(b) (5), (b) (6)

[redacted]

From: Bitter, Adam [mailto:Adam.Bitter@oag.texas.gov]
Sent: Monday, September 11, 2017 2:05 PM
To: Saltman, Julie (CIV) <jsaltman2@CIV.USDOJ.GOV>; Tyler, John (CIV) <JTyler@CIV.USDOJ.GOV>; Halainen, Daniel J. (CIV) <dhalaine@CIV.USDOJ.GOV>; nperales@maldef.org; Markoff, Gabriel <gmarkoff@omm.com>
Cc: Colmenero, Angela <Angela.Colmenero@oag.texas.gov>; Biggs, Adam <Adam.Biggs@oag.texas.gov>
Subject: Texas v. United States: Proposed Stipulation of Voluntary Dismissal

Counsel,

In light of the Court's September 8, 2017 order regarding Plaintiffs' notice of voluntary dismissal (ECF No. 471), we propose to file a Stipulation of Voluntary Dismissal in the above-referenced matter. Attached, in Word and PDF form, is a draft of that proposed stipulation for your consideration.

Please let us know if the proposed stipulation is acceptable to Defendants and Intervenors. Assuming the parties are in agreement regarding the stipulation, we ask that you physically sign your respective signature block (with any necessary changes to the block) and send us a scanned version of the hand-signed page. As reflected in the attached proposal, we intend to file the stipulation with the imaged signature pages for Defendants and Intervenors.

Sincerely,

Adam Bitter

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS ET AL.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 1:14-cv-254
	§	
UNITED STATES OF AMERICA ET AL.	§	
	§	
Defendants.	§	

PLAINTIFFS' STIPULATION OF VOLUNTARY DISMISSAL

On June 15, 2017, the U.S. Department of Homeland Security released a memorandum entitled *Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA")*. On September 5, 2017, the Department released a memorandum entitled *Rescission of the June 15, 2012 Memorandum Entitled "Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children."* Given these memoranda rescinding the DAPA program and phasing out the DACA and Expanded DACA programs, Plaintiffs file this stipulation of voluntary dismissal. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii) (allowing plaintiffs to dismiss an action, without court order, by filing a stipulation of dismissal signed by all parties who have appeared).[1]

[1] The Court's September 8, 2017 order deems Intervenors' proposed answer (Dkt. No. 91-2) to have been filed as an answer, Dkt. No. 471 at 3-4, and deems other filings to be the "equivalent of an answer," *id.* at 2. The instant stipulation of dismissal under Rule 41(a)(1)(A)(ii), unlike a notice of dismissal under Rule 41(a)(1)(A)(i), is not foreclosed by the filing of an answer and requires only the signature of all parties who have appeared.

This stipulation of dismissal is signed by counsel for all parties who have appeared—Plaintiffs, Defendants, and Intervenors.[2] Dismissal of this action is therefore automatic upon the filing of this stipulation, and no further order is needed to consider this case closed. *See Yesh Music v. Lakewood Church*, 727 F.3d 356, 362 (5th Cir. 2013) ("Stipulated dismissals under Rule 41(a)(1)(A)(ii) . . . require no judicial action or approval and are effective automatically upon filing."). The Court's Order of Temporary Injunction (Dkt. No. 144) is necessarily dissolved by this dismissal. *See Francis v. Johnson*, 129 F.3d 610 (5th Cir. 1997) (unpublished) (per curiam) (citing 11A Charles Alan Wright et al., Federal Practice & Procedure § 2947 at 126 n.19 (2d ed. 1995)); *Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994); *see also De Leon v. Marcos*, 659 F.3d 1276, 1283 (10th Cir. 2011) ("A stipulation of dismissal . . . is self-executing and immediately strips the district court of jurisdiction over the merits.").

Pursuant to Federal Rule of Civil Procedure 41(a)(1)(B), this dismissal is without prejudice because Plaintiffs have not previously dismissed any federal- or state-court action based on or including the same claim.

