UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHANNON PEREZ, et al.	)	
	)	CIVIL ACTION NO.
Plaintiffs	)	**11-CA-360-OLG-JES-XR**
	)	[Lead case]
v.	)	
	)	
STATE OF TEXAS, et al.	)	
	)	
State Defendants	)	

STATE DEFENDANTS' MOTION TO DISMISS

All claims arising from the 2011 redistricting plans are moot. The Court has no jurisdiction to award any relief (whether injunctive, declaratory, or equitable, *see* Dkt. 886, Order at 14 (Sept. 6, 2013)) based upon these claims. The political-gerrymandering claim alleged as to the 2013 plans is nonjusticiable. The State Defendants therefore file this motion pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(c), and urge the Court to dismiss the 2011 claims and the political-gerrymandering claims. "A case is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *See Home Builders Ass'n of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). "The burden of proof on a motion to dismiss under Rule 12(b)(1) is on the party asserting jurisdiction." *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam).

1. In September, the Court granted Plaintiffs' requests to amend their complaints and add claims against the 2013 plans to the pending claims regarding the 2011 plans. Dkt. 886, Order at 1. In so doing, the Court denied the State Defendants' motion to dismiss as moot the 2011 claims. *Id.*

The Court's decision is inconsistent with binding Supreme Court and Fifth Circuit precedent, and the State Defendants file this motion to dismiss respectfully urging the Court to reconsider that decision. The claims against the 2011 plans are moot. Arguments to the contrary: (1) treat the State Defendants as if they were private actors, (2) misconstrue the Supreme Court's two narrow exceptions to the "near categorical" rule that legislative repeal moots claims against the repealed statute, and (3) disregard the Supreme Court's settled view that States, not federal courts, bear the primary responsibility for reapportionment to the point of suggesting that the Legislature's adoption of plans in 2013 amounts to an interference with the reapportionment process. The Plaintiff's desire for an advisory opinion regarding the 2011 plans does not satisfy the case-or-controversy requirement of Article III.

The Texas Legislature repealed the 2011 plans and replaced them with plans incorporating this Court's changes: the 2013 congressional plan is a legislative enactment of the interim congressional plan, and the 2013 Texas House plan started with the interim plan and made a few modifications. And the mandate that this Court "take care not to incorporate into the interim plan any legal defects in the state plan," *Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (per curiam), gave the Legislature every reasonable assurance that the 2013 statutes would resolve any potential defects in the 2011 statutes. Under the circumstances, binding precedent compels the dismissal of all claims related to the repealed 2011 maps.

2. The partisan-gerrymandering claim is nonjusticiable, and the Texas Democratic Party fails to state a claim upon which relief can be granted. The Court dismissed partisan-gerrymandering claims asserted against the 2011 plans, and it should likewise dismiss the partisan-gerrymandering claims raised against the 2013 plans.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO CONSIDER CLAIMS OR AWARD ANY RELIEF BASED UPON THE 2011 DISTRICTING PLANS BECAUSE THE REPEAL AND REPLACEMENT OF THE 2011 PLANS RENDERED THOSE CLAIMS MOOT.

A. The Supreme Court Has Established that Legislative Repeal of Challenged Legislation Moots the Case, and Exceptions Must Be Proven with Evidence.

The near categorical rule is that statutory repeal moots a case, and the burden is upon Plaintiffs to meet one of the Supreme Court's two narrow exceptions.

The existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction:

> Article III of the Constitution restricts the power of federal courts to "Cases" and "Controversies." Accordingly, "[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision."

Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). "This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain . . . jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed." *Lewis,* 494 U.S. at 477. The court must determine whether a case is moot before proceeding to the merits. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). "A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.*

Applying this framework, "the [Supreme] Court has [consistently] upheld the general rule that repeal, expiration, or significant amendment to challenged legislation ends the ongoing controversy and renders moot a plaintiff's request for injunctive relief." *Fed'n of Adver. Indus. Reps. Inc. v. City of Chicago,* 326 F.3d 924, 930 (7th Cir. 2003) (citing *Lewis*, 494 U.S. at 474 (amendments to banking statutes rendered moot a Commerce Clause challenge)); *Mass. v. Oakes*, 491 U.S. 576, 582–83 (1989) (overbreadth challenge to a child pornography law rendered moot by statutory

amendment); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (challenge to university regulation moot following substantial amendment); *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977) (constitutional challenge moot following replacement with a different involuntary commitment statute); *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 415 (1972) (per curiam) (holding moot a challenge to a Florida tax exemption for church property when the law had been repealed and replaced by a substantially changed law)).

The Supreme Court's opinion in *Diffenderfer* established the general rule that repeal of a statute moots a case, and it controls here. *Diffenderfer* concerned an Establishment Clause challenge to a Florida statute that exempted church property that was used as a commercial parking lot. *Diffenderfer*, 404 U.S. at 413. After the Supreme Court found probable jurisdiction, the legislature repealed the statute—which had been interpreted to permit church lots to retain full exempt status despite their use for both commercial and church purposes—and replaced it with new legislation exempting only property used "predominantly for religious purposes" and only to the extent of its religious use. *Id.* at 413–14.

Observing that it must review the judgment "in light of Florida law as it now stands," the Supreme Court held that the repeal and replacement mooted the case of its "character as a present, live controversy." *Id.* at 414. Critically, the request for declaratory relief was moot even though the new statute did not guarantee plaintiffs all relief sought. *See id.* at 413–14. *Diffenderfer* also confirmed that the mere potential for a new constitutional challenge to the replacement statute was no bar to mootness by expressly remanding the case so that the plaintiffs could replead an "attack [on] the new legislation." *Id.* at 415.

Courts interpreting *Diffenderfer* and its progeny have read these cases as establishing a "near categorical rule of mootness" in "cases of statutory amendment." *Chem. Producers & Distribs. Ass'n v. Helliker*, 463 F.3d 871, 878 (9th Cir. 2006). The Fifth Circuit's decision in *McCorvey v. Hill*

(unaddressed in the Court's order permitting plaintiffs to amend their 2011 complaints) is part of a unanimous consensus of the circuits that plaintiffs must prove an exception to the rule to avoid a holding of mootness: "all the circuits to address the issue" have "interpreted Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction request, absent evidence" that an exception to the rule applies.[1] *Fed'n of Adver.*, 326 F.3d at 930

[1] *See, e.g., D.H.L. Assocs. v. O'Gorman*, 199 F.3d 50, 55 (1st Cir. 1999) (recognizing the general rule that repeal of a statute moots a case, and that *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283 (1982) and *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993) created an exception to this rule that only applied "when there is a reasonable expectation that the challenged conduct will be repeated following dismissal of the case"); *Assoc. Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 66 (2d Cir. 1994) (holding *the Aladdin's Castle* exception to the mootness rule inapplicable because the City of New Haven had not reenacted the challenged legislation and the court did not foresee that it would); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001) ("As the Fourth Circuit has recently noted, statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed." (citations and quotation marks omitted)); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) ("In other words, we remain satisfied that statutory changes that discontinue a challenged practice are "usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed."); *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004) ("Suits regarding the constitutionality of statutes become moot once the statute is repealed. [W]e, along with all the circuits to address the issue, have interpreted Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction request, absent evidence that the City plans to or already has reenacted the challenged law or one substantially similar." (citations and quotation marks omitted)); *Ky. Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997) (holding that amendment to the challenged statute mooted the claim when the state had expressed no intention to reenact the prior law); *Teague v. Cooper*, 720 F.3d 973, 977 (8th Cir. 2013) ("We agree with the Fourth Circuit that statutory changes that discontinue a challenged practice are usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed. The exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted." (citations and internal quotation marks omitted); *Helliker*, 463 F.3d at 878 ("As a general rule, if a challenged law is repealed or expires, the case becomes moot. *The exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted.*" (citations omitted)); *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1246 (10th Cir. 2009) ("Generally, repeal of a challenged statute causes a case to become moot because it extinguishes the plaintiff's legally cognizable interest in the outcome, rendering any remedial action by the court ineffectual."); *Nat'l Black Police Ass'n. v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997) ("Although voluntary cessation analysis applies where a challenge to government action is mooted by passage of legislation, the mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be *evidence* indicating that the challenged law likely will be reenacted." (emphasis added)); *see* 13C Charles Allan Wright &

