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

SHANNON PEREZ, *et al.*, Plaintiffs, and UNITED STATES of AMERICA, Plaintiff-Intervenor, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-360 (OLG-JES-XR) Three-Judge Court [Lead Case]
MEXICAN AMERICAN LEGISLATIVE CAUCUS, TEXAS HOUSE OF REPRESENTATIVES (MALC), Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-361 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
TEXAS LATINO REDISTRICTING TASK FORCE, *et al.*, Plaintiffs, v. RICK PERRY, Defendant.	Civil Action No. 5:11-cv-490 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

MARGARITA V. QUESADA, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-592 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
JOHN T. MORRIS, Plaintiff, v. STATE OF TEXAS, *et al.*, Defendants.	Civil Action No. 5:11-cv-615 (OLG-JES-XR) Three-Judge Court [Consolidated Case]
EDDIE RODRIGUEZ, *et al.*, Plaintiffs, v. RICK PERRY, *et al.*, Defendants.	Civil Action No. 5:11-cv-635 (OLG-JES-XR) Three-Judge Court [Consolidated Case]

UNITED STATES' OPPOSITION TO THE STATE DEFENDANTS' MOTION TO DISMISS

This Court already—and correctly—ruled that the parties' Voting Rights Act claims concerning the 2011 redistricting plans are not moot. Order (ECF No. 886) [hereinafter 9/6/13 Order]. This Court rightly declined to reconsider that same issue when the State Defendants raised it in their objection to the United States' Motion to Intervene. Order at 2 (ECF No. 904)

[hereinafter 9/24/13 Order]. A motion asking this Court to consider the very same issue a third time is inappropriate and should be rejected.

In the event that this Court nevertheless chooses to revisit this issue, it should once again conclude that claims based on the 2011 plans are not moot for at least two reasons. First, there is a "reasonable possibility" that the Texas Legislature would, once claims challenging the 2011 plans were dismissed, "engage in the same alleged conduct that Plaintiffs assert violated their rights." 9/6/13 Order at 13-14. Second, this Court can still grant relief under Section 3(c) of the Voting Rights Act, 42 U.S.C. § 1973a(c), based on the intentional discrimination that animated the 2011 redistricting plans. 9/6/13 Order at 14-15. Either rationale is independently sufficient to permit the United States' claims to proceed.

I. BACKGROUND

This lawsuit includes challenges to Texas's 2011 redistricting plans under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. 9/6/13 Order at 2. At the time that the State enacted these plans, it was subject to Section 5 of the Voting Rights Act. Thus, Texas sought judicial preclearance for the plans from a three-judge court of the U.S. District Court for the District of Columbia ("D.C. District Court"). *Id.*; *see also* 42 U.S.C. § 1973c. The Section 2 and Section 5 actions proceeded simultaneously, though the law precluded this Court from issuing a decision on plaintiffs' Section 2 claims until a final decision in the Section 5 preclearance action. 9/6/13 Order at 3. When it became apparent that the 2011 plans would not be precleared under Section 5 in time for the 2012 primary elections, this Court enjoined the implementation of the unprecleared 2011 plans, held a bench trial on plaintiffs' Section 2 and constitutional challenges to those plans, crafted interim court-ordered redistricting plans, and extended election deadlines. *Id.* at 3. The

Supreme Court reviewed those interim plans on direct appeal, and this Court recrafted them on remand. *Id.* This Court then extended election deadlines once more, and the 2012 elections proceeded under the revised interim plans. *Id.* at 4. The three-judge panel of the D.C. District Court later issued an opinion denying preclearance as to the State's 2011-enacted plans, finding, *inter alia*, that both the Congressional and House plans were retrogressive, that the Congressional plan was enacted with discriminatory intent against African-American and Hispanic voters, and that the retrogressive effect in the House plan may not have been accidental. *See Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012) (three-judge court), *vacated and remanded*, 133 S. Ct. 2885 (2013). The State Defendants appealed directly to the Supreme Court. 9/6/13 Order at 4-5.