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[2] *See Oswalt v. Scripto, Inc.*, 616 F.2d 191, 194 (5th Cir. 1980) (noting that a stipulation of dismissal, like other filings, may be "signed by the attorneys for" the parties); United States District Court, Southern District of Texas, Administrative Procedures for Electronic Filing in Civil and Criminal Cases, at 8(C)(1) (Jan. 1, 2007; amended July 18, 2013) (allowing "[a] Filing User who electronically files any document requiring the signature of another individual" to "submit an imaged document containing all the necessary signatures inserted by hand").

Dated: September 11, 2017

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system and served on all attorney(s) and/or parties of record, via the CM/ECF service.

s/ Angela V. Colmenero
ANGELA V. COLMENERO
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL., Plaintiffs,	§ §	
V.	§	CIVIL NO. B-14-254
UNITED STATES OF AMERICA, ET AL., Defendants.	§ §	

ORDER

While the States correctly cite Rule 41(a)(1)(A) in their Notice of Voluntary Dismissal (Doc. No. 469), the case law interpreting what constitutes an "answer" clearly suggests that the voluntary dismissal rule is not applicable here. The clear purpose of Rule 41(a)(1)(A) is to allow a plaintiff to unilaterally dismiss an action early in the judicial process. Voluntary dismissal under Rule 41(a)(1)(A) is certainly recognized where the issues and the relative merits of a case have not been addressed. It is not appropriate in a case which has had the extensive and hard-fought clashes over the merits that this one has. When the merits have been joined, and an injunction issued and affirmed on appeal twice, dismissal by notice is not appropriate. The most-cited, and perhaps the most critiqued, example of the exception to the general rule is found in *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir. 1953). The precedential value of the holding in that case has been limited to cases with similar facts.[1] That case has been summarized as follows:

> The plaintiff sought to dismiss by notice before the defendant had answered, but there had been an extensive hearing, lasting several days and producing a record of 420 pages, in which the merits of the controversy squarely were raised. The Court,

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[1] *See, e.g.*, *Johnson Chemical Co., Inc. v. Home Care Prods., Inc.*, 823 F.2d 28, 30–31 (2d Cir. 1987); *Santiago v. Victim Servs. Agency of the Metropolitan Assistance Corp.*, 753 F.2d 219, 222–23 (2d Cir. 1985); *Thorp v. Scarne*, 599 F.2d 1169, 1174–76 (2d Cir. 1979); *Pilot Freight Carriers, Inc. v. Int'l Bd. of Teamsters*, 506 F.2d 914, 916–17 (5th Cir. 1975).

speaking through Judge Augustus Hand, held that the plaintiff no longer had the right to dismiss by notice.

> Consequently, although the voluntary dismissal was attempted before any paper labeled "answer" or "motion for summary judgment" was filed, a literal application of Rule 41(a)(1) to the present controversy would not be in accord with its essential purpose of preventing arbitrary dismissals after an advanced state of a suit has been reached.

WRIGHT & MILLER FEDERAL PRACTICE AND PROCEDURE CIVIL 3D § 2363 (quoting *Harvey Aluminum, Inc.*, 203 F.2d at 108). While subsequent cases have greatly limited the application of this case to a very small set of factual circumstances, if there ever was a situation for the application of an exception to Rule 41, this is it. Here, just the written opinions by the courts exceed the 420 page record referred to by Judge Hand. The actual record in this case is in the thousands of pages.

"When a motion or pleading tender[s] justiciable issues for determination, its interposition terminates the right to dismiss by notice because it is analogous to an answer." WRIGHT & MILLER FEDERAL PRACTICE AND PROCEDURE CIVIL 3D § 2363. The Government in this case has filed numerous pleadings and multiple briefs denying the claims of the States. This case has been litigated tenaciously for almost three years in this Court. It has been appealed twice to the Fifth Circuit Court of Appeals and once to the United States Supreme Court. The merits (or lack thereof) of this case have been addressed by all sides in hundreds of pleadings and briefs. Many of these pleadings are clearly the equivalent of an answer and consequently foreclose the use of Rule 41(a)(1)(A).[2] To hold otherwise would be to elevate form over substance and place undue emphasis

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[2]Also of some importance is the fact that this Court's injunction, which is currently in place, is a temporary one. It was to last until "a further order of this Court . . . ." (Doc. No. 144, p. 2). If a party can unilaterally dismiss a case after obtaining temporary relief pending further court orders, it could deprive a court of jurisdiction by such a dismissal, and thereby theoretically turn a temporary injunction into a permanent one. *Cf. Qureshi v. United States*, 600 F.3d 523, 525–26 (5th Cir. 2010) ("In short, in the normal course, the district court is divested of jurisdiction over the case by the filing of the notice of dismissal itself.").

on the title of a pleading rather than its substance. Therefore, this Court holds an answer has been filed and a Rule 41(a)(1)(A) dismissal is unavailable.

