No. __-_____

In the Supreme Court of the United States

IN RE JEFF LANDRY, *IN HIS OFFICIAL CAPACITY AS THE LOUISIANA ATTORNEY GENERAL,* ET AL.

APPENDIX TO EMERGENCY APPLICATION FOR STAY OF WRIT OF MANDAMUS

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No. 21A_____

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.

EMERGENCY APPLICATION FOR ADMINISTRATIVE STAY, STAY PENDING APPEAL, AND PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Petitioners are R. Kyle Ardoin, in his official capacity as Secretary of State for Louisiana, and the State of Louisiana, by and through Attorney General Jeff Landry.

Respondents are Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, the National Association for the Advancement of Colored People Louisiana State Conference, Power Coalition for Equity and Justice, Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners each represent that they do not have any parent entities and do not issue stock.

/s/ *Elizabeth B. Murrill*
Elizabeth B. Murrill

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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.

Louisiana's congressional boundaries cannot be drawn to create two majority-minority districts without "segregat[ing] the races for purposes of voting." *Shaw v. Reno*, 509 U.S. 630, 641 (1993). Nonetheless, the district court issued a preliminary injunction ordering the Louisiana Legislature to add a second district by June 20, 2022. By fixing race as the sole "non-negotiable" district-drawing variable, *see Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the district court disregarded decades of this Court's precedents, which "mak[e] clear that proportionality is never dispositive." *Johnson v. De Grandy*, 512 U.S. 997, 1026 (1994) (O'Connor, J., concurring); *accord. Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022). Despite acknowledging serious flaws in the Plaintiffs' case, the Fifth Circuit declined to issue a stay—tossing Louisiana into divisive electoral pandemonium. App. 152. The district court's ruling upends statutory deadlines with a promise of more to come, throws the election process into chaos, and creates confusion statewide, all of which undermines confidence in the integrity of upcoming congressional elections. A stay is manifestly warranted because of these harms and because this case is worthy of certiorari. An administrative stay pending further evaluation of this matter is also manifestly warranted to calm the chaos and to permit more orderly proceedings. 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?

Louisiana has worked long and hard to comply with federal redistricting

mandates. After receiving the 2020 Decennial Census data from the federal government far behind schedule, Louisiana began the same congressional district-drawing processes undertaken by other states throughout the Nation. It followed several guideposts. First, because the State was again allotted six congressional districts (and its demographics remained largely consistent), it maintained existing district boundaries to the extent it could, which meant retaining one majority-minority district. App. 318 n.8. Second, it took into account the fact that the United States Department of Justice had twice precleared, under Section 5 of the Voting Rights Act, congressional-district boundaries, which included only one majority-minority district. *See Hays v. Louisiana*, 862 F. Supp. 119, 124 n.4 (W.D. La. 1994). Third, it construed as a warning two federal-court cases that struck, as racial gerrymanders, Louisiana congressional maps drawn to include two majority-minority districts. *Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993) (*Hays I*); *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996) (*Hays IV*). Against this legal background, the Louisiana Legislature approved new maps with two-thirds approval in both bodies.

The day the Louisiana Legislature's plan took effect, however, two groups of plaintiffs sued, insisting that, because "Louisiana has six congressional districts and a Black population of over 33%," Section 2 of the Voting Rights Act mandates proportional representation. After conducting a rushed hearing, the district court enjoined Louisiana's maps. The Fifth Circuit declined a stay despite tremendous electoral upheaval. Perhaps even more perplexingly, the Fifth Circuit failed to

disturb the district court's misapplication of Supreme Court precedent that in areas where there is significant white cross-over voting, the third *Gingles* precondition *cannot* be met. Nor did the Fifth Circuit address the badly bungled analysis surrounding racially polarized voting, which it conflated with *legally significant* racially polarized voting. As this Court well knows, there is a difference.

The record accentuates the inability to draw a constitutionally-compliant plan. Out of *ten-thousand* simulated plans using neutral, non-racial criteria, *none* produced even *one* majority-minority district, let alone *two* that the district court believes the Voting Rights Act requires. App. 270-271. The inescapable conclusion: the district court has ordered a racial gerrymander that "by its very nature" is particularly "odious." *Wis. Legis.*, 142 S. Ct. at 1248 (quoting *Shaw*, 509 U. S. at 643).

Rivaling the lower courts' blunders on the Voting Rights Act question is their baseless refusal to stay this case under *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Potential Louisiana congressional candidates can qualify for the ballot by nominating petition on July 8, 2022 (moved from June 20, 2022 by the District Court) and the regular qualifying period is July 20-22, 2022—but it is impossible for them to qualify with no congressional districts in place. When "[f]iling deadlines need to be met, but candidates cannot be sure what district they need to file for" or even "which district they live in," *Purcell* commands federal courts to refrain from "swoop[ing] in and re-do[ing] a State's election laws." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). The lower courts' refusal to heed this principle clashes with admonitions this Court has issued time and again—as recently as four months

ago. *See id.*

Aggravating the erroneous refusal to apply *Purcell* is the lower courts' decisions to barrel ahead despite *Merrill*, which this Court will hear less than four months from now. Because this case presents the same question as *Merrill*, the Court should grant certiorari in advance of judgment, consolidate the cases, and issue a briefing schedule for this case under which arguments could be heard the same day as *Merrill,* or simply hold the case in abeyance pending the opinion in *Merrill*.

In *Merrill* (like here), Alabama drew districts that tracked its previous district boundaries, given the relative consistency of its demographics. In *Merrill* (like here), the plaintiffs' experts[1] prioritized race in a (failed) attempt to show that an additional majority-minority district with some semblance of compactness could conceivably be created. And in *Merrill* (like here), a federal district court essentially threw out the redistricting work of a state legislature during a time that all but guaranteed "chaos for candidates, campaign organizations, independent groups, political parties, and voters, among others." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Proceeding in this case while *Merrill* is pending defies all conceivable notions of judicial economy and fairness to a State that will otherwise have to (1) redraw congressional districts in compliance with the district court's order to create racial gerrymanders, (2) litigate this question before the Fifth Circuit while conducting the 2022 midterm elections under congressional districts that are most likely illegal, and

[1] Indeed, one expert—Mr. William Cooper—served as a plaintiffs' expert in *both Milligan* and this case.

(3) likely have to start the redistricting process over *again* after this Court issues its opinion in *Merrill*. An administrative stay and stay pending appeal both are warranted, as is a grant of certiorari before judgment. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2319, 2322 (2018); *Perry v. Perez*, 565 U.S. 388, 392 (2012).

Events that transpired yesterday underscore why an administrative stay is necessary. In response to a motion to extend the limited time permitted to the Legislature to do its important work, the district court ordered the Speaker of House and the President of the Senate to appear in person for a hearing on the morning of the second legislative day (of only six days). At that hearing, the district court threatened the Speaker with contempt (for filing a bill she found displeasing), App. 455-457, and demanded the President of the Senate commit to suspend rules and move legislation faster, App. 437. She ordered all parties (two of which were not before her in the hearing) to submit briefs (by the close of business) on how she should proceed if the legislature failed to draw a second district. *See* App. 476. It appears the legislative session is merely a formality.

Without a stay, "even heroic efforts likely [will] not be enough to avoid chaos and confusion" during the rapidly approaching midterm election cycle. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Even if Louisiana pulls it off, with the proverbial gun to its head held by a federal court, the State will be forced to elect congressional representatives using boundaries anathema to the Fourteenth Amendment's Equal Protection Clause, unless this Court steps in now.

OPINIONS BELOW

Petitioners seek an administrative stay and a stay or injunction pending

appeal of the district court's preliminary injunction, entered on June 6, 2022. The district court's opinion is reproduced at App. 1. The district court's order denying a stay pending appeal is reproduced at App. 161. The Fifth Circuit's opinion denying a stay pending appeal is reproduced at App. 167.

JURISDICTION

This Court has jurisdiction to resolve this application under 28 U.S.C. Sections 1331 and 2101(f), and the authority to grant certiorari before judgment under Section 1254(1).

STATEMENT OF THE CASE

A. 2022 redistricting efforts begin against a 30-year legal history.

Louisiana's redistricting saga began thirty-years before the State legislature received the 2020 Decennial Census data. After the 1990 redistricting cycle, the Louisiana Legislature twice attempted[2] to draw congressional maps to include two majority-minority congressional districts. Both times, the maps pinned East Baton Rouge Parish as the population anchor for the second majority-minority district, which extended north along the Mississippi River, into Louisiana's Delta Region (over 180 miles away), and then across the top of the State. App. 333-334. Courts struck both maps as racial gerrymanders that violated the Fourteenth Amendment's Equal Protection Clause. *See Hays v. Louisiana (Hays I)*, 839 F. Supp. 1188, 1195 (W.D. La.

[2] The legislature was forced to attempt this feat because, at the time, the U.S. Attorney General's Office made it plain that "any plan that did not include at least two 'safe' black districts out of seven" would not be precleared under Section 5 of the Voting Rights Act. *Hays I*, 839 F. Supp. at 1196 n.21.

1993) (*Hays I*); *Hays v. Louisiana (Hays IV)*, 936 F. Supp. 360, 368 (W.D. La. 1996).

Because Louisiana could not draw two majority-minority districts without "segregat[ing] the races for purposes of voting," *Shaw*, 509 U.S. 630, 641 (1993), the *Hays* remedial map contained only one. The heart of this district (CD2) centered on New Orleans. East Baton Rouge, the anchor of Louisiana's ill-fated second majority-minority district, found itself in CD6. Since then, the Legislature has never enacted a redistricting plan connecting East Baton Rouge Parish to the Delta region.

In the three decades since *Hays* was litigated, some things changed. Louisiana lost a congressional seat after the 2000 Decennial Census, reducing the number of districts to six. Other things remained constant. Specifically, Louisiana's total black voting-age population (BVAP) did not meaningfully grow. As a matter of plain math, if the State could not draw two districts out of seven without unconstitutionally considering race, its likely impossible for it to draw two districts of six unless race predominates. Efforts to do so proved this assumption correct.

B. 2022: Roadshows, public input, hard work, a veto, and litigation.

Upon receiving long-delayed results of the 2020 Decennial Census, Louisiana, began its redistricting process. This work began months before the Extraordinary Session convened February 1, 2022, with statewide "road shows" to collect feedback and concluded (after a gubernatorial veto and subsequent override vote) March 31, 2022. Although the U.S. Constitution's one-person, one-vote requirement compelled the Legislature to modify several boundaries, its plan deliberately retained the "core districts as they [were] configured" after the 2010 census to ensure continuity of

representation, perpetuating "the traditional boundaries as best as possible" to "keep[] the status quo." Defs. Proposed Findings of Fact, App. 226-227. As enacted, Louisiana's congressional map includes one majority-Black district, as it has since the 1990s.

The same day the Legislature's plan took effect, two groups of plaintiffs sued. *See Robinson v. Ardoin*, No. 3:22-cv-00211 (M.D. La.); *Galmon v. Ardoin*, No.: 3:22-cv-00214 (M.D. La.). In their collective view, Section 2 of the Voting Rights Act requires Louisiana to create a second majority-Black congressional district. At its core, their arguments hinge on proportionality—*i.e.*, because "Louisiana has six congressional districts and a Black population of over 33%," two of Louisiana's six congressional districts must be majority Black. *Robinson, et al. v. Ardoin, et al.,* No. 3:22-cv-211 (M.D. La.) (ECF 42-1 at 4) (hereinafter, *Robinson*). The State of Louisiana and two of the State's Legislative leaders–the Speaker of the House and the President of the Senate—quickly moved for, and were granted, intervention. *Id*. (ECF Nos. 10, 30, 64). The district court consolidated the two cases,[3] denied the State's motion to stay the case pending this Court's disposition in *Merrill v. Milligan*, No. 21-1087 (U.S.) (consolidated with *Merrill v. Caster*, No. 21-1087 (U.S.)), and conducted a truncated preliminary-injunction hearing, *e.g.*, *Robinson* (ECF Nos. 135, 63). After the parties submitted post-trial briefs and proposed findings of fact and conclusions of law, the district court granted Plaintiffs' motions for a preliminary injunction. App.

[3] The consolidated case is *Galmon, et al. v. Ardoin, et al.*, No. 3:22-cv-214 (M.D. La.).

2.

In so doing, the district court concluded Plaintiffs were likely to satisfy the Voting Rights Act Section 2 preconditions this Court set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). It also reasoned that the Plaintiffs would suffer irreparable harm without a remedial map. App. 88–105, 141–42. For this reason, the district court further decreed that the Louisiana Legislature must enact a remedial plan with a second majority-minority district within the next fourteen days, or the court would contrive a map of its own. App. 2.

C. Election deadlines bumped; Special Session called; no relief from lower courts.

Within hours of the district court's preliminary-injunction order, each Defendant noticed appeals. App. 153, 156, 158. A joint motion filed with the district court for a stay pending appeal followed that same day. When the district court declined to stay its injunction, every Defendant group (the Secretary of State, the Attorney General, and the Speaker of the House and President of the Senate) filed emergency motions for a stay pending appeal with the Fifth Circuit. After expedited briefing and an administrative stay, the Fifth Circuit declined to pause the district court's preliminary injunction (though it concluded the Plaintiffs' "arguments and the district court's analysis are not without weakness"). App. 168. It did, however, expedite the appeal and scheduled oral argument July 8, 2022. App. 168-169.

D. Chaos ensues; Legislative process is undermined.

Compliance with the district court's deadline is impossible. For starters, the Louisiana Legislature adjourned *sine die* on the day the district court issued its

injunction, June 6, 2022, as required by the State Constitution. *See* La. Const. art. II, §2(A)(3)(a). So the Governor called a special session. *See* La. Const. art. II, §2(B); https://www.gov.louisiana.gov/assets/Proclamations/2022/89JBE2022CallSpecialSession.pdf. Pursuant to the State Constitution, however, seven days' notice is required before the Legislature may convene an Extraordinary Session, *see id.,* which reduced to six the number of days the ruling actually allowed to complete the task this Court knows "is *never* easy." *Abbott v. Perez*, 138 S. Ct. at 2314 (emphasis added).

For this reason, the Legislative Leadership moved for an extension of time to enact a remedial map. They told the district court that redrawing the State's congressional maps in only six days could not be accomplished, at a minimum, without denying the public their right to notice and to participate. In response, the district court ordered the House Speaker and Senate President, to appear in person at a hearing it had set on the motion *during* the second day of the Session. This hearing occurred June 16, 2022; neither the State's Attorney General nor the Secretary of State were allowed to participate, the district court denied the requested extension from the bench:

> [O]rder[ed] the parties to file briefs by 5:00pm setting forth their proposals for the nature and timeline of the judicial redistricting process in the event that the Legislature is unable to enact a remedial map. The Court specifies that each side will be permitted to offer one proposed remedial map.

Robinson (ECF No. 196). Moreover, during the hearing, the district court threatened the Speaker with contempt for having filed a "placeholder bill" that did not contain a second majority minority district (which he explained can be amended), attempted to

strong-arm the Senate President into suspending the rule to force the process to move faster, and all but declared the legislative process a mere formality. *See* App. 437-438.

REASONS FOR GRANTING THE STAY

Few cases are better candidates for a stay pending appeal and entry of a writ of certiorari before judgment. Indeed, the district court's preliminary-injunction order achieves the rare trifecta of (1) getting both the law and facts egregiously wrong; (2) ordering relief that inflicts immediate irreparable harm in the form of a State-wide Equal Protection violation, accomplishing nothing other than creating utter mayhem in a midterm year; and (3) ignoring the colossal waste of judicial resources inherent in resolving (wrongly) an issue this Court is taking up the first week of its next Term. The Fifth Circuit reinforced the need for this Court's intervention when it declined to act, waiving off *Milligan* as an "outlier" relative to the *Purcell* doctrine. Together, Louisiana's Attorney General and Secretary of State request that the Court return both sensibility and the rule of law to Louisiana's redistricting process.

I. THERE IS A REASONABLE PROBABILITY FOUR JUSTICES WILL VOTE TO GRANT CERTIORARI AND FIVE WILL VOTE TO REVERSE AND VACATE THE PRELIMINARY INJUNCTION.

This case, like *Merrill*, presents the important question whether prioritizing race under Section 2 is inconsistent with the federal Constitution. The answer matters: here, as in Alabama, it is impossible to draw a map without prioritizing race as the predominant factor in order to generate a second majority-minority district, which federal courts have cautioned Louisiana *not* to do in the past.

Section 2 vote-dilution claims are governed by *Thornburg v. Gingles*, 478 U.S.

30 (1986). The *Gingles* criteria ask 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." *Id.* at 50–51. If—and only if—the Plaintiffs can satisfy all three *Gingles* preconditions, they must then show "under the totality of the circumstances," that they "do not possess the same opportunities to participate in the political process and elect representatives of their choice." *See League of United Latin Am. Citizens, Council No. 4434 v. Clements (LULAC, Council)*, 999 F.2d 831, 849 (5th Cir. 1993).

Plaintiffs failed across the board to carry their burden. That the district court concluded otherwise (and the Fifth Circuit acquiesced in this error) affirms how terrifically far the district court's legal analysis wandered. Simply put, race predominated, politics was mistaken for racially polarized voting, and (for good measure) the district court botched the showing necessary to justify imposing mandatory preliminary relief. The result is a legally deficient preliminary injunction that offends all conceivable notions of equal protection, generates chaos during critically important qualifying periods, and undermines confidence in Louisiana's election process. It must be stayed.

A. The district court mangled *Gingles*'s third precondition.

The third *Gingles* precondition requires the Plaintiffs to show that the "amount of white bloc voting . . . can generally 'minimize or cancel' black voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 56 (citations omitted). "In areas

with substantial crossover voting," *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009), which arises when enough white voters support a Black-preferred candidate that the candidate can prevail "without a VRA remedy," (*i.e.,* the creation of a majority-minority district), *Covington v. North Carolina*, 316 F.R.D. 117, 168 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017), this third precondition remains unsatisfied. *Gingles,* 478 U.S. at 56. "[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (quoting *Gingles*, 478 U.S. at 49 n.15).

