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

SHANNON PEREZ, *et al.*, *Plaintiffs*, v. GREG ABBOTT, *et al.*, *Defendants*.	CIVIL ACTION NO. SA-11-CA-360-OLG-JES-XR [Lead Case]

QUESADA PLAINTIFFS' PRE-TRIAL BENCH BRIEF

Pursuant to the Court's June 1, 2017 Order re: Pretrial Disclosures, ECF No. 1404, the Quesada Plaintiffs submit this pre-trial bench brief regarding their claims against the 2013 congressional plan ("Plan C235"). Attached as Exhibit 1 is an outline providing the information the Court requested, "[a]t a minimum," *id.* at 3 (emphasis omitted), from plaintiffs: the Quesada Plaintiffs' (1) specific legal claims, (2) basis for standing, (3) summary of their lay witness testimony, (4) summary of their expert witness testimony, (4) key exhibits, and (5) prior record evidence and Fact Findings upon which the Quesada Plaintiffs rely for their claims against Plan C235.

Consistent with the Court's May 1, 2017 Scheduling Order, the Quesada Plaintiffs' trial presentation regarding the legislative process will not be cumulative of the official legislative record. ECF No. 1389 at 4. That record, however, is voluminous, containing thousands of pages of testimony, debate, and submissions to the legislature. The record contains substantial evidence of intentional discrimination; the Quesada Plaintiffs focus this brief on identifying for the Court

some of the key evidence in light of the Court's directive not to use trial time duplicating evidence contained in the official legislative record.

SUMMARY OF ARGUMENT

The legislative record demonstrates that Plan C235 was enacted with a discriminatory purpose in violation of the Fourteenth Amendment and Section 2 of the Voting Rights Act ("VRA"). That discriminatory purpose exists both as a matter of fact and law.

First, the legislative record shows that, as a matter of fact, the legislature acted with discriminatory purpose *again* in 2013. Throughout these proceedings, Defendants have told this Court a simplistic story: The legislature's only intent was to dutifully follow this Court's "legal advice" that the interim plan complied with the law, and any contrary conclusion would be tantamount to accusing *this Court* of intentional discrimination in imposing the interim plan. But the legislative record shows that, in the time between this Court's interim Order in March 2012 and Plan C235's enactment in June 2013: (1) this Court warned the legislature its analysis was preliminary and subject to change, (2) the D.C. district court found that specific features of Plan C185—incorporated without change in Plan C235—were (or potentially were) intentionally discriminatory, (3) the Chief Legislative Counsel for the Texas Legislative Council ("TLC") provided legal advice to the legislature informing them that they could not simply rely upon the interim Order for legal protection, that the alternative maps proposed by minority legislators illustrated the legal risk in enacting the interim maps, and that failing to adopt those amendments could signal unlawful intent, (4) minority legislators and members of the public informed the legislature of Plan C235's discriminatory features, and (5) the Senate Redistricting Committee Chair, Senator Seliger, knowingly relied upon a mistaken legal interpretation of Section 5 of the

VRA as pretext to reject an alternative plan that restored minority voting rights in the Dallas-Fort Worth ("DFW") districts.

Defendants' simple story that it relied on this Court is simply not true. In fact, the legislature never actually relied on this Court for *legal advice*; it got its own subsequent legal advice, which it declined to follow (or even later acknowledge). Instead, it hoped to use (as pretext) cherry-picked sentences from this Court's earlier interim Order to shield itself from a duty to acknowledge—and respond in good faith to—subsequently obtained information demonstrating the legal infirmities in the interim plan. The question therefore is not whether *this Court* discriminated in 2012; it did not. The question is whether Defendants discriminated over a year later; the record shows they did.

Second, the legislative record reflects a number of procedural departures from the norm that, considered under the *Arlington Heights* framework, suggest a discriminatory purpose. For example, the process was limited in an unprecedented fashion by the scope of the Governor's special session proclamation; the special session lacked the normal procedural protections of the two-thirds rule in the Senate or a Calendar Rule in the House; private (and secret) legal advice was provided to certain members—the committee chairs and by the Attorney General's office to the House Republican caucucs—but withheld from other legislators purportedly represented by those same people; and the legislature, contrary to historical practice, included Findings in the congressional and house bills that they complied with all legal requirements, even though the Senate Select Redistricting Committee Chair refused to admit the plan's legality when asked to do so.

Third, even if discriminatory intent were not present as a matter of fact in the post-2011 legislative record (a counterfactual assumption), the 2013 enactment of Plan C235 would retain,

as a matter of law, the unlawful discriminatory purpose that motivated the original placement of the minority neighborhoods that remained cracked in the new plan. This Court had already concluded that the DFW congressional districts in Plan C185 were drawn "with a motive to crack and limit *minority* population within Republican districts to curb the effect of continued minority growth . . . to ensure that the minority populations would not grow sufficiently to control the district for as long as possible." Amended Order at 134, ECF No. 1390 (emphasis in original). Likewise, the D.C. Court specifically identified as evidence of discriminatory purpose the cracking of neighborhoods that remained cracked in Plan C235. As a matter of law, voters whom the legislature targeted with this cracking in 2011 were discriminated against a second time when the legislature reaffirmed in 2013 its prior decision intentionally cracking them and thus diluting their votes.

Together, the legislative record evidence, the additional evidence of intent that will be elicited at trial, and the governing law all establish Plan C235 was enacted with an unlawful discriminatory purpose.

I. The Record Demonstrates, as a Matter of Fact, that the Legislature Purposefully Discriminated in Considering and Enacting Plan C235.

The legislative record demonstrates that Plan C235, as a matter of fact, was enacted with discriminatory intent. That unlawful intent is demonstrated by the legislature's willful ignorance of the caveats in this Court's March 2012 interim order and the D.C. Court's findings of purposeful discrimination regarding specific aspects of Plan C185 retained in Plan C235, the testimony of Chief Legislative Counsel Jeff Archer to the House Redistricting Committee warning of the legal risk of enacting the interim plan, the warnings of minority legislators and the public about the discriminatory features of Plan C235, and Sen. Seliger's pretextual use of a knowingly mistaken interpretation of Section 5 to reject a proposal to remedy cracking in DFW.

A. The Legislature's Willful Ignorance of the Warnings in this Court's Interim Order and the D.C. Court's Subsequent Findings of Discriminatory Purpose Demonstrates Discriminatory Intent in the Enactment of Plan C235.

