No. 21A814

IN THE SUPREME COURT OF THE UNITED STATES

KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS THE LOUISIANA SECRETARY OF STATE, *et al.*,

Applicants,

v.

PRESS ROBINSON *et al.*,

Respondents.

GALMON RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR ADMINISTRATIVE STAY, STAY PENDING APPEAL, AND PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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INTRODUCTION

"[O]nce a State's [] apportionment scheme has been found to be [unlawful], it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). This is not an unusual case.

Following a five-day evidentiary hearing—and having considered two sets of preliminary-injunction briefing, the testimonies of 21 expert and fact witnesses, and hundreds of pages of proposed findings of fact and conclusions of law—the district court applied governing precedent and concluded that Louisiana's new congressional map dilutes the electoral strength of Black voters in violation of Section 2 of the Voting Rights Act. After hearing from state officials and considering the representations made by the same defendants in prior litigation, the district court further found that a remedial map can be feasibly implemented ahead of Louisiana's November 2022 primary. A motions panel of the U.S. Court of Appeals for the Fifth Circuit agreed: Considering and rejecting the same arguments that the defendants again advance here, the Fifth Circuit denied a stay and expedited their appeal.

In response to 185 pages of meticulous factual findings and carefully reasoned legal analysis from four federal judges, the defendants now suggest that they could have won a *different* case—a case with different evidence, different legal standards, and different election deadlines. They distort the *Gingles* preconditions beyond recognition, disregarding decades of Section 2 precedent. They baselessly mischaracterize the plaintiffs' illustrative maps as "racial gerrymanders," even though the district court concluded that the maps comply with neutral districting

criteria and that race *did not predominate*. And their perfunctory recitation of *Purcell* ignores Louisiana's uniquely late election calendar, the testimony offered by state officials, and their own representations in state court.

The defendants can neither rewrite the law nor relitigate the factual record. Their arguments are no more persuasive now than when the district court and Fifth Circuit rejected them, and they certainly do not warrant the extraordinary relief of an emergency stay or cert before judgment.

The defendants' application should be expeditiously denied.

BACKGROUND AND PROCEDURAL HISTORY

I. Louisiana's new congressional map contains a single Black-opportunity district.

Since 2011, Black Louisianians have had the opportunity to elect their preferred congressional candidates in only one of the state's six districts, Congressional District ("CD") 2. But Louisiana's Black population has continually increased: The 2020 census showed that the state's population growth over the previous decade was driven entirely by minority Louisianians, with nearly half attributable to the Black community. App. 21–22. Louisiana's white population, by contrast, *decreased* by over 5%, an enduring trend since the 1990s. *Ibid.*

Throughout the redistricting process that followed the 2020 census, Black Louisianians, community leaders, and civil-rights groups called for the enactment of a second congressional district in which Black voters could elect their candidates of choice. Ignoring this chorus—and maps featuring two majority-Black districts that were introduced during the legislative process—the Legislature passed House Bill 1

("HB 1") during a special legislative session in February 2022. App. 4, 148. HB 1 largely mirrors the 2011 congressional plan and preserves Louisiana's lone majority-Black congressional district, CD 2. Governor John Bel Edwards vetoed the proposed map for its failure to include two majority-Black congressional districts, which he viewed as a violation of the Voting Rights Act. *Id.* at 5, 80. Rather than heed this warning and draw a new congressional plan that complies with Section 2, the Legislature overrode Governor Edwards's veto of HB 1 on March 30, 2022. *Id.* at 5.

Louisiana's new congressional map packs Black voters into CD 2 and cracks others among districts that extend into the predominantly white reaches of the state. CD 2 achieves its 58.65% Black voting-age population ("BVAP") by snaking through New Orleans and Baton Rouge to collect minority voters. App. 24–25. Meanwhile, three of the state's five parishes with the highest Black populations—East Carroll Parish (70.68%), Madison Parish (63.52%), and Tensas Parish (55.75%)—are located in the predominantly white CD 5. Suppl. App. 41–42.

II. The district court concluded that the plaintiffs were likely to succeed on their Section 2 claims and preliminarily enjoined HB 1.

Within hours of the Legislature's veto override, two sets of plaintiffs filed complaints alleging that the new congressional map violates Section 2 by diluting the votes of Black Louisianians. App. 5. Preliminary-injunction motions followed soon after and, after delaying the proceedings at the defendants' request, the district court adopted an expeditious scheduling order. *Id.* at 126 n.350.

On May 9, 2022, the district court convened a hearing on the preliminary-injunction motions. Over five days, the court heard testimony from 21 witnesses and

admitted 232 exhibits—including several hundred pages of reports from 14 experts—into the record. The plaintiffs presented evidence on each element of their claims, including the expert testimonies of:

- William Cooper and Anthony Fairfax, who prepared multiple illustrative plans that included an additional majority-Black congressional district consistent with traditional redistricting principles, App. 22–24, 30–32;
- Drs. Maxwell Palmer and Lisa Handley, who proved through ecological-inference analysis that Black Louisianians vote cohesively and that white bloc voting serves to defeat Black-preferred candidates in the area where the plaintiffs have proposed an additional Black-opportunity district, *id.* at 51–60; and
- Drs. Allan Lichtman, Traci Burch, and R. Blakeslee Gilpin, who demonstrated that the totality-of-circumstances analysis supports a finding of vote dilution, *id.* at 64–73.

The plaintiffs also offered extensive fact-witness testimony demonstrating the common historic, economic, and cultural interests shared by Black voters in Baton Rouge, the Delta Parishes along the Mississippi border, and St. Landry Parish—the area comprising the plaintiffs' illustrative majority-Black districts. App. 37–40.

On June 6, 2022, the district court issued a thorough, 152-page order granting the preliminary-injunction motions. App. 1–152. Notably, the district court credited the testimonies of the plaintiffs' witnesses, including their mapping experts, whose opinions the district court found "qualitatively superior and more persuasive on the requirements of numerosity and compactness" when compared to the defendants'

mapping experts. *Id.* at 97. In fact, the district court concluded that none of the defendants' seven experts rebutted the plaintiffs' evidence as to the *Gingles* preconditions or the Senate Factors. *Id.* at 92–97, 120–22, 125–27.

Among its extensive factual findings, the district court concluded that, "[g]iven the timing of Louisiana's election and election deadlines, the representations made by Defendants in related litigation, and the lack of evidence demonstrating that it would be administratively impossible to do so, . . . the State has sufficient time to implement a new congressional map without risk of chaos." App. 149.

Based on its findings of fact and conclusions of law, the district court preliminarily enjoined "Secretary Ardoin from conducting any congressional elections under the map enacted by the Louisiana Legislature" and gave the Legislature the opportunity to enact a remedial plan by June 20, 2022. App. 2. In addition, the district court extended the deadline for candidates to qualify by nominating petition in lieu of filing fees—a process that, the State's elections commissioner testified, has not been used by any congressional candidate in recent memory, *id.* at 145, 194—by about two weeks, until July 8, *id.* at 2–3. The district court emphasized that "[t]he candidate qualifying period set for July 20–22, 2022 and all other related deadlines are unaffected . . . and shall proceed as scheduled." *Id.* at 3.