Plaintiffs' experts each defined polarized voting as existing where "black voters and white voters voted differently." App. 328. Specifically, they testified that polarized voting occurs when "black voters and white voters would have elected different candidates if they had voted separately." *Id.* But, that is not the correct standard. This Court has made clear that the Plaintiffs must prove that *extreme* white bloc voting renders the creation of a majority-minority district the only way to ensure that a minority community has an equal opportunity to elect the candidate of that community's choice. *Gingles,* 478 U.S. at 56.[4] To adopt the broader standard converts

[4] Specifically, this Court has held that "Racially polarized voting" exists whenever "there is a consistent relationship between [the] race of the voter and the way in which the voter votes." *Gingles*, 478 U.S. at 53 n.21. But *Gingles* requires evidence of "legally significant racially polarized voting." *Id.* at 55. This occurs only when "less than 50% of white voters cast a ballot for the black candidate." *Id*. Thus, a Section 2 plaintiff can prevail only when there is proof that the white majority usually votes as a bloc to defeat the minority's preferred candidate. *Cooper*, 137 S. Ct. at 1470; *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (Mem.). None of plaintiffs' experts provided any testimony that African

the 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.

The Plaintiffs have not, *and cannot*, show that such an extreme level of white bloc voting exists in Louisiana. Indeed, when pressed, one of Plaintiffs' experts conceded that meaningful white crossover voting exists in Louisiana, meaning that at least two congressional districts (CD2 and CD5) could be drawn with a BVAP below 50 percent that would still, enable the Black community in those districts to elect the candidate of their choice. App. 329. Another expert testified that a district around 40 percent BVAP could perform. *Id*. And an amicus brief submitted by LSU and Tulane University mathematics and computer-science professors analyzed nineteen elections, which demonstrated that districts of about 42 percent BVAP afford an

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Americans need a congressional district with a majority BVAP to have an equal opportunity to elect their candidate of choice. Quite to the contrary, Drs. Palmer and Lichtman conceded that because of substantial white crossover voting, African Americans in Louisiana only need a congressional district with a black VAP in the low 40% range in order to control the election result. Dr. Handley agreed that districts may be "effective" in providing black voters with an opportunity to elect their candidate of choice with a BVAP under 40% but that she did not analyze whether black voters in Louisiana would have such an opportunity in a district drawn with less than 50% BVAP. While Dr. Handley did not attempt to analyze the lowest black percent needed for black voters to control a district, she also gave no testimony whatsoever that a district in excess of 50% is required. All of Plaintiffs experts testified that Plaintiffs illustrative majority black districts would perform, in the sense that black voters would have an opportunity to elect their candidate of choice in those districts. But none of plaintiffs' experts testified that 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. Thus, under the Court's precedent *Gingles*, *Bartlett v. Strickland, Cooper v. Harris, and Covington v. North Carolina*, the evidence in this case only shows the presence of statistically significant RPV and nothing more.

equal minority electoral opportunity. *Robinson* (ECF 97 at 30, 34, 41–43).

The preliminary-injunction record shows that "partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens." App. 330. This means, in turn, that there is no "legally significant" racially polarized voting sufficient to satisfy *Gingles* precondition 3. *LULAC, Council*, 999 F.2d at 850; *see also* App. 287. The motions panel wrongly adopted the test of Plaintiffs' expert Lisa Handley, that whenever the Democrat loses a district, this proves the existance of significant white bloc voting. This is in contravention of *Gingles, Covington,* and *Cooper v. Harris.*

"The Voting Rights Act," naturally, "does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.'" *Id*. at 854 (quoting *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992)). Instead, Section 2 "is implicated only where Democrats lost because they are black, not where blacks lost because they are Democrats." *Id.* (quoting *Baird*, 976 F.2d at 361). This interpretation is reinforced by the text of Section 2 itself, which prohibits state laws that "result[] in a denial or abridgement of the right . . . to vote *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). Hence, "evidence that divergent voting patterns are attributable to partisan affiliation or perceived interests rather than race [is] quite probative" to *Gingles* precondition 3. *LULAC, Council*, 999 F.2d at 858 n.26. Bloc voting that is not "on account of race or color" is by its own terms not a violation of Section 2.

Evidence of partisan-motivated racially polarized voting permeates the record.

Defendants' expert testified that, while "voting may be correlated with race[,] . . . the differential response of voters of different races to the race of the candidate is not the cause." App. 330. Instead, he found the polarization exhibited in the data resulted from Democratic party allegiance—*not race*. App. 330-331. By analyzing the last three presidential elections, Defendants' expert found the all-white 2016 Democratic ticket received greater black and less white support than either the 2012 Democratic ticket (which featured a black presidential candidate) or the 2020 Democratic ticket (which featured a black vice-presidential candidate). *Robinson* (ECF 108-4 at 5-6). By contrast, in Louisiana elections that featured *no* Democratic candidates, "pattern[s] of racial differences in voting largely disappears." *Id.* at 6-7. This is strong evidence that racial voting differences in Louisiana are driven not by the race of the candidates, but by partisan factors.

Plaintiffs failed to carry their burden of proving "legally significant" bloc voting for purposes of *Gingles* precondition 3. *See LULAC, Council*, 999 F.2d at 850. This, in turn, renders their Section 2 claim meritless—rather than "entirely clearcut" in their favor, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). At the very least, the evidence of racial bloc voting does not "clearly favor" Plaintiffs enough to warrant striking the State's enacted congressional map. *See Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976). This is no ordinary error due to the enormity of its consequences.

B. The district court improperly ordered a racial gerrymander, which was wrong and worthy of certiorari before judgment.

This Court has been clear and consistent for decades. "Classifications of

citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw*, 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *accord Wis. Legis.*, 142 S. Ct. at 1248. Creating such classifications "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 509 U.S. at 643 (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).[5] For that reason, "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Id.* (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id.*, at 285 (O'Connor, J., concurring in part and concurring in judgment)).

This Court has assumed (but never held) that compliance with Section 2 of the Voting Rights Act constitutes a compelling governmental interest. *See Cooper v. Harris*, 137 S. Ct. 1455 (2017). It has set beyond peradventure, however, that a "sufficiently large and compact population of black residents" alone does not justify race-based redistricting. *Wis. Legis.*, 142 S. Ct. at 1249. It has never been enough to surmise that the Voting Rights Act "*may* . . . require[]" creation of additional majority minority districts; instead, there must exist "a strong basis in evidence to conclude

[5] *See also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) ((Brennan, J., concurring in part) ("Even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs."). Indeed, this is now happening as a direct consequence of the district court order.

that §2 *demands*" it. *Wis. Legis.*, 142 S. Ct. at 1249 (first emphasis in original). Without this exacting demonstration, Section 2 becomes a rank proxy "allow[ing] a State to adopt a racial gerrymander." *Id.* at 1250.

The facts to which the district court lent its imprimatur are indistinguishable from those in *Covington*, 316 F.R.D. at 130, a three-judge district court case this Court summarily affirmed, *North Carolina v. Covington*, 137 S. Ct. 2211 (2017). In *Covington*, the map-drawers were "instructed" (1) "to draw . . . districts with at least 50%-plus-one" black voting age population; (2) "to draw these districts first, before drawing the lines of other districts"; and (3) "to draw these districts everywhere there was a minority population large enough to do so and, if possible, in rough proportion to their population in the state." *Id.* at 130. In this case, one of Plaintiffs' map-drawers testified as follows:

> Q. During your map drawing process did you ever draw a one majority minority district?
>
> A. I did not because I was specifically asked to draw two by the plaintiffs.

App. 300-301. Additional testimony reveals that "in order to begin drawing" mapdrawers viewed the BVAP of Louisiana precincts to "get an idea where the black population is inside the state." App. 301.

The *Covington* Court criticized North Carolina map-drawers for seeking "proportionality." 316 F.R.D. at 133. In this case, Plaintiffs' pursuit of two majority-minority districts is based on the premise that Louisiana has six congressional districts and a Black voting age population of 31%. *Robinson* (ECF No. 1 at 1). And, in *Covington*, "because race-based goals were primary in the . . . redistricting process,

other 'traditional race-neutral districting principles, including . . . compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, were secondary, tertiary, or even neglected entirely." 316 F.R.D. at 137 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995). So too here.

Simply put, North Carolina relied on evidence indistinguishable from that offered by Plaintiffs here. When it did so, the courts struck down that state's racially gerrymandered districts, and this Court affirmed finding North Carolina violated the Equal Protection Clause when it created them. The district court's preliminary-injunction order, which *requires* Louisiana to create a second majority-minority district based on the very same evidence that led to North Carolina's constitutionally-defectivemaps, thus has no hope of surviving this Court's review. This is particularly true because of *Bartlett v. Strickland*. In *Bartlett*, this Court held that a state cannot rely upon Section 2 to justify using race to draw a crossover district. *Bartlett v. Strickland,* 556 U.S. 1, 14-18 (2009). If a state cannot use race to draw crossover districts, then surely a federal court cannot order a state to draw a crossover districts. *Id.* Again, this case does not call for ordinary error correction: the consequences of imposing constitutionally defective maps at the eleventh-hour during mid-term Congressional elections has nation-wide implications. That also renders this case worthy of a stay and certiorari.

C. The district court contorted *Gingles*'s first precondition beyond recognition.

To prevail under the first *Gingles* precondition, a plaintiff must show the allegedly injured racial group is "sufficiently large," and "geographically compact."

Gingles, 478 U.S. at 50-51; *see also Cooper*, 137 S. Ct. at 1470 (quoting *Gingles*, 478 U.S. at 50). The Plaintiffs failed to carry their burden here for two reasons. First, the illustrative plans they produced are irrefutably racially gerrymandered, so the Legislature could never, consistent with the Fourteenth Amendment, implement them. And second, the minority community they have identified is not compact, reasonably or in any other application of the concept. The district court erred by concluding otherwise.

1. *Racially gerrymandered illustrative maps cannot satisfy the first Gingles precondition.*

In no uncertain terms, this Court has "expressly rejected" "uncritical majority-minority district maximization." *Wis. Legis.*, 142 S. Ct. at 1249; *see also Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("Failure to maximize cannot be the measure of §2."). The reason is obvious. Maximizing majority-minority districts necessarily involves "segregat[ing] the races for the purposes of voting," which "balkanize[s] us into competing racial factions [and] threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw*, 509 U.S. at 642, 657. And for that reason, illustrative maps infected by racial predominance (which devolves inexorably to racial segregation) cannot satisfy *Gingles* precondition 1. Because elevating race to the pole position, above all other traditional district-drawing criteria, is always constitutionally abhorrent, race cannot be elevated in this way under the Voting Rights Act either. *See Cooper*, 137 S. Ct. at 1468-69.

This case is a good vehicle to affirm this principle. Here, Plaintiffs offered only racially gerrymandered exemplars. Both common sense and the record irrefutably show that they were fabricated to "segregate the races for purposes of voting." *Shaw*, 509 U.S. at 642. Indeed, in their effort to produce exemplar maps featuring two majority-Black districts, the Plaintiffs warped each step in this process.

First, the Plaintiffs declined to use the U.S. Department of Justice's definition of "Black" when calculating the BVAP. The Justice Department's definition covers those Census respondents identifying as black alone or multiracial black and white, but "does not include Hispanic individuals that may identify as black, nor multiracial individuals identifying as a combination of races other than 'White' and 'Black or African American.'" *Pope v. Cnty. of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2014 U.S. Dist. LEXIS 10023, at *7–8 n.3 (N.D.N.Y. Jan. 28, 2014).

Instead, Plaintiffs chose "Any Part Black," a broader measure that includes persons who may be 1/7th Black and also self-identify as both Black and Hispanic. They claimed this choice followed from a footnote in *Georgia v. Ashcroft*, 539 U.S. 461, (2003) but their conclusion does not follow what the Court said there. *See Robinson* (ECF Nos. 41-2 at 11; 43 at 6). When this Court decided *Ashcroft*, the Georgia Secretary of State lacked access to a racial category corresponding to "DOJ Black" that it could use for district drawing. *See Georgia*, 539 U.S. at 473 n.1. Thus, the Court permitted Georgia to use "Any Part Black," while underscoring the novelty of this approach by explaining it in a long footnote. The Plaintiffs here are not in the same predicament. Their use of "Any Part Black" was a deliberate choice intended to

load the dice in favor of triggering Section 2.

Second, Plaintiffs offered exemplar maps with districts that exceeded the 50 percent BVAP threshold by a razor-thin margins and surgical precision. The BVAP percentage for the *Robinson* Plaintiffs' majority-Black illustrative districts are 50.16 percent, 50.04 percent, 50.65 percent, 50.04 percent, 50.16 percent, and 51.63 percent. (ECF Nos. 172, at 41-42). For the *Galmon* Plaintiffs, they are 50.96 percent and 52.05 percent. In other words, after adopting the most expansive definition of "Black" they could find, they contrived districts that eked over the majority-Black threshold by a hair's breadth.

Third, Plaintiffs undeniably subordinated *all* traditional redistricting criteria while elevating race to the apex position. By "reach[ing] out to grab small and apparently isolated minority communities," *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 433 (2006) (*LULAC*). Plaintiffs obliterated any argument that the minority population within their majority-Black exemplar districts is reasonably compact.[6] The 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. Indeed, the State's demographic expert showed many examples of how Plaintiffs' map-drawers intentionally segregated cities by race. App. 210-217.

In one illustrative plan for Baton Rouge, for instance, the line drawn through

[6] Although the Fifth Circuit believed that Plaintiffs' compactness evidence was "unrebutted," App. 176, the record belies that notion.

the middle of the map depicts the division between Plaintiffs' proposed majority-minority District 5 in the north and Districts 2 and 6 in the south. App. 210.[7] The only conceivable reason District 5 reaches only so far into Baton Rouge is to pick up the majority BVAP Census blocks (shaded in green). The only other district in this exemplar map that contains any substantial black population is District 2, which is also a majority-minority district. To accomplish this designation, District 2 extends to the New Orleans area to fill out its BVAP. The same scenario, in which district lines are drawn precisely to segregate white voters from black voters, is repeated throughout Plaintiffs' proposed maps in communities as far flung as Baton Rouge, App. 210-213, and Lafayette, App. 214-215.

Louisiana's spatial analytics expert also offered a mileage chart that showed the distance between the center of the Black populations in communities across Louisiana. *Robinson* (ECF 169-12 at 25); App. 288 (showing the large distance between two minority population centers "as the crow flies"); *see also* App. 242 (testimony of Plaintiff witness who stated that it would take almost four-and-a-half hours to get from Baton Rouge to Lake Providence, which lies at the northern end of Plaintiffs' illustrative plans in the delta region). The Plaintiffs' illustrative maps combine Monroe's Black population with the Black population of Baton Rouge and Lafayette—even though these communities are, respectively 152 and 157 miles apart. *Robinson* (ECF 169-12 at 25); App. 288. Combining in the same district Black

[7] Note: these maps only show the division in the city population, not the remainder of the parish.

communities from far-flung parts of Louisiana eviscerates any consideration of the different experiences and make-up of those communities. Incredibly, it improperly assumes all persons belonging to the same racial group share homogenous political interests. The Equal Protection Clause rejects this race-based assumption.

Lest the Court have any residual doubt that Plaintiffs' exemplar maps used race as the predominant consideration, their map-drawers' testimony resolves it. When asked whether they ever attempted to produce a map containing only one majority-minority district, they said no "because I was specifically asked to draw two by the plaintiffs." App. 368. This is indistinguishable from *Covington*, where map-drawers were ordered to produce a map that maximized majority-minority districts to the exclusion of all other criteria. *See* 316 F.R.D. at 130.

"Courts cannot find § 2 violations on the basis of *uncertainty*." *Harding v. Cnty. of Dallas*, 948 F.3d 302, 310 (5th Cir. 2020) (emphasis in original). If Plaintiffs were compelled to use illustrative plans where race predominated, then it is at the very least *uncertain* whether a remedial plan can be drawn that does not violate the Fourteenth Amendment. Phrased differently, if the only evidence that a Plaintiff can produce for *Gingles I* is rife with racial intent, that amounts to no evidence at all.

Elevating race in this way routinely dooms legislative redistricting efforts. If the district court's preliminary injunction ultimately results in adoption of one of Plaintiffs' exemplar plans (which remains a possibility), that map would itself likely be stricken as unconstitutional. *Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 799 (2017) (noting that a finding of racial predominance usually coincides with

a showing that traditional redistricting criteria were subordinated to racial considerations). At a minimum, then, the merits are not "entirely clearcut" in favor of Plaintiffs—the appropriate standard for awarding an injunction in an election case.*Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see also infra* at Section 2D. A stay pending appeal should thus issue.

2. *The compactness of the minority population, not the district as a whole, is the relevant inquiry under Section 2 of the Voting Rights Act.*

Beyond subordinating traditional redistricting criteria to race, the district court and the Plaintiffs' experts further erred by examining the compactness of the *district* rather than the compactness of the relevant *minority population*, *see,* e.g.*,* App. 27 (relying on metrics that measure the *district's* compactness). The Fifth Circuit motions panel correctly recognized that "the requirement relates to the compactness of the *minority population* in the proposed district, not the proposed district itself," even though it noted that "the Supreme Court has not developed a 'precise rule' for evaluating all facets of that requirement." App. 173 (quoting *LULAC*, 548 U.S. at 433). The Fifth Circuit nonetheless excused this error after conducting "a visual inspection" of the district (*i.e., not* the underlying minority population) and conjecturing that "the illustrative CD 5 appears geographically compact." App. 174.