Defendants' sole argument in this case is that the legislature was merely following this Court's "legal advice" in enacting Plan C235—and that surely this Court did not intend to discriminate when it imposed the interim plan. *See, e.g.*, ECF No. 1413 at 5 ("When the Legislature adopted the court-drawn plans in 2013, it had *every reason* to believe the Court's plans complied with the Constitution and Voting Rights Act, and it had *no reason* to believe any district was drawn predominantly on the basis of race." (emphasis added)). Contrary to Defendants' litigation position, this Court's March 2012 Order, together with the D.C. Court's August 2012 Order denying preclearance to Plan C185, demonstrate the legislature purposefully discriminated in adopting Plan C235.

"When [the legislature] enacts laws, it is presumed to be aware of all pertinent judgments and opinions of the judicial branch." *Garrett v. Circuit City Stores, Inc.*, 449 F.3d 672, 677 (5th Cir. 2006). Defendants' entire case rests on a few cherry-picked sentences from this Court's March 2012 Order to assert the legislature had "no reason" to think Plan C235 contained infirmities. But this Court's Order, *on its face*, precludes Defendants' litigation position. The Supreme Court's decision in *Perez* was issued on January 20, 2012 and this Court had to act at break-neck speed to permit the 2012 elections to move forward. The Court explained that it was an "interim plan for the districts used to elect members in 2012" and that "[t]his interim map is not a final ruling on the merits of *any claims* asserted by the Plaintiffs." Mar. 19, 2012 Order at 1, ECF No. 691 (emphasis added). The Court further noted that "[b]oth the § 2 and Fourteenth Amendment claims presented in this case involve difficult and unsettled legal issues as well as numerous factual disputes. . . . Further, both the trial of these complex issues and the Court's analysis have been necessarily

expedited and curtailed, rendering such a standard even more difficult to apply." *Id.* at 1-2. To punctuate the point, the Court stated that it "has attempted to apply the standards set forth in *Perry v. Perez*, but emphasizes that it has been able to make only preliminary conclusions that may be revised upon full analysis." *Id.* at 2 (emphasis added). The Court then explained that the exigency of the calendar required quick imposition of a map, and thus it would adopt the compromise plan (with minor revisions) offered by "[s]ome Plaintiffs and Intervenors." *Id.*; *see also id.* at 14. Defendants cannot plausibly contend that the Legislature had "no reason" to think there might be a legal problem with Plan C235 in light of this Court's clear warnings.

The shaky foundation for Defendants' litigation position collapses entirely in light of the D.C. Court's subsequent findings of intentional discrimination.[1] Although the D.C. Court's August 2012 Order denied preclearance to Plan C185 specifically, the D.C. Court's Opinion, and attached Findings of Fact and Conclusions of Law, specified a number of discriminatory—or potentially discriminatory—features of Plan C185 that the legislature nonetheless readopted in Plan C235.

First, the D.C. Court warned that it viewed the legislature's decision not to include a Hispanic ability district in DFW to be potentially motivated by intentional discrimination. The D.C. Court explained that "[t]he parties have provided more evidence of discriminatory intent than we have space, or need, to address here. Our silence on other arguments the parties raised, such as potential discriminatory intent in the selective drawing of CD 23 and failure to include a Hispanic ability district in the Dallas-Fort Worth metroplex, reflects only this, and not our views

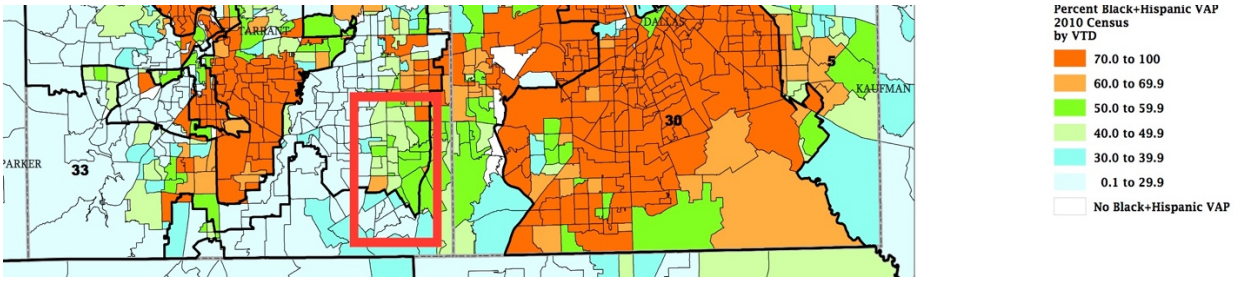
[1] The pendency of the D.C. Court's opinion was explained by this Court as a reason for much of its hesitancy—this Court specifically explained that "[g]iven the exigencies of time, this Court is unable to review the entire record from the D.C. trial, but has reviewed the post-trial briefing in order to determine whether the claims are 'not insubstantial.'" ECF No. 691 at 14.

on the merits of these additional claims." *Texas v. United States*, 887 F. Supp. 2d 133, 161 n.32 (D.D.C. 2012), *vacated on other grounds*, 133 S. Ct. 2885 (2013). The legislature could not conceivably have read this and believed it had "no reason" to consider altering Plan C235 to include a Hispanic ability district in DFW.

Second, in addition to the broad warning quoted above about the evidence of discrimination, the D.C. Court found discriminatory purpose with respect to a specific feature of Plan C185 retained in Plan C235. In the section of its Findings of Fact and Conclusions of Law entitled **"Discriminatory Purpose in the Congressional Plan,"** *id.* at 216 (emphasis in original), the D.C. Court cited the configuration of then-CD 33 as an example of discriminatory purpose behind the plan.