(joining consensus). These two exceptions are "rare and typically involve situations where it is *virtually certain* that the repealed law will be reenacted." *Native Vill. of Noatak v. Blatchford,* 38 F.3d 1505, 1510 (9th Cir. 1994) (emphasis added). Indeed, the "federal courts of appeal have virtually uniformly held that the repeal of a challenged ordinance will moot a plaintiff's request for injunctive relief in the absence of some evidence that the ordinance has been or is reasonably likely to be reenacted." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1331 n.9 (11th Cir. 2004). The United States also recognizes that legislative repeal responding to court pronouncements moots the case. *E.g.*, Brief for the Respondents in Opposition, Adams v. Fed. Aviation Admin., 588 U.S. 821 (2009) (denying cert.), 2009 WL 2187808 (U.S.), 10–11 (citing *Diffenderfer* and other cases for the proposition that "simply put, repeal moots attacks on a statute" (quotation omitted); Brief of United States as Amicus Curiae in Support of Appellants, Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747 (1986), & Diamond v. Charles, 476 U.S. 54, 1985 WL 669705 (U.S.), 11–12 (explaining that legislative repeal triggered the "mootness doctrine," particularly where the recast legislation "represented faithful and repeated attempts to alter the contours of the statute to reflect the latest judicial pronouncements on the subject." (quotation marks and citations omitted)).

The consensus is well founded. "Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them and confines them to resolving real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Lewis*, 494 U.S. at 477 (internal citations omitted). A "declaratory judgment on the validity of a repealed [statute] is a textbook example of advising what the law would

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Arthur R. Miller, Federal Practice & Procedure, § 3533.6 (3d ed.) ("Repeal—even repeal by implication—likewise moots attacks on a statute. Repeal coupled with replacement by a new statute also may moot the attack despite so much similarity that the court anticipates renewed attack in a new action." (citing *Maryland Highways Contractors Ass'n, Inc. v. State of Md.*, 933 F.2d 1246, 1249–50 (4th Cir. 1991)).

be upon a hypothetical state of facts." *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000).

Binding precedent (confirmed by unanimous support among the courts of appeals) commands that Plaintiffs carry the evidentiary burden of establishing an exception to the general rule that the statutory repeal mooted claims arising from the 2011 plans. As explained below, the voluntary cessation doctrine does not supplant this burden, and Plaintiffs have not proven that either of the two exceptions to the general rule applies.

1. The Voluntary Cessation Doctrine Either Does Not Apply in Cases of Statutory Repeal or Is Radically Changed to Acknowledge the General Rule.

Previously, Plaintiffs urged this Court to apply the "voluntary cessation" doctrine, treating the State Defendants no differently than private-party defendants who must carry the "heavy burden" of proving that the "challenged conduct cannot reasonably be expected to recur." *See* Dkt. 886, Order at 12 (quoting *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs.*, 528 U.S 167, 189 (2000)); *id.* (erroneously finding that "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness") (citation omitted); *id.* at 13 (incorrectly holding that the State Defendants "fail to meet their burden of demonstrating that the conduct alleged to violate § 2 and the Constitution with regard to the 2011 plans could not reasonably be expected to recur"). Plaintiffs also incorrectly relied upon *Sossamon v. Lone Star State of Texa*s, 560 F.3d 316 (5th Cir. 2009)—a non-legislative repeal case—to argue that the repeal of the 2011 plans is the sort of act that "ordinarily does not moot a case." Dkt. 838, TLRTF Reply at 9 (quoting *Sossamon*, 560 F.3d at 324, aff'd sub nom. *Sossamon v. Texas*, 141 S. Ct. 1651 (2011)).

Plaintiffs are incorrect on all counts, and the Court should reconsider its order founded upon Plaintiffs' errors. The voluntary-cessation exception does not swallow the general rule that repeal moots a claim for relief against a repealed statute. It either does not even apply in cases of

legislative repeal, or it is radically transformed to require Plaintiffs to establish an exception to the general rule of mootness.

Cessation maneuvers by private parties are "viewed with a critical eye," *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2012), and private defendants must meet the heavy or "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc.,* 528 U.S at 190; *see also Troiano v. Supervisor of Elections in Palm Beach Cnty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004). This exception to mootness traces to the "principle that a party should not be able to evade judicial review, or to defeat a judgment by *temporarily* altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (emphasis added).

The "heavy" burden provides "the appropriate standard for cases between private parties," but it is "not the view . . . taken toward acts of voluntary cessation by government officials." *Fed'n of Adver.,* 326 F.3d at 929; *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 982 (6th Cir. 2012); *see also McCorvey*, 385 F.3d at 849. Courts have thus recognized that the "comity . . . that the federal government owes state and local governments requires us to give some credence to the solemn undertakings of local officials."[2] *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 947 (7th Cir. 2006). Unlike private defendants, "government actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties." *Sossamon*, 560 F.3d at 325.

This distinction between private and public actors is critical. The Fifth Circuit has explained that, outside the legislative-repeal context, the "presumption of good faith" mitigates *Laidlaw*'s heavy

[2] *See, e.g., Building & Construction Dept. v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1491–92 (10th Cir.1993); *Chamber of Commerce of United States of America v. U.S. Dept. of Energy*, 627 F.2d 289, 291–92 (D.C.Cir.1980).

burden to a "lighter burden" that is satisfied by the government's cessation, absent "evidence" that the change is mere litigation posturing. *Sossamon*, 560 F.3d at 325.

Moreover, when the government repeals a challenged statute, its burden is satisfied, and the general rule applies: "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed." *McCorvey*, 385 F.3d at 849 (citing *Diffenderfer*, 404 U.S. at 414–15, among other authorities). The Fifth Circuit makes this clear by citing *McCorvey*, not *Sossamon*, as governing challenges to a repealed ordinance. *Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 357 (5th Cir. 2010). In all events, Plaintiffs' contention that State Defendants were required to satisfy a "heavy burden" was incorrect.

These Fifth Circuit cases are representative of the approaches taken by the other circuits. *E.g.*, *Troiano,* 382 F.3d at 1283 (holding that government's voluntary cessation creates "rebuttable presumption that the objectionable behavior will not recur," which must be overcome by strong evidence to the contrary); *Chicago United Indus.*, 445 F.3d at 947 (quoting *Troiano*, 382 F.3d at 1283). And in cases of legislative repeal, the voluntary-cessation doctrine either "has no application" absent actual evidence that the same statute will be reenacted or is so radically "refin[ed]" as to support a contrary near-categorical rule of mootness with extremely limited exceptions that must be established by Plaintiffs. *See, e.g., Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) ("[W]hen a legislature repeals or amends a statute after it is judicially challenged, … the voluntary-cessation exception has no application 'where there is *no evidence* in the record to indicate that the legislature intends to reenact the prior version of the disputed statute.'" (quoting *Camfield v. Oklahoma City*, 248 F.3d 1214, 1223–24 (10th Cir. 2001) (emphasis added)); *Helliker*, 463 F.3d at 878 ("[W]e have been clear in refining the voluntary cessation exception for state legislative enactments that otherwise moot a controversy. . . . As a general rule, if a challenged law is repealed or expires, the case becomes moot. *The exceptions to this general line of holdings are rare and*

typically involve situations where it is virtually certain that the repealed law will be reenacted.") (citations omitted); *cf. Fed'n of Adver. Indus. Reps.*, 326 F.3d at 930 n. 7 ("In general, the repeal of a challenged statute is one of those events that makes it absolutely clear that the allegedly wrongful behavior . . . could not reasonably be expected to recur.") (citation omitted). In either circumstance, the case is moot unless Plaintiffs produce evidence triggering an exception to the rule.