The Fifth Circuit was wrong. Although a bizarrely gerrymandered district can suggest that the underlying minority population is insufficiently compact for Section 2 purposes, *see LULAC*, 548 U.S. at 433, that ratchet twists only one way. Visual compactness of a district, in contrast, *does not* automatically translate into a conclusion that the minority population within that district is itself compact. A

facially compact district could, for example, house two separate minority population centers separated by a vast swath of rural areas containing negligible minority populations. In that scenario, the *district's* compactness says nothing about the compactness of the relevant minority population—*i.e.*, the only criterion of compactness that matters. Because "there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates," naked-eye district compactness proves next to nothing. *Id*

The Fifth Circuit compounded the error when it concluded that Plaintiffs' illustrative maps "respect traditional redistricting criteria" because, essentially, Plaintiffs' map-drawers said so. App. 175. Specifically, it credited the map-drawers' testimony that they respected political-subdivision boundaries and contiguity when they created their exemplar maps. App. 175-176. That is not how strict scrutiny works, and the Fifth Circuit erred by rubber-stamping this *ipse dixit*.[8]

The Fifth Circuit did not need to dig deep to identify Plaintiffs' failure and the lower court's error. Specifically, Plaintiffs' map drawers testified that they never tried to draw a map containing only one majority-minority district consistent with traditional redistricting criteria. They made no attempt to do so because they were

[8] Indeed, a district connecting Baton Rouge with the Northeast Delta region does not satisfy *Gingles* I, because it is not based on a compact minority population. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1196 n.21 (W.D. La. 1993), *vacated*, 512 U.S. 1230 (1994), *order on remand*, 862 F. Supp 119 (W.D. La. 1994), *vacated sub nom*., *United States v Hays*, 515 U.S. 737 (1995), *decision on remand*, 936 F. Supp. 360 (W.D. La. 1996), *affirmed*, 518 U.S. 1014 (1996).

"specially [sic] asked to draw two by the plaintiffs." App. 368. How that testimony can be construed as anything but a subordination of traditional redistricting criteria to race remains a mystery. At a minimum, this concession shows that the relevant racial community is not compact enough to constitute a second majority district without torquing all traditional notions of compactness to their breaking point. *See id.*; *see also LULAC*, 548 U.S. at 433 (noting that since "no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles." (quotations omitted)). The segregation of voters on account of race is *not* a traditional districting principle, and "[w]e do a disservice to the[] important goals [of the VRA] by failing to account for the differences between people of the same race." *LULAC*, 548 U.S. at 434. If the minority community in Louisiana were sufficiently compact, there would be no need for race to predominate in drawing the illustrative plans; a second majority-minority district would emerge from the application of traditional redistricting principles without creative line-drawing. Defendants' unrebutted evidence that no second majority-minority district naturally emerged from *ten-thousand* simulated districts using race-neutral criteria conclusively proves no naturally-occurring, sufficiently compact minority group supports a second majority-minority district. *Robinson* (ECF No. 109-3 pp. 3-4).

D. Mandatory preliminary relief was improper without a showing of a clear right to relief.

To secure injunctive relief during an election year, "the underlying merits [must be] entirely clearcut in favor of the plaintiff." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). And a "mandatory injunction" (*i.e.,* an injunction that

forces a party to *take* action rather than an injunction that *prohibits* a party from taking action is an "extraordinary remedial process which is granted, not as a matter of right but in the exercise of sound judicial discretion." *Morrison v. Work*, 266 U.S. 481, 490 (1925). These admonitions make sense. A district court decision at the preliminary-injunction stage is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Plaintiffs have not shown, and cannot show, that the facts and law were so "entirely clearcut" in their favor, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), such that a mandatory preliminary-injunction must issue. In holding to the contrary, the district court failed to apply the appropriate heightened standard. Instead, it relied solely on the standard four-factor preliminary injunction test applicable to prohibitory, not mandatory, injunctions. *See* App. 17. But "[t]he 'clear' or 'substantial' showing requirement" for *mandatory* injunctions applies in federal courts across the country, including the Fifth Circuit, and it "alters the traditional formula by requiring that the movant demonstrate a *greater* likelihood of success" than is required for the issuance of a prohibitory injunction. *Tom Doherty Assocs.*, 60 F.3d at 34 (emphasis added). The district court missed this legal point entirely and failed to explain its resort to the laxer standard. And the Fifth Circuit failed to question that decision, despite purporting to "review the district court's legal conclusions *de novo*." App. 170.

The Fifth Circuit did identify flaws in Plaintiffs' argument that cast doubt on

their likelihood of success on the merits. *See, e.g.*, *id.* at 11 (noting that "the plaintiffs' evidence has weaknesses"); *see also id.* at 2; *id.* at 35 ("[N]either the plaintiffs' arguments nor the district court's analysis is entirely watertight."). The Fifth Circuit even conceded that "it is feasible that the merits panel . . . may well side with the defendants" after a complete review of the record. *Id.* at 33. Based upon a record like this, "the underlying merits appear to be close and, at a minimum, not clearcut in favor of the plaintiffs." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). In such a scenario, "[e]ven under the ordinary stay standard outside the election context," both parties have "at least a fair prospect of success on appeal," and no preliminary injunction—much less a mandatory one upending a state's elections—should have issued. *Id.* Nevertheless, the Fifth Circuit denied a stay. App. 199.

The Fifth Circuit's decision is perplexing. It acknowledges holes in Plaintiffs' argument, *id.* at 2-3, concedes Defendants could prevail on the merits, *id.* at 33, and yet leaves the mandatory injunction in place. At no point in the panel's thirty-three-page opinion does it nod to the heightened legal standard, even though it is directly implicated. If Plaintiffs "have much to prove when the merits are ultimately decided" as the Fifth Circuit claimed, then they were not entitled to a mandatory preliminary injunction even if they ultimately prevail later. *Id.* at 3. That award grants Plaintiffs' deference to which they are not entitled and turns the applicable burdens on their head.

Although the heightened mandatory injunction standard should have been sufficient to defeat Plaintiffs' request, the district court's decision was particularly

improper given the unique election context. A "preliminary" injunction granted for the duration of a single election is effectively permanent. If the 2022 election is conducted under a court-ordered congressional map that is later determined held to be an unconstitutional racial gerrymander, the harm cannot be undone. There is no do-over when a federal court order denies citizens the right to vote under a lawful map enacted by their duly-elected representatives. The injury to the State and its voters is permanent and irreparable. Because a mandatory injunction "issues to remedy a wrong, not to promote one," *Morrison*, 266 U.S. at 490, this Court should stay the order below.

II. DECLINING TO STAY THIS CASE INFLICTS PROFOUND, IRREPARABLE HARM UPON NOT ONLY IN LOUISIANA, BUT NATIONWIDE.

This case falls within the heart of the *Purcell* doctrine, which, standing alone, should compel a stay. Dismissing and diminishing Louisiana's *Purcell* arguments as "administrative burdens" that inflict ordinary "bureaucratic strain" on Louisiana's elections officials, App. 195, egregiously misses the point. Mistakes and voter confusion flow directly from increasing the burdens on electoral processes and election officials, particularly as election-year deadlines and responsibilities barrel ever closer. Indeed, this Court recently stayed a materially identical case based expressly on potential infliction of "significant logistical challenges" requiring "enormous advance preparations." *Merrill v,* 142 S. Ct. at 880 (Kavanaugh, J. concurring in grant of applications for stays). The same is true here and having stayed *Merrill*, the justifications here are doubled.

Successful elections demand enormous preparation. Chaotic administration of

elections undermines public trust in the election results. Disturbing *any* step in that process has a cascading effect on many other interlocking and interdependent steps. For the upcoming November 2022 midterm elections, ballots must be drafted, proofed, printed, and distributed to Parish Registrars of Voters by September 23, 2022, so that ballot mailing can be completed by the September 24, 2022 Federal UOCAVA deadline. La. Rev. Stat. §18:1308.2. But before any of that can happen, candidates need to know *where* they can run and voters need to know the districts in which they can vote.

The sand in this electoral hourglass is rapidly sifting. To successfully reach federal UOCAVA deadlines without electoral catastrophe, many interlocking tasks must be completed. Louisiana election officials must comply with state and federal laws about candidacy, ballot preparation, and voter assignment, all of which require significant preparation. A key part of this preparation requires ensuring that voters are correctly assigned in the State's election database system (ERIN). App. 376-379. Only *after* voters receive are assigned in ERIN can the State begin to draft ballots. *Id.* And *before* these assignments can be made, the Secretary of State must know where the congressional district boundaries lie.

The timeline for completing these tasks becomes more compressed the longer the State's congressional districts remain unsettled. *Purcell* exists to make sure that the sand does not run out of the hourglass before all preparations necessary for a smooth election conclude. It applies here. There are hundreds of statewide and local elections running in November 2022. To hold a successful election for the November

2022 election cycle in Louisiana the following major steps must be taken:

First on June 22, 2022, all other municipal and school board redistricting plans are due to the Secretary of State for verification and coding. La. Rev. Stat. §18:465(E)(1)(a). This deadline presupposes that the statewide districting plans have already been entered in the system, and that only the municipal and school board plans remain outstanding. The Legislature's Congressional plan was already implemented in ERIN, meaning that, if the district court's preliminary injunction remains intact, a new plan must be coded. This, in turn, means that elections staff who would otherwise work on assigning voters to their assigned municipal and school board plans need to forgo those tasks to recode the new Congressional district lines. App. 376-379.

Assigning voters to their districts is complicated, time-consuming work. For example, the Legislature's Congressional plan moved only 250,000 voters, but it took weeks to implement. App. 372. In fact, elections administrators worked for a week studying the plan before any coding began. *Id.* If this Court does not stay the district court's preliminary injunction, elections administrators will have to code a different Congressional plan (while coding the municipal and school board plans) by July 13, 2022—less than a month from now. La. Rev. Stat. §18:58(B)(2). Piling on to this coding work will inevitably increase the likelihood of mistakes, which impacts ballot assignment. App. 377-379.

Second, election administrators must handle nominating petitions, qualifying, and objections to candidacy. The deadline for candidates to file by nominating petition

is now, because of the district court's preliminary injunction, July 8, 2022. The candidate qualifying period, which begins July 20 and ends July 22, 2022, has not been moved[9]. La. Rev. Stat. §18:462; 18:467; 18:468(A). This means that under the current, district-court imposed schedule, elections administrators have one week to proof assignments and make any adjustments based on inadvertent mistakes in ERIN. This makes moving the coding deadline impossible. State law affords citizens just one week to object to the candidacy of any person running for election, and they must do so by July 29, 2022. La. Rev. Stat. §18:493; 18:1405(A).

Third, election administrators must program and prepare ballots. Ballot programing must begin no later than August 1, 2022, to ensure that all ballots can be created, proofed, and printed ahead of the September 23, 2022, deadline for local registrars to receive ballots in time to mail them in accordance with federal UOCAVA deadlines. These ballots, in turn, cover hundreds of state and local elections during the November 2022 election cycle. This August 1 date comes just days after the deadlines for qualifying and objections to candidacy. The elections administration calendar is already tight; moving these deadlines back any further will likely result in an insufficient time to prepare the ballots needed for the November election cycle.[10]

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[9] The Governor's call included one thing: drawing a second majority minority map. Changing deadlines and taking any other actions, such as appropriating additional funds necessary to accomplish these Herculean tasks are not included in the call and would likely require another Extraordinary Session (with the accompanying seven-day notice before convening).

[10] These dates are calculated based on the current qualifying period running from July 20-22, 2022, and the court-ordered nominating petition deadline of July 8, 2022. Because many of the statutory deadlines run from one of these two dates, pushing

Fourth, election administrators must work to register voters and administer the November 2022 election cycle. While the election begins on September 24, 2022 for some voters under federal law, the last six weeks before the election are dedicated to registering and assisting people in exercising their right to vote. Statewide voter registration week begins on September 26, 2022. La. Rev. Stat. §18:18(A)(8)(b). This is followed shortly by the deadline to register to vote by mail or in-person (October 11, 2022), and online (October 18, 2022). La. Rev. Stat. §18:135(A)(1)&(C); La. Rev. Stat. §18:135(A)(3). Also on October 18, 2022, early voting begins under the nursing home voting program. La. Rev. Stat. §18:1333(B). Statewide early voting begins soon after on October 25, 2022. La. Rev. Stat. §18:1309

The timeframe to conduct the November 2022 election cycle was *already* extremely tight at the time the district court conducted the rushed preliminary injunction hearing. It is worse now, including merely *three weeks* to code millions of Louisianans to dozens, if not hundreds, of redistricting plans. Adding a new statewide congressional plan to these coding efforts causes rushed coding efforts likely to be riddled with mistakes, especially if the new plan splits precincts, which requires the local registrar of voters to move voters in split precincts *by hand*. App. 376-379.

This is not mere conjecture. Ms. Hadskey, Louisiana's Commissioner of Elections testified that this scenario has already occurred because of a compressed timeframe this cycle. For example, in Calcasieu Parish, late census information

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either of these dates would have a waterfall effect, impacting numerous deadlines that, in turn, decrease the time needed for ballot coding and printing, ahead of federal deadlines that cannot be moved.

caused a rushed entry of voter information and led to entry of incorrect voter information, ultimately resulting in the issuance of incorrect ballots. App. 379. As a result, a judge required state and local officials to hold a special municipal election to remedy the issue. *Id.* Thus, the undisputed evidence shows that rushing voter assignments in ERIN leads to mistakes. App. 378-379. That these issues arose in a small parish-wide election suggests catastrophe during the congressional races. A statewide special election might ensue if the election tanks, and Louisiana's failure to seat its Congressional representatives on time would not be out of the question.

Ms. Hadskey expressed this very concern in her testimony. Specifically, she testified that the issues Calcasieu Parish experienced will arise again on a much larger scale if a new congressional plan is implemented by the Court in June or July—especially since there are nineteen new registrars who have never handled decennial redistricting before. App. 379-380. She continued:

> I'm extremely concerned. I'm very concerned because when you push—when you push people to try and get something done quickly and especially people that have not done this process before, the worst thing you can hear from a voter is I'm—I'm looking at my ballot and I don't think it's right, I think I'm in the wrong district or I don't feel like I have the right races.
>
> The other thing is notifying the voters. I think we all can relate to we know who our person is that we voted for Congress or for a school board or any race; and when you get there and you realize it's not the person you are looking for, you're thinking that's who you are going to vote for and then you find out, wait, I'm in a different district. If we don't notify them in enough time and have that corrected, it causes confusion across the board, not just confusion for the voters, but also confusion for the elections administrators trying to go back and check and double check that what they have is correct.

App. 381-382.

This is precisely why *Purcell* requires a stay of the lower court's orders. The Supreme Court held in *Purcell*, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. at 4-5. In similar situations, this Court has regularly issued stays.[11]

Purcell is a "bedrock tenet of election law." *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). It stands for twin simple, unassailable propositions: "(i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Id*. at 879 (Kavanaugh, J., concurring) (citing *Purcell*, 549 U.S. 1).

The lower courts transgressed these principles. Because they did, this Court should resuscitate them by issuing the stay.[12] The lower courts erred in both simply counting days until the election and comparing that count with the other cases

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[11] *See Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of stay application); *Merrill v. People First of Ala*., 141 S. Ct. 25 (2020); *Clarno v. People Not Politicians*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho,* 140 S. Ct. 2616 (2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205 (2020) (per curiam); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam); *Veasey v. Perry*, 574 U.S. 951 (2014).

[12] Where lower courts have transgressed these principles, this Court has consistently stayed those opinions. *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers) (issuing stay in March of election year); *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (issuing stay about a year and a half before the next election); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (stay of an order enjoining North Carolina's Congressional districts 4 months ahead of the primary election).

applying the *Purcell* doctrine. They made a faulty assumption that all state election laws and administrative burdens are equal. Under *Purcell* "the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or non-issuance of an injunction, considerations specific to election cases and its own institutional procedures." *Purcell*, 549 U.S. at 4. The lower courts did not address Louisiana-specific laws that require additional time and administrative duties beyond what is required in other states. Nor did the courts adequately grapple with the fact that a Louisiana parish has already held one special election this year because of rushed election administration, much less state-wide and ultimately harm the nation as a whole as well.

The courts simply did basic math and assumed *Purcell* did not apply. This is insufficient. Under *Purcell,* courts were required to balance the harms. The lower courts here performed no balancing that took into account that administrators are not just implementing the state Congressional plan, or a few statewide redistricting plans, but dozens, if not hundreds of municipal and school board redistricting plans too. App. 376-380. Thus, under Louisiana's election laws, the work required to administer the election is significantly more than states' where administrators may only deal with a few plans.

Take for example, *Moore v. Harper,* 142 S. Ct. 1089 (2022), where just this term this Court refused to grant relief that would change North Carolina's congressional election districts due to *Purcell.* 142 S. Ct. 1089 (Kavanaugh, J., concurring). In North Carolina the plans at issue for the State Board of Elections were statewide plans for

congressional elections, and state general assembly elections. The State Board told this Court that those three plans were needed three months before the primary for orderly implementation of the election.[13]

The situation here could not be any more different, where dozens of municipalities and school boards are also redistricting after the decennial census, with plans all due to the Secretary of State for administration in the November 2022 election cycle on June 22, 2022. La. Rev. Stat. §18:465(E)(1)(a). Logically, if a state's election administrators need three months to administer three statewide districting plans to ensure an orderly election, then it's impossible to not find that more than three months might be needed in a state like Louisiana with dozens if not hundreds of redistricting plans to implement. And, as discussed above, ballots for Louisiana's election cannot be prepared until *all* redistricting plans are implemented.