III. The Fifth Circuit denied the defendants' motions for a stay.

Shortly after the district court issued its preliminary-injunction order, the defendants filed a joint motion to stay the order pending appeal with the district court and—after that request was denied, App. 161–63—three separate emergency motions with the Fifth Circuit. In a 33-page per curiam opinion, the Fifth Circuit motions

panel denied the defendants' motions. *Id.* at 167–99. The Fifth Circuit rejected the defendants' four contentions of legal error, *id.* at 171–90, and confirmed the district court's conclusion that sufficient time remains to adopt a remedial map in advance of the state's November primary elections, *id.* at 190–96. The Fifth Circuit further expedited the defendants' appeal of the preliminary injunction, *id.* at 199, and eventually scheduled oral argument for July 8, 2022.

IV. The district court declined to extend the remedial deadline after hearing testimony from legislative leaders.

On June 16, 2022, the district court heard live testimony from the Speaker of the Louisiana House of Representatives and President of the Louisiana Senate regarding their motion to extend the time for the Legislature to enact a remedial plan—which was filed a week after the district court's injunction and only after the Fifth Circuit denied the defendants' stay motions. App. 384–85. The district court credited testimony from the Senate President that the June 20 deadline provided sufficient time to enact a remedial map and that legislators could refer to public comments on congressional redistricting that were offered during the Legislature's map-drawing process earlier this year. *Id.* at 467–68. The district court further found that the House's efforts at producing a remedial map had been dilatory and "disingenuous": Committee hearings had not been promptly scheduled, and the chamber adjourned after meeting for only 90 minutes. *Id.* at 468–69. Consistent with the Fifth Circuit's recognition that the Legislature was given sufficient opportunity to adopt a remedial map, *id.* at 198, the district court denied the motion for an extension, *id.* at 469.

Five days after the Fifth Circuit's stay denial, this "emergency" application followed.

REASONS TO DENY THE APPLICATION

An applicant asking this Court for a stay in a matter "pending before [a federal] Court of Appeals," in which "the Court of Appeals [has] denied [a] motion for a stay," faces "an especially heavy burden." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). The Fifth Circuit has the responsibility "to review the District Court's decision . . . . in the first instance," *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017), and its previous stay denial "is entitled to great deference from this Court because the court of appeals ordinarily has a greater familiarity with the facts and issues in a given case," *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers). Moreover, "[r]espect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers); *see also Fargo Women's Health Org. v. Schafer*, 507 U.S. 1013, 1014 (1993) (O'Connor, J., concurring) (concurring in denial of stay application where courts below denied stay motions and Eighth Circuit expedited appeal, explaining that "[w]hen a matter is pending before a court of appeals, it long has been the practice of members of this Court to grant stay applications only upon the weightiest considerations" (cleaned up)). Ultimately, "a stay application to a Circuit Justice on a matter before a court of appeals is rarely granted," especially where the court of appeals "itself has refused to issue the stay."

Heckler v. Redbud Hosp. Dist., 473 U.S. 1308, 1312 (1985) (Rehnquist, C.J., in chambers) (cleaned up).

To obtain the extraordinary relief they seek, the defendants "must demonstrate: (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the [defendants'] position, if the judgment is not stayed." *Packwood*, 510 U.S. at 1319. The defendants cannot meet any element of this heavy burden, particularly since the Fifth Circuit has already denied a stay and expedited the appeal (and will hear oral argument in just two weeks). As that court concluded—after properly deferring to the district court's extensive factual findings—"the defendants have not met their burden of making a 'strong showing' of likely success on the merits," nor should "the cautionary principle from *Purcell v. Gonzalez* prevent[] the ordered remedy from taking effect." App. 168 (citation omitted). Nothing in the defendants' application has shown any compelling reason to second-guess the courts below—let alone "shown cause so extraordinary as to justify this Court's intervention in advance of the expeditious determination of the merits toward which the [Fifth] Circuit is swiftly proceeding." *Gonzales*, 546 U.S. at 1309.

I. The defendants fail to make a strong showing of likelihood of success in this appeal.

The Fifth Circuit already rejected the defendants' arguments as inconsistent with both the district court's factual findings and longstanding Section 2 precedent. This Court should do the same.

Notably, the defendants must overcome the significant deference afforded to the district court's findings. Because Section 2's vote-dilution inquiry is "peculiarly dependent upon the facts of each case" and "requires an intensely local appraisal of the design and impact of the contested electoral mechanisms," this Court applies "the clearly-erroneous test of Rule 52(a)." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (cleaned up). Application of this standard "preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law," *ibid.*, and is consistent with the "singular deference" this Court gives to a district court's credibility determinations, *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017); *see also Anderson v. City of Bessemer*, 470 U.S. 564, 575–76 (1985) (holding that "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings," which "can virtually never be clear error"). The district court's finding that HB 1 violates Section 2 can be reversed only if, "on the entire evidence," this Court "is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573 (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The district court's decision to grant a preliminary injunction is reviewed only for abuse of discretion. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). Under this standard, the Court should neither "reweigh[] evidence" nor "reconsider[] facts already weighed and considered by the district court." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990).

A. The courts below correctly analyzed white bloc voting and the third *Gingles* precondition.

Contrary to the defendants' primary merits argument, the plaintiffs satisfied the third *Gingles* precondition in this case because "whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates" in the area encompassed by the plaintiffs' illustrative districts. 478 U.S. at 56.

This is a straightforward inquiry; as the Fifth Circuit explained, "the question posed by the third *Gingles* precondition is concrete: If the state's districting plan takes effect, will the voting behavior of the white majority cause the relevant minority group's preferred candidate 'usually to be defeated'?" App. 185 (quoting *Covington v. North Carolina*, 316 F.R.D. 117, 171 (M.D.N.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 2211 (2017)). The district court's factual findings confirm that the answer to that question is a resounding yes. *See id.* at 185–86 ("The district court concluded that, without a new majority-minority district, white bloc voting would prevent black voters who satisfy the first and second *Gingles* preconditions from electing their preferred candidates."). Specifically, the district court found that the plaintiffs' racially polarized voting experts independently "examined this issue, amassed detailed data, and arrived at the same conclusion: that White voters consistently bloc vote to defeat the candidates of choice of Black voters." *Id.* at 123–24. The Fifth Circuit noted that "the district court relied on the experts' analysis to answer the right question: whether black voters' preferred candidates could *win* the proposed district under the enacted maps. And the plaintiffs' experts tailored their analysis to that question." *Id.* at 187 (citation omitted).

The defendants offered nothing to rebut this evidence; to the contrary, one of their own racially polarized voting experts *agreed* that white-preferred candidates usually defeat Black-preferred candidates in Louisiana. *See* Suppl. App. 65. Nor do they actually dispute the district court's finding now. They simply ignore it altogether and attempt to turn the third *Gingles* precondition on its head, crafting a new test wholly divorced from this Court's precedent.

1. The defendants mischaracterize the relevance of white crossover voting.

First, the defendants completely misunderstand the relevance of white crossover voting in the *Gingles* inquiry. Misreading *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion), they suggest that, "'[i]n areas with substantial crossover voting,' . . . this third precondition remains unsatisfied." Appl. 12–13 (quoting *Bartlett*, 556 U.S. at 24). But *Bartlett* merely noted that "[i]n areas with substantial crossover voting it is *unlikely* that the plaintiffs would be able to establish the third *Gingles* precondition." 556 U.S. at 24 (emphasis added). This was just a logical application of *Gingles*—after all, if enough white voters support a Black-preferred candidate, then they would not vote as a bloc to defeat that candidate, the third precondition would go unsatisfied, and a Section 2 remedy would not be justified. (Indeed, that is *precisely* the takeaway from *Harris* and *Covington*. *See infra* at 14–15.)