In June 2013, while that appeal was pending and this case was effectively on hold, two key events transpired. First, Texas enacted new redistricting plans that were based on this Court's revised interim redistricting plans. *Id.* at 5-6. Second, the Supreme Court ruled that the existing coverage formula in Section 4(b) of the Voting Rights Act could not be used as a basis for subjecting covered jurisdictions to Section 5 preclearance. *Id.* at 6; *see Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013). This meant that Texas was no longer automatically subject to Section 5's preclearance requirement, as it had been since 1975. 9/6/13 Order at 6. In light of *Shelby County*, the Supreme Court vacated the D.C. District Court's judgment and, upon remand, the D.C. District Court granted Texas's motion for voluntary dismissal of its preclearance claims, which the United States did not oppose. *See* Mem. and Order at 2-4, *Texas v. United States*, No. 1:11-cv-1303 (D.D.C. Dec. 3, 2013) (three-judge court) (ECF No. 255). The D.C. District Court also denied a motion of minority voters who had intervened as defendants in that case to amend their answers in order to assert a counterclaim against Texas under Section 3(c) of the Voting

Rights Act. *Id.* at 3-5. The D.C. District Court agreed with the United States that the ongoing litigation before this Court was the appropriate venue for a claim for prospective relief under Section 3(c). *Id.* at 5 ("[I]f Defendant-Intervenors brought the type of claim they wish to assert against Texas as an original action in this court, we would transfer it to the Western District of Texas.").

These developments led to multiple filings in this case. The State Defendants moved to dismiss plaintiffs' challenges to the 2011 plans, arguing they are moot in light of the legislature's enactment of the 2013 plans. 9/6/13 Order at 6-7. Plaintiffs responded by requesting to amend their complaints to add claims based on the 2013 plans and to seek relief under Section 3(c) of the Voting Rights Act based on the 2011 plans. *Id.* Section 3(c) allows courts, under certain circumstances, to subject a jurisdiction to preclearance requirements like the requirements of Section 5. *See* 42 U.S.C. § 1973a(c). Early in September 2013, this Court denied the motion to dismiss and allowed plaintiffs to amend their complaints. 9/6/13 Order at 1-2. In its opinion, this Court carefully considered and rejected the State Defendants' argument that any claims against the 2011 plans are moot. *Id.* at 11-15.

Meanwhile, in August 2013, the United States sought to intervene in this case to seek relief under Section 3(c) of the Voting Rights Act based upon the intentional discrimination underlying the 2011 redistricting plans. *See* U.S. Mot. Intervene (ECF No. 871). The State Defendants opposed the motion, relying primarily on their argument that any claims against the 2011 plans are moot. Order at 2 (ECF No. 904) ("Defendants' primary argument is that the motion to intervene should be denied 'because this Court cannot provide any relief on claims against the 2011 plans' and the 2011 plan claims are moot."). In late September 2013, this Court granted the United States' motion to intervene. 9/24/13 Order at 1. The Court dismissed the

State Defendants' mootness argument, explaining that it had already decided the issue and that the argument lacked merit. *Id.* at 2.

II. ARGUMENT

A. This motion inappropriately asks the Court to revisit an issue it has considered and correctly rejected twice.

Motions to reconsider "serve a narrow purpose: to permit a party to correct manifest errors of law or fact, or to present newly discovered evidence." *Krim v. pcOrder.com, Inc.*, 212 F.R.D. 329, 331 (W.D. Tex. 2002). Moreover, a motion for reconsideration is meant to address not simply a significant error, but rather an error that has occurred because "the 'Court has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension.'" *Del. Valley Floral Grp., Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1384 (Fed. Cir. 2010) (citation omitted); *see also, e.g.*, *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) ("[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.") (citations omitted).

Thus, "[m]otions to reconsider based on recycled arguments only serve to waste the resources of the court." *Krim*, 212 F.R.D. at 331; *see also Del. Valley*, 597 F.3d at 1384 ("[A] motion for reconsideration should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made." (citation omitted)). This Court accordingly "will not revisit its findings and legal conclusions with which [the party seeking reconsideration] merely disagree[s]." *Krim*, 212 F.R.D. at 332; *see also Baldus v. Members of Wis. Gov't Accountability Bd.*, 843 F. Supp. 2d 955, 957 (E.D. Wis. 2012) (three-

judge court) (concluding that "a second collateral attack on the wisdom of the Court's prior orders" was an improper "third bite at an apple that the Court has twice explained is a bitter one to chew"); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (concluding that a plaintiff that "simply reargued its previous argument . . . improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought through—rightly or wrongly").

