No. 21A814

In the Supreme Court of the United States

KYLE ARDOIN, IN HIS CAPACITY
AS THE LOUISIANA SECRETARY
OF STATE, ET AL.,
APPLICANTS

v.

PRESS ROBINSON, ET AL.,
RESPONDENTS

OPPOSITION TO APPLICATION FOR STAY PENDING APPEAL AND WRIT OF CERTIORARI BEFORE JUDGMENT

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RULE 29.6 DISCLOSURE STATEMENT

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TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT.

After a five-day evidentiary hearing, the district court determined that Louisiana's congressional redistricting map diluted the votes of Black voters in violation of Section 2 of the Voting Rights Act of 1965, and it preliminarily enjoined defendants from conducting the 2022 congressional election using that map. A panel of the Fifth Circuit (Smith, Higginson, and Willett, JJ.), in a per curiam opinion without noted dissent, denied the defendants' motion for a stay pending appeal and ordered expedited briefing and argument on defendants' appeal. Oral argument will be held on July 8, in little more than two weeks. The motions panel made clear that the merits panel can issue a stay if it concludes that one is warranted. Such a stay would come in time to avoid any conceivable irreparable harm.

Defendants nonetheless now ask this Court to take the extraordinary step of staying the district court's injunction and granting certiorari before the merits of their appeal have been argued or decided, and far in advance of the November 2022 election and operative election deadlines. Defendants' application rests on arguments that are contrary to binding case law, and in large part on ignoring or mischaracterizing the district court's findings of fact and the legal analyses of the courts below.

Purcell does not require a stay. The lower courts correctly concluded that *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006), does not require a stay of the district court's injunction. The district court's order was not issued "in the period close to an

election." *Merrill* v. *Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). As the State's legislative leaders (defendant intervenors below) explained in related state court litigation, Louisiana's "election calendar is the latest in the nation." ECF No. 173, *Robinson* v. *Ardoin*, No. 22-CV-211-SDD-SDJ (M.D. La. June 6, 2022) (hereinafter *Robinson*) ("Dist. Op.") at 146. Louisiana does not have a pre-Election Day primary; absentee ballots are not mailed until September 24; and early voting does not begin until October 22, nearly four months from today. The district court's injunction was entered more than five months before Election Day. The State's legislative leaders represented to a Louisiana state court that, in view of the State's election calendar, there was ample time for redistricting litigation to be resolved because "the election deadlines that actually impact voters do not occur until October 2022." *Id*.

"[T]he defendants have not identified a comparable case" where this Court has applied the principle of election nonintervention derived from *Purcell* so far in advance of an election. COA Op. 25. And their position is foreclosed by this Court's recent decision in *Wisconsin Legislature* v. *Wisconsin Elections Commission*, 142 S. Ct. 1245, No. 21A471 (2022) (per curiam). In a decision issued closer in time to the relevant election than the district court's injunction here (139 days in *Wisconsin*, compared to 155 days in this case), the court threw out Wisconsin's state legislative maps and ordered the State to redraw them before the 2022 elections. The Court explained that its order gave the State "sufficient time to adopt maps" consistent

with the state's election calendar. *Id.* The relevant facts here are materially indistinguishable from those in *Wisconsin*.

Defendants offer hyperbolic assertions that the district court's injunction "toss[ed] Louisiana into divisive electoral pandemonium," "throws the election process into chaos, and creates confusion statewide," and will cause "tremendous electoral upheaval." Stay Br. 1–2. But the district court found otherwise. It concluded that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." Dist. Op. 148; *see also* COA Op. 29. That finding can be disturbed only if defendants demonstrate that it is clearly erroneous. Fed. R. App. P. 52(a); *Rogers* v. *Lodge*, 458 U.S. 613, 622–623 (1982). Defendants' distorted and partial presentation of the testimony at the preliminary injunction hearing does not establish clear error.

Defendants also urge the Court to stay the litigation in view of the pendency of *Merrill* in this Court. Stay Br. 4. But, as Justice Kavanaugh's concurring opinion in *Merrill* makes clear, the Court granted a stay in that case because the election was close in time *and* because "the underlying merits appear to be close." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Neither of those two independent circumstances necessary for a stay apply here. First, the relevant timetable here is fundamentally unlike *Merrill*, in which Justice Kavanaugh explained that a stay was necessary because "the primary elections begin (via absentee voting) just seven weeks from" the Court's stay order. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Here, absentee voting for does not even begin

for four months. Second, on the merits, defendants are wrong in asserting that this case substantively resembles *Merrill* simply because both cases involve Section 2 challenges to a State's congressional redistricting plan. App. 4. In *Merrill*, plaintiffs and the State defendants both presented significant evidence relevant to the first *Gingles* precondition. The district court credited the plaintiffs' evidence, but Justice Kavanaugh concluded that "the underlying merits appear to be close" based on a preliminary review, with each side having a "fair prospect of success on appeal." *Merrill*, 142 S. Ct. at 881 & n.2 (Kavanaugh, J., concurring). By contrast, here, as both lower courts observed, defendants' attacks on plaintiffs' numerosity showing under *Gingles* I is foreclosed by this Court's decision in *Georgia* v. *Ashcroft*, 539 U.S. 461, 473 n.1 (2003), and "Defendants did not meaningfully refute or challenge Plaintiffs' evidence on compactness." COA Op. 7 (quoting Dist. Op. 92). As the Fifth Circuit explained, "[t]hat tactical choice has consequences." COA Op. 7.

***Gingles* III**. Defendants next seek a stay based on a merits argument foreclosed by precedent and common sense. Specifically, they raise the novel contention that because there could be white crossover voting in some hypothetical district that was not created, plaintiffs cannot satisfy *Gingles* III in challenging the plan that was actually enacted—despite strong evidence that stark racially polarized voting almost universally leads to the electoral defeat of Black-preferred candidates. The factual record on which this argument is founded is remarkably thin. COA Op. 20 (defense experts' analyses "were based on a single, unusual election . . . and relied on limited data or outlier[s], unlike the analyses offered by

the plaintiffs' experts") (cleaned up). Moreover, the question under *Gingles* is not whether there is white crossover voting in some hypothetical congressional district. Instead, as the district court and the Fifth Circuit concluded, it is whether "White voters consistently bloc vote to defeat the candidates of choice of Black voters" in the districts the Legislature actually enacted. Dist. Op. 124; *see also* COA Op. 21 ("crossover voting is not relevant *per se*; it is relevant only for its effect on the *outcome* of elections"). As the district court found, the undisputed evidence in this case shows that the answer to that question is yes.

***Gingles* I**. Equally misplaced is defendants' assertion that a stay is appropriate because the district court's injunction improperly "ordered a racial gerrymander." Stay Br. 3. It did not. The district court did not adopt a new map at all. Instead, it took care to give the State Legislature a reasonable opportunity to enact a remedial map, and expressly acknowledged the State's "'broad discretion in drawing districts to comply with the mandate of § 2.'" Dist. Op. 151 (quoting *Shaw* v. *Hunt*, 517 U.S. 899, 917 n.9). The Legislature failed to take up that opportunity; it convened but adjourned without enacting a new map.

Defendants argue that racial considerations predominated in the illustrative maps that plaintiffs presented to satisfy their burden under *Gingles* I to show that it is possible to create an additional "reasonably compact district[] with a sufficiently large minority population to elect candidates of its choice." *LULAC* v. *Perry*, 548 U.S. 399, 430 (2006) (plurality op.) (citing *Gingles*, 478 U.S. at 50–51). But the district court found that "[t]here is *no factual evidence* that race

predominated in the creation of the illustrative maps in this case." Dist. Op. 116 (emphasis in original). And, because "[i]llustrative maps are just that—illustrative," COA Op. 17, and need not be enacted at the remedial stage, the Fifth Circuit rightly held that "racial consciousness in the drawing of illustrative maps does not defeat a *Gingles* claim." *Id.* 15.