Levels of crossover voting insufficient to overcome white bloc voting—like the level observed where the plaintiffs drew their illustrative districts—do *not* negate the third precondition. To the contrary, *Gingles* explicitly noted that "a white bloc vote that normally will defeat the combined strength of minority support *plus white*

'crossover' votes rises to the level of legally significant white bloc voting." 478 U.S. at 56 (emphasis added). Accordingly, as the Fifth Circuit explained, "the proportion of these so-called 'crossover' votes is not directly relevant. Instead, white crossover voting is indirectly relevant because it influences the outcome of elections and, therefore, what really matters for the third *Gingles* precondition: whether minority-preferred candidates would usually lose under the challenged plan." App. 185; *see also id.* at 126 ("White crossover voting was inherently included in the analysis performed by Dr. Palmer and Dr. Handley[.]").

The defendants suggest—*without citation*—that the plaintiffs must demonstrate "*extreme* white bloc voting." Appl. 13. That is simply untrue; all that is required is sufficient white bloc voting to usually defeat Black-preferred candidates. Because the undisputed factual record shows that this is the case here, there is legally significant white bloc voting, and the third precondition is satisfied.[1]

2. The defendants mischaracterize the meaning of "legally significant racially polarized voting."

The defendants also mischaracterize "legally significant racially polarized voting," suggesting that it exists only where "a district with a black VAP in excess of 50% is necessary in order to give black voters an opportunity to elect their candidates of choice." Appl. 13–15 & n.4. This definition finds no basis in precedent, which

[1] Undeterred, the defendants suggest that this well-settled standard "converts [] Section 2's protection into electoral guarantees through the reconfiguration of district lines any time a slim majority of white voters supports a candidate that a minority group disfavors." Appl. 13–14. Not so: This inquiry is merely one among three preconditions, which must also be considered along with the totality of circumstances. Satisfaction of the third *Gingles* precondition does not alone prove Section 2 liability.

defines the term as "majority bloc voting at such a level that it enables the majority group 'usually to defeat the minority's preferred candidates.'" *Covington*, 316 F.R.D. at 167 (quoting *Gingles*, 478 U.S. at 56). In other words, legally significant racially polarized voting exists where the third *Gingles* precondition is satisfied.

Rejecting this simple (and binding) definition, the defendants have concocted a new test based on the hypothetical performance requirements of illustrative districts. *See* Appl. 14–15. [2] But the Fifth Circuit already explained why the defendants' proposed definition entirely misses the mark: "The plaintiffs must show that [legally significant] bloc voting would be present in the *challenged* districting plan." App. 185. Accordingly, "the defendants' observation that a hypothetical district could elect black-preferred candidates with as little as 40% BVAP" is just not "relevant." *Id.* at 188. Nor would this approach make any sense, since "it would be bizarre if a state could satisfy its VRA obligations merely by pointing out that it could have—but did not—give minority voters an opportunity to elect candidates of their choice without creating a majority-minority district." *Ibid.* The defendants' obsession with the BVAP required to elect Black-preferred candidates in the illustrative districts is wholly misplaced—they have merely "generated a theoretical factual issue" that has no bearing on the *Gingles* analysis. *Id.* at 126.

[2] Curiously, the first third of the defendants' footnote 4 accurately cites controlling caselaw and seemingly acknowledges the proper definition. *See* Appl. 13–14 n.4. But the footnote then wildly diverges from precedent, spinning an unsupported tangent that bears no relation to the actual legal standard. Notably, their legal citations end with the first third of that footnote—the remaining two-thirds are pure invention.

3. Neither *Covington* nor *Harris* supports the defendants' misunderstanding of the third *Gingles* precondition.

The defendants completely misconstrue *Covington* and *Harris* as endorsing their invented definition of legally significant racially polarized voting. Neither case stated anything of the sort.

Both *Covington* and *Harris* involved attempted *defenses* under the Voting Rights Act, not affirmative Section 2 claims. In both, racial gerrymandering challenges were lodged against districts that the legislature argued were required by Section 2. This proffered justification was rejected because the legislature *failed to establish* in the benchmark plan the existence of "racial bloc voting that, absent some remedy, would enable the majority usually to defeat the minority group's candidate of choice." *Covington*, 316 F.R.D. at 167–68. Indeed, as *Harris* explained, "electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite" because Black-preferred candidates *already prevailed* in the benchmark districts. 137 S. Ct. at 1460. These conclusions were consistent with *Bartlett*—and the third precondition's focus on the electoral success of minority-preferred candidates in *existing* maps, not *illustrative* maps—where this Court observed that "majority-minority districts would not be required in the first place" in areas with crossover voting substantial enough to overcome white bloc voting. 556 U.S. at 24. That would demonstrate that white bloc voting does *not* defeat minority-preferred candidates and thus foreclose the third precondition. And because "the third precondition is a *sine qua non* of a *Gingles* claim," no Section 2 remedy is required where "a minority group can already elect its preferred candidates"—regardless of

"whether that ability accrues in a majority-minority or a performing crossover district." App. 189.

Here, unlike in *Covington* and *Harris*, the plaintiffs *did* demonstrate that, under the state's new congressional plan, white bloc voting usually defeats Black-preferred candidates in the area encompassed by their illustrative majority-Black districts. *See* App. 188–89 (distinguishing *Harris* from this case). Black-preferred candidates *will not prevail* in this area "without a VRA remedy," *Covington*, 316 F.R.D. at 168—and the plaintiffs have thus satisfied the third *Gingles* precondition.

4. The evidentiary record indicates—and the district court found—that polarized voting is attributable to race.

Finally, the defendants claim that "[t]he preliminary-injunction record shows that 'partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens.'" Appl. 15 (quoting App. 330). But proving the cause of racially polarized voting is not the plaintiffs' burden. *See Gingles*, 478 U.S. at 73 ("All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations."). At any rate, the defendants' argument relies on a blatant mischaracterization of the record. Indeed, although they suggest that "[e]vidence of partisan-motivated racially polarized voting permeates the record," they cite only *one* source: the testimony of Dr. John Alford. Appl. 15–16. But the district court "d[id] not credit [his] opinion as helpful," noting that he "merely looked at the results reported by Dr. Palmer and Dr. Handley and opined that polarized voting" is not caused by the race of the candidate—a conclusion at once unsupported (Dr. Alford conceded that he "does not know exactly why voting is polarized") *and* contradicted by Dr. Palmer, who

"demonstrated that the race of the candidate does have an effect; he found that Black voters support Black candidates more often in a statistically observable way." App. 120–21. In short, the district court properly discounted Dr. Alford's underbaked analysis—a determination to which deference is entitled.[3]

Moreover, both the district court's factual findings and the expert testimony on which it relied demonstrate that race is "[t]he driving mechanism" behind Louisiana's polarized voting. Suppl. App. 58. The district court concluded that "the evidence of the historical realignment of Black voters from voting Republican to voting Democrat undercuts the argument that the vote is polarized along party lines and not racial lines" and that "Black voters [vote] cohesively for candidates who are aligned on issues connected to race." App. 128. This conclusion was bolstered by the analyses of Drs. Lichtman, Gilpin, Burch, and Handley—each of whom testified to the ways in which "the racial attitudes of the parties, and their positions on race-related issues, are what drives support for a particular party"—and the testimony of a fact witness "who testified that in her lived experience, Black voters in Louisiana prefer Democratic candidates, not because of the party label, but because Democrats are more likely to discuss the issues that matter to Black voters." *Id.* at 129.