That general rule of mootness is even stronger here, where the Legislature incorporated this Court's interim maps, which the Legislature reasonably concluded were free from legal defect. *See Perry v. Perez*, 132 S. Ct. at 941. A case is moot when a legislature has replaced a challenged statute with one that "it believed would pass constitutional muster." *Teague*, 720 F.3d at 978; *see also Annapolis Rd., Ltd. v. Hagner*, 966 F.2d 1441 (4th Cir. 1992) (citing *Maryland Highways Contractors Ass'n, Inc. v. State of Md.*, 933 F.2d 1246 (4th Cir. 1991)); *infra* part I.A.2. Thus, there is simply no credibility to Plaintiffs' arguments that the repeal and replacement of the 2011 plans with plans based upon the Court's interim plans is the type of "voluntary cessation" that "rarely moots a federal case," nor that the State Defendants were required to produce any evidence beyond the repeal and replacement to render moot claims based upon the 2011 plans.[3] *E.g.*, Dkt. 838, TLRTF Reply at 9–10 (quoting *Sossamon,* 560 F.3d at 324).

2. This Case Does Not Fall Within Either of the Two Limited Exceptions to the General Rule That Legislative Repeal Moots the Challenges to the Repealed Statute.

Once the government has repealed the challenged legislation, the only "issue" for a court is "whether there is any *evidence* that the [government's] repeal was disingenuous; that is, evidence" that either of the Supreme Court's narrow exceptions to the rule of mootness applies. *E.g., Fed'n of Adver. Indus. Reps.*, 326 F.3d at 931 (emphasis added). The Supreme Court has recognized

[3] Plaintiffs' allegation of "lingering effects" from the 2011 redistricting plans has no basis in fact and cannot change this result. Plaintiffs cited no case holding that legislation that has never taken effect is capable of creating lingering effects and State Defendants are aware of none.

exceptions to the general rule of mootness-upon-repeal in only two circumstances: (1) when there is evidence that the legislature will reenact "precisely the same provision" once litigation ends, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), and (2) when there is evidence that replacement legislation has not "changed substantially" or "significantly revised" the challenged provisions of the repealed provisions, thereby disadvantaging the plaintiffs in the same "fundamental way," *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 & n.3 (1993). These narrow exceptions operate only where the repeal or amendment is illusory. Neither exception applies here.

The Supreme Court's jurisprudence and the large volume of interpreting decisions confirm that the determinative question is whether the new legislation "changed [the 2011 plans] substantially" by adopting the court's interim maps with minor modifications. *Id.* If so, then the case is moot absent evidence that the Legislature is virtually certain to reenact the 2011 maps. *Aladdin's Castle, Inc.*, 455 U.S. at 289.

The inquiry must end there, since neither *Northeastern Florida* nor *Aladdin's Castle* overruled *Diffenderfer*, which held that a request for declaratory relief from the repealed statute was moot despite (1) the Supreme Court's explicit recognition that the plaintiffs could still "attack" the new legislation and (2) the Supreme Court's acknowledgment that the new law might not give the plaintiffs all relief sought. *Diffenderfer*, 404 U.S. at 412–15. As numerous courts have held, legislation enacted to comply with a court's rulings moots the claims against the repealed statute. *E.g.*, *Teague,* 720 F.3d at 978.

a. There Is No Evidence That the Texas Legislature Intends To Reenact the 2011 Redistricting Plans; Indeed There Is Evidence to the contrary.

The Supreme Court in *Aladdin's Castle* found an exception to the general rule of mootness where the defendant openly announced its intention to reenact "precisely the same provision" held

unconstitutional below. 455 U.S. at 289 & n.11. This exception is limited to the unusual circumstances presented in *Aladdin's Castle*. Federal courts of appeals "have . . . interpreted *Aladdin's Castle* as precluding a mootness determination in cases challenging a prior version of a state statute only when the legislature has openly expressed its intent to reenact the challenged law." *Camfield*, 248 F.3d at 1223 ("We join these circuits and hold that *Aladdin's Castle* is inapposite in a case such as this where there is no evidence in the record to indicate that the legislature intends to reenact the prior version of the disputed statute."); *id.* at 1223-24 (citing *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) ("Based on our review of the post-[*Aladdin's Castle*] caselaw, however, we are convinced that [*Aladdin's Castle*] is generally limited to the circumstance, and like circumstances, in which a defendant openly announces its intention to reenact 'precisely the same provision' held unconstitutional below"); *Kentucky Right to Life*, 108 F.3d at 645 (explaining that "critical to the [Supreme] Court's decision was the City's announced intention to reenact the unconstitutional ordinance if the case was dismissed as moot" and finding that the *Aladdin's Castle* exception applies only to a "recalcitrant legislature" (citations omitted)); *see Helliker*, 463 F.3d at 878. There is no evidence that the Texas Legislature intends to reenact its 2011 redistricting plans. The *Aladdin's Castle* exception does not apply.

Plaintiffs ignored the well-settled narrowness of the *Aladdin's Castle* exception. Instead, they urged merely that "Texas can include the discriminatory elements of its 2011 plans in any future redistricting maps." Dkt. 838, TLRTF Reply at 5; *see also* Dkt. 886, Order at 14 (claiming that there "is no assurance that [the Legislature] will not engage in the same conduct in the next legislative session or any session thereafter"). That interpretation would turn *Aladdin's Castle* into an exception that swallows the rule, so it is unsurprising that it has been routinely rejected: "[a]lthough voluntary cessation analysis applies where a challenge to government action is mooted by passage of legislation, *the mere power to reenact a challenged law is not a sufficient basis* on which a court can conclude

that a reasonable expectation of recurrence exists. Rather, there must be *evidence* indicating that the challenged law *likely* will be reenacted." *E.g.*, *Nat'l Black Police Ass'n v. D.C.*, 108 F.3d at 349 (emphasis added); *see also Valero*, 211 F.3d at 116; *Teague*, 720 F.3d at 977; *Khodara Envtl., Inc. ex rel. Eagle Envt'l. L.P.,* 237 F.3d at 194 ("As the Fourth Circuit has recently noted, statutory changes that discontinue a challenged practice are usually enough to render a case moot, *even if the legislature possesses the power* to reenact the statute after the lawsuit is dismissed.") (emphasis added); *Helliker*, 463 F.3d at 878 (finding mere power to reenact the old law is not sufficient, requiring instead an evidentiary showing that it is "virtually certain" that the repealed law will be reenacted); *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995) (That "the Colorado legislature remains free to reinstate the old law at a later date [is] too conjectural and speculative to avoid a finding of mootness.").

Plaintiffs' argument that the case is live due to a generalized possibility of future discrimination in future districting cycles also, necessarily, fails. Dkt. 838, TLRTF Reply, at 8. The *Aladdin*'s *Castle* inquiry is whether the Legislature has openly "announce[d] its intention to reenact 'precisely the same provision' held unconstitutional below,"[4] not whether there exists any possibility for future illegal action. *Valero*, 211 F.3d at 116. Absent such evidence, the case is moot even when the legislature is virtually "certain" to revisit the underlying issue. *Teague*, 720 F.3d at 977–78 ("In this case, we share the Parents' view that the 2013 Act's expiration almost guarantees the General Assembly will revisit the issue of public school choice in 2015. But we see no indication it intends to reenact a statewide, exclusively race-based limitation."). Of course the Texas Legislature will be required to redistrict following the census in subsequent decades. But if the current Texas

[4] Plaintiffs' citations of DOJ objection letters to past redistricting maps are irrelevant to this inquiry. TLRTF Reply, Dkt. 838, at 10. Plaintiffs have not produced any evidence that map features targeted by those letters—even assuming that those letters were valid—are the same features challenged in the 2011 maps, or that those objected-to features are included in the 2013 plans. Moreover, the Legislature's use of the Court's interim plans as the starting point in 2013 is concrete evidence that the Legislature will not reenact the 2011 plans.