Defendants assert that the supposed impossibility of drawing a "constitutionally-compliant plan" in Louisiana with more than a single majority-Black district is shown by testimony from one of their experts that a computerized map-drawing simulation did not generate congressional district maps with any majority Black districts. Stay Br. 3. But even were this evidence relevant, the district court found that the expert's testimony "merit[ed] little weight," because the expert "had no experience, skill, training, or specialized knowledge in the simulation analysis methodology that he employed," and the simulations he ran took no account of existing districts and "did not incorporate the traditional principles of redistricting required by law." Dist. Op. 94-95. Defendants should not be permitted to relitigate those factual findings here.

Defendants' petition for certiorari is premature and, in any event, certiorari is not appropriate. Finally, the Court should not take the extraordinary step of granting certiorari before the Fifth Circuit has ruled on the merits of defendants' appeal—especially where the Fifth Circuit is set to hear argument on an expedited basis in just two weeks, affording this Court a prompt opportunity to review the case in the ordinary course if necessary. Defendants do

not cite, much less attempt to satisfy, the stringent standards for prejudgment certiorari set forth in this Court's Rule 11, which provides for certiorari in such cases "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11. This case, like any redistricting case, is undoubtedly of importance in the affected jurisdiction. But this case, as the opinions of the district court and the Fifth Circuit panel make clear, presents the routine application of the *Gingles* standards to the jurisdiction-specific facts in the record. Defendants have had the opportunity to litigate those issues before the district court and the Fifth Circuit, and their appeal to the Court of Appeals on the merits will be argued in little more than two weeks. No compelling national interest requires this Court to intervene in the appellate process at this early juncture.

STATEMENT OF THE CASE

The Adoption of the Challenged Plan.

The Louisiana Legislature is required to redraw congressional district boundaries after each decennial census. U.S. Const. art. I § 2. The 2020 U.S. Census revealed that Louisiana increased in population since 2010 and that this growth was driven entirely by growth in minority populations. ECF No. 41-2 at 15,

Table 1.[1] The census also confirmed that Black citizens represent approximately 31.2% of the State's voting age population. ECF No. 41-1 at 4.

Following the delivery of the 2020 census results in April 2021, the Legislature enacted Joint Rule 21, which established the criteria for legislative redistricting efforts. These criteria included compliance with Section 2 of the Voting Rights Act and traditional districting principles like respect for the geography of the State and communities of interest. ECF 41-3 at 238. It did not identify retaining historical district boundaries, "ensur[ing] continuity of representation," or "keep[ing] the status quo" as criteria for congressional redistricting. Stay Br. 7–8 (cleaned up); ECF 41-3 at 238. Thereafter, the Legislature conducted public hearings across the State to solicit the views of the State's citizens about redistricting. Dist. Op. 4. Numerous speakers urged the Legislature to enact a plan incorporating two congressional districts in which the Black voters would have an opportunity to elect their candidates of choice. Dist. Op. 139–140.

Leading up to the election, voting rights advocates, including some of the plaintiffs, provided detailed submissions to the Legislature demonstrating that, because of the state's stark racially polarized voting patterns and evidence of historical and ongoing effects of discrimination in voting and other social and economic arenas, Black voters have materially less ability than white voters to elect their candidates of choice. Accordingly, those advocates explained, Section 2

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[1] All ECF citations contained herein refer to the docket of the district court action in this case. *See Robinson* v. *Ardoin*, 3:22-cv-00211-SDD-SDJ (2022).

requires any redistricting plan to provide for two districts that give Black voters that opportunity. *See, e.g.*, ECF 41-3 at 270. Counsel for the legislative intervenors in this litigation was engaged in giving legal advice during the entirety of the redistricting process. Def. App. 473.

Beginning in February 2022, the Legislature met to consider redistricting. Legislators submitted multiple congressional redistricting plans with two districts that would provide Black voters with the opportunity to elect candidates of their choice, and that otherwise complied with principles set out in Joint Rule 21. ECF 41-3 at 138–155. Nevertheless, on February 18, 2022, the Legislature passed two bills adopting identical congressional plans with only a single majority-Black district, and five districts with large white majorities. Dist. Op. 4. On March 9, the Governor vetoed both bills on the ground that they violated Section 2 and were unfair to the State's Black voters. *Id.* at 267–268.

Shortly after the Governor's veto, plaintiffs in these consolidated cases commenced actions in Louisiana state court alleging that the operative 2010 map violated the Fourteenth Amendment's requirement that each congressional district have essentially equal population. *Bullman, et al* v. *R. Kyle Ardoin*, No. C-716690, 2022 WL 769848 (19th Judicial Dist. Ct.); *NAACP Louisiana State Conference* v. *Ardoin*, No. C-716837 19th Judicial Dist. Ct.). Defendants argued that plaintiffs' claims were premature because, as the legislative intervenors asserted, Louisiana's "election calendar is one of the latest in the nation," Louisiana was not scheduled to hold its "congressional *primary* election" until November 8, 2022, and "the

candidate qualification period [July 20-22, 2022] could be moved back, if necessary . . . without impacting voters." Pl. App. 8 (Legislative intervenors' proposed FoF/COL in *Bullman*; emphasis in original). The defendants argued:

> The election deadlines that actually impact voters do not occur until October 2022, like the deadlines for voter registration (October 11, 2022, for in-person, DMV, or by mail, and October 18, 2022 for online registration) and the early voting period (October 25 to November 1, 2022).

Id. at 8. The defendants made no mention of the deadline for qualifying for the ballot by petition.

On March 30, 2022, the Legislature overrode the Governor's veto. Dist. Op. 5.

Preliminary Injunction Proceedings and the District Court's Ruling

Plaintiffs commenced these actions the day of the veto override. They alleged that the enacted plan dilutes the voting strength of the State's Black voters in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, and sought preliminary and permanent injunctive relief and the adoption of a congressional redistricting plan that included two districts in which Black voters would have an opportunity to elect candidates of their choice. ECF No. 1. The complaints alleged in detail the facts showing that plaintiffs' claim satisfied each of the three preconditions for a Section 2 claim set forth in *Thornburg* v. *Gingles*, 478 U.S. 30, 46 (1986), and that in the totality of the circumstances, the enacted plan violates Section 2. *Id.* ¶¶ 87–163; *see Gingles*, 478 U.S. at 36–37 (applying Senate factors). Plaintiffs named as the sole defendant the Secretary of State, the State's chief election official; the State legislative leaders (the President of the State Senate and

the Speaker of the House) and the Attorney General were subsequently permitted to intervene.

At a status conference on April 13, 2022, the district court set a tentative hearing date on a motion for preliminary injunction on April 25. ECF No. 33. In response to defendants' contention that the schedule did not provide adequate time for them to prepare, the court later adjourned the hearing by two weeks, to May 9. Dist Op. 6; ECF No. 35. On May 3, 2022, three weeks after the initial status conference, the Attorney General filed an "emergency" motion to stay the proceedings pending a ruling by this Court in *Merrill* v. *Milligan*, No. 21-1086. The district court denied the motion the following day. ECF No. 135.