Louisiana is entitled to have state election laws that allow for municipalities and school boards to redistrict in the same year as congressional districting. Louisiana's elections officials should not be penalized for attempting to comply with their own laws that make election administration in a decennial redistricting year more difficult to administer than other states'. Because the lower courts erroneously assumed all state election laws are equal, and all state election administrators are faced with the same burdens, they failed to adequately weigh the harms under *Purcell*. As a result, this Court should stay these opinions as they are in contravention

[13] https://www.supremecourt.gov/DocketPDF/21/21-1271/215498/20220302161119617_21A455_Response.pdf pp. 9-10.

of *Purcell*. *Merrill,* 142 S. Ct. at 879-880

III. THE EQUITIES TILT DRAMATICALLY IN FAVOR OF GRANTING A STAY.

Given that Plaintiffs elected solely to bring *statutory* claims, their interests must subordinate to the *constitutional* claims of Louisiana's public. Simply put, it "is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest."). And here, the constitutional rights of the entire Louisiana electorate hang in the balance. "The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification," *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). (citing *Shaw I*, 509 U.S. at 641), and the district court's preliminary-injunction order mandates a racial gerrymander. *See supra* at Section I, B. If Section 2 does *not* require creating a gerrymandered second majority-Black district, Louisiana's entire electorate suffers an irreversible Fourteenth Amendment violation when they next cast their ballots for their congressional representatives.

This Court will address an identical issue to the one here—*i.e.,* when does Section 2 of the Voting Rights Act command the creation of additional majority-minority districts. Given the public deprivation that would ensue if (1) the district court's preliminary injunction were to stay in effect, (2) the 2022 midterms were to take place with Louisiana's judicially mandated majority-minority districts and (3) soon after, this Court held that the district court's analysis perpetuated an Equal

Protection violation against every one of the State's voters, the public interest all but ensures that entering a stay is the correct approach here. Given the risk to the public that would arise without a stay, entering one far outweighs any burden Plaintiffs may claim.

CONCLUSION

From start to finish, the proceedings below have transgressed this Court's instructions—and, making matters worse, as recently as yesterday the district court threatened the House Speaker with contempt for engaging his legislative duties, which were apparently not to her satisfaction, interfering with the very legislative defense the State is owed by federal courts in this process.

Only two months ago, the Court reversed a decision from the Wisconsin Supreme Court that—as here—"embrac[ed] just the sort of uncritical majority-minority district maximization that [the Court] ha[s] expressly rejected." *Wis. Legis.*, 142 S. Ct. at 1249 (citing *De Grandy*, 512 U. S., at 1017. And four months ago, this Court stayed a district court order imposing the *precise injunction* that the district court levied in this case—*i.e.*, creation of an additional majority-minority district under the auspices of Section 2.

For all these reasons, the Petitioners request that the Court (1) immediately enter an administrative stay, (2) enter a stay pending appeal, and (3) construe this stay application as a petition for writ of certiorari before judgment, grant it, expedite it and consolidate it, or alternatively grant it and hold in abeyance pending the Court's decision in *Merrill*.

Respectfully submitted,

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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

The Louisiana State Conference of the NAACP is a non-profit membership civil rights advocacy organization. There are no parents, subsidiaries and/or affiliates of the Louisiana State Conference of the NAACP that have issued shares or debt securities to the public.

Power Coalition for Equity and Justice is a non-profit coalition of community organizations that, among other things, works to engage voters in Louisiana. There are no parents, subsidiaries and/or affiliates of the Power Coalition for Equity and Justice that have issued shares or debt securities to the public.

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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,

/s/ *Stuart Naifeh*
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JUNE 23, 2022

(ORDER LIST: 597 U.S.)

TUESDAY, JUNE 28, 2022

CERTIORARI GRANTED

21-1596 (21A814) ARDOIN, LA SEC. OF STATE, ET AL. V. ROBINSON, PRESS, ET AL.

The application for stay presented to Justice Alito and by him referred to the Court is granted. The district court's June 6, 2022 preliminary injunctions in No. 3:22-CV-211 and No. 3:22-CV-214 are stayed. In addition, the application for stay is treated as a petition for a writ of certiorari before judgment, and the petition is granted. The case is held in abeyance pending this Court's decision in *Merrill, AL Sec. of State, et al. v. Milligan, Evan, et al*. (No. 21-1086 and No. 21-1087) or further order of the Court. The stay shall terminate upon the sending down of the judgment of this Court.

Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application for stay and dissent from the treatment of the application as a petition for a writ of certiorari before judgment and the granting of certiorari before judgment.

June 8, 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, and Louisiana Secretary of State Kyle Ardoin, request that this Court set *Ardoin, et al. v. Robinson, et al*., No. 21A814 (U.S.) for oral argument and briefing on the merits in the normal course.

On June 28, 2022, this Court granted Petitioners' application for stay, holding this case in abeyance pending "this Court's decision in *Merrill, AL Sec. of State et al. v. Milligan, Evan, et al.* (No. 21-1086 and No. 21-1087) or further order of the Court" with the stay terminating "upon the sending down of judgment of this Court." *Ardoin v. Robinson*, No. 21A814 (U.S.) (June 28, 2022). In granting the stay, the Court also treated the application for stay as a petition for writ of certiorari and granted that petition as well. *Id*.

On June, 8 2023, this Court issued its opinion in the consolidated *Milligan* and *Castor* litigation.[1] In *Milligan*, the Court addressed "Alabama's attempt to remake [the Court's] §2 jurisprudence anew," *Allen v. Milligan*, 599 U.S. ___ (2023) (slip op., at 15). While the "heart" of *Milligan* was "not about the law as it exists," *see id*., the heart of *Ardoin* is about the district court's misapplication of the law as it exists both before *Milligan* and after.

Today's decision in *Milligan* does not address the district court's significant errors of law that should rightly result in reversal. The issues raised in the motion for stay, and to be more fully briefed on appeal, that were not addressed in *Milligan* include, but are certainly not limited to: (1) the proper analysis of "legally significant racially polarized voting," *Thornburg v. Gingles*, 478 U.S. 30, 55 (1986), under the third *Gingles* precondition; (2) the power of the district court to order a racial gerrymander as a remedy; (3) the proper analysis of the compactness of the minority community—as opposed to the district itself—under *Gingles* 1; and (4) the standard to apply to mandatory, as compared to prohibitory, preliminary injunctions. *See* 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); *see also* Petitioners'

[1] *Allen v. Milligan*, No. 21-1086 and *Allen v. Caster*, No. 21-1087.

Reply in Support of Application for Stay, *Ardoin, v. Robinson*, No. 21A814 at 6-14 (June 24, 2022).

Milligan also once again makes clear 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). The most peculiar facts, among many here, are that Louisiana maps with two majority-minority congressional districts (out of seven districts) have 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 U.S. Department of Justice also subsequently twice precleared Louisiana's congressional maps with one majority-minority congressional district. *See Hays v. Louisiana*, 862 F. Supp. 119, 124 n.4 (W.D. La. 1994). Finally, while Louisiana's demographics remain largely the same today as they were then, Louisiana has lost one of its congressional districts due to apportionment, which makes it even more improbable that a map with two majority-minority districts could be constitutionally drawn. These facts alone also suitably distinguish the Court's *Milligan* decision.

Therefore, *Ardoin* Petitioners respectfully request that the Court set this matter for briefing on the merits and oral argument in the normal course.

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

Respectfully submitted,

/s/ *Elizabeth B. Murrill*

Counsel for Appellant State of Louisiana

June 12, 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:

The *Robinson* Respondents write in response to Petitioners' June 8, 2023 letter to the Court. Letter from Louisiana Attorney General Jeff Landry to Hon. Scott Harris (June 8, 2023) ("Pet. Ltr. Br."). Petitioners' principal argument in seeking the doubly extraordinary relief of a stay and certiorari before judgment was that "this case presents the same question as *Merrill* [v. *Milligan*]." *See* Petitioners' Emergency Application for Administrative Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment, *Ardoin* v. *Robinson*, No. 21A814 (June 17, 2022) ("Pet. Stay App."), at 4-5. Now that *Milligan* has been decided and affirmed, there is no longer any basis for hearing this case before judgment. The preliminary injunction in *Robinson* was issued by the district court applying the same standards on which this Court affirmed the preliminary injunction in *Allen* v. *Milligan*, 599 U.S. __ (2023). Because the reasons for granting it no longer exist, this Court should dismiss the petition for certiorari as improvidently granted. Alternatively, the district court's decision should be summarily affirmed.

In *Milligan*, the Court reaffirmed the standards it first adopted in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), standards that the Court has applied for nearly forty years in litigation under §2 of the Voting Rights Act. *Milligan*, Slip Op. at 11. Applying those standards in *Milligan*, the Court affirmed the judgment of the three-judge panel that the Alabama congressional redistricting plan at issue likely violated §2. *Id.*

The district court here applied the same *Gingles* standards in reaching the same conclusion with respect to Louisiana's congressional redistricting plan and preliminarily enjoining that plan. *Robinson* v. *Ardoin*, 605 F. Supp. 3d 759 (M.D. La. 2022). A Fifth Circuit motions panel also applied *Gingles* in a manner consistent with *Milligan* in denying Petitioners' motion for a stay pending appeal. *See Robinson* v. *Ardoin*, 37 F.4th 208 (5th Cir. 2022) (Smith, Higginson, and Willett, JJ.). This Court's opinion in *Milligan* confirms the correctness of those decisions. Further, because this matter came to this Court on a stay request, the Fifth Circuit has not had an opportunity to consider Petitioners' appeal on the merits. Dismissing Petitioners' certiorari petition will simply allow this case to proceed in the ordinary course in the lower courts, and will allow Petitioners (or Respondents, if the Fifth Circuit rules against us) another opportunity to seek review if warranted after the Fifth Circuit rules.

Petitioners offer no good reason for this Court to take the extraordinary step of hearing this case before the Court of Appeals has even heard or decided the case on the

merits. The Court granted certiorari before judgment pending its decision in *Milligan*, on Petitioners' representation that the cases "present[] the same question." *See Ardoin* v. *Robinson*, 142 S. Ct. 2892 (2022) (holding this case "in abeyance pending this Court's decision in [*Milligan*] or further order of the Court"). The *Milligan* decision has now issued, and Petitioners have failed to make the extraordinary showing required for this Court to proceed with this case. *See* S. Ct. R. 11 ("A petition for a writ of 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."). Because the reasons for the grant of certiorari before judgment no longer exist, the Court should dismiss the petition as improvidently granted.

Petitioners' belated about-face assertion that this case does not "present the same question as *Milligan,*" but differs materially is, in any event, incorrect. All of the purportedly distinguishing issues Petitioners identify are addressed in *Milligan* or other decisions of this Court in §2 cases that *Milligan* reaffirms. Plaintiffs in both *Milligan* and *Robinson* presented the kind of evidence this Court has long required and has now reaffirmed in *Milligan* as sufficient to prove a §2 violation.

First, with respect to the compactness of the minority community, *Milligan* reaffirmed the existing legal standards governing that showing, which the district court applied in evaluating the evidence proffered by Respondents below. *See* Opposition to Application for Stay Pending Appeal and Writ of Certiorari Before Judgment, No. 21A814 (2022) ("Stay Opp."), at 35-39 (describing district court's analysis of Respondents' illustrative maps").

Second, Respondents offered the same kind of evidence of polarized voting, demonstrating similar levels of extreme racial polarization, as this Court found sufficient in *Milligan* to show "legally significant racially polarized voting"—that is, bloc voting sufficient to result in the usual defeat of minority-preferred candidates. *Compare*, *e.g.*, Opposition to Application for Stay Pending Appeal and Writ of Certiorari Before Judgment, No. 21A814 (June 23, 2022) ("Stay Opp."), at 27 n.2 (citing evidence that white voters' support for Black-preferred candidates ranged from 11.7% to 20.8%), *with Milligan*, Slip Op. at 14 (affirming district court's *Gingles* II and III findings based on evidence that "white voters supported Black-preferred candidates with 15.4% of the vote"). The district court in *Robinson*, as in *Milligan*, found that this level of polarized voting prevented Black-preferred candidates from being elected in all but the state's sole majority-Black district. 605 F. Supp. 3d at 842-43, and the Fifth Circuit, in reliance on this Court's decisions in *Gingles* and *Wis. Legislature* v. *Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022), agreed with the district court's analysis, 37 F.4th at 225.

Finally, the mandatory preliminary injunctions in both the *Milligan* and *Robinson* cases contained materially identical terms calling for the legislature or the court to create

a new congressional map that remedies the identified §2 violation. As this Court confirmed in *Milligan*, when §2 of the Voting Rights Act has been violated, a race conscious remedial map that respects traditional redistricting principles (as the Respondents' proposed remedial plan does here) is appropriate and does not constitute unlawful racial gerrymandering. *Milligan*, Slip Op. at 34 ("race-based redistricting" is appropriate and lawful "as a remedy for state districting maps that violate §2"); *id*. at 12 ("Alabama could enact" any of plaintiffs' illustrative maps that remedied the section 2 violation and "comported with traditional redistricting principles."); Stay Opp. at 34-35 (describing district court and Fifth Circuit rulings that Respondents' illustrative maps satisfied traditional redistricting principles).

Most importantly, this Court took this case on Petitioners' representation that, in *Milligan*, it would "address an identical issue to the one here." *See* Pet. Stay App., at 39; *id*. at 1 (the Court's decision in *Milligan* "will soon resolve … [w]hether 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"). If that is the case, now that *Milligan* has been affirmed without changing the law, there is no basis for hearing this case before the Fifth Circuit has an opportunity to address the merits. Petitioners are free to argue that it should come out differently, but the justification for hearing the case outside of the normal course has evaporated.

Insofar as Petitioners' letter is circulated to the Members of the Court, we respectfully ask that you circulate this letter to the Court as well.

Respectfully submitted,

/s/ Stuart Naifeh

STUART NAIFEH

CERTIFICATE OF SERVICE

I, Stuart Naifeh, certify that I filed Respondents' June 12, 2023 letter electronically with the Court; that I am having a copy of the letter delivered to the Clerk through FedEx and that I am serving a copy of the letter on the following counsel through FedEx:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 12, 2023.

/s/ Stuart Naifeh

STUART NAIFEH

(ORDER LIST: 599 U.S.)

MONDAY, JUNE 26, 2023

CERTIORARI -- SUMMARY DISPOSITIONS

21-1596 (21A814) ARDOIN, LA SEC. OF STATE, ET AL. V. ROBINSON, PRESS, ET AL.

The writ of certiorari before judgment is dismissed as improvidently granted. The stay heretofore entered by the Court on June 28, 2022, is vacated. This will allow the matter to proceed before the Court of Appeals for the Fifth Circuit for review in the ordinary course and in advance of the 2024 congressional elections in Louisiana. See this Court's Rule 11.

22-425 CARNAHAN, ADM'R, GSA V. MALONEY, CAROLYN, ET AL.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit with instructions to dismiss the case. Justice Jackson dissents from the vacatur of the order of the United States Court of Appeals for the District of Columbia Circuit and would instead dismiss the writ of certiorari as improvidently granted.

22-683 GUILLEN-PEREZ, MELINA D. V. GARLAND, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Santos-Zacaria* v. *Garland*, 598 U. S. ___ (2023).

22-856 GARCIA MARIN, RAUL V. GARLAND, ATT'Y GEN.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United

22-30333

In The

United States Court Of Appeals For The Fifth Circuit

PRESS ROBINSON; EDGAR CAGE; DOROTHY NAIRNE; EDWIN RENE SOULE; ALICE WASHINGTON; CLEE EARNEST LOWE; DAVANTE LEWIS; MARTHA DAVIS; AMBROSE SIMS; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE LOUISIANA STATE CONFERENCE, ALSO KNOWN AS NAACP; POWER COALITION FOR EQUITY AND JUSTICE,
Plaintiffs – Appellees,

v.

KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR LOUISIANA,
Defendant – Appellant,

CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ; STATE OF LOUISIANA - ATTORNEY GENERAL JEFF LANDRY,
Intervenor Defendants – Appellants.

EDWARD GALMON, SR.; CIARA HART; NORRIS HENDERSON; TRAMELLE HOWARD,
Plaintiffs – Appellees,

v.

KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR LOUISIANA,
Defendant – Appellant,

CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ; STATE OF LOUISIANA - ATTORNEY GENERAL JEFF LANDRY,
Movants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, BATON ROUGE: 053N-3 : 3:22-CV-211; 053N-3 : 3:22-CV-214
THE HONORABLE SHELLY DECKERT DICK, U.S. DISTRICT JUDGE

EMERGENCY MOTION FOR STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

No. 22-30333 *Robinson v. Ardoin*

The undersigned counsel of record certifies pursuant to Fifth Circuit Rule 27.3 and Rule 28.2.1 that the following listed persons and private entities have an interest in the outcome of this case, including all private practice lawyers and private law firms currently engaged in this litigation. Pursuant to the fourth sentence of Rule 28.2.1, government officials and entities are not included in this certificate. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTRODUCTION AND NATURE OF HARM

Over three weeks after the conclusion of a week-long preliminary injunction hearing, and despite impending elections deadlines, the district court enjoined the use of Louisiana's Congressional districts. At every turn, the injunction ignores both controlling precedent and testimony from election officials responsible for the administration of elections. Instead, the district court cherry picks evidence, relies upon testimony of a lawyer for the Governor who has never administered an election in Louisiana, and discounts established Fifth Circuit and Supreme Court precedent. For the following reasons, this Court's immediate intervention is necessary to vindicate Louisiana's interest in the administration of an orderly election, to prevent widespread voter confusion, and to eliminate catastrophic harm to Louisiana voters.