The State Defendants' current "Motion to Dismiss" is exactly the sort of inappropriate motion for reconsideration against which courts have warned. The State Defendants' motion does not point to any newly discovered evidence. And the State Defendants fail even to attempt to show that this Court "has patently misunderstood a party, or has made a decision outside of the adversarial issues presented to the Court by the parties, or has made an error not of reasoning, but of apprehension." *Del. Valley*, 597 F.3d at 1384. Indeed, the State Defendants' motion does not even claim to have uncovered any "manifest errors of law or fact." *Krim*, 212 F.R.D. at 331. It merely asserts—incorrectly—that this Court's earlier decision misapplied the law and seeks to reargue, in greater detail, issues already decided by this Court. *See* Mot. Dismiss at 2 (ECF No. 995) (claiming that this Court's previous decision misapplied the law and "urging the Court to reconsider" it). In other words, the State Defendants ask this Court to do precisely what it should not do: revisit legal conclusions with which a party merely disagrees. *See Krim*, 212 F.R.D. at 332. This Court should thus decline to consider this motion.

B. This Court correctly applied the voluntary cessation rule in its previous opinion.

In the event that this Court chooses to entertain the State Defendants' motion, it should conclude that the Court correctly applied controlling precedent when it ruled that the State

Defendants failed to meet their burden of establishing that the challenged conduct cannot reasonably be expected to recur. 9/6/13 Order at 12. After taking more than six months to repackage its mootness argument, the State Defendants proffer a misleading brief that claims that this court has somehow violated a "near categorical rule" and put the burden on the wrong party. State Defs.' Mot. Dismiss at 3. In reality, this Court's mootness ruling is fully consistent with Supreme Court and Fifth Circuit precedent. That precedent shows that this Court has correctly set out and applied the voluntary cessation doctrine. It also shows that the burden of proving an exception to that doctrine is squarely on the defendant – even when the defendant is a State. *See K.P. v. LeBlanc*, 729 F.3d 427, 438 (5th Cir. 2013) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)).

This Court appropriately relied on *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982), for this proposition: " that repeal of a challenged law does not render a case moot if there is a reasonable possibility that the government would reenact the law if the proceedings were dismissed." *See also* 9/6/13 Order at 13. This Court correctly applied that doctrine to rule that this case is not moot due to the reasonable possibility that the Texas Legislature would, once claims challenging the 2011 plans were dismissed, "engage in the same alleged conduct that Plaintiffs assert violated their rights, including removing economic engines from minority districts, dismantling coalitions, manipulating voter turnout among Hispanics, or engaging in other conduct that Plaintiffs allege violated their rights in connection with the 2011 plans." *Id.* at 14. Despite three attempts to do so, the State Defendants have not carried their burden to establish that there is not a reasonable possibility that the Texas Legislature will engage in this conduct in the next legislative session or a subsequent one. *See id.*; *see also* 9/24/13 Order; Mot. Dismiss at 11-14. This Court's contrary finding is well supported both by

(a) the history of racially discriminatory redistricting in Texas despite being subject to federal oversight under Section 5 since 1975, and (b) the fact that, though the Legislature adopted new redistricting plans, "it has not conceded the illegality of the [2011 plans] and has steadfastly maintained that its actions [*i.e.* enacting the 2011 plans] did not violate Plaintiffs' rights." 9/6/13 Order at 14; *see also* U.S. Statement of Interest at 18 (ECF No. 827) (listing the cases and citing the objection letters that chronicle Texas's history of racial discrimination in voting).

It bears repeating that in *every* redistricting cycle since 1970, courts have found that one or more of Texas's statewide redistricting plans violated the voting guarantees of the Constitution or the Voting Rights Act. *See* U.S. Statement of Interest at 18. Indeed, the D.C. District Court, as well as this Court, made findings, or found evidence, of intentional racial discrimination in the adoption of the 2011 Congressional and House redistricting maps at issue in this case, which is why the United States now seeks relief from this Court under Section 3(c) of the Voting Rights Act. *See, e.g., Texas*, 887 F. Supp. 2d at 159-62, 177-78; Opinion at 6, 8-9, 11-12 (ECF No. 690); Order at 36, 40-41 (ECF No. 691). And it is also significant that, even after this Court had enjoined the 2011 plans, the State defendants repeatedly urged this Court and the Supreme Court to adopt those plans *unchanged* as the interim plans for the 2012 elections. *See, e.g.*, Brief for Appellants at 31, 54-55, *Perry v. Perez*, 132 S. Ct. 934 (Dec. 21, 2011) (Nos. 11-713, 11-714, 11-715) (urging the Supreme Court to "remand to the district court with instructions to impose Texas' legislatively enacted map as the interim plan while preclearance is pending"); Reply Brief for Appellants at 4, 56, *Perry* (Jan. 3, 2011) (same); Defs.' Advisory re: Interim Reapportionment at 9 (ECF. No. 405) (urging this Court to impose the 2011 plans as the interim plans); Defs.' Objections to Proposed Plans at 23 (ECF No. 468) (same). The State Defendants' insistence on pushing in this litigation for implementation of the very plans as to