Legislature's mere ability to reenact the very text of the repealed legislation does not trigger the exception, then a future Legislature's power to produce some other districting map in future cycles that the Plaintiffs may contend violates federal law likewise cannot trigger the exception.

b. The *Northeastern Florida* Exception Does Not Apply Because the 2013 Redistricting Plans Do Not Effectively Reinstate the Repealed 2011 Plans.

Implausibly characterizing the Texas Legislature's near-wholesale adoption of this Court's legal interim maps as a "rep[etition of] its allegedly wrongful conduct," Plaintiffs attempt to bring this case within the *Northeastern Florida* exception to the general rule of mootness. Dkt. 838, TLRTF Reply, at 10–11 (citing *Ne. Fla.*, 508 U.S. at 662). According to Plaintiffs, this Court must find that the controversy is still live on the basis of Plaintiffs' *pleadings and allegations* that the new maps injure Plaintiffs in the "same fundamental way," albeit to a "lesser degree." *Id.*

The exception recognized in *Northeastern Florida* does not apply for at least four reasons: (1) the exception requires evidence that the replacement legislation has not "changed substantially" any illegal provisions in the prior legislation, *Ne. Fla.*, 508 U.S. at 662 n.3; mootness does not turn upon mere pleadings that the new law has not gone far enough; (2) the 2013 plans are "changed substantially" with respect to the concerns announced by this Court; and (3) *Diffenderfer* confirms that substantial revisions suffice to moot challenges to repealed legislation, even if the replacement legislation is subject to attack on the same grounds and even if plaintiffs do not achieve all of the relief that they have requested, and (4) substantially changed legislation enacted in response to litigation is evidence of good faith and that the challenged conduct will not recur, further distinguishing this case from *Northeastern Florida*.

i. The *Northeastern Florida* Exception Requires Evidence That the Replacement Legislation Did Not "Change[] Substantially" the Challenged Provisions in the Repealed Legislation.

The mere fact that plaintiffs may assert (or have asserted) claims under section 2 and the Constitution against the 2013 redistricting plans cannot keep their claims against the 2011 plans live under *Northeastern Florida*. In *Northeastern Florida*, the Supreme Court recognized a narrow exception to mootness where the challenged law has been repealed but effectively reinstated in a new but materially indistinguishable form. *Ne. Fla.*, 508 U.S. at 662. The exception does not apply when the repealed legislation has been "substantially changed" or "significantly revised." *Northeastern Florida*'s exception applies only when the repeal and amendment of challenged legislation effects a "change" in name only. *Id.* at 662 & n.3.

In *Northeastern Florida*, the plaintiffs brought facial and as-applied challenges to a municipal ordinance creating a race-based set-aside program for city contracts. *Id.* at 659. The district court entered summary judgment for the plaintiffs and permanently enjoined the ordinance, holding that it violated the Equal Protection Clause. *See Ne. Fla. Ch. Of Assoc. Gen. Contractors of Am. v. Jacksonville*, 951 F.2d 1217, 1218 (11th Cir. 1992) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). The Eleventh Circuit vacated and remanded with instructions to dismiss for lack of subject matter jurisdiction, holding that the plaintiffs lacked standing. *Ne. Fla.*, 508 U.S. at 660. After the Supreme Court granted certiorari, the city repealed the challenged ordinance and enacted a new ordinance that replaced the "set aside" with a "Sheltered Market Plan" that was "virtually identical to the prior ordinance's 'set aside.'" *Id.* at 661. The city claimed that repeal of the ordinance mooted the case, but the Supreme Court disagreed. Reasoning that the Court should not permit "a defendant [to] moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect," the Court held that the case was not moot. *Id.* at 662–63.

The Court's rejection of the city's mootness claim was driven by the racial classification on the face of the repealed and amended ordinances. The opinion defined the "wrongful conduct" in question as the "set aside" itself, not the plaintiffs' inability to secure city contracts:

> The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but *insofar as it accords preferential treatment to black- and female-owned contractors*—and in particular, insofar as its "Sheltered Market Plan" is a "set aside" by another name—it disadvantages them in the same fundamental way.

Id. at 662 (emphasis added and footnote omitted). The case fell into the *Aladdin's Castle* exception to mootness—indeed, it was "an *a fortiori* case," *id.*—because the city had already repeated its allegedly wrongful conduct by enacting a new racial set-aside. The disadvantage imposed by the ordinance was an express race- and gender-based classification, not an actual or anticipated disparate impact.

Northeastern Florida did not purport to overrule *Diffenderfer*, nor did it suggest that the strong rule of mootness in legislative repeal cases may be overcome by mere allegations that the new statute does not pass constitutional muster or the hypothetical chance that some future law will violate the same statutory or constitutional provisions. On the contrary, the majority distinguished *Northeastern Florida* from *Diffenderfer* and its progeny on the grounds that the "the statutes at issue" in the *Diffenderfer*-line cases "*were changed substantially, and that was therefore no basis for concluding that the challenged conduct was being repeated.*" *Id.* at 662 at n.3 (emphasis added). A holding of mootness was warranted where the infirm provisions in the old legislation were "significantly revised" by the new legislation, having undergone "major revisions." *Id.* (quoting *Fusari v. Steinberg*, 419 U.S. 379, 380, 385 (1975)).

Context is critical to make sense of *Northeastern Florida*'s exception to mootness, particularly to identify the relevant "wrongful conduct" and the type of statutory amendment that is so "insignificant" or "substantially similar" that it does not moot claims against a repealed statute. Repeal of the city ordinance in *Northeastern Florida* fit an exception to the general rule of mootness because the plaintiffs' claim called into question the permissibility of a discrete policy choice—a

race-conscious set-aside—that was inherently suspect under the Equal Protection Clause. *See Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute.") (citing *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979))); *id.* at 643-44 ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."). If *Northeastern Florida*'s exception has any application beyond facial constitutional claims and challenges to express racial classifications, it must be limited to cases in which the amended or newly enacted statute is unexplainable on grounds other than race, *see Shaw*, 509 U.S. at 643 (explaining that presumption of invalidity extends to those "rare" statutes that, although race neutral, are, on their face, "unexplainable on grounds other than race"), or necessarily imposes the same degree of disadvantage on the plaintiff. *See, e.g.*, *Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 286 (5th Cir. 2012) (rejecting mootness argument where city amended restrictions on church's property use but "doubled down and banned Opulent Life from the property altogether"); *Reed v. Town of Gilbert*, 707 F.3d 1057, 1066-67 (9th Cir. 2013) (declining to dismiss for mootness where amended sign code removed challenged provision but effectively barred plaintiffs from erecting signs at all). The fact that a plaintiff may bring similar claims against the new law is not sufficient to invoke the exception.

The *Northeastern Florida* exception is particularly ill-suited to equal-protection claims against facially neutral statutes because, absent extremely rare circumstances, these claims require proof that the government acted with a racially discriminatory purpose. When the repealed statute has been challenged on equal-protection grounds, a new or amended statute disadvantages the plaintiffs "in the same fundamental way" only if it is enacted for a racially discriminatory purpose. An equal-protection claim against a newly enacted statute necessarily presents a "substantially different controversy," *see Ne. Fla.*, 508 U.S. at 662 n.3, than an equal-protection claim against the statute it

replaces. There is no basis in law or fact for the notion, implicit in Plaintiffs' claims, that discriminatory purpose or racial classifications are hard-wired into district boundaries. They aren't. *See, e.g.*, *Shaw*, 509 U.S. at 646 ("A reapportionment statute typically does not classify persons at all; it classifies tracts of land, or addresses."). Claims of actual intentional discrimination are specific to the enacting body and the time of enactment. In this case, the 2011 and 2013 redistricting plans were enacted two years apart by different legislatures.