Ultimately, as Dr. Lichtman testified, "[p]arty by itself doesn't explain anything. . . . [B]lacks are voting Democratic in Louisiana, whites are voting

[3] Notably, the district court is not the first to discount Dr. Alford's analysis based on shortcomings in his analysis—including his mere "speculation [] that partisanship is the cause of [] racial polarization." *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, Nos. 1:21-CV-5337-SCJ, 1:21-CV-5339-SCJ, 1:22-CV-122-SCJ, 2022 WL 633312, at *57–58 (N.D. Ga. Feb. 28, 2022) (collecting cases).

Republican. . . . Not in spite of race but because of race. Race is at the center of all of this." Suppl. App. 58; *see also id.* at 66 (Dr. Alford's testimony acknowledging that party affiliation can be motivated by race). The credited expert evidence that polarization is attributable to race and not partisanship went effectively unrebutted by the defendants—and serves to refute their baseless claim that Louisiana's polarized voting is attributable only to party. Accordingly, this argument does not move the needle as to the third precondition or any other facet of the Section 2 inquiry.

B. The courts below correctly rejected the defendants' charges of racial gerrymandering.

As the Fifth Circuit observed, rather than contest whether the plaintiffs' illustrative maps are sufficiently compact for purposes of the first *Gingles* precondition, *see infra* at 25–31, the defendants "put all their eggs in the basket of racial gerrymandering," App. 173. That court rejected this argument as meritless, reiterating that "racial consciousness in the drawing of illustrative maps does not defeat a *Gingles* claim," and "even if it did, the defendants have not shown that the plaintiffs' maps prioritized race so highly as to commit racial gerrymandering." *Id.* at 181. Neither this conclusion nor the district court's findings underpinning it should be disturbed.

This Court has explained that a racial-gerrymandering claim requires a showing "that race was the *predominant factor* motivating the legislature's decision to place a significant number of voters within or without a particular district." *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added). "It does not follow that race predominates in the redistricting process" from mere "aware[ness] of racial

demographics." *Ibid.* Here, the district court "credit[ed] Cooper's testimony" that, although "he was aware of race during the map drawing process," "race was *not* a predominant consideration in his analysis," as he "considered all of the relevant principles in a balanced manner." App. 98 (emphasis added); *see also id.* at 98–99 (crediting Mr. Fairfax's testimony "that race did not predominate in his mapping process"). These factual findings were based on the district court's comprehensive review of the expert testimony, *see, e.g.*, *id.* at 92–95, 97 (rejecting defendants' expert testimony regarding racial predominance), and a detailed assessment of the witnesses' credibility, *compare id.* at 98–99, 116–17 (finding Mr. Cooper and Mr. Fairfax credible), *with id.* at 92 (declining to exclude Mr. Bryan but finding "his methodology to be poorly supported"), *and id.* at 94 (finding that Dr. "Blunt has no experience, skill, training or specialized knowledge").

Remarkably, the defendants' racial-gerrymandering arguments fail to even acknowledge, let alone refute, the district court's findings on racial predominance. Instead, by cherry-picking evidence from the record, they claim that "[t]he facts to which the district court lent its imprimatur are indistinguishable from those in *Covington*." Appl. 18. Far from being "indistinguishable," the racially motivated map-drawing in *Covington* was found to be unlawful based on factors not present here:

- There, race-neutral districting criteria were subordinated to race-based goals, *Covington*, 316 F.R.D. at 137–40, whereas here, the plaintiffs' mapping experts "explicitly and credibly testified that they did not allow race to predominate over traditional districting principles as they developed their illustrative plans," App. 116;

- There, the challenged maps "split a high number of precincts," were less compact than the benchmark maps on most compactness measures, and contained "bizarre" and "oddly shaped" districts, *Covington*, 316 F.R.D. at 137–38, 143–46, whereas here, the district court "found that [the illustrative] plans outperformed the enacted plan on every relevant criteria," App. 118; *see also infra* at 25–29;

- There, the map-drawer was "instructed [] to draw enough VRA districts to provide North Carolina's African American citizens with a substantially proportional and equal opportunity to elect their preferred candidates of choice," *Covington*, 316 F.R.D. at 132 (cleaned up), whereas here, proportionality was merely one factor considered as part of the totality-of-circumstances analysis, *see* App. 140;[4]

- There, "the overriding priority of the redistricting plan was to draw a predetermined race-based number of districts, each defined by race," *Covington*, 316 F.R.D. at 135, whereas here, the plaintiffs' mappers were asked whether it was possible to draw a second majority-Black congressional district consistent with neutral criteria and concluded that it was, App. 117–18; and

- There, the legislature "erred in drawing each of the challenged districts by failing to evaluate whether there was a strong basis in evidence for the third

[4] The defendants' repeated claims to the contrary notwithstanding, *see* Appl. 2, 8, 18, at no point have the plaintiffs contended that Section 2 confers a proportionality requirement. Rather, both they and the district court properly treated proportionality as just one piece of "evidence of whether 'the political processes leading to nomination or election in the State or political subdivision are not equally open to participation'" by Black Louisianians. *LULAC v. Perry*, 548 U.S. 399, 437 (2006) (plurality opinion) (quoting 52 U.S.C. § 10301(b)); *see also Johnson v. De Grandy*, 512 U.S. 997, 1012 (1994).

Gingles factor in any potential VRA district," *Covington*, 316 F.R.D. at 167, whereas here, that precondition was demonstrated by unrebutted evidence, *see supra* at 10–11.

This case is therefore readily distinguishable from *Covington*. In a vain attempt to make the analogy stick, the defendants point to testimony indicating that the plaintiffs' mapping experts considered race when drawing their illustrative maps, *see* Appl. 18—as the first *Gingles* precondition requires. The district court effectively dispatched this argument in its preliminary-injunction order:

> This is not the "gotcha" moment that Defendants make it out to be. It is well-established that in a vote dilution case, the method by which a plaintiff can prove numerosity to satisfy *Gingles I* is the production of illustrative maps demonstrating that it is possible to draw an additional 50% + majority-minority district. So, the fact that Plaintiffs asked Cooper to draw such a map is no surprise. And, while Cooper did testify that Plaintiffs asked him to draw two majority-Black districts, he also testified that he "did not have a goal to under all circumstances create two majority-Black districts" because "when developing a plan you have to follow traditional redistricting principles." And Fairfax's testimony established how he considered socioeconomic data extensively in deciding where to draw his lines. Overall, the Court . . . credits their testimony that race did not predominate in their drawing as sincere.