which the federal courts found evidence of intentional racial discrimination casts further doubt on their assertion that the intentional discrimination that occurred in the drawing of the 2011 plans cannot reasonably be expected to recur.

The State Defendants contend that this Court should have viewed *Aladdin's Castle* as a narrow exception to the "near categorical rule . . . that statutory repeal moots a case." Mot. to Dismiss at 3. But the Supreme Court does not view *Aladdin's Castle* that way; instead, the Court has described *Aladdin's Castle* as one application of the general voluntary cessation rule. Thus, the Court recently cited *Aladdin's Castle* for the proposition that "[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citing *Aladdin's Castle*, 455 U.S. at 289); *see also Laidlaw*, 528 U.S. at 189 ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'") (citing *Aladdin's Castle*, 455 U.S. at 289).

Cases determining that a repeal of a challenged statute or other public law or policy renders a legal challenge moot simply reflect the fact-specific nature of the *Aladdin's Castle* rule. As this Court's mootness opinion recognized, the voluntary cessation rule does not apply when there is very little chance that a defendant will repeat or reengage in the challenged conduct once the case is dismissed. In many instances, a repeal of a challenged law or a change in official policy does make it very unlikely that the challenged conduct will recur. But, as this Court correctly found, here Texas's adoption of altered redistricting plans does not perform this function: "The fact that the [Texas] Legislature has adopted the Court's interim plans in an attempt to curb this particular litigation is no assurance that it will not engage in the same

conduct in the next legislative session or any session thereafter." 9/6/13 Order at 14. There is certainly no assurance that Texas will await the results of the next decennial census before again redrawing the House and Congressional districts. Indeed, after a change in the political composition of the Texas legislature in 2003, Texas, though under no legal compulsion to do so, enacted a new Congressional plan in October 2003 that supplanted the court-ordered post-2000 Census Congressional plan used in the 2002 elections. *See LULAC v. Perry*, 548 U.S. 399, 410-13 (2006). Texas's history of racial discrimination in redistricting and its adamant denial of any wrongdoing in its adoption of the 2011 plans plainly support this Court's conclusion.

Nor does the pre-*Aladdin's Castle* Supreme Court decision on which the State Defendants principally rely conflict with this Court's mootness ruling. Contrary to the State Defendants' contention, *Diffenderfer v. Central Baptist Church of Miami*, 404 U.S. 412 (1972), does *not* establish a "general rule that repeal of a statute moots a case." Mot. to Dismiss at 4. Indeed, *Diffenderfer* did not announce a general rule at all; it instead relied on unique circumstances that clearly distinguish it from this case. The key to the Court's ruling in *Diffenderfer* was that the challenged statute appeared no longer to apply to the defendant's property. Plaintiffs had brought only an as applied challenge; they argued that a statute that authorized tax exemptions for certain church property violated the First Amendment as applied to a particular church parking lot. 404 U.S. at 414. The challenge to the 2011 plans is far broader than the very narrow challenge at issue in *Diffenderfer*. More importantly, *Diffenderfer* gives no indication that the plaintiffs even argued that there was a reasonable possibility that the State would repeat the challenged conduct. Here, the State Defendants' long history of racial discrimination in voting and its vigorous defense of the alleged intentionally-discriminatory 2011 plans provided this Court with an unquestionably sound basis for concluding that there was a

reasonable possibility that the State Defendants would repeat the challenged conduct. Furthermore, the Court's opinion in *Diffenderfer* relied on the fact that an injunction preventing the tax exemption's application to the particular church parking lot, the only relief plaintiffs had requested, was no longer possible (because it appeared that the exemption no longer applied to the church parking lot). *Id.* at 414-15. Here, relief is possible not only in the form of an injunction preventing repetition of the discriminatory conduct that animated the 2011 plans, but also, as discussed below, under Section 3(c) of the Voting Rights Act. Moreover, the other Supreme Court cases the State Defendants cite, *see* Mot. Dismiss at 3-4, likewise do not support the broad "general rule" they favor. *See, e.g.*, *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989) (plurality op.) (concluding that a statutory challenge case was moot "[b]ecause the *special concern* that animates the overbreadth doctrine is no longer present after the amendment or repeal of the challenged statute" (emphasis added)).