It is no answer to say that a future Texas Legislature may pass laws that violate section 2 of the Voting Rights Act or the Equal Protection Clause. Unlike the racial set-aside at issue in *Northeastern Florida*, a redistricting plan is not inherently suspect under the Constitution. Plaintiffs' suggestion that the *Northeastern Florida* exception is triggered by mere pleadings of continued illegality would eviscerate the rule that a repeal of the challenged legislation moots the challenge to that repealed legislation.

Moreover, predictions about what a future legislature may do are inherently speculative. No Supreme Court decision has suggested, much less held, that claims against a repealed statute are moot only if the government can guarantee that no future law will violate the Constitution. Such an impossible burden would swallow the rule of mootness by repeal. If this level of proof were required by *Northeastern Florida*—and it is not—statutory repeal could never moot a constitutional claim. Understandably, this interpretation of *Northeastern Florida* has not been adopted by the circuit courts. Rather, these courts have uniformly concluded that the mootness inquiry turns upon whether the new legislation amounts to a change, or merely a change in name only. *See Fed'n of Adver. Indus. Reps., Inc.*, 326 F.3d at 930 ("We, along with all the circuits to address the issue, have interpreted Supreme Court precedent to support the rule that repeal of a contested ordinance moots a plaintiff's injunction request, absent evidence that the City plans to or already has reenacted the

challenged law or one *substantially similar*.") (emphasis added); *McCorvey*, 385 F.3d at 849 (quoting *Fed'n of Adver.*, 326 F.3d at 930).

Plaintiffs also claim that the *Northeastern Florida* exception applies because the new maps as a whole are not substantially changed, since they were derived from this Court's interim maps which, in turn, were derived from the Texas Legislature's 2011 maps as the Supreme Court's unanimous decision in this case required. *See* Dkt. 886, Order at 13–14. That argument also fails. A statute need not be changed in every single respect—or even most respects—in order to moot the case, so long as the challenged provisions are substantially changed. *See, e.g., Maryland Highways Contractors Ass'n, Inc.*, 933 F.2d at 1249 (holding that the enactment of a new and revised statute mooted an attack on specific provisions of the statute that the legislature repealed in response to the litigation, even though "[m]ost of the remaining provisions . . . were not changed").

To the extent Plaintiffs maintain that the 2013 redistricting plans will have the same *effect* as the repealed 2011 plans, their claims cannot solve the Plaintiffs' mootness problem. A discriminatory effect, even if proven, cannot justify bail-in under Section 3—the only relief that Plaintiffs have offered as a basis for keeping their 2011 claims alive. If an alleged disparate impact is the only sense in which the 2013 plans can be said to "disadvantage the plaintiffs in fundamentally the same way" as the 2011 plans, that alleged disadvantage could not sustain live claims against the 2011 plans even if the plaintiffs' jurisdictional argument were sound. In any case, an allegation of disparate impact in a district carried over from the 2011 plans can be fully addressed through a claim against the 2013 plans.

ii. The 2011 Claims Are Moot Because the 2013 Legislation Substantially Changed the Challenged Maps.

Northeastern Florida's exception to mootness does not apply in this case because the challenged features of the 2011 maps have been "changed substantially" for the specific purpose of addressing Plaintiffs' legal claims. The Supreme Court's opinion in this case explained that any

court-drawn redistricting plan must reflect the Texas Legislature's political determinations while "tak[ing] care not to incorporate into the interim plan *any* legal defects in the state plan." *Perry v. Perez*, 132 S. Ct. at 941 (emphasis added). This is exactly what the Court did, and any suggestion that it made only insignificant changes is baseless.

Consistent with the Supreme Court's instruction, this Court's interim plans altered the state-enacted plans to address any constitutional or section 2 claim "shown to have a likelihood of success on the merits," and any "not insubstantial" section 5 claim. *See, e.g.*, Dkt. 691, Order at 11 (March 19, 2012); Dkt. 690, Opinion Order at 2-3 (March 19, 2012); *Perry v. Perez*, 132 S. Ct. at 941-42. The Court's effort to remove any likely legal defects from the 2011 plans resulted in the following changes:

(1) Reconfiguration of congressional districts 9, 18, and 30, based on not-insubstantial section 5 claims, "to include member offices and homes, and to restore economic engines to the district," Dkt. 691, Order at 41;

(2) Reconfiguration of congressional district 23 to return the district to benchmark performance levels in exogenous elections, based on a not-insubstantial section 5 claim, which remedied section 2 claims alleging a failure to draw 7 Latino opportunity districts in South and West Texas, *id.* at 31-32;

(3) Reconfiguration of congressional districts in Dallas and Tarrant County, based on a not-insubstantial section 5 claim, to "withdraw[] the encroachments into minority communities from the Anglo districts surrounding DFW" and address the claim of packing in CD 30, thereby providing a remedy for Fourteenth Amendment claims, *id.* at 36-38;

(4) Relocation of House district 35 to Hidalgo and Cameron County based on a not-insubstantial section 5 claim, Dkt. 690, Order at 5;

(5) Reconfiguration of House district 41, based on the likelihood of success on a one-person, one-vote claim, to ensure that the district remained a performing Latino ability district, *id.* at 4;

(6) Reconfiguration of House district 117, based on a not-insubstantial section 5 claim, to address claims of intentional discrimination, *id.* at 6;

(7) Restoration of House district 149, based on a not-insubstantial section 5 claim, to address claims of retrogression, *id.* at 11;

(8) Reconfiguration of House districts 77 and 78, based on a not-insubstantial section 5 claim, "to increase District 78's HCVAP to 58.3% and to provide minorities the ability to elect the candidate of their choice," *id.* at 11-12;

(9) Reconfiguration of House district 144, based on a likelihood of success under section 2, to create a Latino opportunity district and offset the elimination of a Latino-opportunity district in Nueces County, *id.* at 9.

The Legislature adopted these substantial changes in 2013 when it enacted the Court's interim plans and repealed the 2011 plans. The substantial changes adopted by the Texas Legislature in 2013 moot Plaintiffs' claims. *Ne. Fla.*, 508 U.S. at 662 n.3; *cf. Puerto Rican Legal Defense & Educ. Fund v. Gantt*, 796 F. Supp. 698, 700 (E.D.N.Y. 1992) (holding that complaint challenging preexisting 34-district congressional plan became moot when new 31-district plan was enacted and signed into law); *Tangipahoa Citizens for Better Gov't v. Parish of Tangipahoa*, 2004 WL 1638106 (E.D. La. 2004) (granting motion to dismiss Section 2 claims as moot where the challenged redistricting plan failed to gain preclearance and subsequent plan had been precleared).

iii. Claims Against the Replacement Legislation Do Not Create an Exception to Mootness, and the Changes Need Not Give Plaintiffs All Relief Sought.

Courts applying *Northeastern Florida* have time and again held that the sort of sweeping changes contained in the 2013 maps render moot claims against the repealed statute. *See Citizens for Responsible Gov't*, 236 F.3d at 1182 ("We have carefully compared each challenged provision in § 104 to the most analogous provision in § 105.3, and we conclude that the differences between the statutes are too numerous and too fundamental to preserve our jurisdiction over the § 104 challenges."). Plaintiffs, however, appear to argue that even if the 2011 maps have been substantially changed, their pleadings that the changes do not go far enough nevertheless can trigger a mootness exception. Dkt. 838, TLRTF Reply at 10.