First, the district court erred because Defendants are likely to succeed on the merits. The district court ignored controlling precedent to sidestep the fact that Plaintiffs' illustrative plans are racial gerrymanders which cannot satisfy the first (or any other) *Gingles* condition. *Sensley v. Albritton*, 385 F.3d 591, 597 (5th Cir. 2004); *Cooper v. Harris,* 137 S. Ct. 1455, 1468-69 (2017). The district court also ignored controlling precedent demonstrating that Plaintiffs' illustrative plans wrongly combine "far-flung segments of a racial group with disparate interests." *LULAC v. Perry*, 548 U.S. 399, 433 (2006). Instead, the district court twisted the burden of proof criticizing Defendants for failing to present evidence proving the illustrative plans did not combine coherent communities of interest. (D.E. 173, 100-

101). The district court also ignored that the third *Gingles* condition cannot be established "[i]n areas with substantial crossover voting." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). In order to reach this conclusion, the district court overlooked the "crucial difference between legally significant and statistically significant racially polarized voting." *Covington v. North Carolina*, 316 F.R.D. 117, 167, 169–70 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). The district court failed to cite any evidence supporting the notion that a reasonably compact group of black voters can constitute a majority in a second single-member congressional district and that any such district must be drawn with a black voting age population over 50% to provide black voters with an equal opportunity to elect their preferred candidate in that district.

Second, the district court refused to stay this case in light of the Supreme Court's stay order in *Merrill v. Milligan* (Sup. Ct. 21-1086). The claims and defenses (and, for good measure, many of the Plaintiffs' counsel) in *Merrill* are essentially identical to the claims and defenses in this case. Accordingly, staying the proceedings in the instant case in light of *Merrill* is in the best interests of the parties and the judicial system. If the Supreme Court finds that Plaintiffs' illustrative districts in *Merrill* amount to racial gerrymanders, or are not required under the VRA, or otherwise alters the legal standards under the VRA, then the upcoming remedial phase and appeals on the merits in the instant case will constitute a waste of time of the Court and the parties, not to mention a waste of funds of the taxpayers of Louisiana.

Finally, the district court has erroneously intervened into state election laws in defiance of the *Purcell* doctrine. Tellingly, the injunction was issued 155 days before the November 2022 election, and 110 days prior to the date ballots must be mailed overseas pursuant to federal law. This Court has previously indicated that lower courts "interven[ing] and alter[ing] the election rules" 168 days before an election, is an "error" that must be corrected. *Texas Democratic Party v. Abbott*, 961 F.3d 389, 412 (5th Cir. 2020) (*app. to vacate stay den'd*, 140 S. Ct. 2015). In erroneously intervening, the district court largely ignored the testimony of Louisiana's Commissioner of Elections, choosing instead to rely on a witness who has never administered elections. The district court also repeatedly and erroneously asserted that the election is "6 months" away, when in fact, the federal election is 5 months away on November 8, 2022.

The district court has now refused to grant Defendants' Joint Motion for Stay. Therefore, Secretary of State Ardoin respectfully requests an emergency stay pending appeal by **Tuesday, June 14, at 12:00pm**. Secretary Ardoin also requests that a temporary administrative stay be immediately issued until such time as this Court can rule on his application for a permanent stay of the district court's preliminary injunction. Under the circumstances of this case, a stay is necessary to prevent manifest injustice to the citizens of Louisiana.

ARGUMENT

Standard of Review

Under the "traditional" standard for a stay pending appeal, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009).

However, in election cases where an injunction has issued close to an upcoming election, the standard is arguably more relaxed and the burden shifts to the plaintiff. Under those circumstances, plaintiffs must show that "(i) the underlying merits are entirely clear-cut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill,* 142 S. Ct. at 881. A stay should be issued under any of these standards.

Discussion

I. Defendants will succeed on the merits.

Under current precedent the district court's order is unlikely to withstand appellate scrutiny and Defendants will succeed on the merits. The reason

Defendants will succeed on the merits is fully outlined in the Joint Proposed Findings of Fact and Conclusions of Law, which Secretary Ardoin incorporates here by reference. Secretary Ardoin will focus here on several egregious errors by the district court that alone should be fatal to the court's order.

First, Plaintiffs' illustrative plans are plainly racial gerrymanders. *Sensley*, 385 F.3d at 59; *Miller v. Johnson,* 115 S. Ct. 2475 (1995). During the 1991 redistricting cycle, after repeated refusals by the DOJ to preclear a plan drawn by the Georgia General Assembly without a third majority-minority district, the General Assembly finally relented and enacted the ACLU's "max-black" plan. *Id.* at 2484. The hallmark of the ACLU's "max-black" plan was the "Macon/Savannah trade" which moved the black population of Macon into a new district, thereby creating a district that connected "black neighborhoods of metropolitan Atlanta to the poor black populace of Coastal Chatham County" near Savannah. *Id.* This new district was 260 miles long and "worlds apart in culture." *Id.* The Supreme Court found this district was a "geographic monstrosity" tying majority black population centers at the periphery of Atlanta, Augusta, and Savannah with a sparsely populated rural area called "plantation country." *Id.* In striking down this "max-black" strategy, the Supreme Court held that only "a shortsighted and unauthorized view of the Voting Rights Act…which has played a decisive role in redressing some of our worst

forms of discrimination" could support "the very racial stereotyping the Fourteenth Amendment forbids." *Id.* at 2494.

Plaintiffs' illustrative plans bear striking similarities to the ACLU's 1991 "max-black" plan. The plans are almost the exact same length as the Georgia district struck down in *Miller.* Moreover, all the illustrative plans take urban and suburban areas of East Baton Rouge Parish ("EBR") and connect them to far away northeastern parishes which have a largely rural and agrarian economy. These configurations have never been seen before in any lawful district.

These configurations also create a likely unlawful districting scheme because there is no evidence that EBR has legally significant racially polarized voting. While the district court's order confuses the distinction between statistically significant racially polarized voting and legally significant racially polarized voting, the Supreme Court is clear that polarized voting becomes legally significant only when there is "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes…." *Thornburg v. Gingles*, 478 U.S. 30, 55-56 (1986). Plaintiffs failed to prove that white voters voted as a bloc to defeat the combined strength of minority voters plus white crossover voters, and the district court ultimately ignored testimony showing there was often significant white crossover voting in EBR resulting in the election of minority preferred candidates.

Second, the district court did not address Defendant's arguments under *Cooper* where the Supreme Court struck down North Carolina's CD1, finding that the inclusion of the urban area of Durham was an attempt to reach an impermissible racial target. 137 S. Ct. at 1466-1472. The *Cooper* Court held that electoral history provided "no evidence that a §2 plaintiff could demonstrate the third *Gingles* prerequisite- effective white block voting" in Durham. *Id.* at 1472. In *Cooper,* the Supreme Court held that the victories by preferred candidates occurred because the district's white population did *not* vote sufficiently as a bloc to thwart black voter preference. *Id.* This doomed the state's efforts to redraw CD1 with a majority black population using the black population in Durham because "in areas with substantial cross over voting" §2 plaintiffs cannot prevail because they cannot establish the 3rd *Gingles* prong. *Id. citing Strickland,* 556 U.S. at 24. All of Plaintiffs' illustrative plans make the same legal mistake—they use black population in EBR, where there is substantial crossover voting, to achieve the 50% racial target needed to draw a second majority black district. Plaintiffs' mapdrawer conceded that the second majority black district could not have been drawn without using black population in EBR. FOF 148, Appendix Ex. 13. This is indistinguishable from North Carolina's impermissible use of Durham's black population to form the basis for a majority black district and dooms Plaintiffs' claims.

Finally, the district court completely failed to grapple with the *Gingles* geographic compactness requirement as explained by the Supreme Court in *LULAC*. The district court simply relied on Plaintiffs' experts' mathematical compactness calculations purporting to show that the illustrative plans met certain scores. But this reduces the compactness inquiry to "style points." *LULAC*, 548 U.S. at 434. "The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district." *Id.* at 433 (citation omitted). An illustrative district is not compact if it adjoins disparate communities on the basis of race, *see Sensley*, 385 F.3d at 597, notwithstanding their "different characteristics, needs, and interests," *LULAC*, 548 U.S. at 434. A district joining urban and suburban Black residents in EBR with rural Black residents of the delta region up to one-hundred eighty miles away, COL ¶487 Appendix Ex. 13, is precisely the type of district *LULAC* and *Sensley* found non-compact. *See Sensley*, 385 F.3d at 597 (finding a district joining discrete communities "roughly 15 miles apart from one another" failed the first precondition).

II. This Case Should be Stayed Pending the Outcome of *Merrill v. Milligan.*

On February 7, 2022, the United States Supreme Court announced that it will consider issues associated with claims identical to the claims in this case in *Merrill v. Milligan* (Sup. Ct. 21-1086).[1] The specific legal issues common to *Merrill* are

[1] This case was consolidated with *Caster v. Merrill* (Sup. Ct 21-1087), which raised largely the same issues and was heard at the same time as *Merrill v. Milligan.*

dispositive issues in the instant case. Plaintiffs here rely upon the same statutes, arguments, and in some instances share the same counsel and experts as *Merrill*.

The Court considers three factors in determining whether to stay a case pending outcome of other litigation that could have a dispositive effect on the case at hand. *Coker v. Select Energy Servs., LLC*, 161 F. Supp. 3d 492, 495 (S.D. Tex. 2015). In weighing the various competing interests, courts consider: (1) the potential prejudice to plaintiffs from a brief stay; (2) the hardship to defendants if the stay is denied; and (3) the judicial efficiency in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay. *Id.*

Staying the proceedings in the instant case in light of *Merrill* is in the best interests of the parties and the judicial system. If the Supreme Court finds that Plaintiffs' illustrative districts in *Merrill* amount to racial gerrymanders, or are not required under the VRA, or otherwise alters the legal standards under the VRA, then the upcoming remedial phase and merits appeal in the instant case will constitute a waste of time of the Court and the parties, not to mention a waste of funds of the taxpayers of Louisiana. A stay pending *Merrill* is warranted under these circumstances. *See Bank of La. v. Fed. Deposit Ins. Corp*., 919 F.3d 916, 921 (5th Cir. 2019) (noting the court "stayed proceedings pending the Supreme Court's decision in *Lucia v. SEC*"); *Louisiana ex rel. Guste v. Roemer*, 949 F.2d 145, 150 (5th Cir. 1991) (noting the court stayed proceedings "pending a resolution by the

United States Supreme Court of *Ayers v. Mabus*"); *Creasy v. Charter Commc'ns, Inc.*, 489 F. Supp. 3d 499, 511 (E.D. La. 2020) ("Because the viability of the plaintiffs' surviving claim will turn in large part on the Supreme Court's forthcoming decision in *Facebook, Inc. v. Duguid*, staying this action in wait of such a decision is the best course.").

A. The Dispositive Nature of *Merrill* Warrants a Stay.

Merrill squarely presents the same fundamental questions confronted in this litigation. The appellants' merits brief in *Merrill* characterizes the question presented for the Supreme Court as:

> 1. Whether the 2021 Alabama Congressional redistricting plan violated §2 of the Voting Rights Act, 52 U.S.C. §10301, as the District Court determined that it was likely that it did, in light of Plaintiffs' evidence showing that it was possible to draw, not one majority minority district, as it had existed for decades but 2, majority minority districts, by ignoring preexisting districts, and prioritizing racial considerations over race-neutral districting criteria.

Furthermore, the facts in *Merrill* are essentially identical to the facts here. In *Merrill*, Plaintiffs, with largely the same counsel as are representing Plaintiffs here, alleged that because the statewide population of Alabama was such that a second majority-minority district could be drawn, the VRA requires it be drawn. This is the same claim brought by Plaintiffs here. The *Merrill* defendants countered that Alabama's districts were based on core retention of the previous districting plans for the last few decades—the same defense raised in the instant case—and that the

illustrative plans proposed by Plaintiffs prioritized race over traditional districting principles. The record in this case is clear that Plaintiffs' mapdrawers, including Mr. Cooper, also an expert for Plaintiffs in *Merrill,* prioritized race in drawing their illustrative plans. Based on the issues raised and the similarity of the facts, it is likely the Supreme Court's decision in *Merrill* will be dispositive of the issues here, including whether Plaintiffs can show a likelihood of success on the merits. In fact, this Court need look no further than the fact that the district court cited the corresponding district court case in *Merrill* 16 times in its preliminary injunction opinion.

B. Judicial Economy Warrants a Stay.

Judicial economy is best served by staying any further proceedings in this case until after the Supreme Court issues its opinion in *Merrill*. There is little point to re-drawing districts or proceeding on an appeal on the merits with all of the public confusion and expense that comes with the same as the Supreme Court is hearing and considering a case that will be controlling on any analysis of the facts and law. *See Greco v. NFL,* 116 F.Supp. 744, 761 (N.D. Tx. 2015) ("appropriate conservation of judicial resources" and "risk of duplicative litigation" weighed in favor of a stay when a pending Fifth Circuit case would "very likely bear on this case").

C. The Prejudice to Plaintiffs in Granting a Stay is Minimal, While the Prejudice to Defendants in Denying a Stay Would be Severe.

The remedial phase ordered by the district court will be highly publicized and expend significant taxpayer resources. It will also cause widespread voter confusion

for Louisianians who have already received updated voter cards informing them of their new congressional district. Awaiting guidance while the Supreme Court is reviewing controlling and likely dispositive cases bests serves the public welfare. Furthermore, the hardship to Plaintiffs is minimal. Plaintiffs too benefit from resolving this matter after the Supreme Court rules in *Merrill,* because neither party will have to pay for continued litigation, when the law in this matter will be resolved in the near future.

Furthermore, because it "is always in the public interest to prevent the violation of a party's constitutional rights," *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014), the risk that the injunction actually inflicts, rather than protects against an equal-protection violation, cannot be justified. If Plaintiffs ultimately do not prevail on the merits, then the Court's order will have inflicted a staggering constitutional injury.

To the extent Plaintiffs argue that conducting elections under an "illegal" plan is a hardship, this grossly overstates their harm. Courts order elections to go forward under unconstitutional, or legally suspect districting schemes regularly, when faced with a short time before an election *See Covington*, 316 F.R.D. at 177 (refusing to enjoin election despite a final judgment against certain North Carolina legislative districts because "such a remedy would cause significant and undue disruption to North Carolina's election process and create considerable confusion, inconvenience,

and uncertainty among voters, candidates, and election officials."); *Upham v. Seamon*, 456 U.S. 37, 44 (1982) (holding that despite error by the lower court, the interim plan should be used). Accordingly, this matter should be stayed.

III. The Purcell Doctrine Requires a Stay of the District Court's Order.

The *Purcell* doctrine also requires a stay of the district court's order. The Supreme Court of the United States held in *Purcell v. Gonzalez*, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. 1, 4-5 (2006) (per curiam). Since this seminal opinion, the Supreme Court has regularly stayed injunctions of challenged election laws. *See Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of stay application); *Merrill v. People First of Ala*., 141 S. Ct. 25 (2020); *Clarno v. People Not Politicians*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho,* 140 S. Ct. 2616 (2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205 (2020) (per curiam); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018)(per curiam); *Veasey v. Perry*, 574 U.S. 951 (2014).

Even in a normal election cycle, "[r]unning elections state-wide is extraordinarily complicated and difficult." *Merrill*, 142 S. Ct. at 880. Elections officials must navigate "significant logistical challenges" that require "enormous advance preparations." *Id*. But, the 2022 election cycle has been far from a "normal"

cycle in Louisiana, as the Covid-19 pandemic delayed census results, exacerbating the challenge of drawing new districts and conducting elections under these new districts, statewide and parishwide.

The 2022 election cycle already underway is no exception. In his concurring opinion in *Merrill*, Justice Kavanaugh invoked the *Purcell* doctrine for the proposition that courts "should not enjoin a state's election laws in the period close to an election." 142 S. Ct. at 879-880. This is because "filing deadlines need to be met" and candidates need to "be sure what district they need to file for" or even determine "which district they live in." *Id*. An increased risk of voter confusion resulting from last minute election changes is also a concern. *Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 42 (2020) (DNC) (Kagan, J., dissenting) ("Last-minute changes to election processes may baffle and discourage voters…").

The facts regarding election administration and the election chaos the district court's injunction brings were identified by Louisiana's Commissioner of Elections, Sherri Hadskey—who has 30 years of experience as an elections administrator. Particularly, Ms. Hadskey testified:

- Substantial administrative work has already been completed on administration of the Enacted Congressional Plan. 5/13 Tr. 31:5–15.[2] In order to implement a new congressional plan Ms. Hadskey's office would

[2] The cited transcripts were completed by the parties' court reporter to meet the district court's schedule. Because the official transcripts are not available, these transcripts are submitted in the interim. The May 13 transcript is filed as appendix exhibit 22.

have to reassign voters who are in new congressional districts to their new districts. The Secretary of State's office has already reassigned voters in the fifteen Louisiana parishes that required changes under the enacted plan in the Secretary of State's ERIN system. Moreover, approximately 250,000 voting cards have been sent to voters whose parishes changed districts following reapportionment. *Id*.; Those voters have been notified of the specific congressional district in which they will be voting this year. *See id.*

- Prior to any qualifying deadline, Ms. Hadskey's office must notify voters (and potential candidates) of which districts they live in—which has already been done under the Enacted Plan by the mailing of the new voter cards. *Id*. at 32:2–15. Candidates and voters need adequate notice of these districts to ensure they have enough time to decide whether to attempt to qualify by petition or, in the case of voters, who to support. *Id*. If congressional candidates do not meet the original June 22 qualification deadline, the candidates will have to pay a filing fee and qualify by between July 20-22, 2022. *Id*. at 32:16–20.
- Between now and July 20, Ms. Hadskey's office must complete several tasks to ensure timely and accurate administration of the 2022 election in Louisiana for all offices. *Id*. at 32:21-36:5. These activities include: (1) implementation of complicated school board and municipal redistricting plans; (2) conducting a June 4 special election in Calcasieu Parish due to a redistricting error; (3) conducting yearly maintenance on scanners and voting equipment; (4) processing an estimated 800 legislative acts when the latest session ends; (5) completion of a statewide voter registration canvas to maintain the voter rolls; and (6) complete the voter canvas already began on May 23, 202 which requires determination of whether a voter's address or registered name has changed. *Id*. None of these tasks are straightforward and all are under already limited time constraints.