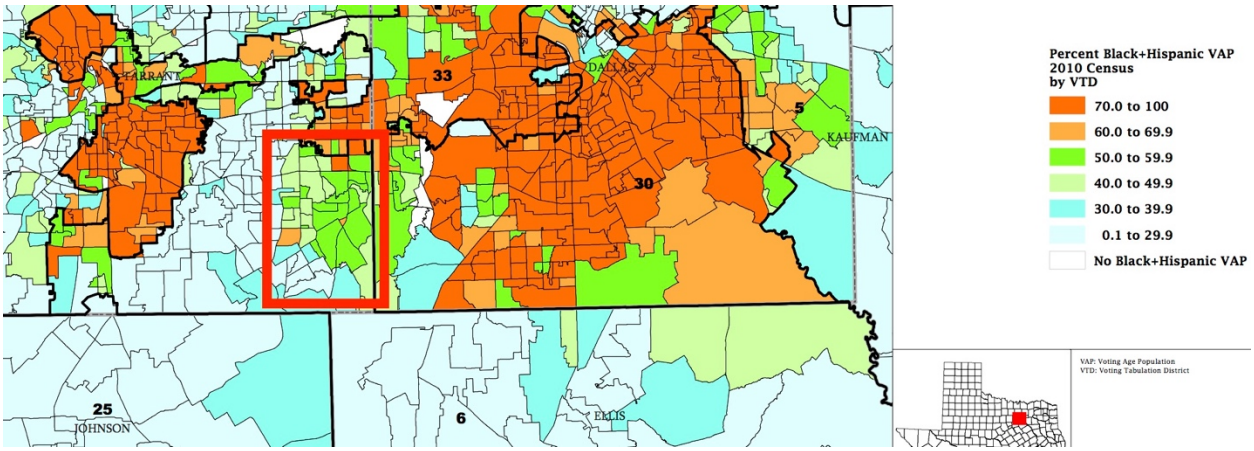
> In the Congressional Plan, this district includes all of Parker County and part of Wise County, both of which are predominantly comprised of Anglo, suburban areas. Anglos make up 85.3% of the population in Parker County and the portion of Wise County included in CD 33 is 78.7% Anglos. In addition to those Anglo areas, CD 33 cuts into Tarrant County to include Tarrant County's fast-growing minority populations. Representative Veasey testified that enacted CD 33 "goes around southwest—underneath southeast Ft. Worth in the unincorporated Tarrant County, and then moves into Arlington, into the heavily Anglo part of Arlington, and then *picks up the fast minority growth area in Southeast Tarrant County, Arlington—southeast Arlington-Grand Prairie area*."

Id. at 220, ¶ 112 (emphasis added). To illustrate, below is a cropped portion of Quesada Exhibit 2017-17, a map produced by TLC of Plan C185 including racial shading, with a red box showing the area of then-CD 33 described by the D.C. Court as cracked from other minority neighborhoods and included in Anglo-dominated CD 33.



See Quesada-2017-17 (red box added); *see also* Fact Findings, ECF No. 1340 at 245-46, ¶ 316.

As the map below demonstrates, Plan C235 retains this intentionally discriminatory feature. The same "southeast Arlington-Grand Prairie area" *Texas*, 887 F. Supp. 2d at 220, ¶ 112, identified by the D.C. Court remains cracked from other minority neighborhoods; this time it is just included in a different Anglo-dominated district—suburban/rural CD 6, which stretches two counties southward (Ellis and Navarro).



See Quesada-2017-18 (red box added). Plan C235 CD 6's CVAP is 60.9 percent Anglo, 19.0 percent African American, and 14.2 percent Hispanic. *See* JX-100.3 (Report Red-116, 2011-2015 ACS Data). Quesada Plaintiff John Jenkins, an African-American registered voter, resides in this region of southeast Arlington in CD 6, and has thus been the victim of intentional discrimination twice. *See* Stipulation No. 2, ¶ 6, ECF No. 1445. The legislature knew that the D.C. Court had concluded it was intentionally discriminatory to crack the fast-growing minority community of southeast Arlington/Grand Prairie and place it into an Anglo-dominated district, yet it reaffirmed

its original decision to do so by discriminating against minority voters in this same community again in Plan C235.

Knowingly reenacting a statute containing the same characteristic just deemed purposefully discriminatory by a federal court is about as potent an example of intentional discrimination as exists. The legislature acts with knowledge of judicial decisions, *Garrett*, 449 at 677; where that knowledge is of a finding of purposeful discrimination, the reenactment of the same provision is an axiomatic example of discriminatory intent.

B. The Legislature Acted with Discriminatory Intent by Knowingly Ignoring the Warnings of TLC Chief Legislative Counsel Jeff Archer Regarding the Legal Risk of Enacting the Interim Plans.

The legislature acted with discriminatory intent when it knowingly ignored warnings from its own legal counsel, legislators, and the public that Plan C235 retained many of the same infirmities that caused the D.C. Court to reject preclearance for Plan C185.

A legislature's decision to reject amendments to a bill despite warnings from legal counsel that the legislation likely violates the Voting Rights Act is evidence of a discriminatory purpose. *See Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2017) (*en banc*) ("Against a backdrop of warnings that SB 14 [Texas's Photo ID law] would have a disparate impact on minorities and would likely fail the (then extant) preclearance requirement, amendment after amendment was rejected."); *id.* at 262 (noting that counsel in Lieutenant Governor's office warned that Photo ID law was unlikely to obtain preclearance).

The legislative record shows that Jeff Archer, Chief Legislative Counsel for TLC, warned the House Select Redistricting Committee that it could not rely upon the March 2012 interim order to inoculate Plan C235, that enacting the interim plans would cause continued legal jeopardy for

the State, and that the alternative plans and amendments offered by minority legislators demonstrated the areas of legal liability.

Mr. Archer appeared for the first time at the June 12, 2013 hearing of the House Select Redistricting Committee. JX 14.4 at 6.[2] He spoke at length about the ramifications of this Court's March 2012 Order imposing Plan C235 as an interim order, the D.C. Court's opinion denying preclearance to Plan C185, whether Plan C235 was vulnerable to challenge under the VRA or Constitution, and whether the legislature could be found to have intentionally discriminated if it rejected the amendments proposed by minority legislators aimed at addressing the pending legal claims. JX 14.4 at 11-19.

Mr. Archer explained that, in imposing Plan C235 on an interim basis, this Court was in "a little bit tricky [position] because the Court had not made final determinations, . . . had not made fact findings on every issue, had not thoroughly analyzed all the evidence but they had to make some best case guesses based on the direction that the U.S. Supreme Court gave them." *Id.* at 11. Mr. Archer explained to the Committee that this Court "started with the legislatively enacted plan in all three cases and addressed voting rights violations again on an interim basis and impromptu basis almost, as if to say this is the best we can do now. We haven't gotten to the bottom of things." *Id.* Moreover, Mr. Archer explained to the Committee that the interim plan Order was "not a final ruling. These are preliminary determinations on the merits of Section 2. We're only looking at preclearance claims that are, quote, not insubstantial. In other words, [the Court] disclaimed

[2] Later, when the House was conducting floor debates, Chairman Darby characterized the Committee as having "relied heavily" upon Mr. Archer's analysis. JX 17.3 at 9. At his deposition, Rep. Darby testified that TLC's lawyers were his—and all the members'—legal counsel. ECF No. 1455-2 (D. Darby Depo. Tr. at 114:3-10).

making final determinations under the Voting Rights Act claims that the plaintiffs brought." *Id.* at 12.