This argument fails for the basic reason that *Northeastern Florida* did not overrule *Diffenderfer*. *Diffenderfer* found the plaintiffs' claim for relief against the repealed legislation to be moot as a result of the substantially changed legislation, even though the Court expressly remanded the case so that the plaintiffs could "attack the newly enacted legislation." *Diffenderfer*, 404 U.S. at 415.

Following *Diffenderfer*, the circuits facing the issue have held that where the legislature substantially changes a law in an attempt to comply with a court's pronouncements, mootness is established even though the reenacted law is subject to constitutional challenge. In *D.H.L. Associates, Inc. v. O'Gorman*, 199 F.3d 50, 52-53, 55 (1st Cir. 1999), the First Circuit determined that *Diffenderfer* controlled and refused to allow the plaintiff to "attempt to bypass this precedent through reliance on an exception to the mootness doctrine for situations in which the defendant voluntarily ceases the challenged practice." *Id.* at 55 (citing *Aladdin's Castle*, 455 U.S. 283, 289 and *Ne. Fla.*, 508 U.S. 656, 662 & n.3). The court found that:

> the ordinance has been recast apparently for the purpose of making it *more likely to overcome constitutional challenge* and it has remained unchanged since 1996. With no indication of a contrary intent, it would be unreasonable to presume that the Town

> would return to its prior zoning plans after the conclusion of this litigation. Thus, the voluntary-cessation exception to the mootness doctrine is inapplicable here.

Id. (emphasis added).

The Fourth Circuit reached a similar conclusion in *Maryland Highways Contractors Association*, refusing to find an exception to the rule of mootness where the state legislature had modified a statute in response to the litigation and the Supreme Court's ruling upon the statute's constitutionality. 933 F.2d at 1249. The court held that the attacks on the repealed legislation were moot because:

> the Maryland legislature repealed the MBE statute and enacted a new and revised MBE statute to replace it. See Md. State Fin. & Procurement Code Ann. §§ 14–301 et seq. (1990). The new *statute, by its terms, attempts to comply with the Supreme Court's holding regarding MBE statutes* in *City of Richmond v. Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989).

Id. at 1249 (emphasis added). This was so despite the court's acknowledgement of the "likelihood of a new attack upon the constitutionality of the present Maryland MBE statute." *Id.* at 1250.

Plaintiffs relatedly attempt to invoke *Northeastern Florida*'s exception by complaining that they have not received all of the relief that they have requested. This argument fares no better. While it is true that a plaintiff's receipt of all the relief that he is requested moots a case, the inverse is not true. "[D]isagree[ment] with the extent and sufficiency of the remedy" does not preclude a finding of mootness. *See, e.g.*, *Zessar v. Keith*, 536 F.3d 788, 795 (7th Cir. 2008). Indeed, *Diffenderfer* itself was moot despite the court's recognition that the lot might be partially exempt from taxation under the new law. *Diffenderfer*, 404 U.S. at 412-14.

iv. Legislative Adoption of the Court's Plans Moots the Case by Confirming the Absence of Evidence that the Challenged Conduct Will Recur.

The Supreme Court in *Northeastern Florida* grounded its exception not only upon the absence of substantial change, but also upon evidence providing a basis for "concluding that the challenged

conduct was being repeated." *Northeastern Florida*, 508 U.S. at 662 n.3. No basis for such a conclusion exists here, where the Legislature replaced the challenged maps with substantially changed maps "it believed would pass constitutional muster." *Teague*, 720 F.3d at 978.

Any characterization of the Texas Legislature's repeal and replacement of the 2011 maps as an evasion of a proper court-lead redistricting process is mistaken. Time and again, courts have rejected the notion that legislative remedial action in response to litigation is suspect or illegitimate. And a legislature's remedial action within the redistricting context is even more appropriate, not less.

The U.S. Supreme Court has held that legislative action is "presumptively legitimate." *Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades*, 485 U.S. 568, 575 (1988). This is no less true when the legislature responds to litigation by remedial legislation: "[t]he legislature may act out of reasons totally independent of the pending lawsuit, or because the lawsuit has convinced it that the existing law is flawed." *Lewis v. Hotel and Rest. Emps. Union*, 727 A.2d 297, 300 (D.C. Cir. 1999).

Applying these principles, courts have commended state legislatures for responding to litigation by repealing an invalidated statute and promptly replacing it with one that the State believes will pass constitutional muster and recognizing that such actions are made in good faith. These courts have refused to find that such actions are evidence that the challenged conduct was being repeated or would be again.

For example, the Eighth Circuit held in *Teague* that once the Arkansas state legislature repealed the Arkansas Public School Choice Act, the parents' action seeking declaration that the Act violated Equal Protection Clause of Fourteenth Amendment no longer involved a live case or controversy. The Eighth Circuit explicitly rejected the parents' argument—similar to that advanced by Plaintiffs here—that the replacement legislation was a "stop-gap; unless [the court] rule[s] on the merits of these appeals, the General Assembly will be free to return to employing race-based limits on public school transfers when it revisits the issue in 2015." 720 F.3d at 977. Despite the certainty

that the legislature would revisit the issue, the Eighth Circuit held that the challenges to the old law were mooted by the Legislature's "quick" action to "replace the stricken" legislation with a law that it "believed would pass constitutional muster." *Id.* at 978. The court rejected the application of the voluntary-cessation exception:

> we must assume the General Assembly will properly perform its legislative duty . . . in fashioning a new law that will then be subject to judicial review. "There is no evidence here that the State intends to reenact the repealed statute, nor that any such legislative action could evade review." *Epp v. Kerrey*, 964 F.2d 754, 755 (8th Cir.1992). In these circumstances, the "voluntary cessation" exception to mootness does not apply because "the allegedly wrongful behavior could not reasonably be expected to recur." *City of Mesquite*, 455 U.S. at 289 n. 10, 102 S.Ct. 1070.

Id.; *D.H.L. Associates, Inc.*, 199 F.3d at 55 (finding no evidence that the "legislature would return to its prior law after the conclusion of the litigation" where there was evidence that the "ordinance has been recast apparently for the purpose of making it more likely to overcome constitutional challenge").

Similarly, in *Federation of Advertising Industry Representatives,* the Seventh Circuit rejected the plaintiff's attempts to overcome the rule of mootness by characterizing the city's legislative response to litigation as a "disingenuous game of constitutional 'cat and mouse,'" explaining that:

> We disagree with Federation's characterization of the City's actions as disingenuous; rather, they *just as likely reveal the City's good-faith attempts to initially maintain an effective ordinance that complies with the Constitution, and then its desire to avoid substantial litigation costs by removing a potentially unconstitutional law from the books. . . . We can hardly fault the City for its attempts to craft an ordinance that passes constitutional muster and complies with judicial decisions.* Finally, the City candidly admits that the *Lorillard* decision persuaded it to repeal the ordinance because of the risk of losing in the litigation. We find that the City's actions over the course of this litigation do not give rise to an expectation that it will reenact the challenged ordinance.

326 F.3d at 931 (citations omitted) (emphasis added).

The D.C. Circuit has rejected in even stronger terms Plaintiffs' suggestion that legislative repeal while litigation is pending is evidence of bad faith or evasion. In *American Library Association v. Barr*. 956 F.2d 1178, 1187 (D.C. Cir. 1992), the court recognized that Congress "amended the

recordkeeping section" of a statute in order to "comply with [the] U.S. district court's decision" on the constitutionality of that section. *Id.* at 1186 (citation omitted). The Court explained that "Congress rendered the case moot by passing legislation designed to repair what may have been a constitutionally defective statute. *Congress's action represents responsible lawmaking, not manipulation of the judicial process*," *id.* at 1187 (emphasis added) and refused plaintiffs request to leave the district court judgment in place, *id.*).