Implementing a new congressional districting plan would create undue hardship and chaos for Louisiana and its voters. The deadline to mail ballots is merely three months away, and the November election is just five months away (a fact that the district court's order repeatedly misconstrues as six months). And in this now extremely truncated time period, Secretary Ardoin will be required to implement a new

plan, starting the entire process over again. The Order also reduces the amount of time registrars have to program the map, error check, and notify voters and potential candidates of their new districts – which is less than 20 days between the deadline imposed on the legislature and the court-created July 8 petition qualifying deadline.

The hardship here is undeniable. Ms. Hadskey testified that if the Secretary of State were forced to implement one of Plaintiffs' illustrative plans, at a minimum the following tasks would need to be completed by July 20: (1) undoing the coding of the fifteen parishes already completed for the enacted plan; (2) coding the approximately twenty-five parish changes under an illustrative plan, and (3) timely notifying voters and potential candidates of those changes. 5/13 Tr. 36:6-38:2. At each stage, Ms. Hadskey testified that the process would be rushed, which gives her significant concern that voters' information could be coded incorrectly, leading to incorrect information on ballots used in the election. *Id*. at 37:14-38:2. This task would be further complicated if an illustrative map splits precincts, as the registrar of voters for each parish is responsible for moving voters in split precincts by hand. *Id*. at 38:3–12. In addition to regularly scheduled early voting, Ms. Hadskey testified that overseas ballots must be mailed no later than September 24, 2022, under the federal UOCAVA deadline. *Id*. at 45:1-10. While the district court's order blithely states that completing these tasks should be no problem, given the amount of time it took to code the current Congressional plan, this ignores that the current congressional plan was based on core

retention, meaning a fairly low number of voters actually needed to be reassigned. It also completely ignores that Ms. Hadskey and her staff will be required to implement a new plan at the same time they are engaged in all of the other tasks enumerated above. This unanticipated multi-tasking produces a clear risk of error and is exactly what the *Purcell* doctrine is designed to avoid.

In addition to the confusion created by reassigning voters, there is a real risk that such a compressed time frame could lead to the issuance of incorrect ballots, and even possibly an invalidated election. This is not a theoretical concern. Ms. Hadskey testified that this scenario has already occurred due to a compressed timeframe this cycle. For example, in Calcasieu Parish, late census information caused a rushed entry of voter information and led to entry of incorrect voter information, ultimately resulting in the issuance of incorrect ballots. *Id*. at 38:3–21. As a result, a judge required state and local officials to hold a special municipal election in Calcasieu Parish to remedy the issue. *Id*. Ms. Hadskey expressed great concern that the issues Calcasieu Parish experienced will arise again, but on a larger scale, if a new congressional plan is implemented by the Court in June or July—especially considering the fact that there are nineteen (19) new registrars across the state who have not handled decennial redistricting before. 5/13 Tr. at 38:22-39:4. Ms. Hadskey expressed her great concern as to whether her office could administer an error-free election on a new congressional plan within the next few months:

> I'm extremely concerned. I'm very concerned because when you push – when you push people to try and get something done quickly and especially people that have not done this process before, the worst thing you can hear from a voter is I'm -- I'm looking at my ballot and I don't think it's right, I think I'm in the wrong district or I don't feel like I have the right races.
>
> The other thing is notifying the voters. I think we all can relate to we know who our person is that we voted for Congress or for a school board or any race; and when you get there and you realize it's not the person you are looking for, you're thinking that's who you are going to vote for and then you find out, wait, I'm in a different district. If we don't notify them in enough time and have that corrected, it causes confusion across the board, not just confusion for the voters, but also confusion for the elections administrators trying to go back and check and double check that what they have is correct.
>
> *Id*. at 40:12-41:15

Based on Ms. Hadskey's testimony, it is clear that the district court's injunction "require[s] heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). That is hardly contested; Plaintiffs' evidence *supports* it. Plaintiffs' "election-administration" witness, Matthew Block, confirmed as much. As an initial matter, Mr. Block was a curious choice as an "election administration" witness as he has never been an elections commissioner, never served on a parish board of supervisors, never sat on a state elections board, and never meaningfully participated in elections administration. 5/11 Tr. 28:5–29:9.[3] The premise of Mr. Block's testimony was that the election might be

[3] Appendix Exhibit 20.

administered *sans* disaster if the election date, November 8, 2022, is pushed back, as occurred with state legislative elections after Hurricane Ida. 5/11 Tr. 21:17–22:21. But that premise fails: Louisiana may move its state election dates, but not the *federal* election date because Congress codified that date, *see* 2 U.S.C. §§ 1 and 7, under its Elections Clause authority. *Foster v. Love*, 522 U.S. 67, 69 (1997).

Furthermore, Mr. Block testified that, even if the election date could move, elections administration would be a "huge challenge." 5/11 Tr. 23:1–2. This alone concedes that under the *Purcell* doctrine it's too late to change Louisiana's Congressional districts. The *Purcell* doctrine does not afford federal district courts free reign to meddle with state election laws so long as the burdens they impose fall short of the "impossible." Quite the opposite, *Purcell* requires "that federal district courts ordinarily should not enjoin state election laws in the period close to an election," because "[l]ate judicial tinkering with election laws *can* lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill*, 142 S. Ct. at 881. Simply put, *Purcell* forbids injunctions that act like the natural disasters Mr. Block testified about.

Moreover, controlling precedent from this Court confirms this. *See Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016) (remanding §2 case for new trial but ordering that no remedy could be enforced until after the election, which was four months away); *Abbott*, 961 F.3d at 412, *motion to vacate den'd,* 140 S. Ct. 2015

(2020) (staying enforcement of a preliminary injunction that would have resulted election law changes prior to the November 3, 2020 election.) In *Abbott*, the district court issued the injunction on May 19, 2020, and this Court stayed the order on June 4, 2020 holding the district court had "erroneously intervene[ed] and alter[ed] the election rules so close to the election date" *Id*. The injunction in *Abbott* came 168 days before the November 2020 election, and this Court's stay was issued 152 days prior to the election. Here, the injunction comes 155 days before the November 2022 election date. If 168 days was too short in 2020, 155 days is certainly too short today. This Court should follow the same logic it applied in *Abbott* and correct the District Court's "erroneous[] interven[tion]."

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, Secretary Ardoin respectfully requests the Court grant the motion and stay the District Court's June 6, 2022 Order pending the United States Supreme Court's decisions on the dispositive issues in *Merrill v. Milligan* (Sup. Ct. 1086), or in the alternative until after the 2022 Congressional elections on the basis of the *Purcell* doctrine.

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**Applications for Admission pending*

CERTIFICATE OF CONFERENCE

On June 9, 2022, counsel for Appellant R. Kyle Ardoin, in his official capacity as the Louisiana Secretary of State, conferred via email with counsel for *Robinson* Plaintiffs-Appellees; counsel for *Galmon* Plaintiffs-Appellees; counsel for Intervenor Plaintiff-Appellee Louisiana Legislative Black Caucus; counsel for Legislative Intervenor Defendants-Appellants; and counsel for the State of Louisiana Intervenor Defendant-Appellant. *Robinson* Plaintiffs-Appellees, *Galmon* Plaintiffs-Appellees, and Intervenor Plaintiff-Appellee Louisiana Legislative Black Caucus are opposed to the stay requested in this Motion. Legislative Intervenor Defendants-Appellants and the State of Louisiana are unopposed to the requested relief.

/s/ John C. Walsh
John C. Walsh
Counsel of Record for Defendant-Appellant R. Kyle Ardoin

CERTIFICATE OF COMPLIANCE WITH RULE 27.3

I certify the following in compliance with Fifth Circuit Rule 27.3:

- Before filing this motion, counsel for Appellant contacted the clerk's office and opposing counsel to advise them of Appellant's intent to file this motion.

- The facts stated herein supporting emergency consideration of this motion are true and complete.

- The Court's review of this motion is requested by 12:00p.m. CST on Tuesday, June 14, 2022, or alternatively, Appellant requests a temporary administrative stay pending that review at the earliest possible date.

- True and correct copies of relevant order and other documents are attached in the Appendix to this motion, filed separately.

- This motion is being served at the same time it is being filed.

/s/ John C. Walsh
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Counsel of Record for Defendant-Appellant R. Kyle Ardoin

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on June 10, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 35(b)(2)(A) because this brief contains 5,128 words, excluding the parts of the brief exempted by FED. R. APP. P. 32.

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2013 in 14-point font size in Times New Roman.

Dated: June 10, 2022

/s/ John C. Walsh

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No. 22-30333

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRESS ROBINSON, et al.,
Plaintiffs-Appellees,

v.

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana,
Defendant-Appellant,

CLAY SCHEXNAYDER, et al.,
Intervenor Defendants-Appellants.

EDWARD GALMON, SR., et al.,
Plaintiffs-Appellees,

v.

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana,
Defendant-Appellant,

CLAY SCHEXNAYDER, et al.,
Movants-Appellants.

On Appeal from the Middle District of Louisiana
Case Nos. 3:22-cv-211, 3:22-cv-214
The Honorable Shelly D. Dick

Emergency Motion of Legislative Intervenor Defendants-Appellants Under Circuit Rule 27.3 for a Stay Pending Appeal

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Certificate of Interested Persons

***Robinson, et al. v. Ardoin, et al.*, Case No. 22-30333**

Pursuant to Fifth Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Intervenor Defendants-Appellants (movants in the present motion): Clay Schexnayder and Patrick Page Cortez, in their official capacities as Speaker of the Louisiana House of Representatives and President of the Louisiana Senate, represented by Baker & Hostetler LLP attorneys Katherine L. McKnight, Richard B. Raile, E. Mark Braden, Michael W. Mengis, Patrick T. Lewis, Erika Dackin Prouty, and Renee M. Knudsen.

Intervenor Defendant-Appellant: State of Louisiana, by and through Attorney General Jeff Landry, represented by Louisiana's Office of the Attorney General attorneys Elizabeth Baker Murrill, Angelique Duhon Freel, Carey T. Jones, Jeffrey Michael Wale, Morgan Brungard, and Shae McPhee; and by Holtzman Vogel Josefiak Torchinsky PLLC attorneys Jason B. Torchinsky, Dallin B. Holt, and Phillip Michael Gordon.

Defendant-Appellant: Kyle Ardoin, in his official capacity as Secretary of State for Louisiana, represented by Shows, Cali & Walsh, LLP attorney John Carroll Walsh; and by Nelson Mullins Riley & Scarborough LLP attorneys

Alyssa Riggins, Cassie Holt, John E. Branch, III, Phillip Strach, and Thomas A. Farr.

Plaintiffs-Appellees: Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, National for the Advancement of Colored People Louisiana State Conference (NAACP), Power Coalition for Equity and Justice, represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP attorneys Adam Savitt, Amitav Chakraborty, Briana Sheridan, Daniel Sinnreich, Jonathan Hurwitz, Robert A. Atkins, Ryan Rizzuto, Yahonnes Cleary; and by the NAACP Legal Defense Fund attorneys Jared Evans, Kathryn C. Sadasivan, Leah C. Aden, Sara Sara Rohani, Stuart C. Naifeh, and Victoria Wenger; and by ACLU of Louisiana attorneys Nora Ahmed, and Stephanie Legros; and by the ACLU attorneys Samantha Osaki, Sarah E Brannon, Sophia Lin Lakin, and Tiffany Alora Thomas; and by attorneys Tracie L. Washington; and by John Nelson Adcock.

Plaintiffs-Appellees: Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard, represented by Elias Law Group LLP attorneys Abha Khanna, Jacob D Shelly, Jonathan Patrick Hawley, Lalitha D. Madduri, and Olivia Sedwick; and by Walters Papillion Thomas Cullens, LLC attorneys Jennifer Wise Moroux, Darrel James Papillion, and Renee' Chabert Crasto.

Movant: Vincent Pierre (Chairman of LLBC), represented by Arthur Ray Thomas of Arthur Thomas & Associates and Ernest L. Johnson, I.

Movant: Louisiana Legislative Black Caucus (LLBC), represented by Stephen M. Irving of Steve Irving LLC and Ernest L. Johnson, I.

Amici: Michael Mislove, Lisa J. Fauci, Robert Lipton, and Nicholas Mattei, represented by Jenner & Block LLP attorneys Alex S. Trepp, Andrew J. Plague, Jessica Ring Amunson, Keri L. Holleb Hotaling, and Sam Hirsch, and Barrasso Usdin Kupperman Freeman & Sarver, LLC attorneys Judy Y. Barrasso and Viviana Helen Aldous.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Attorney of Record for Appellants Clay Schexnayder and Patrick Page Cortez

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INTRODUCTION

This Court rarely will encounter a redistricting case as consequential as this or a district-court order as imprudent as the one presented for review. For three decades, Louisiana conducted congressional elections under redistricting plans with one majority-Black district, because a federal court invalidated plans containing two as racial gerrymanders. After the State Legislature adopted a new plan in March 2022 maintaining that status quo, two sets of challengers (Plaintiffs) sued and demanded a new plan with two majority-Black districts as *temporary* relief for the 2022 elections. The district court conducted a hearing and then took no action for 24 days. During that time, the Legislature continued and ultimately concluded its spring legislative session, and the State continued to implement the enacted plan. On June 6, the court provisionally enjoined the enacted plan, stayed and extended the candidate nominating-petition deadline, and gave the Legislature 14 days to enact a new plan with two majority-Black districts. That is a practical impossibility.

This Court should stay the injunction pending appeal. When a three-judge court in Alabama issued a materially identical injunction (commanding two majority-Black districts rather than one) on a materially identical time frame (four-and-a-half months before an election), the Supreme Court stayed that order. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). A stay is warranted here, as in *Merrill*, based on equitable factors governing election cases, and because this appeal is likely to succeed. To obtain a second majority-Black district, Plaintiffs were required to establish three elements called the "*Gingles*" preconditions. But they have no

prospect of establishing at least the third of those, because their experts admitted their own analyses show its predicates do not exist. Indeed, the district court made the same error that resulted last decade in "the most extensive unconstitutional racial gerrymander ever encountered by a federal court." *Covington v. North Carolina*, 270 F. Supp. 3d 881, 892 (M.D.N.C. 2017). To conduct the 2022 election with two majority-Black districts would risk a widespread equal-protection violation.

Time is of the essence. The Legislature must convene an extraordinary session beginning June 15, at significant public expense. To be fully effective, relief from this Court must issue by **noon, Tuesday, June 14, 2022**, and undersigned counsel certifies that this motion qualifies for emergency treatment pursuant to Fifth Circuit Rule 27.3. The Court should, first, issue an administrative stay pending briefing on this motion, which is a "routine practice" in this Circuit. *In re Abbott*, 800 F. App'x 296, 298 (5th Cir. 2020). It should, second, stay the injunction pending appeal, just as the Supreme Court did in *Merrill*.

STATEMENT

1. After each decennial census, "[s]tates must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). "Redistricting is never easy." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). This is, in part, because "federal law restrict[s] the use of race in making districting decisions." *Id.* "The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 641

(1993) (*Shaw I*)). Districting maps that "sort voters on the basis of race 'are by their very nature odious.'" *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (quoting *Shaw I*, 509 U.S. at 643). As a result, purposefully creating a new majority-minority district is presumptively unconstitutional. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468-69 (2017).

On the other hand, "[a] State violates § 2" of the Voting Rights Act (VRA) "if its districting plan provides 'less opportunity' for racial minorities 'to elect representatives of their choice.'" *Abbott*, 138 S. Ct. at 2315 (quoting *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 425 (2006) (*LULAC*)). The Supreme Court has "interpreted this standard to mean that, under certain circumstances, States must draw 'opportunity' districts in which minority groups form 'effective majorit[ies].'" *Id.* (citation omitted).

In the face of these "'competing hazards of liability,'" the Supreme Court has "assumed"—but never held—that "compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)). Satisfying the "strictest scrutiny" is not easy. *Miller v. Johnson*, 515 U.S. 900, 915 (1995). The state must establish the three "*Gingles*" preconditions: that (1) the relevant minority group is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district"; (2) the group is "politically cohesive"; and (3) the "district's white majority…'vote[s] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S. Ct. at 1470 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)).

It is insufficient that advocacy groups "want[] a State to create" a majority-minority district, *Abbott*, 138 S. Ct. at 2334, or that a government actor demands this, *Miller*, 515 U.S. at 922; *Shaw v. Hunt*, 517 U.S. 899, 911-12 (1996) (*Shaw II*). The Supreme Court has forbidden states from maximizing the number of majority-minority districts. *Shaw II*, 517 U.S. at 913. "Nor is proportional representation the benchmark." *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008). No defendant has successfully invoked Section 2 in the Supreme Court as a racial-gerrymandering defense.

Louisiana is no exception. After the 1990 census, the Louisiana Legislature twice enacted congressional plans with two majority-minority districts; both were invalidated under the Constitution. *Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993) (*Hays I*); *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996) (*Hays IV*). The three-judge court imposed a remedial plan with one majority-Black district anchored in Orleans Parish (CD2). *Hays IV*, 936 F. Supp. at 372.

2. In the 2000s and 2010s, the Legislature carried that concept forward, maintaining CD2 as a majority-Black district but declining to create more. The U.S. Department of Justice precleared these plans under VRA Section 5. Black population has not materially grown as a matter of proportion; as in 1994, it has been "approximately 30%" of the voting-age population, *Hays v. Louisiana*, 862 F. Supp. 119, 124 n.4 (W.D. La. 1994) (*Hays II*); Dist.Ct.Dkt.162-4, at 220:8-14. Meanwhile, after the 2010 census, Louisiana lost a congressional district, going from seven to six.