Moreover, the Fifth Circuit Court of Appeals ordered that the Jane Doe Intervenors be allowed to participate as parties herein. The Fifth Circuit held that the Intervenors had a legally protected interest "sufficient to support" intervention (Doc. No. 327, p. 9) and that they had a "real concrete stake in the outcome of this litigation" (Doc. No. 327, p. 11). The Circuit found that the Intervenors had shown not only opposition to the Plaintiffs' position,[3] but also an "adversity of interest" between themselves and the Government (Doc. No. 327, p. 13). Further, the Circuit found that the Government's position was also "directly adverse to the Jane Does" (Doc. No. 327, p. 15). The Circuit concluded that the Jane Does could intervene to oppose the States' objectives in this lawsuit. That intervention was effectuated.

Case law has established that interventions that raise justiciable issues preclude the use of Rule 41(a)(1)(A). *Butler v. Denton*, 150 F.2d 687, 690 (10th Cir. 1945); *Nance v. Jackson*, 56 F.R.D. 463, 471 (M.D. Ala. 1972).

> It therefore is clear that the plea of intervention tendered justiciable issues for determination. And in that posture the plaintiff was not vested with the absolute right of dismissal . . . .

Butler, 150 F.2d at 690. While a pending motion to intervene may not preclude the use of 41(a)(1)(A),[4] this intervention is not one pending a ruling; it was granted almost two years ago. The Court in *Nance* put it succinctly:

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[3]In fact, the Intervenors described themselves as the "target" of the States' lawsuit. (Doc. No. 91, p. 7).

[4]*See Fort Sill Apache Tribe of Oklahoma v. United States*, 2008 WL 2891654 (W.D. Ok. 2008).

VOLUNTARY DISMISSAL

> The remaining plaintiffs in this case are the individuals Smith and Bell, who voluntarily seek to be dismissed as plaintiffs. They have no absolute right to dismissal in view of the fact that a petition for intervention tendering a justiciable issue has been filed. See 5 Moore, *supra*, ¶ 41.02[3]. Nevertheless, dismissal may be granted by order of this Court pursuant to Rule 41(a)(2), even though dismissal will defeat removal. *Id.*

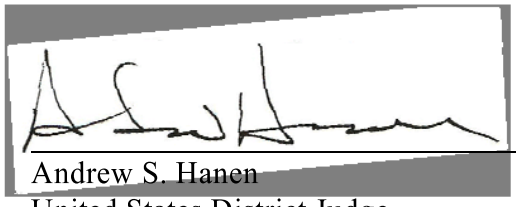
Nance, 56 F.R.D. at 471 (citing MOORE FEDERAL PRACTICE ¶ 41.07).

Most importantly, attached to the intervention, in compliance with Rule 24(c), was an answer, which became effective once the intervention was granted. (Doc. No. 91-2).

Given the lengthy history of protracted litigation on the merits, the plethora of pleadings filed in opposition to the Complaint brought by the States, the Court-ordered intervention (complete with answer) in opposition to both the States' and Government's positions, and the lengthy involvement of all levels of the federal judiciary, this Court finds Rule 41(a)(1)(A) to be inapplicable and holds the States' Notice of Dismissal (Doc. No. 469) to be ineffective.

This Order does not presage any ultimate ruling should a different form of dismissal motion be filed. The parties are hereby granted leave to file such a motion which should include a proposed order, and pursuant to this Court's local rules, a certificate of conference. If such a motion is filed, the Court will give it due consideration.

Signed this 8th day of September, 2017.



Andrew S. Hanen
United States District Judge