The district court held a five-day evidentiary hearing on May 9–13, 2022. The court heard testimony from 21 witnesses, including 14 expert witnesses and seven fact witnesses, and reviewed 244 exhibits. *See generally* ECF 212-216. The parties submitted post-hearing briefs and proposed findings of fact and conclusions of law on May 18, 2022. Contrary to defendants' accusation that the preliminary injunction hearing was "truncated," Stay Br. 8, defendants presented one fact witness and 7 expert witnesses—who offered testimony on issues largely irrelevant to the well-established inquiry under *Gingles*. *Id.* Indeed, as the lower courts recognized, defendants made a "tactical choice" not to present evidence on key issues, including "leav[ing] the plaintiffs' evidence of compactness largely uncontested," COA Op. 7, and, in what the district court termed a "glaring omission" in defendants' case, choosing not to call any witnesses to testify about

communities of interest, although the Legislature's Joint Rule 21 requires communities of interest to be given priority in redistricting, Dist. Op. 101. Having chosen not to present witnesses on these and other key issues, defendants rested their case several hours before the scheduled end of the last day's session. PI App. 19.

On June 6, 2022, the district court granted plaintiffs' motion for a preliminary injunction. In a 152-page Ruling and Order, the court held that plaintiffs are substantially likely to prevail on their Section 2 claim. Dist. Op. 141. Carefully addressing each of the *Gingles* preconditions, the court concluded that plaintiffs had established that (i) Louisiana's Black voting-age population is sufficiently large and geographically compact so as to constitute a majority in a second majority-minority congressional district; (ii) Black voters in Louisiana are politically cohesive; and (iii) white voters vote sufficiently as a bloc to usually defeat Black voters' preferred candidates in the five majority-white districts in the plan enacted by the state. *Id*. at 88–127. The court further concluded that the totality of the circumstances supported the conclusion that the enacted map violated Section 2. *Id*. at 127–41. The court also found that plaintiffs would suffer irreparable harm "if voting takes place in the 2022 Louisiana congressional elections based on a redistricting plan that violates federal law" and "has been shown to dilute Plaintiffs' votes." *Id*. at 141–142.

The district court rejected the defendants' argument under *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006), that an injunction was improper because there was

insufficient time for the State to enact and implement a new redistricting plan in time for the 2022 election. Based upon the testimony at trial, the court found "that a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." *Id.* at 148. Among other things, the court considered the testimony of Louisiana's commissioner of elections that, after the Governor's veto was overridden and the enacted map became law, "her office was able to update their records and send out mailings to all impacted voters in *less than three weeks*." *Id.* at 144 (emphasis in original). The court concluded that "although [the commissioner's] testimony demonstrated general concern about the prospect of having to issue a new round of notices to voters" identifying their congressional districts, her testimony "did not provide any specific reasons why" the task could not be completed in sufficient time for elections in November. *Id.* at 144. The court also questioned "the credibility of Defendants' assertions regarding the imminence of [pre-election] deadlines" in light of defendants' prior representations to the state court that "[t]he election deadlines that actually impact voters do not occur until October 2022," and that the pre-election candidate qualification period "could be moved back, if necessary, . . . without impacting voters." *Id.* at 145–46.

Recognizing this Courts' instruction that, when a Section 2 violation is found, the State's legislature should be given a "reasonable opportunity . . . to adopt a substitute measure," the district court provided the Legislature until June 20, 2022 to enact a compliant redistricting plan before considering its own remedial plans.

Id. at 2, 150–51. The court emphasized that the Legislature retained "broad discretion" in adopting a remedial map. *Id.* at 151 (cleaned up). It noted also that "[t]he Legislature would not be starting from scratch; bills were introduced during the redistricting process that could provide a starting point, as could the illustrative maps in this case, or the maps submitted by the *amici*." *Id.* at 148 (cleaned up).[2]

Defendants' motions for a stay pending appeal.

Defendants filed notices of appeal and a joint motion in the district court for stay pending appeal. The district court denied the motion on June 9, 2022. ECF No. 182. The same day, defendants moved in the Fifth Circuit for a stay pending appeal. Stay Mot., *Robinson* v. *Ardoin*, Civ. No. 22-30333 (June 9, 2022). Later that day, a Circuit motion panel (Smith, Higginson, and Willett, JJ.) entered an administrative stay of the district court's injunction and directed plaintiffs to respond to the defendants' motion by 4 pm the following day. Court Order, *Robinson* v. *Ardoin*, Civ. No. 22-30333 (June 9, 2022).

On June 12, 2022, after receiving plaintiffs' responses and a reply from the legislative intervenors, the panel issued a 33-page opinion denying defendants' motion for a stay, vacating the administrative stay, and directing expedited briefing

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[2] The timeline the district court established is well within the nationwide norm. Dist. Op. 149 & n. 443; *see Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1357 (N.D. Ga. 2004) (three-judge court) (ordering legislature to enact new legislative plans within two-and-a-half weeks); N.C. Gen. Stat. § 120-2.4(a) (allowing as few as 14 days); *Harris* v. *McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (14 days); *Common Cause* v. *Rucho*, 279 F. Supp. 3d 587, 691 (M.D.N.C.) (15 days), *rev'd on other grounds*, 138 S. Ct. 823 (2018); *League of Women Voters of Ohio* v. *Ohio Redistricting Comm'n*, Nos. 2021-1193, 2021-1198, 2021-1210, 2022 WL 110261, at *28 (Ohio Jan. 12, 2022).

and oral argument before a new panel. COA Op. 2, 33. The panel expressly noted that the merits panel could reassess whether a stay was warranted in the course of considering the appeal. *Id.* 3. Oral argument is currently scheduled for July 8, 2022. June 24 Minute Order.

The panel concluded that the defendants "have not met their burden of making a strong showing of likely success on the merits." COA Op. 2. It rejected defendants' argument (substantially similar to the arguments they urge here) that the district court erred by (i) using an overly expansive metric of the Black voting age population; (ii) finding that the proposed districts in plaintiffs' illustrative maps were sufficiently "compact" to satisfy the first *Gingles* precondition; (iii) determining that plaintiffs' illustrative maps were not unconstitutional racial gerrymanders; and (iv) finding that plaintiffs satisfied the third *Gingles* precondition despite limited evidence of some white crossover voting in illustrative district 5. *Id.* at 5, 21-22.

The panel also rejected defendants' contention that a stay was warranted under *Purcell*. As the panel noted, *Purcell* has been applied by this Court and the Fifth Circuit "to stay injunctions that threaten to confuse voters, unduly burden election administrators, or otherwise sow chaos or distrust in the electoral process," in circumstances where the injunction has been entered "days or weeks before an election—when the election is already underway." *Id.* at 25, 26. By contrast, in this case, the court noted that "the primary elections are five months away," "[o]verseas absentee ballots need not be mailed until last September, and early voting begins in October." *Id.* at 26. Reviewing the hearing testimony of the State's elections

commissioner about the administrative challenges posed by a revised map, the panel "agree[d] with the district court: The defendants have not shown that bearing those administrative burdens while complying with the challenged injunction would inflict more than ordinary 'bureaucratic strain' on state election officials." *Id.* at 27–29 (quoting Dist. Op. 145). As the panel concluded:

> It is axiomatic that injunctions in voting-rights cases burden the defendants. But the question, under *Purcell*, is not whether an injunction would burden the defendants, but whether that burden is intolerable—that is, whether the defendants cannot bear it 'without significant cost, confusion, or hardship.' Here, the burdens threatened by the injunction are, as far as the defendants have shown, entirely ordinary.

Id. at 29–30 (quoting *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring)). The motion panel noted that the merits panel could, in its discretion, opt to impose a stay. *Id.* at 2.