These cases instruct that Plaintiffs' 2011 claims are moot. The Texas Legislature's incorporation of this Court's interim maps—maps which the Legislature had every reason to believe were legal in all respects—into the 2013 maps was responsible lawmaking, not evasion of the judicial process. And this is especially true given that the Supreme Court has emphasized the States' primary responsibility for reapportionment and the superiority of state legislative solutions to reapportionment disputes. The Texas Legislature can hardly be admonished for enacting statutes it believed would pass constitutional muster based upon this Court's obligations when drafting the interim maps. *See Perry v. Perez*, 132 S. Ct. at 941. The fact that the State enacted a law incorporating the interim orders of this Court renders moot the repealed 2011 maps.

B. The Case For Mootness By Legislative Repeal and Replacement is Especially Strong in the Context of Reapportionment.

Plaintiffs' treatment of the Texas Legislature's sovereign enactment of the 2013 maps as an interference with or evasion of the proper reapportionment process demonstrates a fundamental misunderstanding of the districting process and the role of redistricting litigation. Because both redistricting litigation and the mootness inquiry in cases of legislative repeal are rooted in significant concerns for federalism, exceptions to the general rules in both contexts should be construed quite narrowly.

The Supreme Court has made quite clear that the States, through their legislatures, bear the responsibility for reapportionment. *E.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (principal

opinion) ("Legislative bodies should not leave their reapportionment tasks to the federal courts."); *see also LULAC v. Perry*, 548 U.S. 399, 415 (2006) (Kennedy, J.) (describing court-drawn district processes as "unwelcome obligation[s]," and explaining "[t]hat the federal courts sometimes are required to order legislative redistricting, however, does not shift the primary locus of responsibility").

Thus, while federal courts may at times be called upon to review legislatively drawn reapportionments, those courts must not interfere with the legislative prerogative to undertake the State's obligation to reapportion districts. In *Growe v. Emison*, the Supreme Court unanimously explained:

> "We say once again what has been said on many occasions: *reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.*" *Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 766, 42 L.Ed.2d 766 (1975). Absent evidence that these state branches will fail timely to perform that duty, *a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.*

507 U.S. 25, 34 (1993) (emphasis added). Indeed, "[t]he [Supreme] Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 U.S. at 539–40 (principal opinion) (citing *Connor v. Finch*, 431 U.S. 407, 414–15 (1977); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973); *Burns v. Richardson*, 384 U.S. 73, 84–85 (1966)). This duty not to impede the State's processes extends even after a federal court determines that a districting plan is unconstitutional: "[w]hen a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution." *Wise*, 437 U.S. at 540 (principal opinion).

Given that reapportionment responsibility is assigned to the States, it follows also that court-draw plans are always subject to review and replacement with legislatively drawn maps. *E.g.*, *LULAC v. Perry*, 548 U.S. at 416 ("It should follow, too, that if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act. . . .[O]ur decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own.") (citing *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (per curiam); *Reynolds v. Sims*, 377 U.S. 533 (1964)) (additional citations omitted); *Wise*, 437 U.S. at 540 (explaining that the "unwelcome obligation" of the imposition of a federal-court-drawn plan is only "pending later legislative action").

In *Growe*, the Supreme Court held that the district court had erred by issuing an injunction prohibiting implementation of a legislative districting plan adopted by a state court. The Supreme Court reasoned that at the point that the state court entered its order, "the elementary principles of federalism and comity embodied in the full faith and credit statute, *obligated the federal court to give that judgment legal effect*, rather than treating it as simply one of several competing legislative redistricting proposals available for the District Court's choosing. *Growe*, 507 U.S. at 35-36 (citations omitted) (emphasis added).

Here, Plaintiffs do far worse. Dismissing the Texas Legislature's enactment of the 2013 maps as merely an attempt to "curb" pending litigation, and claiming that the Legislature has somehow interfered with or evaded the reapportionment process shows a complete disregard for the State's proper role in the apportionment process. As the Supreme Court has repeatedly made clear, States are empowered to reapportion legislative districts; litigants may not use federal courts to "affirmatively obstruct state reapportionment," nor may federal courts "permit federal litigation to be used to impede it." *Id.* at 34.

In 2013, the Texas Legislature undertook its obligation to provide maps for the 2014 elections and beyond. The Court's implementation of the 2013 maps as interim maps for the 2014 elections due to "current time restraints [that] would cause unnecessary delay" had the Court attempted to create new maps to serve as interim maps for 2014, *see* Dkt. 886, Order at 22; *id.* at 24, demonstrates that the Legislature was not merely permitted to redistrict under *LULAC, Growe*, *Wise* and other cases, the Legislature was best positioned to adopt maps for the approaching 2014 election cycle.

No precedent could possibly be read to fault the Texas Legislature for acting in a timely fashion in an attempt to obviate the need for another round of court-drawn interim maps. And no impropriety exists with respect to the Legislature's decision to enact districting maps in 2013. Plaintiffs' arguments to the contrary—and their attempt to maintain in this court claims regarding the now-replaced 2011 maps—are founded upon the refusal to accept the settled principle that in the reapportionment context, the end to be achieved is a legal map devised through the State's processes. Federal litigation is sometimes—and only sometimes—a legitimate means to ultimately arriving at a legal apportionment, but it cannot be permitted to thwart Texas's attempt to replace a challenged set of maps with maps that this Court ensured would not "incorporate . . . any legal defects [from] the state plan," *Perry v. Perez*, 132 S. Ct. 934, 941 (2012). A federal court has the duty to "stay[] its hand" to allow the State reapportionment processes to proceed unimpeded, *Scott v. Germano*, 381 U.S. 407, 409 (1965); a State is not supposed to stay its hand, leaving reapportionment to the federal courts, *Wise*, 437 U.S. at 540 (principal opinion).

C. There Are No Valid Alternative Bases for a Finding of Continued Justiciability.

Because neither of the exceptions to the general rule of mootness applies, there is no alternative basis for continuing the 2011 litigation. In their briefing, Plaintiffs argue that the 2011

litigation is live because this Court can still provide equitable relief in the form of Section 3 bail-in and because the injury is capable of repetition yet evading review. These arguments fail.

1. The Potential For a Collateral Benefit Under Section 3(c) Cannot Sustain a Live Controversy Under the Collateral-Consequences Doctrine.

Plaintiffs cannot keep their claims alive based on the alleged "collateral consequences" of the 2011 redistricting plans. No such consequences exist, and no declaratory or injunctive relief could possibly provide a remedy against the 2011 plans. Dkt. 838, TLRTF Reply, at 8. The collateral-consequences doctrine is "most commonly applied in habeas corpus proceedings where the petitioner has subsequently obtained the relief sought." *Pub. Util. Comm'n of State of Cal. v. F.E.R.C.*, 100 F.3d 1451, 1460 (9th Cir. 1996). It is sometimes applied in cases of a repealed statute or regulation, but only where the plaintiff is shown to be subject to a continuing disability or penalty because of the challenged law, such as civil liability or criminal conviction that remains in effect after repeal. *See Qwest Corp. v. City of Surprise*, 434 F.3d 1176, 1182 (9th Cir. 2006).

The collateral-consequences doctrine does not apply in this case because the plaintiffs cannot identify any present effect of the 2011 redistricting plans. "Classically, the collateral consequences doctrine is applicable as to official acts that have already occurred." *Kansas Judicial Review v. Stout*, 562 F.3d 1240, 1248 (10th Cir. 2009). It does not apply where the "enforcement" of the challenged laws "was enjoined *before* they were applied against the plaintiffs." *Id.* (rejecting plaintiffs' argument to "keep this case going" where challenged clauses of judicial code were never enforced against the plaintiffs). Here, no elections were ever conducted under the 2011 maps, and there is no danger that those maps will be enforced since they were replaced by this Court's interim maps, and subsequently, by the 2013 maps.