App. 117 (footnote omitted) (quoting ECF No. 164 at 40).[5] Indeed, the defendants' suggestion that *any* consideration of race as part of the *Gingles* inquiry constitutes an unlawful racial gerrymander is wholly at odds with precedent. As this Court has observed, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines . . . . That sort of race

[5] "ECF No." citations refer to entries on the district court docket. *See Robinson v. Ardoin*, Nos. 3:22-cv-00211-SDD-SDJ (M.D. La.).

consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646 (1993). And because courts "*require* plaintiffs to show that it is possible to draw majority-minority voting districts," "[t]o penalize [the plaintiffs] . . . for attempting to make the very showing that *Gingles*[and its progeny] demand would be to make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action." *Davis v. Chiles*, 139 F.3d 1414, 1425–26 (11th Cir. 1998). Consideration is not the same as predominance, and nothing in the defendants' application—and certainly none of their evidence in the record—indicates that race *predominated* in the plaintiffs' illustrative districts.[6]

Moreover, the plaintiffs' illustrative maps are consistent with neutral districting criteria, *see infra* at 25–29, which "serve[s] to defeat a claim that a district has been gerrymandered on racial lines," *Shaw*, 509 U.S. at 647; *see also* App. 182–

[6] Even if it had—and even if courts had not sensibly rejected the cavalier application of the racial-gerrymandering doctrine to the *Gingles* inquiry, *see, e.g.*, *Davis*, 139 F.3d at 1425; *Clark v. Calhoun County*, 88 F.3d 1393, 1406–07 (5th Cir. 1996)—a district drawn to comply with Section 2 that uses race as the predominant factor can survive strict scrutiny. *See Miller*, 515 U.S. at 916, 920 (applying strict scrutiny to racial-gerrymandering claims and requiring that such maps be "narrowly tailored to achieve a compelling interest"); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) ("As in previous cases . . . the Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act was compelling."). Here, the sum total of the plaintiffs' evidence and the district court's findings, along with the numerous maps rejected during the legislative process and Governor Edwards's veto, provide indisputably "good reasons" to believe that a second Black-opportunity district is required under the Voting Rights Act. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015) (cleaned up). The plaintiffs' illustrative plans would thus satisfy the requirements of strict scrutiny against a hypothetical racial-gerrymandering claim. And, as the Fifth Circuit noted, "even if the plaintiffs had engaged in racial gerrymandering as they drew their hypothetical maps, it would not follow that the Legislature is required to do the same to comply with the district court's order. Illustrative maps are just that—illustrative." App. 183.

83 ("[F]actual findings by the district court, based on expert and lay testimony presented by the plaintiffs, indicate that the boundaries of the illustrative maps have at least some basis in traditional districting principles[.]"). Adherence to neutral criteria further undermines the defendants' feverish claims of racial gerrymandering.

Absent any evidence of racial predominance in the illustrative maps, the defendants repeatedly raise the specter of *Hays*, suggesting that a second majority-Black congressional district in the Bayou State is necessarily foreclosed by litigation that occurred almost 30 years ago. *See* Appl. 2, 6–7, 26 n.8. The district court correctly dismissed this argument as "a red herring," explaining that the "assertion that *Hays* automatically vitiates the validity of Plaintiffs' illustrative plans is refutable by a cursory visual inspection of the *Hays* maps"—which in no way resemble the plaintiffs' illustrative plans, *compare* App. 22–23, 30 (plaintiffs' illustrative maps), *with id.* at 107, 109 (*Hays* maps)—and because "the Black population in Louisiana has increased significantly since the 1990 census that informed the *Hays* map," *id.* at 106–10. Because "*Hays* is distinguishable and inapplicable," *id*. at 110, it does not support the defendants' racial-gerrymandering claims.

In short, as the Fifth Circuit concluded, "the unchallenged findings of the district court foreclose the defendants' contention that the plaintiffs' illustrative maps are racial gerrymanders." App. 183.

C. The courts below correctly analyzed numerosity, compactness, and the first *Gingles* precondition.

The defendants claim that the plaintiffs' did not satisfy the first *Gingles* precondition because "the illustrative plans [the plaintiffs] produced are irrefutably

racially gerrymandered" and that "the minority community they have identified is not compact, reasonably or in any other application of the concept." Appl. 20. Neither argument is persuasive.

For the reasons discussed above, *see supra* at 17–22, the plaintiffs' illustrative maps are not racial gerrymanders. Although the defendants suggest that "common sense and the record irrefutably show that [these maps] were fabricated to 'segregate the races for purposes of voting,'" Appl. 21 (quoting *Shaw*, 509 U.S. at 642), both the district court and Fifth Circuit concluded otherwise. "Racial gerrymandering" is not a mystical incantation that automatically forecloses a Section 2 claim. It is an independent constitutional claim subject to a "demanding" evidentiary standard. *Miller*, 515 U.S. at 928 (O'Connor, J., concurring). Mere repetition of the term cannot erase the extensive evidentiary record that clearly refutes the defendants' baseless claims of racial gerrymandering. Simply put, race did not predominate in the drawing of the plaintiffs' illustrative maps. The defendants' additional racial-gerrymandering arguments are no more compelling.

1. Any-part BVAP is the proper metric in this case.

The defendants' claims to the contrary notwithstanding, *see* Appl. 21–22, the district court and Fifth Circuit properly used the any-part BVAP metric when considering whether the plaintiffs satisfied the first *Gingles* precondition, *see* App. 85–90, 171–72. As both courts noted, use of the any-part BVAP metric in this case is compelled by this Court's precedent: Where, as here, "the case involves an examination of only one minority group's effective exercise of the electoral franchise . . . . it is proper to look at *all* individuals who identify themselves as black."

Georgia v. Ashcroft, 539 U.S. 461, 473 n.1 (2003), *superseded by statute on other grounds as recognized in Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015). The Fifth Circuit recognized that the defendants provided "no reason to part from that holding," App. 172, and their only argument now appears to be an aggressive misreading of the critical *Ashcroft* footnote, *see* Appl. 21.

Departing from use of the any-part BVAP metric in this case would be inconsistent not only with the Court's precedent but also with the state's historical racial categorization; as the district court observed, "[i]t would be paradoxical, to say the least, to turn a blind eye to Louisiana's long and well-documented expansive view of 'Blackness' in favor of a definition on the opposite end of the spectrum" that "gatekeeps Blackness in the context of this Voting Rights case." App. 87. Neither the plaintiffs' nor the courts' use of the any-part BVAP metric in this case was an attempt "to load the dice in favor of triggering Section 2." Appl. 21–22. Instead, it was a proper application of precedent.

2. The illustrative maps satisfy the numerosity requirement.

The defendants similarly disregard controlling precedent when they fault the plaintiffs for "offer[ing] exemplar maps with districts that exceeded the 50 percent BVAP threshold by [] razor-thin margins." Appl. 22. *Bartlett* established an "objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" 556 U.S. at 18. The purpose of this bright-line rule was to "provide[] straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2," *ibid.*, and in neither that case nor any other opinion of this Court has a numerosity threshold beyond 50%

been imposed. The plaintiffs can hardly be faulted for satisfying the first *Gingles* precondition as this Court has defined it.

3. The illustrative districts are sufficiently compact.

The defendants' remaining arguments revolve around the issue of compactness, an "inquiry [that] take[s] into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (plurality opinion) (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997)). The district court found, based on the extensive factual record before it, that the "[p]laintiffs demonstrated that they are substantially likely to prove that Black voters are sufficiently 'geographically compact' to constitute a majority in a second congressional district." App. 90 (footnote omitted) (quoting *Harris*, 137 S. Ct. at 1470). As the courts below noted, "the '[d]efendants did not meaningfully refute or challenge Plaintiffs' evidence on compactness,'" a "tactical choice [that] has consequences" because "[i]t leaves the plaintiffs' evidence of compactness largely uncontested." *Id.* at 173 (first alteration in original) (quoting App. 92).

a. The illustrative districts satisfy traditional redistricting principles.