Recent developments

Six days later, on June 7, 2022, the day after the district court's injunction was entered, the Governor proclaimed an extraordinary legislative session for June 15 through June 20 to consider congressional redistricting.[3]

On June 13, 2022, the day after the Fifth Circuit denied defendants' motions for a stay pending appeal, the legislative intervenors moved in the district court to extend the deadline for the Legislature to adopt a remedial plan to June 30. ECF Nos. 188, 188-1, 188-2, 188-3. The legislative intervenors asserted in support of the

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[3] Gov. Edwards Issues Call for Special Session, Office of the Governor (June 7, 2022), https://gov.louisiana.gov/index.cfm/newsroom/detail/3703.

motion that "[t]he June 20 deadline is unattainable" because, taking account of timing requirements imposed by the State's constitution and legislative rules, the deadline gave the Legislature "only five days to introduce, deliberate over, and pass a bill enacting a plan through the legislative process required by Louisiana law." ECF No. 188-1 at 1.

On June 16, the district court held a hearing on the legislative intervenor's motion for an extension of the deadline and heard testimony in person from the intervenors (as noted, the Senate President and the Speaker of the House). Def. App. 386. The Senate President acknowledged that the June 20 deadline gave the Legislature time to enact remedial maps provided that the legislature exercise its authority to suspend certain rules (such as multi-day readings of proposed bills), some of which the Senate had already suspended. Def. App. 434–35, 466–67. Testimony at the hearing also showed that neither house had scheduled or conducted any committee hearings earlier than the second day of the extraordinary session (although legislative committees can and do meet between sessions); that no redistricting bills had been introduced until the day before the session began; and that, as the district court found, "there has been utterly no process provided for the public to make comments" on proposed bills. Def. App. 402–403, 404, 468–469.

The district court denied the legislative intervenor's motion. It found that its deadline provided sufficient time to enact remedial maps compliant with the Voting Rights Act. The court also took judicial notice that the Legislature had passed a budget in four days during a special session in 2017 and had enacted a redistricting

bill in 1994 in six days. Def. App. 469. The district court also established a schedule, commencing June 22, for written submissions, discovery, and a hearing on a court-ordered remedial plan in the event the Legislature failed to act. ECF No. 206.

ARGUMENT

Defendants' application for a stay and for a prejudgment grant of certiorari should be denied. A stay pending appeal is an extraordinary remedy. *See Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994); *Edwards* v. *Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, in chambers). To establish a right to a stay from this Court, defendants must show (1) "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; (2) "a fair prospect that a majority of the Court will vote to reverse the judgment below"; and (3) "a likelihood that irreparable harm will result from the denial of a stay," *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010); *see also Nken* v. *Holder,* 556 U.S. 418, 434 (2009); *Edwards*, 512 U.S. at 1302.

Where, as here, a matter is pending before a court of appeals which has already unanimously rejected a motion for a stay, applicants face "an especially heavy burden" to obtain an emergency stay from this Court. *Packwood* v. *Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). Such a stay "is rarely granted." *Heckler* v. *Redbud Hosp. Dist.*, 473 U.S. 1308, 1311–12 (1985) (Rehnquist, C.J., in chambers). That is because "when a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for the orderly

disposition of cases on its docket." *Certain Named & Unnamed Non-Citizen Child. & Their Parents* v. *Texas*, 448 U.S. 1327, 1330–31 (1980) (Powell, J., in chambers).

Defendants' burden is even heavier here in light of the Fifth Circuit's expedited consideration of the merits appeal, which will be fully briefed and argued in just over two weeks, and the fact that the merits panel can take up any request for a stay. *See Doe* v. *Gonzales*, 546 U.S. 1301, 1309 (2005) (Ginsburg, J., in chambers) (concluding applicant failed to "show[] cause so extraordinary" that a stay is required "in advance of the expeditious determination of the merits toward which the Circuit is swiftly proceeding"). The fact that defendants have another timely opportunity to seek a stay makes this Court's extraordinary intervention at this time wholly unnecessary.

Defendants' request for a writ of certiorari before the Fifth Circuit has heard and decided their appeal is governed by this Court's Rule 11, and defendants have utterly failed to satisfy that Rule's stringent requirements, particularly in light of the imminent argument and presumably resolution of the appeal. Rule 11 reflects the importance of obtaining the "airing of competing views" to "aid[] this Court's own decisionmaking process." *Dep't of Homeland Sec.* v. *New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring). It should not be granted, whereas here, "this Court can await the decision of the Court of Appeals." *Mount Soledad Mem'l Ass'n* v. *Trunk*, 573 U.S. 954 (2014) (Alito, in chambers) (denying writ of certiorari before judgment). There is no reason to short-circuit the appellate process.

I. Neither *Purcell* nor the balance of equities justifies a stay pending appeal

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

As Justice Kavanaugh recently explained, the *Purcell* principle instructs "that federal district courts ordinarily should not enjoin state election laws in the period close to an election," particularly where the merits are "close" and such changes would impose "significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). In *Merrill,* the Court held that a stay was appropriate under *Purcell* because the election was only seven weeks away and "the plaintiffs have not established that [election] changes are feasible without significant cost, confusion, or hardship." *Id.* at 881–82.

Those principles do not justify a stay here, as both lower courts concluded. Louisiana is not "close to an election." *Id.* As defendants argued in the related state proceedings, there is more than enough time to ensure a lawful districting plan is in place. Dist. Op. 145–46. Election Day will not occur for nearly five months, and it is more than four months before the start of early voting. Dist. Op. 148. The Court concluded in *Wisconsin Legislature* v. *Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022) (per curiam), that even a slightly shorter time before the election was sufficient and did not preclude this Court from directing the state to redraw its state legislative maps. There, the Wisconsin governor and legislature reached an impasse in the redistricting process, leading the Wisconsin Supreme Court to adopt a new map of state legislative districts. *Id.* at 1247. On appeal, in an order entered less than five months before the coming primary

election, this Court required the State to redraw its maps. The Court concluded that its order gave the State "sufficient time to adopt maps consistent with the timetable" for the primary. *Id.* at 1248. If five months was sufficient time in Wisconsin, it is sufficient in Louisiana. Dist. Op. 148.

Defendants' reliance on *Merrill* is misplaced. Stay Br. 3 (citing *Merrill*, 142 S. Ct. at 881). In *Merrill*, the candidate qualifying deadline was days away at the time of the district court's ruling, and absentee ballots for the primary elections were scheduled to go out about seven weeks later, *Merrill*, 142 S. Ct. at 879. Here the district court's decision was issued more than five months before Election Day, four and a half months before the start of early voting, and six weeks before the candidate qualifying deadline. *See* Dist. Op. 148. As the Fifth Circuit rightly observed in denying the stay, "the defendants have not identified a comparable case" where this Court has applied the principle of election nonintervention derived from *Purcell*. *See* COA Op. 25. [4]

[4] The three other redistricting cases defendants cite in which the Court stayed lower federal court preliminary injunctions are sharply distinct from this case. In *Karcher*, Justice Brennan issued a stay, noting a fair prospect that a three-judge panel's congressional reapportionment plan was unconstitutional, *Karcher* v. *Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers). Both *Gill* and *Rucho* involved claims of partisan gerrymandering, which the Court subsequently held to be nonjusticiable. *See Rucho* v. *Common Cause*, 139 S. Ct. 2484, 2494, 2508 (2019). Here, by contrast, both the district court and Fifth Circuit held that none of Petitioners' attacks on the merits of the district court's opinion were likely to prevail on appeal, and this case involves no claim of partisan gerrymandering. This is not a "consistent[]" pattern of staying preliminary injunctions enjoining district maps that violate Section 2 of the Voting Rights Act. Stay Br. 36 n.12.