In the 2020 apportionment, Louisiana retained six districts. But population shifts necessitated redistricting to "achieve population equality 'as nearly as is practicable.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (citation omitted). The Legislature enacted a plan that preserved "the traditional boundaries as best as possible" and "keeps the status quo." Dist.Ct.Dkt.169-212, at 12:13-17, 6:19-7:4. On average, the plan maintains more than 96% of constituents per district in the same district as before. Dist.Ct.Dkt.162-4, at 212:24-213:6. Like prior plans, CD2 remained a majority-Black district, which Plaintiffs' expert called a "carbon copy" of last decade's rendition. Dist.Ct.Dkt.160-1, at 88:17-20. Plaintiffs do not allege any district in the enacted plan was drawn with predominantly racial intent. Dist.Ct.Dkt.137.

3. The Legislature faced "demands" to engage in race-based redistricting. *See Abbott*, 138 S. Ct. at 2334. Some public commenters and legislators contended that, "[b]ecause over 1/3 of Louisiana's population is minority…at least 2 of the 6 districts should have a fair chance of electing a member of a minority." Dist.Ct.Dkt.1, ¶ 48. The Governor, too, called for an additional "minority" district. Dist.Ct.Dkt.52, at 3; *compare Hays I*, 839 F. Supp. at 1196 n.1; *Miller*, 515 U.S. at 917-18; *see also Shaw II*, 517 U.S. at 902-03. No one advocating this presented "a strong basis in evidence to conclude that § 2 demands such race-based steps." *Cooper*, 137 S. Ct. at 1471. Plaintiffs refused to provide statistical studies of voting patterns they alleged they conducted. Dist.Ct.Dkt.169-187, at 135:21-137:5, 141:2-14; Dist.Ct.Dkt.169-195, at 22:11-23:15.

The Legislature resisted these calls "to segregate the races for purposes of voting." *Shaw I*, 509 U.S. at 642. It ultimately enacted the above-described plan. The Governor vetoed both bills for failing to achieve his predetermined racial target. The Legislature overrode the veto on March 30, 2022.

4. Two sets of Plaintiffs filed suit against the Louisiana Secretary of State under VRA Section 2, and the cases were consolidated. The Attorney General, on behalf of the State, and the President of the Louisiana Senate and Speaker of the House of Representatives (the Legislative Appellants and Movants here) intervened. Plaintiffs moved for a preliminary injunction, requesting a new redistricting plan as temporary relief.

The district court conducted a hearing and then took no action for 24 days. On June 6, it issued a preliminary injunction that "**ORDERS** the Louisiana Legislature to enact a remedial plan" which "includes an additional majority-Black congressional district." Ex. A ("Op.") 2. The court afforded the Legislature 14 days to do so. The court also moved the candidate nominating-petition deadline from June 22 to July 8. Op. 3. The same day, the three sets of defendants (Appellants) appealed, Ex. B, and moved the district court for a stay, which was denied on June 9, Ex. C.

ARGUMENT

Under the "traditional" standard governing stays pending appeal, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will

substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted). A movant "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (citation omitted).

As the Supreme Court "has often indicated, however, that traditional test for a stay does not apply…in election cases when a lower court has issued an injunction of a state's election law in the period close to an election." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). The Supreme Court "has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election, and [the Supreme] Court in turn has often stayed lower federal court injunctions that contravened that principle." *Id.* A court addressing an injunction in the period close to an election must inquire, at a minimum, whether the "plaintiff establishe[d] at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Id.* at 881. A stay is warranted under any applicable standard.

I. Likelihood of Success

The Court should have "little difficulty concluding that the legal questions presented by this case are serious, both to the litigants involved and the public

at large, and that a substantial question is presented for [the Fifth Circuit] to resolve." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014).

A.1. Plaintiffs have little hope of establishing at trial the critical "threshold conditions." *Cooper*, 137 S. Ct. at 1470. As noted, a Section 2 challenger must establish three preconditions, the third being an "amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 56 (citations omitted). Unless this is established, "there neither has been a wrong nor can be a remedy." *Growe v. Emison*, 507 U.S. 25, 41 (1993).

The question is not "whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc). The Supreme Court defined "legally significant white bloc voting" as a level of white voter opposition against minority-preferred candidates such that the "white bloc…normally will defeat the combined strength of minority support plus white 'crossover' votes" (i.e., white voters supporting minority-preferred candidates). *Gingles*, 478 U.S. at 31. This precondition cannot be shown "[i]n areas with substantial crossover voting." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009); *see also Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) ("[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters" (citation omitted)).

A.2. Plaintiffs failed to prove, or even address, this element. To be sure, Plaintiffs sponsored, and the district court credited, expert testimony to the effect

that "black voters and white voters voted differently" in examined elections, Dist.Ct.Dkt.164-1, at 13:12-13; *see also id.* 20:9-10, and that "black voters and white voters would have elected different candidates if they had voted separately." *Id.* 21:2-4. But this merely established "(to no one's great surprise) that in [Louisiana], as in most States, there are discernible, non-random relationships between race and voting." *Cooper*, 137 S. Ct. at 1471 n.5. The finding falls short of *legal* significance.

A political scientist can describe voting as "polarized" in any "circumstance in which 'different races vote in blocs for different candidates.'" *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 2211 (2017) (citation omitted). But white bloc voting becomes legally significant only if it "exist[s] at such a level that the candidate of choice of African-American voters would usually be defeated *without a VRA remedy*." *Id.* at 168 (emphasis added). A VRA remedy is a 50% minority voting-age population (VAP) district. *See Bartlett*, 556 U.S. at 19. As the Supreme Court explained in *Bartlett*, where white crossover voting is sufficient to create a functioning minority-opportunity district at below 50% minority VAP, "majority-minority districts *would not be required in the first place*." *Id.* at 24 (emphasis added).

The Supreme Court confirmed this in *Covington*, which addressed "the most extensive unconstitutional racial gerrymander ever encountered by a federal court." *Covington*, 270 F. Supp. 3d at 892. The North Carolina legislature created 28 majority-minority districts in its legislative plans, based on expert analyses finding "statistically significant racially polarized voting in 50 of the 51

counties studied." *Covington*, 316 F.R.D. at 169 (quotation marks omitted). A three-judge court invalidated each district, and the Supreme Court summarily affirmed. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017). The case was not close. *Covington*, 270 F. Supp. 3d at 892 ("The Supreme Court affirmed that conclusion without argument and without dissent. And the Supreme Court unanimously held that Senator Rucho and Representative Lewis incorrectly believed that the Voting Rights Act required construction of majority-minority districts.").

The problem was that North Carolina's experts addressed "the general term 'racially polarized voting'" which "simply refers to when different racial groups 'vote in blocs for different candidates.'" *Covington*, 316 F.R.D. at 170 (citation omitted). They missed "crucial difference between legally significant and statistically significant racially polarized voting." *Id.* Non-actionable polarized voting becomes legally significant only when "racial bloc voting is operating at such a level that it would actually minimize or cancel minority voters' ability to elect representatives of their choice, *if no remedial district were drawn*." *Id.* at 168 (quotation and edit marks omitted; emphasis added). The question is whether "the candidate of choice of African-American voters would usually be defeated *without a VRA remedy*." *Id.* (emphasis added).

A.3. This case is no closer than *Covington*. Plaintiffs' experts testified that white crossover voting is sufficiently robust that a majority-Black-voting-age-population (BVAP) district is unnecessary to afford equal Black electoral opportunity. Dr. Palmer testified that there is meaningful white crossover voting,

Dist.Ct.Dkt.160-1, at 339:18-343:10, and that CD2 and CD5 need not be majority-Black to enable Black voters to elect their preferred candidates, *id.* 346:18-21. Dr. Lichtman acknowledged that white crossover voting consistently ranges from 20% to 26%. Dist.Ct.Dkt.164-1, at 198:14-18; *see Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (finding significant crossover voting where "the average percentage of whites voting for black candidates across Georgia ranged from 22% to 38%); *McConchie v. Scholz*, 2021 WL 6197318, at *8 (N.D. Ill. Dec. 30, 2021) (finding crossover voting exceeding 25% to be "significant"). He agreed that a district around 40% BVAP can perform. Dist.Ct.Dkt.164-1, at 198:14-200:20. Dr. Handley testified that it is possible districts below 50% BVAP may perform. *Id.* 75:7-11. Likewise, a sophisticated *amicus* brief of Tulane and Louisiana State University math and computer science professors analyzed nineteen elections and found that districts of 42% BVAP afford an equal Black electoral opportunity. Dist.Ct.Dkt.97 at 23, 27, 34-35. There is *no contrary record evidence*. No witness testified, and no analysis showed, that Black voters are unable to elect their preferred candidates without a 50% BVAP district.[1]

A.4. The district court failed to ask the correct legal question. It observed that "[w]hite crossover voting was inherently included in the analysis performed by Dr. Palmer and Dr. Handley." Op. 123, 126. But the question is not whether

[1] Indeed, Plaintiffs' contention that their remedial districts will afford an equal minority electoral opportunity depends on white crossover voting, as their experts concede that the success of the Black preferred candidates in their projected election results occurs only with white cooperation. Dist.Ct.Dkt.164-1, at 54:18–55:18; *id.* 62:3–13.

an analysis included white crossover voting but whether white bloc voting is "legally significant." *Gingles*, 478 U.S. at 31. That cannot be so where, as here, Black voters can elect "representatives of their choice" even "if no remedial district were drawn." *Covington*, 316 F.R.D. at 168 (quotation and edit marks omitted). The district court understood the distinction between expert opinion and legal conclusions at the hearing and forbade counsel from cross-examining Plaintiffs' experts about the legal significance of white bloc voting levels. Dist.Ct.Dkt.164-1, at 52:24-53:19. It is hard to see why the same court believed it could resolve the third precondition question simply by crediting experts.

The district court also attempted to sweep away this fundamental flaw by shifting the burden. It found that the defense failed to produce "sufficient data" on the third precondition and observed that Plaintiffs' experts' testimony regarding the need for a 50% BVAP remedial district was tentative. Op. 126-27. This "twisted the burden of proof beyond recognition." *Abbott*, 138 S. Ct. at 2333. "Section 2 'does not assume the existence of racial bloc voting; plaintiffs must prove it.'" *Growe*, 507 U.S. at 42 (citation omitted).

B. Plaintiffs are also unlikely to establish the first *Gingles* precondition, which requires proof that additional "reasonably configured" majority-Black districts may be drawn. *Wis. Legislature*, 142 S. Ct. at 1248. A plan cannot be reasonably configured when it "segregate[s] the races for purposes of voting." *Shaw I*, 509 U.S. at 642. A district that links "distinct locations" on the basis of race does not qualify. *Sensley v. Albritton*, 385 F.3d 591, 597 (5th Cir. 2004).

That is the case here. Plaintiffs' experts presented remedial maps created "using [a] 50 percent voting age population as" a "threshold," Dist.Ct.Dkt.160-1, at 208:2-4, and they never drafted plans with one Black-minority district "because [they were] specifically asked to draw two by the plaintiffs," *id.* 123:1-4. Each plan was similar in that it grouped areas in and around Baton Rouge, which their own sponsored testimony referred to as "south Louisiana," Dist.Ct.Dkt.160-1 at 240:23-241:3; *see also id*. 240:24-247:20, with the delta parishes of northeast Louisiana, 180 miles away. Plaintiffs' demography expert consulted racial data at the outset of map-drawing "to get an idea where the black population is inside the state in order to begin drawing," Dist.Ct.Dkt.160-1, at 209:6-8, because "you can't draw a plan in an area where black population doesn't exist," *id.* 209:22-23. Then, the expert continued assigning voters on the basis of race, to "pull the BVAP percentages back up to check [his] work." *Id.* 210:9-12; *see also id.* 210:12-212:4 (similar).

The district court found that the defense's racial-gerrymandering objections were "hypercritical," Op. 117, but the Supreme Court has found the same evidentiary indicators to compel findings of racial predominance. *Cooper*, 137 S. Ct. at 1469 (affirming district court finding of a "textbook example" of "race-based districting"); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (reversing finding of a lack of racial predominance); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 273 (2015) (calling materially identical evidence "strong, perhaps overwhelming, evidence that race did predominate"). There can be no question that that Plaintiffs' experts (1) "purposefully

established a racial target" that "African-Americans should make up no less than a majority of the voting-age population," and (2) the racial target "had a direct and significant impact" on the "configuration" of districts—which is how the Supreme Court defines predominance. *Cooper*, 137 S. Ct. at 1468-69.

The district court also concluded that *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996), deems racial predominance irrelevant to Section 2 claims, Op. 112-13, but the Supreme Court subsequently held in *LULAC* that the first *Gingles* precondition is not satisfied by "a district that combines two farflung segments of a racial group with disparate interests" and warned that Section 2 does not countenance districting decisions that "assume from a group of voters race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" 548 U.S. at 433 (alteration accepted; citation omitted). The district court's directive (at Op. 2) that the Legislature create "an additional majority-Black congressional district," somewhere—anywhere—contravenes that holding and does not "protect[] the rights of individual voters," but rather depends on vague statewide ideals of "proportional representation," *Gonzalez*, 535 F.3d at 598. Implementing it would amount to racial segregation.

Meanwhile, the Supreme Court issued a stay in *Merrill* to address whether racially predominant districts form an appropriate Section 2 baseline. *See Merrill*, 142 S. Ct. at 879; *id.* at 884-89 (Kagan, J., dissenting) (describing the appellants' legal theory). Both this Court and the Supreme Court are empowered to revisit *Clark* and are likely to do so when subsequent precedent confirms that race-based districting is "odious." *Wis. Legislature*, 142 S. Ct. at 1248. "It is not [this Court's]

task today to resolve the merits of this conflict in deciding the instant motion." *Campaign for S. Equal.*, 773 F.3d at 58. It is sufficient that Appellants raise at least one "serious legal issue." *Id.* (citation omitted).

II. The Equities

"The equities do not justify withholding interim relief." *NFIB v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665-66 (2022). They *command* relief. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). This Court, of course, "must follow the dictates of the Supreme Court." *Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014) (Costa, J., concurring in the judgment) (voting to stay injunction because the Supreme Court had stayed similar injunctions in recent decisions).

A. There can be no question that, without a stay, Appellants will suffer irreparable harm. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Id.* at 895 (citation omitted). "If the district court judgment is ultimately reversed, the State cannot run the election over again, this time applying" the enacted redistricting plan. *Id.* at 896; *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020). In addition, Appellants "would plainly suffer irreparable harm were the stay not granted," because "[u]nder the District Court order the legislature must either adopt an alternative redistricting plan before [June 20]…or face the prospect that the District Court will implement its own redistricting plan." *Karcher v. Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers) (issuing stay in redistricting appeal brought by legislative leaders).

B. The public interest favors a stay. This is so under the rule that, "because the State is the appealing party, its interest and aforementioned harm merge with that of the public." *Tex. Democratic Party*, 961 F.3d at 412 (alterations accepted; citation omitted).

The injunction imposes an additional, unacceptable risk to the public by ordering the 2022 elections to be conducted under a "congressional redistricting plan that includes an additional majority-Black congressional district," Op. 2, which is presumptively unconstitutional, *Cooper*, 137 S. Ct. at 1468-69. If any aspect of the district court's Section 2 analysis turns out to be incorrect, the 2022 election will have impaired the equal-protection rights of hundreds of thousands of Louisiana voters. What the district court has commanded the Supreme Court has called by its "very nature odious." *Wis. Legislature*, 142 S. Ct. at 1248 (citation omitted). Thus, the public interest favors a stay because "it is in the public interest…to prevent the State from violating the requirements of federal law." *Texas Democratic Party*, 961 F.3d at 412 (alterations accepted; citation omitted).

C.1. A stay is independently compelled by the *Purcell* principle, "which establish[es] (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J. concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). This principle (which long predates *Purcell*) "has been the guidon to a number of courts that have refrained from enjoining impending elections," *Chisom v. Roemer*, 853 F.2d 1186, 1190 (5th Cir. 1988),

"even in the face of an undisputed constitutional violation," *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). In cases where a lower court has chosen differently, "the Supreme Court" has consistently "stayed [that] district court's hand." *Chisom*, 853 F.2d at 1190. *Merrill* is just the Supreme Court's latest correction of this all-too-familiar error. 142 S. Ct. at 879; *see also id.* at 879-82 (Kavanaugh, J., concurring).

There is no breathing room between *Merrill* and this case. As here, the court in *Merrill* commanded Alabama to conduct the 2022 election under a plan with two majority-minority districts rather than one. *Singleton v. Merrill*, 2022 WL 265001, at *77 (N.D. Ala. Jan. 24, 2022). Like the court below, the district court in *Merrill* made findings that the injunction would not harm election administration. *Id.* at *51-52. Any assertion that the same result should not follow here is "an incredibly difficult sell." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 2022 WL 496908, at *5 (E.D. Ark. Feb. 17, 2022). The court below observed that Louisiana's elections are five months later than Alabama's, Op. 148, but its injunction issued nearly five months later than the *Merrill* injunction.

C.2. Nor do the district court's findings concerning election administration merit any credence. First, the court cited decisions issuing remedial plans after final judgment in redistricting cases. Op. 149 & n.443. But "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The court cited only one case that has ever ordered a new

redistricting plan to be crafted as *provisional* relief: the district-court *Merrill* decision. Op. 50 n.449.

Second, the court failed to account for the time it will take to craft a remedial plan. The order requires the Louisiana Legislature to enact redistricting legislation by June 20, but the deadline is virtually unattainable. Because the district court failed to act until the spring legislative session ended, an extraordinary session is required, and, by operation of a seven-day notice requirement, La. Const. art. 3, § 2(B), it cannot begin until June 15. The Louisiana Constitution also requires that "each bill shall be read at least by title on three separate days in each house." La. Const. art. 3, § 15(D); *Doll v. City of New Orleans*, 85 So.2d 514, 515 (La. 1956). Further, the Constitution provides that "[n]o bill shall be considered for final passage unless a committee has held a public hearing and reported on the bill." La. Const. art. 3, § 15(D). And after a bill passes the Legislature, the Governor must sign it (or take no action) before it becomes law. And then there is the redistricting process itself, which is "the most difficult task a legislative body ever undertakes." *Covington*, 316 F.R.D. at 125.