Disregarding the factual record and the conclusions of both the district court and the Fifth Circuit, the defendants claim that the plaintiffs "undeniably subordinated *all* traditional redistricting criteria while elevating race to the apex position." Appl. 22. Without citing to anything concrete in the factual record, they maintain that "[t]he illustrative maps often split cities, counties, and communities of interest while merging far flung and distinct areas with nothing in common but-for

their common racial makeup." *Ibid.* This is just plain false. As both the Fifth Circuit and the district court agreed, the plaintiffs' illustrative majority-Black districts—CD 5 in each illustrative map—are sufficiently compact along a range of traditional metrics and consistent with neutral districting criteria.

First, the plaintiffs' "illustrative CD 5 appears geographically compact upon a visual inspection." App. 174; *see also Bush v. Vera*, 517 U.S. 952, 980–81 (1996) (plurality opinion) (explaining that "bizarre shape and noncompactness" constitute "[s]ignificant deviations from traditional districting principles"). Indeed, the district court concluded not only that "the districts proposed in the illustrative maps are regularly shaped," but also that, "[c]ompared to the shape of CD 2 and the wraparound shape of CD 6 in the enacted plan, the illustrative plans are visually *more* compact." App. 99 (emphasis added).[7] The plaintiffs' mapping experts also "demonstrated, without dispute, that in terms of the objective measures of compactness, the congressional districts in the illustrative plans are demonstrably superior to the enacted plan." *Id.* at 92. The defendants still do not dispute this finding, suggesting only that "[v]isual compactness of a district . . . *does not* automatically translate into a conclusion that the minority population within that district is itself compact," Appl. 25—an argument without relevance, given that the compactness finding was *not* based solely on a visual inspection.

[7] Reproductions of the enacted congressional map and the plaintiffs' illustrative maps can be found in the district court's order. *See* App. 4, 22–23, 30.

Second, the plaintiffs' illustrative districts "respect traditional redistricting criteria." App. 175. As the Fifth Circuit summarized, Messrs. Cooper and Fairfax

> testified that they took criteria such as "political subdivision lines, contiguity" and "the Legislature's Joint Rule 21" into account when drawing their maps. Fairfax also said he grouped populations with similar economic demographics together and attempted to keep census designated places together when possible. And Cooper stated that he had declined to draw maps for plaintiffs in the past when doing so would require him to violate traditional redistricting criteria. . . . [T]heir testimony indicates that the districts they drew—including CD 5—are likely consistent with traditional redistricting criteria. Accordingly, the population of black voters in those districts is likely to be reasonably compact as well.

Id. at 175–76 (citations omitted) (quoting App. 23).[8] Though the defendants contend that "[t]he Fifth Circuit . . . concluded that Plaintiffs' illustrative maps 'respect traditional redistricting criteria' because, essentially, Plaintiffs' map-drawers said so," Appl. 26 (quoting App. 175), they offered nothing to impugn the credibility of the plaintiffs' mapping experts, *see* App. 117, and they conspicuously fail to acknowledge the unrebutted, *objective* evidence provided by the plaintiffs' experts that demonstrates compliance with these criteria. Specifically, the district court found that the illustrative plans "are contiguous and equalize population across districts"; "respect political subdivision boundaries as much or more so than the enacted plan with regard to parish splits"; and "respect political subdivision boundaries with regard to precinct splits." *Id.* at 99–100.[9] Without "either [] circumstantial evidence

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[8] Joint Rule No. 21 enumerated the Legislature's redistricting criteria. *See* App. 3.

[9] The defendants claim that the plaintiffs' experts "erred by examining the compactness of the *district* rather than the compactness of the relevant *minority population*." Appl. 25. But as the Fifth Circuit noted, this is a distinction without a

of a district's shape and demographics or more direct evidence going to [the mapping experts'] purpose," *Miller*, 515 U.S. at 916, the defendants' assertions of racial predominance are based on nothing more than *their* own say-so.

Third, "the illustrative CD 5 preserves communities of interest." App. 176. The district court found that the "[p]laintiffs made a strong showing that their maps respect [communities of interest] and even unite communities of interest that are not drawn together in the enacted map," which the defendants did "not meaningfully dispute[]." *Id.* at 103. In addition to their mapping experts, who "employed different approaches to identifying communities of interests and considering them in their illustrative maps," *id.* at 34–36, 101, the "[p]laintiffs also presented several lay witnesses who spoke to the shared interests, history, and connections between East Baton Rouge Parish and two areas included together with it in [their] illustrative CD 5." *Id.* at 37. One described "the strong historical connection between East Baton Rouge and the Delta parishes," including the "pattern of migration from the Mississippi Delta to Baton Rouge" and "educational ties between the Delta parishes and Baton Rouge." *Id.* at 37–38. Another testified that "St. Landry and Baton Rouge share common policy concerns" stemming from educational and economic ties. *Id.* at 38–40. The defendants, by striking contrast, "did not call *any* witnesses to testify about communities of interest"—"a glaring omission, given that [the Legislature's

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difference—"the geographic compactness of a district is a reasonable proxy for the geographic compactness of the minority population within that district." App. 180 n.4.

own] Joint Rule 21 requires communities of interest to be prioritized over and above preservation of political subdivisions." *Id.* at 101 (emphasis added).

In short, the defendants do not meaningfully dispute the plaintiffs' satisfaction of *any* of the traditional redistricting principles that together led to a finding of sufficient compactness—let alone give any reason to question the district court's thorough factual finding and the Fifth Circuit's endorsement of its legal conclusions.[10]

b. The defendants' experts did not meaningfully contest the compactness of the illustrative districts.

In the words of the Fifth Circuit, "actions speak louder than words, and the defendants mention very little of what they introduced before the district court in connection with the compactness inquiry in their motion[] for a stay." App. 177. Indeed, the defendants only briefly acknowledge the evidence provided by their mapping experts, *see* Appl. 22–23—and they ignore the district court's conclusion that these experts contributed nothing of merit.

First, the defendants reference the testimony of demographer Thomas Bryan. *See* Appl. 22–23. The district court "found his methodology to be poorly supported" and that his "analysis lacked rigor and thoroughness." App. 92–93. His "misallocation"

[10] The amicus brief filed by the National Republican Redistricting Trust chides the district court's dismissal of core retention as a relevant criterion. But, as the Fifth Circuit noted, "the defendants have not explained why Louisiana's previous districting should be used as a measuring stick for compactness." App. 178. Indeed, the Legislature's own redistricting guidelines did *not* include core retention as an enumerated criterion. *Id.* at 105. Ultimately, "[c]ore retention is not and cannot be central to *Gingles I*, because making it so would upend the entire intent of Section 2, allowing states to forever enshrine the status quo regardless of shifting demographics." *Ibid.*

analysis—which aimed to show how the illustrative plans split geography based on race—was not only based on assumptions that, "he admitted, are not supported by the evidence in this case," but also *disregarded* the neutral criteria that guided the plaintiffs' mapping experts. *Id.* at 42, 93. It is no surprise that Mr. Bryan's analysis—which looked at race *to the exclusion of all else*—saw racial predominance where none actually existed. Notwithstanding these methodological flaws, the defendants cite Mr. Bryan's analysis as proof that the plaintiffs' "map-drawers intentionally segregated cities by race." Appl. 22. But, as the Fifth Circuit noted, Mr. Bryan's testimony *at most* demonstrates that the plaintiffs' illustrative maps "split[] Baton Rouge and Lafayette between congressional districts such that the black neighborhoods were included in CD 5"—and "evidence of a minor departure in one area of the district has only limited probative value with respect to the compliance of the district with traditional redistricting criteria *on the whole*" and "is outweighed by the plaintiffs' direct testimony that the black populations in CD 5 are culturally compact." App. 177.