The district court and the Fifth Circuit also correctly held that *Purcell* did not require a stay because, as the Fifth Circuit explained, there was sufficient time to enact new maps with no more than "ordinary 'bureaucratic strain' on state election officials." COA Op. 29. Relying on testimony from State election commissioner, the district court found that, after the Legislature overrode the Governor's veto, the commissioner's office "updated their records and noticed affected voters in *less than three weeks*." Dist. Op. 144 (emphasis added). In addition, the lower courts considered testimony from the Governor's executive counsel who explained that Louisiana has the administrative capacity to draw a new map before the 2022 election, and has successfully adjusted election rules in the past in response to events ranging from hurricanes to COVID-19. *See* Dist. Op. 79–80; PI App. 13-18. The election commissioner similarly testified that her office has moved election dates themselves "due to emergencies, due to hurricanes, due to things like that." PI App. 20.

Against the weight of this evidence, the applicants identify a handful of election-related burdens. None undermine the district court's finding that compliance with its injunction is feasible without undue burden or confusion.

First, while about 250,000 voters have already received notice of their districts under the 2020 enacted map, the district court and Fifth Circuit concluded that informing the subset of these voters whose districts will change under a remedial map will cause minimal confusion. Dist. Op. 148; COA Op. 27.

Second, neither lower court credited the testimony that a "national paper shortage" posed an imminent threat of harm. As the Fifth Circuit explained, "[n]o ballots have been printed for the November primaries, and the number of ballots needed for the elections will not change if district lines are altered." COA Op. 30 (citing Dist. Op. 144–45). The Fifth Circuit also credited the district court's doubts that a paper shortage "could prevent the State from notifying voters of their districts before the elections months away." *Id.*

The other factors that Justice Kavanaugh noted in *Merrill* likewise do not support a stay. *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). As the district court's opinion demonstrates, and as discussed in more detail below, the merits are clearcut in plaintiffs' favor; indeed, plaintiffs' evidence on the *Gingles* factors was largely uncontested. As the district court found, plaintiffs would suffer irreparable harm absent the injunction because the November election will take place under a redistricting plan that dilutes their votes in violation of federal law. Dist. Op. 141. Finally, plaintiffs have not "unduly delayed bringing the complaint to court." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). On the contrary, plaintiffs filed their complaints the very day the challenged maps were enacted, ECF 1, and plaintiffs and the district court acted with extraordinary expedition in fully litigating and deciding a complex preliminary injunction motion within 67 days after the action was commenced (a process defendants complain was "rushed," Stay Br. 2).

B. The balance of harms decisively tips against a stay.

The other purported harms alleged by defendants do not outweigh the harms to plaintiffs and other Black voters in Louisiana should the 2022 congressional election proceed pursuant to a plan that dilutes their votes in violation of federal law. Voting is "a fundamental political right" that in turn protects all other rights. *Purcell*, 549 U.S. at 4 (quoting *Dunn* v. *Blumstein*, 405 U.S. 330, 336 (1972)). As the district court explained, defendants do not dispute that an election in violation of the Voting Rights Act's "ban on racial discrimination in voting," *Shelby County* v. *Holder*, 570 U.S. 529, 557 (2013), constitutes irreparable harm; and the district court found that, absent a preliminary injunction, the risk of such an election would be significant. Dist. Op. 2.

Defendants argue that the illustrative maps plaintiffs offered to prove a Section 2 violation are racial gerrymanders in violation of the Equal Protection Clause, and they contend that this alleged constitutional violation trumps plaintiffs' and Black Louisianians' statutory rights. But neither the district court nor the Fifth Circuit deemed defendants' racial gerrymandering argument sufficiently likely to carry the day on appeal to outweigh the demonstrable harm to plaintiffs. In contrast, the two lower court cases defendants cite show only that, where a district court holds, unlike here, that constitutional rights *are likely to be violated*, they may outweigh statutory harms. *Gordon* v. *Holder*, 721 F.3d 638, 645, 653 (D.C. Cir. 2013) (affirming a district court's preliminary injunction enjoining a statute where that court also held that the statute was likely unconstitutional); *Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014)

(similar). Moreover, defendants, as state officials, not private citizens, make no showing that *their* constitutional rights would be violated, and instead assert the speculative rights of others not before the Court. Finally, defendants have had the opportunity to secure a stay from the district court and the Fifth Circuit motion panel, and they will have the opportunity to ask the merits panel for the same relief. In these circumstances, there is no irreparable injury calling for action from this Court.

II. There is no reasonable prospect that this Court will grant certiorari and no fair probability that the Court will reverse.

A Section 2 vote-dilution claim requires that plaintiffs satisfy three preconditions, whether (1) "the minority group [can] demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group . . . is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles* at 50–51. Defendants do not contest in their application—nor in their motion for a stay before the Fifth Circuit—that plaintiffs satisfy the second *Gingles* precondition. Their claim instead is that plaintiffs are not likely to satisfy the first and third preconditions.

The district court correctly determined, on largely uncontested evidence, that plaintiffs satisfied all three *Gingles* preconditions, and that the totality of the circumstances weighed in favor of finding a Section 2 violation. As discussed below, *first*, plaintiffs established the first *Gingles* factor by proffering multiple illustrative maps including two majority Black voting age populations that were reasonably

compact and consistent with traditional redistricting standards. None of defendants' witnesses disputed that each of the illustrative maps was more compact than the enacted map on multiple standard metrics. *Second*, plaintiffs established that Black voters in the relevant districts are politically cohesive, which defendants do not dispute here. *Third*, plaintiffs offered detailed expert evidence that, under the enacted map, white voters usually vote as a bloc to prevent the election of candidates preferred by Black voters. Defendants largely did not contest this evidence either.

Rather than contest plaintiffs' evidence under the *Gingles* standard, defendants largely rested on unsupported and illogical legal arguments. But they identify no Circuit conflict or other basis for a grant of certiorari, and their legal arguments are without merit.

A. Plaintiffs satisfy the third *Gingles* precondition

Defendants first contend that that district court "mangled" the third precondition. Stay Br. 12. It did not. The district court and the Fifth Circuit applied well-established legal standards governing *Gingles* III. The third *Gingles* precondition requires Section 2 plaintiffs to show "legally significant" white bloc voting by demonstrating that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 51. This requires a straightforward determination that the white majority in a challenged district usually defeats the candidate preferred by minority voters. *LULAC*, 548 U.S. at 427 (holding that the third precondition was satisfied where "the projected results in [the challenged district] show that the Anglo citizen voting-

age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district"); *Growe* v. *Emison*, 507 U.S. 25, 40 (1993) (holding that the third *Gingles* precondition helps to establish that "the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population"). "Legally significant" white bloc voting can occur even where some white voters vote for the Black-preferred candidate, so long as "a white bloc vote [] normally will defeat the combined strength of minority support plus white 'crossover' votes." *Gingles*, 478 U.S. at 31.