The Fifth Circuit has specifically determined that the voluntary cessation doctrine applies to public entities, and that public defendants, like private ones, have the burden of showing that their conduct cannot reasonably be expected to recur. *See Sossamon v. Texas*, 560 F.3d 316, 325 (5th Cir. 2009), *aff'd sub nom.*, 131 S. Ct. 1651 (2011). In *Sossamon*, the Fifth Circuit first noted that the Supreme Court had made clear that there is a "stringent" standard for construing exceptions to the general rule that a defendant's voluntary cessation of a challenged practice does not moot a case, and that defendants bear a "heavy burden" in meeting that standard. *See id.* (citing *Laidlaw*, 528 U.S. at 189). The court in *Sossamon* then concluded that it could remain faithful to *Laidlaw* but treat a public defendant with more "solicitude" than would be afforded a private defendant. *See id.* But although the State's burden is a "lighter burden" than the particularly heavy one that would have been borne by a similarly situated private defendant, it is

nonetheless a serious burden. A public defendant must "make 'absolutely clear' that the [challenged conduct] cannot 'reasonably be expected to recur.'" *Id.* (citing *Laidlaw*, 528 U.S. at 189).

Moreover, it is not at all clear that the "presumption of good faith" *Sossamon* found generally applicable to public entity defendants, *see id.*, is appropriate here, in the face of Texas's consistent history of race-based voting discrimination and, in particular, its recurrent pattern of voting-rights violations with respect to statewide redistricting. *See supra* at 9 (citing U.S. Statement of Interest at 18). Additionally, the presumption of good faith in *Sossamon* was predicated partly on the notion that public servants are "not self-interested." 560 F.3d at 325. But, as courts have repeatedly recognized, legislators' self-interest is a very significant factor in redistricting. *See, e.g.*, *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 304 (D. Md. 1992) (three-judge court) (Muraghan, J., and Motz, J., concurring) (recognizing that redistricting "[i]nevitably . . . directly involves the self-interest of the legislators"). In any event, the State Defendants have fallen far short of meeting the "lighter" but still very significant burden here.

Furthermore, a more recent Fifth Circuit decision indicates that *Sossamon*'s "lighter burden" and "presumption of good faith" do not always apply when public defendants seek to establish an exception to the voluntary cessation doctrine. In *K.P. v. LeBlanc*, the Fifth Circuit stated that the state-actor defendant asserting mootness bore "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," and ruled that the case was not moot "[b]ecause it is not clear that the [state-actor's conduct] could not reasonably be expected to recur." 729 F.3d at 438. Indeed, in rejecting another of the defendant's jurisdictional arguments, the court noted that the defendant's "theory,

if accepted, would work an end-run around the voluntary-cessation exception to mootness where a state actor is involved." *Id.* at 439.

Nor does *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), establish that "plaintiffs must prove an exception to the rule [that statutory repeal moots a case] to avoid a holding of mootness." Mot. Dismiss at 5 (citing *McCorvey*, 385 F.3d at 849). Instead, *McCorvey* explained that repeal of a statute does not moot a case where there is "evidence, or a legitimate reason to believe, that the state will reenact the statute or one that is substantially similar." 385 F.3d at 849 n.3. That statement is fully consistent with this Court's determination that "repeal of a challenged law does not render a case moot if there is a reasonable possibility that the government would reenact the law if the proceedings were dismissed." 9/6/13 Order at 13. *McCorvey*'s general statement that "[s]uits regarding the constitutionality of statutes become moot once the statute is repealed," 385 F.3d at 849, simply reflects the reality that normally there is little likelihood that the repealed law or similar statute will be reenacted once the case is dismissed. *See also Int'l Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 357 (5th Cir. 2010) (making the same general statement and citing *McCorvey*).