Second, the defendants reference Dr. Alan Murray, *see* Appl. 23, whose opinions the district court found "unhelpful and unilluminating" when compared to "[t]he time-tested, generally accepted statistical measures of compactness used by other experts in this case." App. 97. The defendants nevertheless rely on his "mileage chart that showed the distance between the center of the Black populations in communities across Louisiana." Appl. 23–24. But they never explain why distance is a proxy for dissimilarity or "why those distances are too great—especially for rural regions such as the delta parishes included in CD 5. Indeed, it is not unusual for

districts in rural parts of Louisiana to span such distances." App. 179. Dr. Murray's statewide analysis thus "has limited probative value with respect to the compactness of the black voting population that would reside in plaintiffs' proposed district—especially in light of the plaintiffs' direct evidence supporting compactness." *Ibid.*

Third, the defendants briefly rely on the simulations analysis performed by Dr. Christopher Blunt as proof of racial gerrymandering. *See* Appl. 3, 27. But the district court found not only that "Dr. Blunt's simulation analysis experience is best described as novice," but also that "the simulations he ran did not incorporate the traditional principles of redistricting required by law"—including "minimizing precinct splits, respecting communities of interest, incumbency protection, [and] even the criterion considered paramount by Defendants, core retention"—and accordingly "merit little weight." App. 94–95. "In accord with that finding of fact," the Fifth Circuit similarly "discount[ed] his opinion as well for whatever purpose it could serve in showing the compactness (or lack thereof) among the black voting population." *Id.* at 178. In sum, Dr. Blunt's simulated plans demonstrate nothing of consequence—least of all that the plaintiffs' illustrative maps are unlawful racial gerrymanders.

The district court considered the credibility and contributions of the defendants' experts and concluded that their testimonies were neither helpful nor illuminating—and the Fifth Circuit agreed. These factual determinations are entitled to deference; the defendants have *no* meaningful evidence on the first precondition.

D. The courts below applied the correct legal standard.

As a last-ditch merits argument, the defendants suggest that the plaintiffs must establish more than a substantial likelihood of success on the merits to obtain

a preliminary injunction—even though this is *precisely* the standard the Secretary of State urged below. *See* ECF No. 101 at 7. The defendants now suggest that a "heightened" standard was required because the plaintiffs sought a mandatory injunction. That is wrong twice over: The defendants offer no citation for a heightened standard from this Court, and the plaintiffs sought a *prohibitory* injunction barring the use of Louisiana's enacted congressional plan—which is precisely what the district court ordered. *See* App. 2. That the district court gave the Legislature an *opportunity* to craft a remedial map—as this Court's precedent generally requires, *see, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (plurality opinion)—does not transform the prohibitory injunction into a mandatory injunction.

And importantly, the burden is flipped on appeal. As the Fifth Circuit correctly noted, to obtain a stay, the defendants must make "a strong showing that [*they* are] likely to succeed on the merits." App. 170. They failed to do so, as shown by the Fifth Circuit's methodical refutation of each of their contentions of error. *See id.* at 171–90. The Fifth Circuit's observation that the plaintiffs' entitlement to *preliminary* relief does not guarantee *permanent* relief merely reflected the court's careful attention to the case's posture. And the defendants do not—and cannot—cite to any material flaw that the Fifth Circuit identified in the district court's analysis.

Finally, the defendants fault the courts below for not reviewing whether the underlying merits were "entirely clearcut" in the plaintiffs' favor. Appl. 28 (quoting *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring)). But this proposed standard is not binding law, and even if it were, (1) it would apply only in

the period "close to an election," *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), which is not the case here, *see infra* at 35–37; and (2) the standard is satisfied in any event given that the defendants have identified no credible shortcomings in the plaintiffs' case or the district court's order.

Ultimately, the conclusions of the courts below are based on the straightforward application of well-established law to the undisputed record. The defendants try to muddy the waters by insisting on legal standards unsupported by caselaw and factual assertions unsupported by the record—a gambit that falls far short of establishing their burden for the extraordinary relief they seek here.

II. The balance of the equities weighs conclusively against a stay.

Like their merits arguments, the defendants' equities arguments rely on hyperbole and a seemingly pathological disregard for the factual record. Both the district court and the Fifth Circuit were correct: A remedial plan can be feasibly implemented ahead of the midterm elections, and a stay is not otherwise justified.

A. The *Purcell* principle does not require a stay.

Notwithstanding their new argument that chaos will ensue if a remedial map is now implemented, the defendants previously *insisted* that a redistricting plan for the state's 2022 congressional elections was not urgently needed—a position ultimately supported by the factual record in this case.

1. The defendants' position is inconsistent with their prior representations.

During state-court litigation in March of this year, Louisiana's legislative leaders made on-the-record representations about how the state's unique election

calendar permits redistricting to occur during the summer—or even the autumn—of an election year. As the district court recounted, the legislative leaders

> asserted that: "the candidate qualification period could be moved back, if necessary, as other states have done this cycle, without impacting voters." They further represented that: *"[t]he election deadlines that actually impact voters do not occur until October 2022. . . Therefore, there remains several months on Louisiana's election calendar to complete the process."* There was no rush, they assured the court, because Louisiana's "election calendar is one of the latest in the nation."

App. 146 (alterations in original) (emphasis added) (footnotes omitted) (quoting Suppl. App. 47, 50). Despite opportunities to do so in *three* federal courts, the defendants have not persuasively explained their extraordinary about-face.

Moreover, the defendants' newfound insistence that a congressional map is urgently needed is further belied by their persistent—and baseless—attempts to delay this litigation. *See, e.g.*, ECF No. 129 (legislative intervenors' motion to restart proceedings before three-judge court due to new claim purportedly asserted in footnote of reply brief); ECF No. 131 (State's motion to stay proceedings on eve of preliminary-injunction hearing); ECF No. 200 (State's proposal to delay remedial hearing); ECF No. 201 (legislative intervenors' proposal to delay remedial hearing by nearly a month, until week of July 25, 2022); ECF No. 202 (Secretary of State's submission endorsing legislative intervenors' proposed remedial timeline); ECF No. 223 at 3 (order denying State's motion for extension as "a red herring for a delay"). The district court has refused the many invitations to slow-walk these proceedings and remains on pace to adopt an interim map well in advance of the July 20–22 candidate-qualifying period, and several months before the start of early voting on October 25. *See* ECF No. 206 (ordering remedial hearing to be held on June 29, 2022).

After three months of asking both state and federal courts to slow down, the defendants now have the temerity to suggest that time has run out. But while their litigation tactics have apparently changed, the election calendar remains the same: The October deadlines they cited in March remain October deadlines today. And the Legislature could postpone the candidate-qualifying period now just as it could have months ago—though that will not even be necessary. *See* App. 3.

2. The preliminary injunction was not issued in the period close to an election.

Neither *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), nor *Merrill* alters this analysis. *Purcell* vacated an appellate order that reversed a district court and suspended voter-identification rules mere weeks before an election. *Id.* at 4. This Court faulted the court of appeals for failing "to give deference to the discretion of the District Court" and explained that the risk of disenfranchisement created by the challenged rules had to be weighed against the risk that the appellate decision itself could "result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. Like *Purcell* admonished, the district court's factual findings here are due considerable deference. But that is where the parallels end; the defendants cannot seriously suggest that voters will avoid the polls in November due to confusion over a new congressional map adopted in July.

