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DEPARTMENT OF JUSTICE
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June 14, 2023

Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543

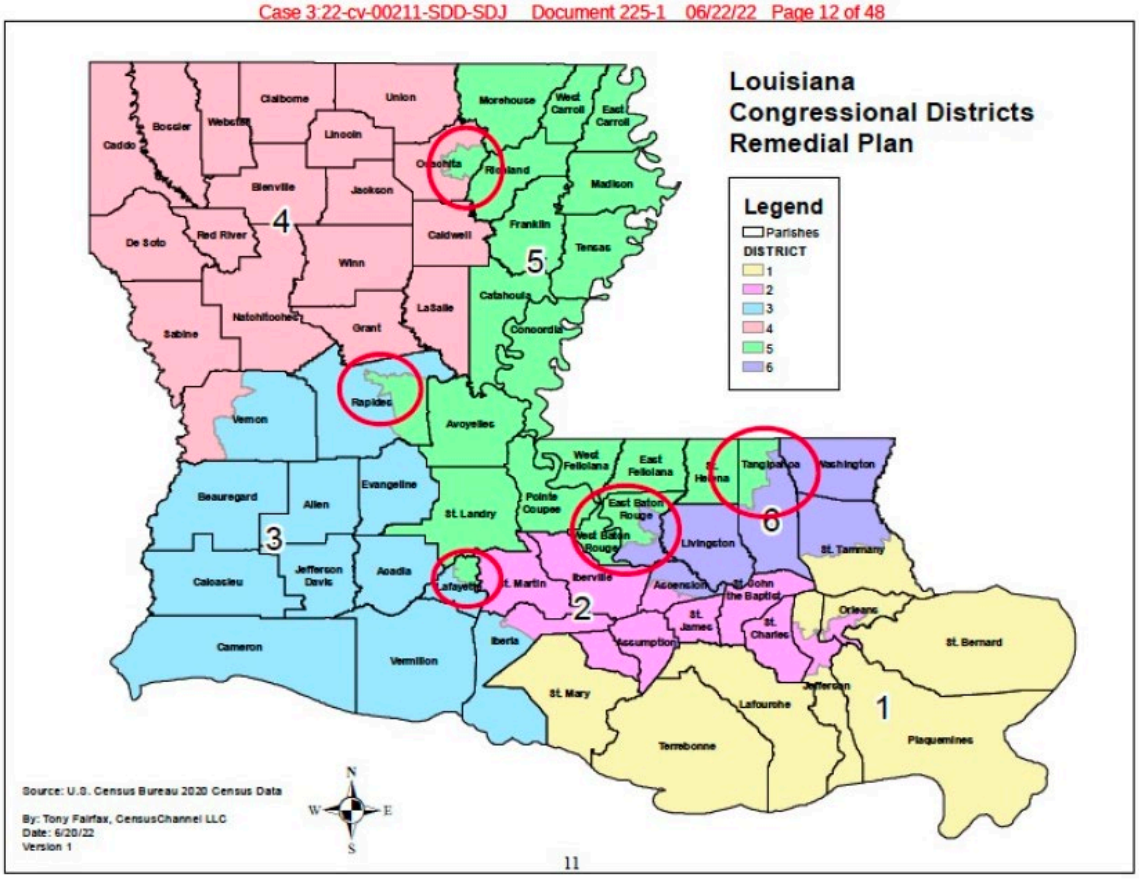
Re: No. 21A814, *Ardoin, et al. v. Robinson, et al.*

Dear Mr. Harris:

Petitioners the State of Louisiana, by and through its Attorney General Jeff Landry, write in reply to Respondents' letters.

I. The Court Should Proceed to Hear this Case on the Merits to Correct the District Court's Errors under Established Precedent.

The erroneous legal reasoning of the district court below necessitates review and reversal by this Court. As we stated in our original letter to the Court, *Allen v. Milligan*, 599 U.S. ___ (2023) "does not address the district court's significant errors of law that should rightly result in reversal." Petrs. Ltr. at 1. Those significant errors will be briefed fully in the coming days and weeks. However, it bears emphasizing that any remedial map that contains two majority-minority districts in Louisiana must be drawn in a way that aggressively splits cities and parishes nearly exclusively along racial lines. The joint remedial plan proposed by Plaintiffs below splits parishes and cities exclusively to add additional Black Voting Age Population ("BVAP") to barely create a second majority-minority district. *See* Reply, *Ardoin v. Robinson*, No. 21A814 at 13 (June 24, 2023) (reproduced below); *see also* Application, *Ardoin v. Robinson*, No. 21A814 at 16–27 (June 17, 2022).