Mr. Archer continued, explaining to the Committee that this Court was clear that "these are difficult and unsettled legal issues, there are numerous factual disputes and [the Court] essentially made it *explicitly clear* that this was an interim plan to address basically *first impression of voting rights issues.*" *Id.* at 12 (emphasis added). Rep. Martinez Fischer, a Hispanic member of the Committee, asked Mr. Archer about whether some of this Court's caution arose from the fact the D.C. Court had not yet issued its decision. *Id.* at 14. Mr. Archer responded that "if the District Court for the District of Columbia in the Section 5 preclearance litigation were to uphold or object to limited parts of the district, that may change the ultimate determination." *Id.* at 14-15; *see supra* Part I.A (D.C. Court finds portion of then-CD-33—included in interim plan's CD 6—purposefully cracked from neighboring minority communities).

Turning to the relationship between this Court's interim plan Order, the D.C. Court's Order denying preclearance to Plan C185, and the legislation being considered by the Committee, Mr. Archer explained that adopting Plan C235 as a permanent plan would be a risky move. Rep. Villalba, a Republican who later voted in favor of enacting Plan C235, *see* JX 17.1 at 1032, asked the following question of Mr. Archer:

> REPRESENTATIVE VILLALBA: One of the questions that has come up *over and over in our testimony* is if we adopt interim plans in their current state, and now you've described for us that at least *the Court perceives there's additional work to be done*, what is essentially the effect of doing that?
>
> As a body, we adopt interim plans and, therefore, we give this plan the imprimatur of the people, right? We're the people's House and the Legislature will act and speak. If we do that and adopt these and, again, just hypothetically without any change whatsoever, it sounds to me like there's going to be at least a delta between where the interim maps are and what needs to be completed work-wise and fact finding-wise to get them to where they would be *in consonance with the existing*

> *holdings of the Supreme Court or the District Court*. So, what is the legal effect or impact of doing that?
>
> Do we – since we – if we did that as a body, are we blessing those and somehow by having done that, are we advancing the ball or is there still work to be done?

Id. at 16-17. Mr. Archer responded by explaining that "it's clear that legislative enactment of the plan gives it imprimatur of state law" and that "by enacting this plan or any other plan, to some extent, the Court will give greater deference to the elements of the plan than perhaps it would give to its own plan." *Id.* at 17. But, Mr. Archer explained, "[t]hat doesn't mean that the parts of the plan that it ultimately finds deficient are any better because the Legislature adopted them," *id.* at 17, and although it removes from contention the legal claims addressed by the interim map, "with respect to all the unaddressed issues and second guessing the Court's own determinations, you have – you haven't removed legal challenges to any of the plan on a – on a realistic level, that is," *id.* at 18. Responding to a subsequent question from Rep. Villalba, Mr. Archer explained that "challenges to both the Court drawn fixes as well as to the background districts that were not changed in any of the plans will go forward" and "the parties to the case will continue to press issues that the Court took a [s]tab at perhaps but didn't fix." *Id.* at 18-19.

Several days later, at the June 17, 2013 House committee hearing, Rep. Villalba had another exchange with Mr. Archer about the legal ramifications of enacting the interim plan as the permanent plan.

> REP. VILLALBA: I recognize that these maps were predicated upon previous maps that did have deficiencies. But wasn't the San Antonio Court aware of most of those deficiencies? And wouldn't – is it fair to say that they had made an attempt to cure the kinds of fragmentation and population deviation and other issues that we're talking about curing today?
>
> MR. ARCHER: I don't think it would be fair to put those words in their mouths. I don't – I think the fairest way of looking at it is they could go into a lot more issues than they already have –

JX 15.3 at 49. Later, Mr. Archer explained to the Committee, in response to questions from Rep. Villalba, that this Court, in being tasked with imposing an interim map, faced "a tension there between what they *thought* the Voting Rights Act required and what they thought the deference they had to give until where were *sure* what the Voting Rights Act required." *Id.* at 52 (emphasis added).

Later in that hearing, Rep. Villalba attempted to backtrack from his previous admission (made a week prior) that there was a "delta" between the interim map and what the law required, asking Mr. Archer to confirm that the proposed modifications by minority legislators were merely for policy, not legal reasons. Mr. Archer declined to do so.

> REP. VILLALBA: The question is if we make changes to these maps, they're being made for policy purposes, not legal purposes?
>
> MR. ARCHER: I can't say that. I think you can always reduce your legal risk by making changes based on assessment of any witnesses or information you have. So I think, again you have to assess what's – what will happen and what will – what do we gain to lose or win by enacting Plan A or Plan B? And so I think it's fair to say by enacting the Court-ordered plan, you've put to bed – as we discussed in Houston – those issues that the Court identified so far. *But I don't think you put the rest to bed*. So if you do other thing –
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> REP. VILLALBA: You don't know what additional issues are?
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> MR. ARCHER: It's hard to identify them, but I think that *the maps people have proposed show where the vulnerabilities are*.
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> REP. VILLALBA: Thank you.
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> MR. ARCHER: *I think Ms. Davis' plan shows where some vulnerabilities are*.

JX 15.3 at 56 (emphasis added).[3]

[3] A number of alternative plans were proposed by minority legislators, including during the House hearings and as floor amendments during the House and Senate debate. The bill proposed by Rep. Davis, HB 14 (Plan C236), would among other things, create a third minority opportunity district in DFW to give Latino voters the opportunity to elect a candidate of their choice to Congress. *Id.* at 153. As Defendants have admitted, "in considering and enacting Plan C235 in June 2013, the

After explaining to the Committee that the alternative proposals illustrated the legal vulnerabilities, Mr. Archer advised the Committee that its failure to adopt any of those proposals could be problematic: "Certainly the proposals that are made here will be at issue if the Legislature does not adopt them. What the Court thinks of that remains to be seen." *Id.* at 58-59. Mr. Archer's testimony is the most striking, in light of his role as a legal advisor to the Committee. But as Rep. Villalba admitted, the Committee heard an avalanche of testimony about the interim plan's discriminatory features and failure to respond to the D.C. Court's ruling.[4]