As the Fifth Circuit noted in denying a stay pending appeal, "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." COA Op. 21 (emphasis in original).[5] Crediting the testimony of plaintiffs'

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[5] Defendants mischaracterize the district court's findings by arguing that plaintiffs' experts only established that black and white voters voted *differently*, not that majority bloc-voting exists. Stay Br. at 13. The Fifth Circuit appropriately "disagree[d]" with that argument and recognized the district court's clear finding that "the levels [of crossover voting the experts] found were insufficient to swing the election for the Black-preferred candidate in any of the contests they examined." COA Op. 20–21 (alterations in original). Defendants also mischaracterize the district court's findings and the evidentiary voting record by asserting that plaintiffs' experts testified only that "black voters and white voters would have elected different candidates if they had voted differently." Stay Br. at 13. In fact, the court credited the testimony of plaintiffs' experts that voting in recent elections in Louisiana is "starkly racially polarized." Dist. Op. 120. One of plaintiffs' experts testified that, in the elections he considered, white voters supported the Black preferred candidate with only 20.8% of the vote on average; the other plaintiff expert on this point found that the average percentage of white voter support for Black-preferred candidates in statewide elections was 11.7%. Dist. Op. 123.

experts, the district court found that white voters would have—almost without exception—defeated the candidate preferred by Black voters in each of the existing districts that does not have a majority-Black voting age population. Dist. Op. 123.

That finding is fully supported by the record. One of plaintiffs' experts, Dr. Handley, concluded that, in every election she analyzed (including 15 statewide elections and multiple congressional races), the Black-preferred candidate was defeated by white voters in every district except the majority-Black Congressional District 2, the lone majority-Black district under the enacted plan. *Id.* at 57–59, 123; ECF 41-2 Ex. 2; ECF 123-1 Supp. Ex. 2. Another of plaintiffs' experts, Dr. Palmer, found similar results. Dist. Op. 51, 123–24; ECF 47. Defendants offered no contrary evidence. Based on this robust record, the district court concluded that, unlike in *Covington*, "White voters consistently bloc vote to defeat the candidates of choice of Black voters," and that plaintiffs had therefore satisfied the third *Gingles* precondition. Dist. Op. 124, 127 (citing *Covington* v. *North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017)).

Defendants contend that the third precondition is satisfied only when there is "*extreme* white bloc voting," meaning that "the creation of a majority-minority district [is] the *only way* to ensure that a minority community" can elect the candidate it prefers. Stay Br. 13 (emphasis added). In other words, defendants are immune from Section 2 if virtually *any* white voters support a Black-preferred candidate, because in such circumstances, a hypothetical district can be drawn in which the Black voting-age population is less than 50% but still elects—with the

help of a small number of white crossover voters—the Black-preferred candidate. As the Fifth Circuit pointed out, that is not the standard: "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." COA Op. 22.[6]

There is no Circuit split on defendants' proffered legal standard. Indeed, defendants cite no case that supports their theory. In *Cooper* v. *Harris*, for example, the Supreme Court found that the third *Gingles* precondition could not be met because Black voters were *already* electing their candidates of choice in the existing districts despite comprising less than 50% of the voting-age population. 137 S. Ct. 1455, 1465–66, 1471–72 (2017). In contrast, as the district court held here, plaintiffs' experts showed that white bloc voting under the enacted plan nearly always results in the defeat of Black-preferred candidates; "[t]he fact that Plaintiffs' experts agreed, hypothetically, that a sub-50% BVAP [Black voting-age population] district *could* perform under unspecified circumstances, is not sufficient to overcome" the actual record in Louisiana of Black-preferred candidates' consistent defeat due to white bloc voting. Dist. Op. 126. As the Fifth Circuit unanimously concluded, "defendants have not presented sufficient evidence for us to conclude

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[6] Moreover, a requirement that plaintiffs can satisfy *Gingles* III only in the presence of "extreme white bloc voting" would render superfluous the consideration of "the extent to which voting in the elections of the state or political subdivision is racially polarized" under Senate Factor 2. *Gingles*, 478 U. S. at 37 (quoting S.Rep. No. 97-417 at 28–29).

that the district court's factual findings [that plaintiffs satisfy the third precondition] were clearly erroneous." COA Op. 23.

Defendants also maintain, again without citing any support, much less a circuit split, that legally significant white bloc voting does not exist where racially polarized voting can be explained by party affiliation. The district court credited plaintiffs' evidence that racial polarization explained party alignment rather than the other way around. Dist. Op. 128. The district court found that "[Defendants' expert] Dr. Alford's opinions [that party rather than race better explains RPV in Louisiana] border on *ipse dixit*," and were "unsupported by meaningful substantive analysis and [were] not the result of commonly accepted methodology in the field." DC Op. 121. In contrast, the court credited plaintiffs' evidence that "demonstrated that [contrary to Dr. Alford's opinion] Black voters support Black candidates more often in a statistically observable way." *Id.*

In any event, "[i]t is the difference between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives." *Gingles*, 478 U.S. at 63 (plurality op.). And since *Gingles*, courts have consistently held that the relevant question when evaluating whether the *Gingles* preconditions have been satisfied is whether there *is* racially polarized voting, not the reasons why. *See, e.g.*, *N. Carolina State Conf. of NAACP* v. *McCrory*, 831 F.3d 204, 221 (4th Cir. 2016) (holding that "[i]t is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in the opportunity for

discriminatory laws to have their intended political effect" (cleaned up)); *Goosby* v. *Town Bd.*, 180 F.3d 476, 493 (2d Cir. 1999) ("[I]nquiry into the *cause* of white bloc voting is not relevant to a consideration of the *Gingles* preconditions." (emphasis in original)). That makes sense, as the VRA's purpose is to give minority voters the same opportunity as white voters to elect candidates of their choice, regardless of the reasons for that choice. Once plaintiffs have demonstrated the existence of racially polarized voting, it is defendants' burden to rebut that showing. *See, e.g., Solomon* v. *Liberty Cnty. Comm'rs*, 166 F.3d 1135, 1144 (11th Cir. 1999), *reh'g en banc granted, opinion vacated*, 206 F.3d 1054 (11th Cir. 2000), *and on reh'g*, 221 F.3d 1218 (11th Cir. 2000) ("Although section 2 plaintiffs bear the burden of proving the *Gingles* factors and other factors in the totality of circumstances that support a finding of vote dilution, defendants bear the burden of proving any factor that they believe weighs in their favor."); *Teague* v. *Attala County*, 92 F.3d 283, 290–92 (5th Cir. 1996) (holding that once plaintiffs have demonstrated the existence of racially polarized voting, it is the defendant's burden to rebut that showing); *Uno* v. *City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (noting that "establishing vote dilution does not require the plaintiffs affirmatively to disprove every other possible explanation for racially polarized voting"). The district court found defendants' evidence insufficient to carry that burden, and the Fifth Circuit correctly agreed. Dist. Op. 121; COA Op. 23–24.

B. The district court did not order a racial gerrymander.

Defendants' argument that the district court "ordered a racial gerrymander" by "lend[ing] its imprimatur" to plaintiffs' illustrative maps, Stay Br. 16, 18, has no

merit. *First*, the district court has not ordered *any* remedial map at all, much less a "racial gerrymander." *Second*, the racial predominance analysis this Court applied to a *state law* in *Shaw* v. *Reno* does not apply to *Gingles* illustrative maps because the Equal Protection Clause is only implicated where there is state action. *Bethune-Hill* v. *Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) ("The Equal Protection Clause prohibits *a State*, without sufficient justification, from separat[ing] its citizens into different voting districts on the basis of race." (emphasis added) (cleaned up)). Plaintiffs, as private citizens, are not governed by the Equal Protection Clause. And as the Fifth Circuit aptly observed, "[i]llustrative maps are just that—illustrative." COA Op. 17; *see also* Dist. Op. 116 ("Defendants' insistence that illustrative maps drawn by experts for private parties are subject to Equal Protection scrutiny is legally imprecise and incorrect.").