Merrill is also readily distinguishable. Because the stay in that case was not accompanied by any opinion for the Court, the defendants rely on Justice Kavanaugh's concurrence, which suggested that an election-related injunction may be appropriate even "in the period close to an election" where, as relevant here, "the

changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).[11] Although Justice Kavanaugh did not define what constitutes "the period close to an election," it clearly does not encompass the period here—where the injunction was issued *155 days* before Louisiana's primary elections—because after *Merrill* this Court held that "sufficient time" remained for Wisconsin's high court "to take additional evidence" and adopt new state legislative maps *139 days* before that state's primary elections. *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248, 1251 (2022) (per curiam). Every method of calculating the relevant period before the election confirms that more time remains in this case than existed in the Wisconsin litigation, and there is *much* more time here than the truncated period that concerned the Court in *Merrill*. After this Court's remand, final districts in Wisconsin were not adopted until April 15, 116 days before the August 9 primary. *See Johnson v. Wis. Elections Comm'n*, 972 N.W.2d 559, 586 (Wis. 2022). The parallel date for Louisiana's November 8 primary is July 15—well after the deadline the district court ordered for final maps here. In *Merrill*, this Court's order issued on February 7, 106 days before Alabama's May 24 primary. The parallel date in Louisiana is July 25. Similarly,

[11] Justice Kavanaugh would also consider the underlying merits, the irreparable harm suffered by plaintiffs absent the injunction, and whether plaintiffs unduly delayed in bringing suit. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Each of these considerations weighs in favor of the plaintiffs: Both the district court and the Fifth Circuit have determined that the plaintiffs are likely to succeed on the merits, *see supra* at 8–33; the defendants do not dispute that a stay will irreparably harm the plaintiffs and other Black Louisianians; and the plaintiffs filed their underlying complaints on the same day the challenged map was enacted.

Justice Kavanaugh noted that early voting would commence seven weeks from his concurrence. *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring). The parallel date before early voting begins in Louisiana is not until September 4—*11 weeks away*.

The efficiency of Louisiana's remedial process compares favorably to Wisconsin's in other respects. Whereas Wisconsin's legislative maps include more than 100 districts, Louisiana is apportioned only *six* congressional seats. And while this Court faulted the Wisconsin Supreme Court for citing insufficient evidence to justify the application of Section 2 in a malapportionment challenge, the district court here held a week-long hearing and issued a 152-page opinion replete with the necessary factual findings. No reopening of the evidentiary record is necessary.[12]

3. A new congressional map can be feasibly implemented.

Because Louisiana is not in the "period close to an election," there is no need to further analyze whether remedying the Section 2 violation is "feasible" without "significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). But that proposed test is satisfied in any event.

Defendants rely exclusively on the testimony of Sherri Hadskey, Louisiana's Commissioner of Elections, but nothing in her testimony indicates that implementation of a new congressional map at this juncture would be unduly burdensome or otherwise infeasible. Ms. Hadskey claimed that the adoption of a

[12] The defendants also claim that Louisiana's administrative obligations are more burdensome than North Carolina's, *see* Appl. 37–38, but North Carolina had to geocode new voter assignments for congressional, state legislative, *and* local elections, *see* State Respondents' Appendix at 3, *Moore v. Harper*, No. 21A455 (U.S. Mar. 2, 2022). In Louisiana, most state and local elections are not held until 2023.

remedial redistricting map would require her to redo a few tasks and otherwise prepare for the congressional primary elections in addition to her other duties. *See* Appl. 32–35. For a 30-year veteran of election administration, *see* App. 173, these routine assignments do not amount to "heroic efforts," Appl. 5 (quoting *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring)). As the district court and Fifth Circuit both recognized, a recitation of administrative redistricting tasks resolves nothing—the operative question is whether there is time for the usual duties to be completed, and Ms. Hadskey's testimony does not suggest otherwise. *See* App. 144–49, 191–96. Nor do the defendants' arguments in their application.

The defendants first note that "[a]ssigning voters to their districts is complicated, time-consuming work." Appl. 32. That might be so, but the defendants cite no evidence for how much time that work will require, let alone how it could lead to voter confusion. *See* App. 144, 193–94. Next, they report that the candidate-qualifying period runs from July 20–22. Appl. 32–33. But the district court remains on track to adopt a remedial map without disturbing this or any subsequent deadlines. The defendants further assert, without citation, that "[b]allot programing must begin no later than August 1, 2022." Appl. 33. In fact, Ms. Hadskey testified that August 1 is the relevant date for receiving absentee-ballot *envelopes*, due to Louisiana's unique affidavit flap. *See* Suppl. App. 70–71. Envelope purchases have nothing to do with redistricting. *See* App. 145 (questioning "how paper usage is affected by the shape of Louisiana's congressional districts"). Finally, the defendants flag that "voter registration week begins on September 26, 2022," followed by registration deadlines

and the start of early voting in October. Appl. 34. Here, the plaintiffs agree: *These* are the relevant deadlines, and there is no risk that the remedial process will disrupt them.

The district court credited the testimony of Matthew Block, Governor Edwards's executive counsel, who explained that Louisiana has a responsive elections apparatus that is not only capable of implementing last-minute adjustments to election dates and deadlines, but has done so several times in just the past decade. *See* App. 79. "He stated that he was unaware of any electoral chaos that ensued, and that he has heard nothing to dispute that the Secretary of State was able to successfully administer these elections." *Ibid.* The district court thus found, consistent with the evidence presented, that "the implementation of a remedial congressional map is realistically attainable well before the [] November elections." *Id.* at 142. There is no basis to second-guess this well-reasoned, record-based finding.

Ultimately, this Court should not allow gamesmanship to circumvent the requirements imposed by federal law, nor should it allow a State to evade its legal obligations by invoking *Purcell* without providing *any* supporting evidence. In contrast to the defendants' unjustified attempts at delay, the plaintiffs filed their complaints mere hours after the Legislature enacted HB 1 and have diligently pressed their case. The district court adopted a remedial schedule on the same timeline that the defendants previously proposed in state-court litigation. Whatever factors might weigh against the plaintiffs, the equities are certainly not among them.

B. This Court's stay in *Merrill* does not warrant a stay here.

The stay in *Merrill* did not strike Section 2 from the U.S. Code—*Gingles* and its progeny remain good law, and four federal judges below have dutifully applied binding precedent to the facts of this case and unanimously concluded that no stay is warranted. The defendants speculate that this Court *might* refine the vote-dilution inquiry next term, but, as the Fifth Circuit noted, "any decision likely will come long after the 2022 elections, which are the subject of this appeal, have taken place. In that context, staying these proceedings would not promote judicial economy, and the defendants do not explain how a stay would serve the parties' interests." App. 197. And unlike in *Merrill*, where this Court's review of the three-judge district court's entry of a preliminary injunction was mandatory and exclusive, the defendants here are already assured appellate review of the district court's injunction in the coming weeks. The defendants have not satisfied their "especially heavy burden" to stay the injunction and bypass the Fifth Circuit's review. *Packwood*, 510 U.S. at 1320.

CONCLUSION

The defendants ask this Court to "return both sensibility and the rule of law to Louisiana's redistricting process." Appl. 11. But by weighing the evidence and properly applying governing law, the district court already did that. The Fifth Circuit has expedited the defendants' appeal and will be able to rule on the merits in a timely manner. The normal course of federal litigation should be allowed to proceed. This Court's extraordinary intervention is neither needed nor warranted, and the defendants' application should be denied.

Respectfully submitted,

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