The response to all this from Rep. Drew Darby, the House Redistricting Committee Chairman, and Sen. Kel Seliger, the Senate Redistricting Committee Chairman, was to essentially plug their ears. Nearly verbatim, five different times, Rep. Darby said he "believe[d] the [interim plans were] legal and provide the voters with much needed stability going forward. If there is a legal deficiency in these maps, I want this committee to know about it and I want to correct it." JX 10.4 (May 31, 2013 House Cmte. Hr'g) at 26; JX 11.4 (June 1, 2013 Hr'g at 7); JX 12.4 (June 6, 2013 Hr'g at 6); JX 13.4 (June 10, 2013 Hr'g) at 12-13; JX 14.4 (June 12, 2013 Hr'g) at 39. On the House floor, on the day of passage, Rep. Darby said "it's been my position from the start that these maps are legal. And if somebody can demonstrate to me that a district has been drawn illegally, and it can be fixed and changed, then I want to consider those amendments, and consider those changes." JX 17.3 at S6. Later, he said in an exchange with Rep. Chris Turner, "Do you recall, specifically, my challenge to those present? Don't just come and say you're against the interim maps—which is largely what a lot of folks did. Tell me how the maps are deficient, give

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Texas Legislature rejected all proposed modifications, including modifications proposed by Hispanic and African-American legislators." Quesada-2017-73.

[4] The record in this regard is substantial. In Exhibit 1 attached hereto, the Quesada Plaintiffs provide pin citations to the hearing transcripts and floor debates where these discussions occurred, as well as to the written testimony submitted as part of the legislative record.

me a remedy to do that, and tell me why that remedy is necessary. And that's what I asked the people to do throughout the state, and we did not always hear that type of response. We just said, we're against the maps." *Id.* at S59. Of course, the onus is not on the public to explain to the legislature its legal obligations. Nonetheless, many did (*see* testimony cited in Ex. 1 attached hereto[5]) and Mr. Archer—the committee's counsel who testified in Rep. Darby's presence—described in plain terms the flaw in relying upon the interim order and the fact that the alternative proposals illustrated the deficiencies. In any event, in response, Reps. Chris Turner, Sylvester Turner, and Trey Martinez Fischer explained a number of deficiencies, including by page number reference to the D.C. Court's opinion. *Id.* at S59-62. Rep. Darby's only response, before calling a vote on the House plan, was "[w]ell, I will take your word for that." *Id.* at S61.

Likewise, Sen. Seliger repeated the same mantra regardless of the actual evidence elicited at the hearings. At the first hearing in April 2013, Sen. Seliger said "[t]he interim plans remedied the legal flaws found by the federal court in Washington, DC. Enacting these lawful and constitutional interim plans will help bring to a close this chapter of redistricting. Enacting these plans will practically ensure that the ongoing litigation over Texas redistricting plans will be brought to a swift end . . . ." JX 19.3 at § I, p. 13. During the floor debate on the day of passage, Sen. Seliger said: "[t]he interim plans remedy, we believe, the legal flaws found in the federal

[5] Others submitted written testimony specifically directing the committees to the D.C. Court's decision, as well as to the parties' filings in this case explaining the remaining flaws. For example, the Texas NAACP attached plaintiffs' briefing, ECF Nos. 739 and 744, which detail, *inter alia*, the remaining flaws in the DFW region resulting from intentional fracturing of minority communities. *See* JX 28, 6.10.13 hearing, p. 10; JX 29 ("Other" file) at 86, 48, 74-75. When asked at his deposition, Rep. Darby testified that he read the NAACP's letter, but not the attached briefs, and he asserted his legislative privilege not to answer whether he directed any staff to review the briefing. *See* ECF No. 1455-2 (D. Darby Depo. Tr. at 132-34). Sen. Seliger could not recall whether he reviewed them. *See* ECF No. 1455-3 (K. Seliger Depo. Tr. at 131-32); *see also* JX 28, 6.6.13 vol. I hearing, p.17 (public submission noting intentional discrimination finding and how Plan C235 maintains fracturing of 44,000 African Americans outside CD 33.

court in D.C. . . . Enacting those plans will help bring a close this chapter of redistricting. They will almost ensure that the ongoing litigation over the redistricting plans will be brought to a swift end . . . ." JX 26.2 at 5. These denials, in the face of plain text of the San Antonio and D.C. Courts' orders, the testimony of the Chief Legislative Counsel of the TLC, the minority legislators, and members of the public, and the false claim by Rep. Darby that no one had proposed a remedy to the discriminatory features of the interim map, defy credibility and bear the mark of purposeful discrimination. *Cf. Veasey*, 830 F.3d at 237 ("When other legislators asked Senator Fraser questions about the possible disparate impact of SB 14 [the photo ID bill], he simply replied 'I am not advised.'").

C. The Legislature Acted with Discriminatory Intent in Rejecting an Alternative Plan that Would Remedy the Intentional Cracking of Minority Neighborhoods in DFW in Plan C235.

The legislature acted with discriminatory intent in rejecting an alternative plan that would remedy the intentional cracking of minority voting strength in the DFW region. On June 14, 2013, the Senate deliberated on passage of SB 4—the bill to enact Plan C235. At several points throughout the day, Sen. Seliger debated with Sen. Royce West, an African-American senator from Dallas who also served on the Senate Select Redistricting Committee. In an early exchange, Sen. West asked Sen. Seliger "[i]f, indeed, there was an amendment that allowed for minority underrepresented groups to elect a candidate of its choice, you would be supportive of that?" *Id.* at 10. Sen. Seliger responded: "No, Sir, not necessarily. Not unless it is required by the law." *Id*.