In any event, even if racial predominance were a relevant consideration, "the unchallenged findings of the district court foreclose the defendants' contention that the plaintiffs' illustrative maps are racial gerrymanders." COA Op. 17. The district court found, based on its assessments of the credibility of plaintiffs' map-drawing experts and the substance of the maps themselves, that race was *not* the predominant factor in creating plaintiffs' illustrative maps. Dist. Op. 105–06. Indeed, the court found "*no factual evidence* that race predominated in the creation of the illustrative maps in this case." *Id.* 116 (emphasis in original). As the court explained, "Defendants' purported evidence of racial predomination amounts to

nothing more than their misconstruing any mention of race by Plaintiffs' expert witnesses as evidence of racial predomination." *Id.*

Defendants misleadingly rely on testimony by one of plaintiffs' map-making experts that he was "asked to draw two [majority Black districts] by plaintiffs." *See, e.g.*, Stay Br. 18, 24. But as the district court remarked, "[t]his is not the 'gotcha' moment that Defendants make it out to be." Dist. Op. 117. To satisfy *Gingles* I, the plaintiffs must "demonstrat[e] that it is possible to draw an additional 50%+ majority-minority district," so it is scarcely a surprise that Mr. Cooper was asked to see if he could draw two such districts. *Id*; *see also Bartlett* v. *Strickland*, 556 U.S. 1, 19–20 (2009) ("[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). Defendants omit Mr. Cooper's clear testimony 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." Dist. Op. 117. The district court found both Mr. Cooper and Mr. Fairfax, the plaintiffs' other demographic expert, to be "highly credible witnesses" on this issue. *Id.*

Defendants' reliance on *Covington* v. *North Carolina,* 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017), is misplaced. Covington did not involve illustrative maps used by plaintiffs to satisfy *Gingles* I. Rather, the maps criticized by the Court in that case were adopted by the State of North Carolina. Moreover, in contrast to *Covington*, where race-based considerations were the "only

'primary' criteria" and traditional redistricting principles were "neglected entirely," *id.* at 134, 137, here, extensive, unrebutted record evidence here demonstrates the opposite: Plaintiffs' experts did not subordinate other factors to race, but properly "weighed racial considerations alongside traditional factors such as communities of interest." COA Op. 16. In any event, as defendants acknowledge, this Court has long assumed that compliance with Section 2 of the Voting Rights Act is a compelling governmental interest and a remedial plan, even one in which race predominates, will survive strict scrutiny if it is narrowly tailored to cure the violation that the district court found. *See* Stay Br. at 17.

Defendants' argument that plaintiffs improperly relied on proportionality—i.e., that they somehow acted improperly by seeking two majority Black districts "on the premise that Louisiana has six congressional districts and a Black voting age population of 31%," Stay Br. 18—is both inaccurate and contrary to this Court's precedents. Plaintiffs did not rest their illustrative maps on proportionality, and neither the district court nor the Fifth Circuit approved them on that basis. Instead, the district court found that the plaintiffs' illustrative maps satisfied plaintiffs' obligations under *Gingles* I and other applicable precedents. In addition, this Court has consistently taught that, while the Voting Rights Act does not mandate proportionality, a disproportion between the number of minority voters and the ability of those voters to elect their candidates of choice "provides some evidence of whether the political processes leading to nomination or election in the State or political subdivision are not equally open to participation" by the minority

group, and thus is relevant to a Section 2 claim. *LULAC*, 548 U.S. at 437; *see also* *Johnson* v. *De Grandy*, 512 U.S. 997, 1000 (1994) ("[P]roportionality … is a relevant fact in the totality of circumstances.").

C. Plaintiffs satisfy the first Gingles precondition.

Defendants' objections to plaintiffs' *Gingles* I showing are similarly without merit. The *Gingles* I standard, as applicable here, asks whether the Black population of Louisiana is sufficiently large and geographically compact to constitute a majority in two reasonably compact, majority-Black congressional districts. *See, e.g.*, COA Op. 3–4; Dist. Op. 18.

This Court made clear in *Bartlett* that to satisfy the first *Gingles* precondition a plaintiff must show that the relevant "minority population in the potential election district is greater than 50 percent." *Bartlett*, 556 U.S. at 19–20. *Gingles* I also requires that Section 2 plaintiffs demonstrate the compactness of the minority population. *LULAC*, 548 U.S. at 433. This inquiry takes into account "traditional districting principles such as maintaining communities of interest and traditional boundaries." COA Op. 8 (citing *id.*); *see also* Dist. Op. 18–19.

The district court and the Fifth Circuit correctly concluded that plaintiffs satisfied that standard. Dist. Op. 106; COA Op. 6–16. Plaintiffs introduced multiple illustrative maps prepared by two expert demographers demonstrating that two congressional districts with a Black voting age population ("BVAP") of over 50%—including existing CD2, which even in the enacted plan has a BVAP over 50%, and a redrawn CD5—are "easily achieved." Dist. Op. 88. The district court found, and the Fifth Circuit agreed, that the plaintiffs' illustrative maps were

geographically compact, respect traditional redistricting criteria, and preserve communities of interests, even uniting some that are divided in the enacted plan. Dist. Op. 103, 105–06; COA Op. 8–10.

Defendants' argument that the courts below "contorted" the first *Gingles* factor, Stay. Br. 19, finds no support in the record or this Court's precedent. *First*, defendants argue that plaintiffs' illustrative maps were "racially gerrymandered" and that "illustrative maps infected by racial predominance . . . cannot satisfy *Gingles* precondition I." *Id.* 20. As discussed above, however, the racial predominance inquiry relevant to racial gerrymandering claims has no relevance to the preparation of illustrative maps offered to show, under *Gingles* I and *Bartlett*, that the minority population is sufficiently large and geographically compact to establish such a district. *See* pp. 31–35, above. And, as also discussed, the district court found that there was no evidence of racial predominance, and defendants do not show that this finding was clearly erroneous.

Defendants maintain that the district court erred in determining that the plaintiffs' illustrative maps exceeded 50% Black voting age population by allegedly declining to use what defendants contend is the Department of Justice definition of "Black."[7] The district court rejected this contention, and instead held that in the context of this case, it was appropriate to include for purposes of the *Gingles* I analysis all those who identified as Black on their census forms, whether alone or in

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[7] In their application, defendants assert that the DOJ measure defines as "Black" only those persons who identify on the census as Black or as both Black and White, but not Black and any other race. Stay Br. 21–22.

combination with another race or ethnicity. Dist. Op. 85–87. The definition the district court used was expressly approved by this Court in *Georgia* v. *Ashcroft*, 539 U.S. 461, 473 n.1, where, as here, where the case "involves an examination of one minority group's effective exercise of the electoral franchise." *Id.*

In addition, defendants' own experts conceded that the DOJ publication that defendants cite does not adopt the cramped definition that they proffer, under which the courts would be asked to police the racial identity of individuals who identify as Black whenever they also identify with another race or ethnicity. ECF 162 at 15. Moreover, although they argue in favor of limiting who qualifies as Black in this court, none of defendants' experts offered any opinion on what definition of Black is appropriate or legally required in this case. *See e.g.,* Dist. Op. 43, 95. And, in any event, plaintiffs' experts demonstrated that, "even using [the] most restrictive definition of Black [urged by defendants], the *Gingles* numerosity requirement was achieved." Dist. Op. 88.

Second, citing the opinions of their "demographic expert" and "spatial analytics expert," defendants claim that plaintiffs' experts "subordinated all traditional redistricting criteria while elevating race to the apex position," and thereby "obliterated any argument that the minority population within their majority-Black exemplar districts is reasonably compact. Stay Br. 22. Although colorful, this assertion is unsupported by the record. The Fifth Circuit concluded that the testimony of defendants' experts "only obliquely and unpersuasively supports their claim that CD 5's black population is not compact." COA Op. 11.

