, 388 (S.D.N.Y. 1969) ("Rule [41(a)(2)] should be interpreted as requiring the exercise of discretion by the courts in all cases arising under it, especially when . . . the litigation is at an advanced stage and the grant of a dismissal would not finally determine the suit as between all of the parties that are involved in it."). Defendant-Intervenors would suffer particularly undue prejudice if this case were dismissed at this stage of the litigation because Intervenors would be forced to re-litigate issues previously resolved by this Court in order to assert their Section 3(c) counterclaim.

CONCLUSION

Defendant-Intervenors respectfully request that this Court deny Texas' Motion to Dismiss and establish a scheduling order for briefing on the issues that still need to be resolved in this case, including the Section 3(c) relief requested and the issue of attorneys' fees. Or, in the alternative, Defendant-Intervenors respectfully request that this Court schedule a hearing on both Defendant-Intervenors' motion for leave to amend and the State's motion to dismiss.

Dated: July 26, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2013, I served the foregoing on counsel of record by electronically filing the foregoing document with the Clerk of the United States District Court for the District of Columbia using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Allison J. Riggs
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