Sen. West later offered an amendment he explained was required by law to remedy the intentional discrimination of cracking minority neighborhoods in DFW into adjoining Anglo districts. That amendment, Floor Amendment 3 (Plan C248), *see* JX 59, redrew only DFW-area districts and included a third minority opportunity district to elect a candidate of choice of Hispanic

voters. JX 26.2 at 33. Sen. West explained the demographic changes in DFW, and how Plan C235 does not address those changes, but instead draws districts centered in suburban counties that "kind of dart into the urban counties and take up that [minority] population." *Id.* at 34; *see id.* at 35 (explaining that under Plan C248, CD 33 would continue to elect African American candidate of choice because "we increase, there were some stranded African Americans in one of the other contiguous districts, we're taking those in my map and putting in that particular district."); *id.* at 37 ("[W]hat those districts are doing that are contiguous to 33 and 30, they're darting in, taking ethnic minority population that would be of no political consequences to them because of the sheer numbers."). Moreover, Sen. West explained that it was necessary to remedy the cracking of minority voters in DFW because there had been "a finding of intentional discrimination." *Id.* at 36.[6]

Sen. Seliger urged the rejection of Sen. West's amendment. His basis for doing so, however, was an obviously pretextual use of the Voting Rights Act to avoid remedying the intentional cracking and packing in DFW. Sen. Seliger contended that Sen. West's amendment would be retrogressive and in violation of the Section 5 of the VRA because it would reduce CD 30's African American population by 5.5 percent—"the very definition of retrogression under Section 5." *Id.* at 35-36.[7]

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[6] Sen. West and others had repeatedly requested the Senate holding a hearing in Dallas so the committee could address DFW-specific concerns. *See, e.g.*, Letter from Sen. West (JX 29 (6/6/13 Hr'g) at 1); JX 21.4 at § I, p. 43; JX 24.4 at § II, p. 8; JX 26.2 at 5-6, 13-14. During the floor debate, Sen. Seliger responded that the House Committee held a hearing in Dallas, JX 26.2 at 13; Sen. West explained in response that it was a departure from regular process for the Senate to rely upon House hearings, *id.* Sen. Seliger commented that the House Dallas hearing transcript would be available for the Court to review in the future, *id.*, but acknowledged *he* had not reviewed it in determining whether Plan C235's DFW configuration was legal, *id.* at 14.

[7] Although Sen. Seliger does not specify that he is referring to CD 30, the Black VAP and CVAP figures he cites are those of CD 30, not CD 33. *See* JX 100.3.

Sen. West then responded that Sen. Seliger was wrong in light of the "finding of intentional discrimination." *Id.* at 36. Sen. Seliger ignored that explanation, and reasserted "[t]his appears to be the sort of retrogression that we must avoid, and yet you put it in your map." *Id.*; *see id.* ("Is retrogression okay if it's proposed by you, but not okay if it's proposed by me?"). The senators then had this exchange:

> SEN. WEST: Okay. Why do you think it's retrogressive?
>
> SEN. SELIGER: Because, as I've said, it reduced the, what did I say, the Black citizen voting age population in, from 46 point, I'm sorry, the Black voting age population from 46.4 to 41.8, and reduced the Black citizen voting age population from 53.5 to 48 percent.
>
> SEN. WEST: Do you agree with me in a Section 5 analysis that you must go beyond mere population data to include such factors as minority voter registration, minority voter turnout, election history, and majority, minority-majority voting behaviors?
>
> SEN. SELIGER: Ah, I am, I'm sorry, *I neither agree or disagree but certainly agree that is your assertion.* At the same time, I think there could be accusation that is retrogressive and, therefore, [I] must move to table the amendment.
>
> SEN. WEST: And as you're moving to table the amendment, I think that what Senator Watson said few minutes ago, this is, I won't say it was preordained, I'll say it's been predetermined.

Id. at 37.

There are a number of problems here, and they begin with Sen. Seliger's contradictory positions with respect to whether Plan C235 complied with the Voting Rights Act. When initially asked by Sen. West whether he thought Plan C235 complied with Section 5, Sen. Seliger responded "that, I think, is what's going to be asserted by our attorneys. I make no such assertion on my own." JX 26.2 at 8; *id.* (SEN. WEST: Okay, so this bill does or does not comport with current law, that's all I'm asking"; SEN. SELIGER: "You're asking for a legal decision, and I don't make

those, Senator West. I'm not a lawyer.").[8] Sen. Seliger's position changed, however, when Sen. West introduced an amendment to remedy the purposefully discriminatory cracking of minority populations identified by the D.C. Court. At that point, Sen. Seliger quickly announced what he claimed to be "the very definition of retrogression under Section 5." *Id.* at 35-36.

Importantly, Sen. Seliger's definition of retrogression under the Voting Rights Act was wrong. First, two days prior, Sen. Garcia had explained, in an exchange with Sen. Seliger, that the actual Section 5 test was not a bright-line population determination. *See* JX 24.4 at § II, p. 3 (SEN. GARCIA: "The functional analysis, and that's the key here, the functional analysis established by the Department of Justice, and the District Court in the District of Columbia, makes clear . . . there is no bright (line) number for minority opportunity."). Second, Sen. West explained that to him again during their exchange on the Senate floor. Third, this Court, in the very March 2012 Order on which Defendants purport to rely, explicitly rejected Sen. Seliger's professed definition of a simple statistical test for measuring retrogression under Section 5. *See* ECF No. 691 at 7-8 ("The D.C. Court held that the proper comparison is the minority group's *ability to elect* under the benchmark and enacted plans. The D.C. Court rejected Texas's position that the standard for determining retrogressive effect should include an evaluation of voting population demographics alone." (emphasis in original)). Fourth, the D.C. Court, in its final judgment denying preclearance—a case in which Sen. Seliger was a witness and in which the opinion includes his name twenty-five times—reiterated its rejection of this view of Section 5. *See Texas*, 887 F. Supp.

[8] Sen. Seliger's professed ignorance is peculiar, in light of his insistence that the bill include legislative findings announcing the plan's legality. When Sen. Zaffirini sought to strip the Legislative Findings from S.B. 4 regarding the professed legality of the map, Sen. Seliger exclaimed that "this amendment guts the bill and I oppose it, and think we should vote nay on the amendment," JX 24.4 at § I, p. 13, and during the floor debate explained he agreed with the sentiment expressed in Section 2 of S.B. 4 that "these maps satisfy the requirements to be legal maps." JX 26.2 at 26.