This plea from the Respondents for a remedial racial gerrymander sits "peculiarly" unwell with *Milligan* and the Court's other precedents, considering the facts of this litigation. First, Louisiana maps with two majority-minority congressional districts (out of then seven districts) have already been twice declared unconstitutional as racial gerrymanders by federal courts. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993); *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996). The United States Department of Justice later twice precleared congressional maps with just the one majority-minority congressional district. *See Hays v. Louisiana*, 862 F. Supp. 119, 124 n.4 (W.D. La. 1994). Now, today, Louisiana's demographics remain essentially the same, but the State has lost one of its congressional districts to apportionment, making it impossible to constitutionally draw a map with two majority-minority districts. That difficulty distinguishes Alabama's congressional map in *Milligan* and further necessitates the Court's involvement here.

Both the majority opinion in *Milligan* and Justice Kavanaugh's concurrence specify that racial gerrymanders remain insufficient to satisfy *Gingles* precondition 1. *See Milligan*, 599 U.S. at ___ (slip op., at 34) ("Our opinion today does not diminish or disregard [] concerns" that §2 may impermissibly elevate race in the allocation of political power within the States" and that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters.") (citing *Shaw v. Reno*, 509 U. S. 630, 657 (1993)); *id.* (Kavanaugh, J., concurring) (slip op., at 3) ("If *Gingles* demanded a proportional number of majority-minority districts, States would

be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines. But *Gingles* and this Court's later decisions have flatly rejected that approach."). And the Court walked through its history of rejecting racial gerrymanders as remedies for alleged Section 2 violations. *Id*. (slip op., at 18–22). What the *Milligan* majority—underlined by Justice Kavanaugh's concurring opinion—disclaimed, therefore, is the Respondents' errant elevation of race over all traditional districting principles to levels previously rejected by this Court. *Id.*

The Court has been clear: Although race can be considered at *Gingles* precondition 1, racial gerrymanders that violate traditional districting principles are not required to comply with Section 2. For that reason, and because Louisiana's unique situation raises that exact issue with clearly presented facts, the Court should hear this case on the merits.

II. The Proper Course Is for the Court to Allow Merits Briefing to Resume, Set the Matter for Oral Argument, and Maintain the Stay Pending a Decision on the Merits.

Respondents' protestations aside, this Court should allow briefing on the merits to resume and conduct oral argument. In *Milligan*, the question before the Court was "[w]hether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated section 2 of the Voting Rights Act." Order, *Allen v. Milligan*, No. 21-1086 (U.S.) (March 21, 2022). As we said when we requested the stay, the legal issue before the Court in this matter is identical to that in *Milligan*. Petitioners' Emergency Application for Administrative Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment, *Ardoin v. Robinson*, No. 21A814 at 12-30 (June 17, 2022) (Ptr. App.) ("This case presents the exact question this Court will soon resolve: Whether Louisiana's 2021 redistricting plan for its six seats in the United States House of Representatives violated section 2 of the Voting Rights Act, 52 U.S.C. § 10301"). While Respondents argue that this obvious similarity requires affirmance or remanding and sending this to the Fifth Circuit, the opposite conclusion is the more proper course.

Respondents argue that the stay and grant of petition for a writ of certiorari before judgment was for the purpose of waiting for *Milligan* because of the possibility that the Court would upend its *Gingles* precedent. Now, it turns out, the law in the section 2 context has not substantially changed, but that does not undermine the Court's original grant of certiorari.[1] While this Court could have granted a stay, it chose to grant Petitioners' request for certiorari before judgment, over the dissent of three Justices. In so doing, the Court acknowledged what it reemphasized in *Milligan*; that the "application of the *Gingles* factors is 'peculiarly dependent upon the facts of each case.'" *Allen v. Milligan*, 599 U.S. ___ (2023) (slip op., at 11) (quoting *Thornburg v. Gingles*,

[1] It is also worth emphasizing that Petitioners requested that the Court "expedite" and "consolidate" this case with *Milligan* such that the merits of this matter could be heard. Ptr. App. At 40. Alternatively, Petitioners requested that this matter be held in abeyance pending *Merrill*. *Id*. As the Court granted the abeyance but declined, at that time, to allow merits briefings, it should now allow Petitioners the opportunity to brief the merits and show the grievous mistakes in law that infected the district court's determination.