To be sure, some of the many cases the State Defendants cite from other jurisdictions contain statements that appear to be closer to the rule they would prefer. On the other hand, some of these cases, like Fifth Circuit and Supreme Court mootness cases that are binding here, plainly support the rule this Court has set out and applied. For example, in *D.H.L. Associates, Inc. v. O'Gorman*, the First Circuit explained that a case is not moot "when there is a reasonable expectation that the challenged conduct will be repeated following dismissal of the case." 199 F.3d 50, 55 (1st Cir. 1999). Similarly, in *Associated General Contractors of Connecticut, Inc. v. City of New Haven*, the Second Circuit ruled that "a case is moot when it can be said with

assurance that there is no reasonable expectation that the alleged violation will recur," but concluded, based upon the particular facts of the case, that it was not reasonable to expect the challenged law or a similar law to be reenacted. 41 F.3d 62, 66-67 (2d Cir. 1994) (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Here, this Court applied essentially the same standard and quite appropriately found that the State Defendants had failed to show that there was no reasonable possibility that the challenged conduct would recur.

C. This Court correctly concluded that the potential availability of Section 3(c) relief based on the 2011 plans prevents claims against those plans from becoming moot.

Plaintiffs' challenges to the 2011 redistricting plans are not moot for the additional and independent reason that this Court can still grant relief under Section 3(c) of the Voting Rights Act based on the alleged intentional discrimination that animated the 2011 redistricting plans. Often plaintiffs challenging the legality of a statute seek only to enjoin the statute, and thus must rely on the voluntary cessation doctrine to overcome a mootness determination if the statute is repealed. But here, unlike the typical statutory challenge, Congress has expressly created a statutory scheme under which this Court could grant prospective relief based on challenges to the 2011 plans, even if (contrary to fact) there were no need for an injunction based on those plans. Both the language and purpose of Section 3(c) of the Voting Rights Act support this Court's decision to rule on the constitutionality of the 2011 plans for purposes of determining whether to impose a preclearance remedy against Texas based on its intentionally discriminatory conduct in enacting those plans. In other words, this Court will need to decide whether Texas violated the Fourteenth or Fifteenth Amendment when it enacted the 2011 plans to determine whether to impose a preclearance requirement under Section 3(c) with respect to Texas's future voting

changes. For this reason also, an ongoing controversy remains that necessitates this Court's exercise of its Article III powers.

That means Section 3(c) relief from the intentionally discriminatory conduct that motivated the 2011 redistricting plans remains a real possibility. And, as this Court has already observed, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." 9/6/13 Order at 14-15 (quoting *Knox*, 132 S. Ct. at 2287). This Court rightly interpreted the Supreme Court's decision in *Chafin v. Chafin* to mean that "uncertainty as to relief does not render a case moot." 9/6/13 Order at 15 (citing *Chafin v. Chafin*, 133 S. Ct. 1017, 1026-27 (2013)). So, as this Court has determined already, even a possibility that Section 3(c) relief is available based on the 2011 plans is enough to prevent claims based on those plans from being moot.

Notably, in its review of the 2011 Congressional and House redistricting maps also challenged in this case, the D.C. District Court found evidence of intentional racial discrimination. *See Texas*, 887 F. Supp. 2d at 159-62, 177-78, 216-222. In particular, the D.C. District Court held that Texas had not carried its Section 5 burden to demonstrate that the 2011 Congressional plan was not enacted with a discriminatory purpose. *See id.* at 159-62. The court noted that Texas had removed the home offices and the major economic engines of several districts represented by minority legislators who were the candidates of choice in all three African-American ability districts and in one Hispanic ability district. *See id.* at 159-60. "No such surgery was performed on the districts of Anglo incumbents," the D.C. District Court explained, and Texas's only explanation ("coincidence") was unconvincing. *Id.* at 160. The D.C. District Court also considered other factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), including Texas's

history of voting discrimination, the sequence of events leading to the enactment of the plan, and procedural and substantive departures from the normal decisionmaking process. *See Texas*, 887 F. Supp. 2d at 161. The D.C. District Court was "persuaded by the totality of the evidence that the [Congressional] plan was enacted with discriminatory intent." *Id.* As for Texas's 2011 House plan, the D.C. District Court noted that while it rested its decision on retrogressive effect, the "full record strongly suggests that the retrogressive effect we have found may not have been accidental." *Id.* at 178. The court pointed to, for example, the State's failure to create any new minority ability districts despite "dramatic population growth in the State's Hispanic population that was concentrated primarily in three geographic areas"; its use of a "deliberate, race-conscious method to manipulate not simply the Democratic vote, but more specifically, the *Hispanic* vote"; its rampant splitting of existing voting precincts along racial lines; and the "incredible" and "implausib[le]" testimony of the lead map-drawer, which "reinforce[d] evidence suggesting mapdrawers cracked [precincts] along racial lines to dilute minority voting power." *Id.* at 177-78. This Court relied on similar evidence when it earlier ruled that the intentional discrimination claims that plaintiffs raised with respect to both the Congressional and House plans were "not insubstantial." *See, e.g.*, Op. at 6, 8-9, 11-12 (ECF No. 690); Order at 36, 40-41 (ECF No. 691).