Plaintiffs' effort to secure a future litigation advantage does not trigger the collateral-consequences doctrine. Because "missed benefits are not legal penalties from past conduct, they do

not fall within" the collateral-consequences exception to mootness. *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1167 (9th Cir. 2011). Plaintiffs insist on an advisory opinion regarding the 2011 plans in order to then seek a collateral advantage in the form of section 3 bail-in. "[A]n amendment that satisfies the claim may moot the claim despite the plaintiff's hope to achieve some collateral advantage by further litigation." 13C Charles Allan Wright & Arthur R. Miller, Federal Practice & Procedure, §3533.6 (3d ed.) (citing *Langford v. Day*, 134 F.3d 1381, 1382 (9th Cir. 1998) (finding that prohibition of hanging mooted plaintiff's Eighth Amendment claim, despite plaintiff's intent to rely on the unconstitutionality of hanging to obtain the collateral benefit of an invalidation of his death sentence). Bail-in cannot provide any remedy against the 2011 plans—and the plaintiffs have not argued that it can—because those plans have no consequences, period. The possibility of bail-in therefore cannot sustain a live controversy against the 2011 plans.

2. The Capable-of-Repetition-Yet-Evading-Review Exception to Mootness Does Not Apply.

Nor can Plaintiffs create a justiciable controversy by characterizing the dispute over the 2011 redistricting plans as "capable of repetition, yet evading review." This exception "permit[s] suits for prospective relief to go forward despite abatement of the underlying injury" when two conditions are satisfied: "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis*, 494 U.S. at 481 (alteration in original; citations omitted). Neither condition can be satisfied in this case.

First, a challenge to a statewide redistricting plan is not the kind of claim that evades review. The relevant question is "whether the challenged activity is by its very nature short in duration, so that it could not, or probably would not, be able to be adjudicated while fully live." *Nat'l Black Police Ass'n v. D.C.*, 108 F.3d 346, 350 (D.C. Cir. 1997). Statewide redistricting schemes are not inherently short in duration. On the contrary, redistricting schemes are intended to remain in effect for up to

ten years. If anything, the empirical evidence refutes the claim that redistricting plans evade review; redistricting litigation frequently lasts for the better part of a decade.

Second, there is no reasonable expectation that the same plaintiffs will suffer the same wrong again. It is not enough to speculate that *some* voter will be wronged at some point by a future Legislature. There must be a reasonable expectation that "the same complaining party [will] be subjected to the same action again." *Lewis*, 494 U.S. at 481; *cf. Roe v. Wade* 410 U.S. 113, 125 (1973) ("Pregnancy often comes more than once to the same woman . . . ."). Even if it were reasonable to predict voting rights act violations in the future, there is no reason to expect that it will affect the particular plaintiffs in this case. The exception to mootness for disputes capable of repetition yet evading review has no application to Plaintiffs' claims against the 2011 redistricting plans.

II. THE PARTISAN-GERRYMANDERING CLAIM SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM ON WHICH RELIEF MAY BE GRANTED.

The Texas Democratic Party Plaintiffs ("TDP") and others alleged partisan-gerrymandering claims in their initial complaints in this case. The State Defendants filed a motion to dismiss the claims for lack of subject matter jurisdiction and failure to state a claim on which relief may be granted. The Court dismissed those claims under Rule 12(c) for failure to state a claim. *See* Dkt. 285, Order at 19-22 (Sept. 2, 2011). The TDP is the only party asserting partisan-gerrymandering claims against the 2013 redistricting plans. Those claims are nearly identical to that asserted in 2011. TDP raises no new issues and once again proposes no reliable standard for measuring the alleged burden on representational rights. TDP's partisan-gerrymandering claims should be dismissed.

In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a plurality of the Supreme Court refused to entertain partisan-gerrymandering claims, holding that partisan gerrymandering presents a nonjusticiable political question. The plurality would have overruled *Davis v. Bandemer*, 478 U.S. 109 (1986),

because it had produced "[e]ighteen years of essentially pointless litigation" without identifying a standard for partisan-gerrymandering claims. *See Vieth*, 541 U.S. at 306 (plurality).

It follows from *Vieth* that any party who asserts a partisan-gerrymandering claim first bears the heavy burden of identifying a standard of liability—something that no claimant or court has succeeded in doing in the last twenty-five years. The Supreme Court has rejected a number of proposed standards; therefore, a litigant hoping to pursue a partisan-gerrymandering claim must, at the very least, propose a standard that has not already been rejected.

TDP has again failed to articulate a reliable standard. First, TDP claims that "a standard is unnecessary" because the State Defendants have admitted that portions of the plan were motivated by politics. Dkt. 902, TDP's First Amended Cross Claim at 6. The Supreme Court has already rejected a standard that asks "whether district boundaries had been drawn solely for partisan ends to the exclusion of all other neutral factors relevant to the fairness of redistricting." *Veith*, 541 U.S. at 290-91 (internal quotations omitted); *see also id.* at 307 (Kennedy, J., concurring) (concluding that liability "must rest on something more than the conclusion that political classifications were applied"). The argument that no standard is required is a non-starter.

Second, TDP argues that "population deviation was utilized in the State House map as the principal method to obtain the sought political ends, [and that] this case presents a meaningful standard." Dkt. 902, TDP's Amended Cross Claim at 6. TDP does not, however, identify any meaningful standard by which the alleged use of population deviations for political ends may be judged.

The remainder of TDP's Amended Cross Claim is substantially identical to the previously dismissed Cross Claim. It asserts liability for failure to provide Democrats with a number of seats proportional to the partisan breakdown of statewide elections. Dkt. 55, TDP's Cross Claim at 4–6.

The Supreme Court plurality in *Vieth* expressly rejected "the principle that groups (or at least political-action groups) have a right to proportional representation," explaining that:

> [T]he Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.

Vieth, 541 U.S. at 288 (plurality). Justice Kennedy likewise concluded that proportional representation was not a justiciable measure of fairness for electoral districts. *See id.* at 317 (Kennedy, J., concurring in the judgment) ("The failings of the many proposed standards for measuring the burden a gerrymander imposes on representational rights make our intervention improper.").

The non-justiciability of political-gerrymandering claims is strongly anchored in the Constitution. Article I assigns the task of drawing congressional districts to the States:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. CONST. art. I § 4, cl. 1. As the *Vieth* plurality explained, the Framers included the "make or alter" clause for the specific purpose of controlling excessive partisanship in the drawing of congressional electoral districts. *See, e.g.*, *Vieth*, 541 U.S. at 275 ("James Madison responded in defense of the provision that Congress must be given the power to check partisan manipulation of the election process by the States."). The express grant to *Congress* of power to regulate partisanship in the electoral process means that this task, should it be undertaken by the federal government at all, is to be left solely to the legislative branch. This explicit enumeration of congressional power clearly evidences that partisanship in electoral matters is not the sort of thing upon which the federal judiciary should opine.

The Supreme Court has never approved of a legal standard to determine liability for partisan gerrymandering. The TDP has not offered one. Without a standard of liability, there is no claim fit for judicial resolution, and the claim should be dismissed for lack of subject-matter jurisdiction. In the alternative, because the TDP has again failed to provide a workable standard of liability, its partisan-gerrymandering claim must be dismissed for failure to state a claim on which relief may be granted.

CONCLUSION

The Court should grant the State Defendants' motion and dismiss the claims based upon and arising from the Legislature's enactment of the 2011 maps. The Court should also dismiss the 2013 partisan-gerrymandering claim. Trial in these consolidated proceedings should then proceed on those claims for injunctive, declaratory, and equitable relied arising from the 2013 maps not resolved on summary judgment.

Dated: May 14, 2014

Respectfully submitted.

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I hereby certify that on May 13, 2014, I conferred with opposing counsel by email. All counsel who responded indicated that they are opposed to this motion.

/s/ Patrick K. Sweeten
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