2d at 140 ("As we explained in our summary judgment opinion, ensuring that a proposed plan will not undo the gains minority voters have achieved in electoral power requires a multi-factored, functional analysis. A single-factor inquiry, such as the test Texas proposed relying on racial and ethnic population statistics alone, is inconsistent with precedent and too limited to provide an accurate picture of the on-the-ground realities of voting power.").[9] Fifth, Mr. Archer had already advised the legislature in 2011 that Section 5 was not a mathematical exercise, *see* Fact Findings, ECF No. 1340 at 53-54, ¶ 96(F); *see also id.* at 430 ¶ 712 (mapdrawers in 2011 were of view that "districts above 40% BVAP were treated as African-American districts rather than coalition districts."), and David Hanna, on whom Sen. Seliger relies for advice in redistricting, *id.* at 43, ¶ 89, "encouraged election analysis because there are shortcomings in the demographic analysis . . . one would want to conduct election analysis to determine whether a district was performing or not," *id.* at 432-33, ¶ 718. And sixth, the D.C. Court, whose opinion was issued nearly a year before Sen. Seliger's statement, concluded that CD 30 in Plan C185 was *packed* and on that basis the product of purposeful discrimination. *Id.* at 222, ¶ 120; *see also* ECF No. 1340 at 251, ¶ 331. In the 2012 election, Congresswoman Eddie Bernice Johnson, CD 30's representative, received 78.82 percent of the vote, a margin of nearly 130,000 votes.[10] In light of all of this, it is hard to believe that Sen. Seliger *truly* thought Sen. West's amendment, which reduced the African-

[9] Were there any remaining doubt on the point, the Supreme Court has subsequently agreed that the *plain text* of Section 5 requires a functional analysis. *See Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1272 (2015) ("Section 5 . . . does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority's ability to elect a preferred candidate of choice. That is precisely what the language of the statute says.").

[10] *See* Tex. Sec'y of State, Election Results, http://elections.sos.state.tx.us/elchist164_state.htm.

American CVAP of CD 30 by 5.5 points to 48 percent, threatened the ability of African-American voters to elect their candidate of choice.[11]

The legislative record reflects Sen. Seliger used a purposeful misunderstanding of Section 5 as pretext to avoid remedying the intentional packing and cracking of minority voters in DFW. If a legal mistake cannot support a racial gerrymander, *see Cooper v. Harris,* 137 S. Ct. 1455, 1472 (2017) ("But neither will we approve a racial gerrymander whose necessity is supported by no evidence and whose *raison d'être* is a legal mistake."), then a *purposeful* legal mistake in the service of maintaining minority vote dilution surely qualifies as improper intentional discrimination.

II. The Legislative Record Reveals a Number of Departures from the Ordinary Process, Evidencing the Legislature's Discriminatory Intent in Enacting Plan C235.

The legislative record reflects a number of departures from the ordinary legislative process, supporting Plaintiffs' claim of intentional discrimination.[12] *See Vill. of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-68 (1977).

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[11] The D.C. Court questioned Sen. Seliger's credibility in its decision denying preclearance. *See Texas*, 887 F. Supp. 2d at 200-01, ¶ 16 ("In his pre-filed written direct testimony, Chairman Seliger claimed that he relied on these experts to 'inform me if the demographics, performance, or any other attribute of a proposed district would raise concerns under the Voting Rights Act. To the contrary, these experts testified before the Senate Redistricting Committee that they did not 'provide[] verbal or written guidance or []opinion to the committee regarding whether [the proposed Congressional plans were] in compliance with Section 5' because they were not asked to do so." (internal citations omitted; alterations in original); *id.* ¶ 17 ("Chairman Seliger also admitted during the floor debate that the Senate Redistricting Committee Outside Experts he hired had not seen the Congressional Plan until it was released in committee and that these experts had not evaluated the plan for compliance with the VRA."). Despite the D.C. Court's finding in this regard and his contradictory floor statement, at his subsequent deposition, Sen. Seliger declined to acknowledge any "substantive" error in his testimony provided the D.C. Court. *See* ECF No. 1455-3 (K. Seliger Depo. Tr. at 103:8-104:2).

[12] This Part of the brief focuses only on these departures reflected in the official legislative record; the Quesada Plaintiffs' expert witness Dr. Lichtman will address the *Arlington Heights* factors more fully in his testimony at trial.

First, the Governor's proclamation calling the special session was unusually restrictive, purporting to limit the legislature to enacting the Court-imposed interim plans. *See* Quesada-2017-6. As Sen. Davis testified at the first Senate hearing of the special session, "[i]f we are limited by the Call to end where we began, it seems to have created a false expectation that the input would actually produce any sort of meaningful consideration in terms of the outcome." JX 20.4 at § I, p. 18. Even Rep. Darby lamented, "keep in mind, we've had a telescoped-down, if you will, process, and we're trying to move this process within the call that the governor issued to us." JX 17.3 at 17. This is not the normal redistricting process.

Second, because redistricting was considered during a special session, the Senate did not follow its normal rules of a blocker bill and a two-thirds requirement. *See Veasey*, 830 F.3d at 238 (identifying suspension of two-thirds rule as a procedural departure suggesting intentional discrimination). The record indicates minority senators and members of the public repeatedly complained about the lack of availability of the two-thirds rule in these proceedings. *See, e.g.*, JX 19.3 at § II, p. 6 (expressing concern during the regular session of the possibility that the Senate could "bypass our Two-Thirds Rule, the only real legislative protection that African-Americans and Latino voters have in this process."); *id.* § II, p. 7 (Senator Watson, testifying that "I could see where a court . . . could look at the fact that a long-standing rule and tradition that protects and is built to protect the minority, when it is circumvented is some evidence and it would be in my view some evidence of purposeful efforts to discriminate"); JX 20.4 at § II, p. 3; JX 21.4 at 34; JX 26.2 at 23 (Sen. Seliger admitted that "if the regular rule that requires there to be, or tradition that requires there to be a motion to suspend the rules in order to take up a bill . . . the Two-Thirds Rule . . . [were followed,] those that represent over 60 percent of the Hispanic population and a majority of the Black and Hispanic population would be in a position to prevent such a bill coming to the

floor if that tradition were being followed."). Indeed, the record suggests that the interim plans were not adopted during the regular session precisely because of the two-thirds rule:

> SEN. WATSON: [D]uring the regular session of the Legislature, at that point in time, that bill was blocked from coming to the floor.
>
> SEN. SELIGER: I'm not aware of a block or anything else. All I'm aware is, was, I was given a hearing in front of the State Affairs Committee, there was not a vote taken in the State Affairs Committee, and what went into that consideration I was not privy to.
>
> SEN. WATSON: Oh, so you don't know whether there was a block on the congressional map during the regular session of the Legislature?
>
> SEN. SELIGER: No, I suspect you'd be the authority on that, but nobody said anything to me about it.

JX 26.2 at 22.

Similarly, the House declined to follow its ordinary process of employing a Calendar Rule for the filing of amendments. *See* JX 17.3 at 13-14 (Rep. Martinez Fischer noting to Rep. Darby that, absent a Calendar Rule, "when we're doing this on the floor in real time, we don't know that the map is as perfectly drawn as we might think it is. And so, I'm concerned about that. I'm troubled that you don't find it concerning"); *id.* at 16-17. Calendar rules have normally been used in redistricting in the House, *see* Findings of Fact, ECF No. 1340 at 57-59, ¶¶ 101-02, and Rep. Darby has testified that "[t]ypically there's at least a 24-hour calendar rule on major pieces of legislation,"—a characterization he applied to redistricting bills. *See* ECF No. 1455-2 (D. Darby Depo. Tr. at 96:10-22).