478 U.S. 30, 79 (1986)). Now that *Milligan* has been decided without any substantive change in law, the Court should now hear this case, having already granted certiorari.[2]

Procedurally, the proper course is for the Court to allow briefing and argument and a stay should continue to remain in effect. The Court should wholly reject Respondents invitation to dismiss this matter as improvidently granted. *Robinson* Resp. Ltr. at 2; *Galmon* Resp. Ltr. at 2. Initially, it is rare that the Court dismisses a case as improvidently granted regardless of circumstance. Rarer still is the Court dismissing a grant of certiorari as improvidently granted *before* oral argument has been heard. In fact, counsel is aware of only a handful of instances where certiorari was denied as improvidently given before oral argument over the last forty years. *See, e.g., Cline v. Oklahoma Coalition for Reproductive Justice*, 571 U.S. 985 (2013) (certiorari dismissed as improvidently granted after the Oklahoma Supreme Court answered this Court's certified question under the Revised Uniform Certification of Questions of Law Act, Ok. Stat. 20 Sec. 1601 et seq.); *Visa Inc., et al. v. Osborn, Sam, et al.*, No. 15-962 (2016) (certiorari granted to determine a specific issue, but "[a]fter having persuaded [the Court] to grant certiorari on th[e] issue . . . petitioners chose to rely on a different argument in their merits briefing." (cleaned up)). And totally unprecedented—as far as counsel can ascertain—is the Court's dismissing a grant as improvidently granted after granting certiorari before judgment. As jurisdiction now lies with this Court, and there has been no intervening change in law or of the position of Petitioners question before the Court, the proper course is to allow briefing on the merits and set this matter for oral argument.[3]

Therefore, *Ardoin* Petitioners respectfully request that the Court set this matter for briefing on the merits and oral argument while maintaining the stay currently in effect.

I would appreciate it if you would circulate this letter to the Members of the Court.

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[2] Any accusations of a "bait-and-switch" are beyond the pale. *See Galmon* Resp. Ltr. at 2. The question presented to the Court here is the same as it was when certiorari was granted. The mere fact that the Court chose to largely maintain the *status quo pendente lite* with respect to section 2 claims in *Milligan* simply means that this case should now proceed to merits briefing.

[3] The Court's procedure of ordering a grant, vacatur, and remand serves as an important analogue here. A grant, vacatur, and remand is appropriate when "intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010). This Court seems to apply that normal, sensible standard to district courts in the cert-before-judgment context. For example, dealing with the ever-changing legal landscape of pandemic law, the Supreme Court granted a petition for writ of certiorari before judgment in *Gish v. Newsom*, 141 S. Ct. 1290 (2021), then vacated and remanded "to the United States Court of Appeals for the Ninth Circuit with instructions to remand to the District Court for further consideration in light of *South Bay United Pentecostal Church v. Newsom*, 592 U. S. ___, (2021)."

Applying that standard here, the courts below have no reason to change its reasoning based on *Milligan*. True, the district court's reasoning is flawed for reasons stated elsewhere, but *Milligan* reveals no probability, reasonable or otherwise, that the district court would now post-*Milligan* reject a premise it had relied upon pre-*Milligan* in crafting its decision below. *Milligan*, unlike the cases listed above, features no legal pronouncement from this Court that would upend the district court's own premises and views about the legal issues presented in *Ardoin*, as wrong as those premises and views were under established Supreme Court precedent.

Respectfully submitted,

/s/ *Elizabeth B. Murrill*

Counsel for Appellant State of Louisiana

CERTIFICATE OF SERVICE

I, Elizabeth Baker Murrill, certify that I filed Petitioners' June 14, 2023 letter in reply electronically with the Court and that I emailed the foregoing on this 14th day of June 2023, to the following counsel of record:

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