Section 3(c) relief is in fact available and should be ordered by this Court to remedy the continuing effects of the intentional discrimination that motivated adoption of the 2011 redistricting plans and to prevent such discrimination from recurring. *See* U.S. Statement of Interest; U.S. Reply Mem. (ECF No. 885). Indeed, as this Court noted in deciding this mootness issue, the situation here is closely analogous to the one addressed in *Blackmoon v. Charles Mix County*, 505 F. Supp. 2d 585 (D.S.D. 2007). *See* 9/6/13 Order at 15. In *Blackmoon*, after

modifying the jurisdiction's redistricting plan to remedy a successful malapportionment claim, the court nonetheless denied a defendant jurisdiction's motion to dismiss as moot plaintiffs' claims that the prior redistricting plan was racially discriminatory. *See* 505 F. Supp.2d at 593. The court concluded that if plaintiffs prevailed on their race discrimination claim, they might be entitled to relief under Section 3 of the Voting Rights Act, and the possibility of further relief precluded mootness. *See id.*

This Court has not relied on the "collateral-consequences doctrine" in determining that relief remains available concerning the 2011 plans, and the State Defendants' discussion of that doctrine misses the mark. *See* Mot. Dismiss at 30. The relevant point is that Section 3(c) could provide prospective relief that protects against the intentionally discriminatory conduct underlying Texas's 2011 redistricting plans. The State Defendants assert that the 2011 plans "have no consequences, period" because they were never used in an election, and thus that Section 3(c) can provide no remedy against them. *Id.* at 31. But the Voting Rights Act generally and Section 3(c) in particular allow courts to take a broader view of a jurisdiction's intentionally discriminatory race-based conduct with respect to voting changes. Thus, under Section 3(c), once a court determines that a jurisdiction has engaged in intentional racial discrimination in voting that violates the Fourteenth or Fifteenth Amendment and justifies equitable relief, it may then step back and examine the jurisdiction's history of voting discrimination to determine whether and to what extent the stronger medicine of Section 3(c)'s preclearance remedy should be imposed. *See, e.g.*, *Jeffers v. Clinton*, 740 F. Supp. 585, 591-92 (E.D. Ark. 1990) (three-judge court); *see also* U.S. Statement of Interest at 3-6 (citing cases).

Section 3(c) allows courts to scrutinize future changes to a jurisdiction's voting laws because of that jurisdiction's pattern of intentional race discrimination in voting. A grant of

prospective relief under Section 3(c) does not require a showing of an ongoing constitutional violation that has not already been enjoined or otherwise remedied; it instead requires showing merely that "violations of the fourteenth or fifteenth amendment justifying equitable relief *have occurred* within the territory of such State or political subdivision." 42 U.S.C. § 1973a(c) (emphasis added). Indeed, if, as the State Defendants suggest, Section 3(c) could only be used to remedy a challenged redistricting plan or other practice both that the State seeks to continue to enforce and a court finds to violate plaintiffs' constitutional rights, then Section 3(c) effectively would permit a defendant to avoid bail-in by abandoning a challenged practice at any time up to the moment of final judgment. The jurisdiction could then adopt a slightly modified discriminatory practice, necessitating the filing of a new complaint. This cycle of discrimination would create the type of gamesmanship the preclearance requirements embodied in both Section 5 and Section 3(c) were designed to end. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966) ("[C]ase-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits."). The State Defendants assert that the plaintiffs can simply file a new action if aggrieved by any revised redistricting plan or other legislation that its legislature enacts. But Section 3(c) provides relief that repeated litigation cannot. By putting the burden on a covered jurisdiction to prove that future voting changes are not discriminatory, the relief provided in Section 3(c) serves to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* Indeed, the very purpose of the prospective relief provided in Section 3(c) is to obviate the need for voters to file a lawsuit every time a badly behaving jurisdiction enacts a new discriminatory law.

III. CONCLUSION

The State Defendants' motion to dismiss should be denied.

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Respectfully submitted,

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