Third, both Chairmen Darby and Seliger's handling of legal advice and committee technical resources was unusual and differed between minority and Anglo legislators. Minority legislators had for weeks sought redistricting counsel and resources for their work on the committee. At the June 6, 2013 House hearing, Chairman Darby announced that TLC had retained

legal counsel for *him*, but that this counsel would not be shared with other committee members, an arrangement to which minority legislators objected. JX 12.4 at 9-13. At the subsequent hearing on June 10, Rep. Darby reported that those attorneys had "asked . . . to be allowed to withdraw their counsel" of him, JX 13.4 at 4-5, and that with respect to legal counsel for the committee going forward, "those resources are best found at the Texas Legislative Coun[cil]," *id.* at 5. At the same hearing, Chairman Darby confirmed his refusal to seek testimony or advice for the committee from the Attorney General's office, JX 13.4 at 67, and finally at the June 12, 2013 hearing, Chairman Darby announced that Mr. Archer was available as a resource witness to provide counsel. JX 14.4 at 6. During the House floor debate, Rep. Darby confirmed that he refused to ask the Attorney General or his staff to come before the Committee, but that the Attorney General's staff had, that day, met with the Republican caucus exclusively. JX 17.4 at 37-41. In the Senate, Sen. Seliger refused to answer questions about whether "Committee counsel and the Attorney General" advised him about the legality of Plan C235, despite acknowledging that the Committee counsel of which he spoke, Mr. Heath, was "counsel to the Committee, individually and collectively," when Sen. Watson suggested the committee members' attorney-client relationship with Mr. Heath precluded Sen. Seliger from claiming privilege. JX 26.2 at 8, 21.

Fourth, the legislature took the unprecedented step of including legislative findings in Section 2 of the Congressional (and House) redistricting bills asserting that they were legal under "all federal and state constitutional provisions or laws applicable to redistricting plans, including the federal Voting Rights Act." JX 9. TLC counsel David Hanna was unaware of such a finding being included in previous redistricting legislation, acknowledged he wrote Section 2, but would not reveal which legislator asked him to—revealing only that "it may or may not have been the person who filed the bill." JX 24.4 at 11-12. Stranger yet, the senate adopted Sen. Zaffirini's

amendment to remove Section 2 from S.B. 2—the state senate bill over which there was no dispute, JX 26.1 at 24, yet Sen. Seliger explained that with respect to the congressional bill, S.B. 4, "[t]his amendment is different because it takes on a different context in this map." JX 26.2 at 27.

These procedural departures from the norm, together with the presence of the other *Arlington Heights* factors to be addressed at trial, support the conclusion that Plan C235 was enacted with discriminatory intent.

III. As a Matter of Law, the Discriminatory Intent Present in 2011 Infects the Offending Characteristics of Plan C185 that Plan C235 Retained.

Even if the legislative record for the 2013 special session were not replete with evidence of intentional discrimination (which it is), the discriminatory purpose that motivated the 2011 plan persists, as a matter of law, with respect to the offending provisions carried over into Plan C235. Discriminatory purpose can exist both in the original enactment of legislation and when the legislature "reaffirms" a law motivated by discrimination. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). And once a court determines that a state actor has engaged in purposeful discrimination, "the racial discrimination [must] be eliminated root and branch." *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 437-39 (1968). In *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982), the Supreme Court affirmed the invalidation, pursuant to Section 5 of the VRA, of both a purposefully discriminatory redistricting plan *and* the city's later-enacted remedial plan as a "reasonable hedge against the possibility that the [remedial] scheme contained a purposefully discriminatory element." Thus, a subsequent enactment can retain the original law's discriminatory purpose even after its "more blatant discriminatory" portions are removed. *Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985). Moreover, the law requires that victims of discrimination be placed in "the position they would have occupied in the absence of discrimination," *United States v. Virginia*, 518 U.S. 515, 547 (1996) (quotation marks omitted).

That right is not lessened simply because the number of victims of purposeful discrimination is reduced in the later enactment.

This rule is consistent with "the 'well settled' rule 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'" because "'repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.'" *Northeastern Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (quoting *City of Mesquite v. Alladin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). In *City of Jacksonville*, that principle was all the more relevant because "[t]here is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; *it has already done so*." *Id.* (emphasis added). "Nor does it matter that the new ordinance differs in certain respects from the old one. *City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot. . . . The new ordinance may disadvantage [petitioners] to a lesser degree than the old one, . . . [but] it disadvantages them in the same fundamental way." *Id.* (emphasis in original). The same is true here. And if a repealed law can still be challenged and enjoined because of the *threat* it will be reenacted in whole or part, it would make scant sense to preclude a court from probing the original law's intent when the law *actually is* reenacted and is challenged. The law does not permit a state to evade liability for discrimination by attempting to bifurcate its discriminatory intent and the discriminatory effects of its legislation into two successive enactments.

These authorities are particularly salient here. Although Defendants rest their case on the fact this Court originally imposed the interim plan, Rep. Villalba admitted that the Supreme Court's *Perez* decision meant "that these maps were predicated upon previous maps that did have

deficiencies." JX 15.3 at 49. Those deficiencies were later detailed by the D.C. Court and deemed to be purposefully discriminatory, and yet were reenacted in the same discriminatory fashion by the legislature—fully advised by its counsel and by the plain text of the judicial decisions that doing so would yield new claims of intentional discrimination.

Many thousands of Texas minority voters remain the victims of intentional discrimination because of the legislature's knowing failure to remedy the purposeful discrimination that two federal courts have explicitly identified. The law imputes the 2011 legislature's discriminatory intent onto the 2013 legislature for knowingly reaffirming Plan C185's discriminatory features.

CONCLUSION

The legislative record demonstrates, and the evidence at trial with further show, that the 2013 legislature acted with discriminatory intent in enacting Plan C235, both as a matter of fact and a matter of law.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of July, 2017, I served a copy of the foregoing on counsel who are registered to receive NEFs through the CM/ECF system. All attorneys who have not yet registered to receive NEFs have been served via first-class mail, postage prepaid.
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/s/ J. Gerald Hebert
J. GERALD HEBERT