The district court, having observed the testimony and demeanor of defendants' experts, found that their demographic expert's methodology was "poorly supported," that his analysis "lacked rigor and thoroughness," and his conclusions were "unsupported by the facts and data in this case and thus wholly unreliable." Dist. Op. 92, 93. Likewise, the district court found that the opinion of defendants' expert in spatial analytics was "untethered to the specific facts of this case and the law applicable to it." *Id.* at 97. This Court is not the place to relitigate those credibility determinations.

Third, defendants argue that the district court "erred by examining the compactness of the *district* rather than the compactness of the relevant *minority population*." Stay Br. 25 (emphasis in original). But as the Fifth Circuit correctly observed, geographic compactness may be determined by the shape of proposed districts, and "the geographic compactness of a district is a reasonable proxy for the geographic compactness of the minority population within that district." COA Op. 8, 14 (citing *Bush* v. *Vera*, 517 U.S. 952, 980–81 (1996)). Upon a visual inspection, the Fifth Circuit noted that "the illustrative CD 5 appears geographically compact," including at least "as compact as the benchmark CD 5, if not more so." *Id.* 8.

The Fifth Circuit criticized the district court for considering mathematical measures of compactness of the plaintiffs' illustrative maps "on a plan-wide basis, not a district-by-district basis." COA Op. 9. But the uncontested evidence in the record shows that Districts 2 and 5 and in each of plaintiffs' illustrative maps are no less compact, and in most cases are more compact, than districts in the same part of

the state in the enacted plan. Dist. Op. 27, 32. The record is thus consistent with this Court's direction in *LULAC* v. *Perry*, in the context of remedial maps, to compare, for compactness purposes, "the [court ordered remedial map] … and the 'existing number of reasonably compact districts.'" 548 U.S. 399, 402 (2006) (quoting *Johnson*, 512 U.S. at 1008).

Fourth, defendants erroneously represent that the only evidence that plaintiffs' illustrative maps respect traditional redistricting criteria was that "[p]laintiffs' map-drawers said so." Stay Br. 26. This remarkable assertion ignores the voluminous record credited by the district court and the Fifth Circuit, including multiple expert reports, the illustrative maps, and expert testimony that detailed precisely how the illustrative maps comply with traditional districting principles, as well as both expert and lay witness testimony about relevant communities of interest. Dist. Op. 99, 101, 103. Indeed, the respect for many of the traditional criteria is reflected in objective measures—such as the number of split parishes and municipalities and mathematical measures of compactness—that were well documented and undisputed. Dist. Op. 91, 99, 100. The district court also properly relied on the weaknesses of the evidence defendants proffered and the gaps in that evidence, including defendants' failure to call any witness to testify about communities of interest. Dist. Op. 101–02.

Finally, defendants assert that race must have predominated in the drafting of plaintiffs' illustrative maps because one of defendants' experts purportedly generated ten thousand simulated districts that did not include any districts with

even a single majority Black population. Stay Br. 26–27. But the district court found that defendants' simulation expert's opinions "merit little weight," Dist. Op. 95, and that finding is not clearly erroneous. The court noted that the expert "has no experience, skill, training or specialized knowledge in the simulation methodology that he employed to reach his conclusions," and that his experience in simulation analysis "is best described as novice." *Id.* at 94. The district court also found that the expert's opinions were unpersuasive because his algorithmic plans, unlike plaintiffs' illustrative plans, were run "from scratch, without reference to the enacted plan." *Id.* Indeed, the simulated maps generated by defendants' expert did not include a map that resembled defendants' own enacted plan. While the enacted plan—which defendants agree did not suffer from racial predominance, App. 228 ¶ 23—includes one majority Black district (CD2), the simulations by defendants' expert had none.

III. A grant of certiorari before judgment is premature and inappropriate.

Certiorari before judgment is rarely granted and defendants have offered no compelling reason why it would be appropriate here. That is particularly so in view of the expedited Fifth Circuit argument, which will take place in slightly more than two weeks, and defendant's opportunity, once the Fifth Circuit rules, to make a timely application for certiorari after judgment, on full briefing and consideration by the court of appeals in due course. There is no reason to jump the gun where, as here, the lower courts have acted with extraordinary expedition.

Defendants have not demonstrated that their application satisfies Supreme Court Rule 11, which provides that petitions for certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11.

The pendency of *Merrill* does not counsel in favor of certiorari before judgment here. As a preliminary matter, *Merrill* came to this Court on direct appeal from a three-judge panel decision, not on a petition for certiorari before judgment. *See* 28 U.S.C. § 1253. In this case, there is no statutory right to bypass the courts of appeals and directly appeal to the Supreme Court; instead, the typical procedure is to afford parties an opportunity to seek certiorari after the appellate court has had an opportunity to consider the issues. *See* 28 U.S.C. § 1254; *see also Mount Soledad*, 573 U.S. 954 (Alito, in chambers) (denying writ of certiorari before the court of appeals decided the issue below). The Court's grant of review in *Merrill* did not short-circuit any appellate review; doing so here would.

Moreover, there are key differences between *Merrill* and this case on the merits and on the equities. With respect to the equities, as explained above, this case is a far cry from *Merrill*. With the primary election nearly five months away, this case is materially indistinguishable from *Wisconsin*, in which this Court struck down Wisconsin's state legislative redistricting plan and ordered new maps four and a half months before the primary election, finding that time period provided "sufficient time to adopt maps consistent the [election] timetable." *Wisconsin*

Legislature v. *Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam).

In addition, unlike in *Merrill*, where Justice Kavanaugh found "the underlying merits appear to be close," in this case, plaintiffs' evidence under the *Gingles* framework and the totality of the circumstances is essentially unrebutted. COA Op. 7, 10; Dist. Op. 92, 102, 121, 134. As discussed above, defendants offered no evidence to rebut plaintiffs' showing that plaintiffs' plans better unite and preserve communities of interest than the enacted plan, COA Op. 10; Dist. Op. 101, and many of defendants' experts either agreed with plaintiffs' experts or disclaimed offering any opinion on plaintiffs' showing under *Gingles*. Dist. Op. 47; 49–50. And while defendants urge a number of novel legal arguments, the evidentiary record on even those issues is undeveloped. For example, as discussed above, defendants' simulations expert—on whose testimony defendants continue to rely to argue that plaintiffs' maps are racial gerrymanders—conducted his analysis using incomplete and unrealistic assumptions, and his experience at simulation analysis was "novice." Dist. Op. 46, 94–95. Another of defendants' experts on whose testimony defendants rely in arguing that race was the predominant factor in the design of plaintiffs' illustrative maps concededly "did not account for compactness, communities of interest, or incumbent protection" in forming his opinions, and that the assumptions on which his analysis rested was not supported by the evidence in the case. Dist. Op. 93. The district court found that this expert's conclusions were "unsupported by the facts and data in this case and thus wholly unreliable." Dist.

Op. 93. Likewise, the experts defendants rely on for their novel argument that crossover voting defeats plaintiffs' *Gingles* III showing either analyzed only one election, which the district court found insufficient to support his opinion, Dist. Op. 125–26, or limited their analysis to a single "outlier" parish. Dist. Op. 122, 125.

In any event, after the Fifth Circuit's decision, the parties will have an opportunity to seek certiorari as part of the normal appellate process and, at that time, this Court will be better positioned to determine whether to grant review and, if so, whether to consider the case with *Merrill*.

CONCLUSION

Defendants' application for a stay pending appeal and petition for certiorari before judgment should be denied.

Respectfully submitted,

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