The district court set the Legislature up to fail. That error alone contravenes the rule that a federal court must "afford a *reasonable* opportunity for the legislature to meet [federal] requirements" in a remedial plan. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added); *accord Jones v. City of Lubbock*, 727 F.2d 364, 387 (5th Cir. 1984).

Third, the district court's intention to "issue additional orders to enact a remedial plan," Op. 2, does little to mitigate the risk of meltdown. It took the

district court 67 days from filing, and 24 days from the hearing, to issue an injunction. There is no reason to believe a remedial order will issue any more promptly. A remedial phase in redistricting litigation presents a new adversarial proceeding requiring opportunities for competing submissions, expert analyses and discovery, evidentiary hearings, and typically the appointment of a special master. *See, e.g.*, *Terrebonne Par. Branch NAACP v. Edwards*, 399 F. Supp. 3d 608 (M.D. La. 2019); *United States v. Brown*, 561 F.3d 420, 436 (5th Cir. 2009) ("The district court held two evidentiary hearings before determining the appropriate remedy."). A court-ordered plan must comply with the law, including the Equal Protection Clause. *Clark*, 88 F.3d at 1407. And the need for expedition does not excuse a court from utilizing effective "procedures." *Jones*, 727 F.2d at 387.

A new plan is unlikely to be in place for some time, and it is a mystery how the 2022 election can be administered with no plan in place. Ultimately, the end date of the congressional elections cannot be moved, *Foster v. Love*, 522 U.S. 67, 69 (1997), and there is every prospect that administering a redistricting plan at this late hour will require, at best, "heroic efforts." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring).[2]

[2] The district court erroneously found relevance in statements by Legislative Appellants in state impasse litigation in March 2022 to the effect that it was then unnecessary for the court to implement a new plan before the legislative session ended in late March. Op. 145-46; Ex. C at 2. The court failed to appreciate the difference in timing (March versus June); the different animal of impasse litigation, where the court need not adjudicate liability; and the extensive litigation necessary before a new map can be in place.

D. Any harm Plaintiffs may incur through a stay "does not outweigh the other three factors." *Veasey*, 769 F.3d at 896. "In consideration of this factor, the maintenance of the status quo is important." *Louisiana v. Biden*, 2022 WL 866282, at *3 (5th Cir. Mar. 16, 2022). Louisiana has for decades conducted congressional elections under plans with one majority-Black district. A stay would preserve that status quo pending review of the difficult legal questions at issue here.

CONCLUSION

The Court should stay the injunction below pending appeal.

Dated: June 9, 2022

/s/ Richard B. Raile

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Certificate of Conference

I hereby certify that I contacted opposing counsel about the imminent filing of this motion, and an opposition will be filed.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Certificate of Compliance with Rule 27.3

Pursuant to Fifth Circuit Rule 27.3, I hereby certify the following:

- Before filing this motion, counsel for Appellants Clay Schexnayder and Patrick Page Cortez ("Appellants") contacted the clerk's office and opposing counsel to advise them of Appellants' intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested by Tuesday, June 14, 2022, at noon, or alternatively, Appellants request a temporary administrative stay pending the Court's review at the earliest possible date.
- True and correct copies of the relevant orders are filed concurrently with this motion, and other relevant documents cited herein are available electronically including on Pacer and are identified by their district court docket number as Dist.Ct.Dkt.[#] at [page #].
- This motion is being served at the same time it is being filed.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Certificate of Compliance

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. ("Rule") 27(d)(2) because it is 5,199 words, excluding the parts that are exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced typeface with serifs.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Certificate of Service

I hereby certify that on June 9, 2022, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

EXHIBIT A

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, *et al*

versus

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana

CIVIL ACTION

22-211-SDD-SDJ

consolidated with

EDWARD GALMON, SR., *et al*

versus

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana

CIVIL ACTION

22-214-SDD-SDJ

RULING AND ORDER

Before the Court are the *Motion for Preliminary Injunction*[1] filed by the *Robinson* Plaintiffs and the *Motion for Preliminary Injunction*[2] by the *Galmon* Plaintiffs. Defendant Secretary Ardoin and the Intervenor Defendants filed *Oppositions*,[3] to which Plaintiffs filed *Replies*.[4] The Court also received a *Brief Amicus Curiae in Support of Neither Party*[5] from a group of mathematics and computer science professors at Louisiana State and Tulane Universities. A five-day hearing on the *Motions* was held, beginning May 9, 2022 and ending May 13, 2022. After the hearing, Plaintiffs and Defendants (along with the

[1] Rec. Doc. No. 41.
[2] Rec. Doc. No. 42.
[3] Rec. Doc. No. 101; Rec. Doc. No. 108; Rec. Doc. No. 109.
[4] Rec. Doc. No. 123; Rec. Doc. No. 120.
[5] Rec. Doc. No. 97.

Intervenor Defendants) both filed *Proposed Findings of Fact*,[6] as well as post-hearing briefs.[7]

For the reasons set forth herein, the Court concludes that Plaintiffs are substantially likely to prevail on the merits of their claims brought under Section 2 of the Voting Rights Act. The Court finds that absent injunctive relief, the movants are substantially likely to suffer irreparable harm. The Court has considered the balance of equities and hardships associated with injunctive relief, as well as the public policies attendant to the issuance of injunctive relief, and concludes that injunctive relief is required under the law and the facts of this case. The Court hereby **GRANTS** the *Motions for Preliminary Injunction*[8] and **PRELIMINARILY ENJOINS** Secretary Ardoin from conducting any congressional elections under the map enacted by the Louisiana Legislature in H.B. 1.

The appropriate remedy in this context is a remedial congressional redistricting plan that includes an additional majority-Black congressional district. The United States Supreme Court instructs that the Legislature should have the first opportunity to draw that plan.[9] Therefore, the Court **ORDERS** the Louisiana Legislature to enact a remedial plan on or before June 20, 2022. If the Legislature is unable to pass a remedial plan by that date, the Court will issue additional orders to enact a remedial plan compliant with the laws and Constitution of the United States. The Court hereby **STAYS** and **EXTENDS** the

[6] Rec. Doc. No. 164; Rec. Doc. No. 166.
[7] Rec. Doc. No. 163; Rec. Doc. No. 165.
[8] Rec. Doc. No. 41; Rec. Doc. No. 42.
[9] *See, e.g., North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018); *White v. Weiser*, 412 U.S. 783, 794–95 (1973).

deadline for candidates to qualify by nominating petition in lieu of filing fees[10] (currently set for June 22, 2022) until July 8, 2022. The candidate qualifying period set for July 20 - 22, 2022 and all other related deadlines are unaffected by this *Order* and shall proceed as scheduled.

BACKGROUND

I. Procedural Posture

In April 2021, the United States Census Bureau delivered the 2020 Census data that would drive the state of Louisiana's redistricting process. Under the new numbers, Louisiana's congressional apportionment was unchanged from 2010, holding steady at six seats in the U.S. House of Representatives.[11] The task of redrawing those six districts fell upon the Louisiana Legislature, where the drawing of new maps was guided in part by Joint Rule No. 21, passed by the Louisiana Legislature in 2021 to establish criteria that would "promote the development of constitutionally and legally acceptable redistricting plans."[12] Joint Rule 21 provided as follows:

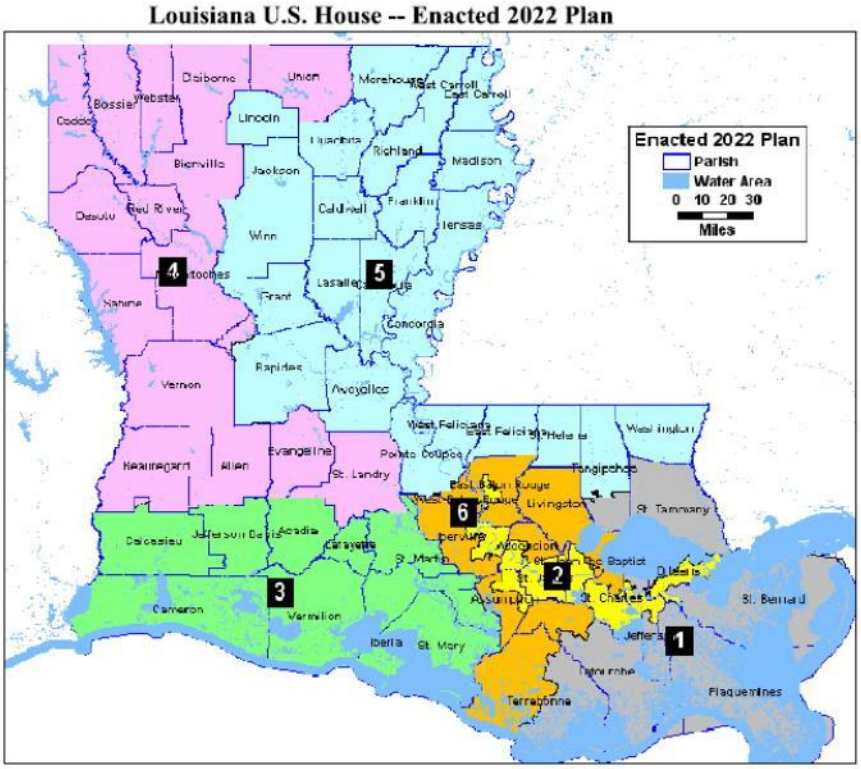
> Joint Rule No. 21. Redistricting criteria
>
> A. To promote the development of constitutionally and legally acceptable redistricting plans, the Legislature of Louisiana adopts the criteria contained in this Joint Rule, declaring the same to constitute minimally acceptable criteria for consideration of redistricting plans in the manner specified in this Joint Rule.
>
> B. Each redistricting plan submitted for consideration shall comply with the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment to the U.S. Constitution; Section 2 of the Voting Rights Act of 1965, as amended; and all other applicable federal and state laws.
>
> C. Each redistricting plan submitted for consideration shall provide that each district within the plan is composed of contiguous geography.
>
> D. In addition to the criteria specified in Paragraphs B, C, G, H, I, and J of this Joint Rule, the minimally acceptable criteria for consideration of a redistricting plan for the House of Representatives, Senate, Public Service Commission, and Board of Elementary and Secondary Education shall be as follows:
>
> (1) The plan shall provide for single-member districts.
>
> (2) The plan shall provide for districts that are substantially equal in population. Therefore, under no circumstances shall any plan be considered if the plan has an absolute deviation of population which exceeds plus or minus five percent of the ideal district population.
>
> (3) The plan shall be a whole plan which assigns all of the geography of the state.
>
> (4) Due consideration shall be given to traditional district alignments to the extent practicable.
>
> E. In addition to the criteria specified in Paragraphs B, C, G, H, I, and J of this Joint Rule, the minimally acceptable criteria for consideration of a redistricting plan for Congress shall be as follows:
>
> (1) The plan shall provide for single-member districts.
>
> (2) The plan shall provide that each congressional district shall have a population as nearly equal to the ideal district population as practicable.
>
> (3) The plan shall be a whole plan which assigns all of the geography of the state.

[10] Pursuant to La. R.S. 18 § 465, a potential congressional candidate may qualify for the ballot by obtaining one thousand signatures from qualified voters within the district and filing a nominating petition with the Secretary of State. Testimony from the Commissioner of Elections (see *infra*) established that this method of qualifying is used very rarely by candidates for office in Louisiana.

[11] Rec. Doc. No. 143, p. 10 (Joint Stipulation Pre-Hearing).

[12] PR-79.

Leading up to their redistricting session, legislators held a series of "roadshow" meetings across the state, designed to share information about redistricting and solicit public comment and testimony, which lawmakers described as "absolutely vital to this process."[13] Citizens who engaged in the process at the roadshows were assured that "your ideas and recommendations matter to me and they matter to us."[14] The Legislature convened on February 1, 2022 to begin the redistricting process; on February 18, 2022, H.B. 1 and S.B. 5, the bills setting forth new maps for the 2022 election cycle, passed the Legislature. The enacted plan created the six districts pictured below:[15]



[13] PR-38, p. 3.
[14] *Id*. Statement of Senator Sharon Hewitt at the Monroe roadshow in October 2021. *See* PR-38 through PR-46 for transcripts of roadshows held in Monroe, Shreveport, Lafayette, Alexandria, Baton Rouge, Covington, Lake Charles, New Orleans, and Thibodaux.
[15] GX-1, p. 19.

Having long telegraphed that he would,[16] Louisiana Governor John Bel Edwards vetoed H.B. 1 and S.B. 5 on March 9, 2022.[17] The Legislature voted to override the Governor's veto on March 30, 2022.[18] That same day, the *Robinson* and *Galmon* Plaintiffs filed their *Complaints* in this Court, alleging that the 2022 congressional map dilutes Black voting strength in violation of the Voting Rights Act of 1965 (the "VRA") by "packing" large numbers of Black voters into a single majority-Black congressional district (Congressional District 2 or "CD 2") and "cracking" the remaining Black voters among the other five districts, where, Plaintiffs argue, they are sufficiently outnumbered to ensure that they are unable to participate equally in the electoral process.[19]

After the *Complaints* were filed, Patrick Page Cortez, the President of the Louisiana State Senate, and Clay Schexnayder, the Speaker of the Louisiana House of Representatives (collectively, "the Legislative Intervenors"), moved to intervene as Defendants in the suit, as did Louisiana Attorney General Jeff Landry ("Attorney General Landry" or "the Attorney General").[20] The Court granted those motions[21] and, on April 12, 2022, consolidated the *Robinson* and *Galmon* matters.[22] The Louisiana Legislative Black Caucus also sought, and was granted, intervention.[23]

The motions now before the Court -- the *Motion for Preliminary Injunction*[24] by the *Robinson* Plaintiffs and the *Motion for Preliminary Injunction*[25] by the *Galmon* Plaintiffs –

[16] GX-16.
[17] Rec. Doc. No. 143, p. 11 .
[18] *Id*.
[19] *See* Rec. Doc. No. 1 in 22-cv-214 and 22-cv-211.
[20] Rec. Doc. No. 10; Rec. Doc. No. 30.
[21] Rec. Doc. No. 64.
[22] Rec. Doc. No. 27.
[23] Rec. Doc. No. 82; Rec. Doc. No. 136.
[24] Rec. Doc. No. 41.
[25] Rec. Doc. No. 42.

were filed on April 15, 2022. Therein, Plaintiffs urge the Court to enjoin Secretary Ardoin from conducting the 2022 congressional elections under the enacted district maps, to set a deadline for the Legislature to enact a compliant map and, if the Legislature fails to do so, to order that the November 2022 election be conducted under one of the illustrative plans proposed by Plaintiffs.[26]

After a more condensed schedule proposed by the Court drew objections from Defendants, the Court set the *Motions* for a five-day evidentiary hearing to begin May 9, 2022.[27] On the eve of the preliminary injunction hearing, Attorney General Landry filed a *Motion to Stay*, arguing that the Supreme Court's forthcoming merits decision in *Merrill v. Milligan*[28] "could be dispositive of this litigation" and will, "[a]t the very least. . .be informative to the Parties' claims and defenses in the instant case."[29] The Court denied that motion, reasoning that "[t]he blow to judicial economy and prejudice to Plaintiffs that would result from granting the moved-for stay cannot be justified by speculation over future Supreme Court deliberations. . ."[30]

II. Factual and Legal Background

Article I, § 2 of the United States Constitution compels that members of the House of Representatives "shall be apportioned among the several States . . . according to their respective Numbers."[31] Thus, every ten years, state legislators use census data to divvy their state up into congressional districts via a redistricting process. As the Legislature's Joint Rule No. 21 notes, redistricting efforts are bound by a number of federal

[26] Rec. Doc. No. 41-1, p. 10.
[27] Rec. Doc. No. 35.
[28] 142 S.Ct. 879 (2022).
[29] Rec. Doc. No. 131-1, p. 15.
[30] Rec. Doc. No. 135, p. 4.
[31] U.S. Const. art. I, § 2, cl. 3.

constitutional and statutory requirements. Perhaps most fundamentally, the "one person, one vote" rule requires that districts be drawn such that one person's "vote in a congressional election" is "nearly as is practicable ... worth as much as another's."[32] The United States Supreme Court has observed that "to say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention."[33] To that end, districts must be drawn as close to equal in population as possible, and states must "justify population differences between districts that could have been avoided by a good-faith effort to achieve absolute equality."[34]

More nuanced are the requirements regarding the consideration of race in redistricting. As many courts have observed, mapdrawers are pulled in one direction by the Equal Protection Clause, which "forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification."[35] The Voting Rights Act "pulls in the opposite direction" and in fact, "often insists that districts be created precisely *because* of race."[36] "[T]o harmonize these conflicting demands, the [Supreme] Court has assumed that compliance with the VRA is a compelling State interest for Fourteenth Amendment purposes, and a State's consideration of race in making a districting decision is narrowly tailored if the State has 'good reasons' for believing that its decision is necessary in order to comply with the VRA."[37]

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[32] *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).
[33] *Id*.
[34] *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 759 (2012) (internal quotation marks omitted).
[35] *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018).
[36] *Id*. (emphasis added).
[37] *Id.* at 2309.

> Section 2 of the Voting Rights Act provides as follows:
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[38]

A state violates Section 2 "when a state districting plan provides 'less opportunity' for racial minorities 'to elect representatives of their choice.'"[39] "A plaintiff may allege a Section 2 violation in a single-member district if the manipulation of districting lines fragments politically cohesive minority voters among several districts or packs them into one district or a small number of districts, and thereby dilutes the voting strength of members of the minority population."[40] *Thornburg v. Gingles*[41] sets forth three threshold conditions for a claim of vote dilution under Section 2: "first, that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member

[38] 52 U.S.C. § 10301.
[39] *Abbott*, 138 S. Ct. at 2309 (quoting League of *United Latin American Citizens v. Perry,* 548 U.S. 399, 425).
[40] *Shaw v. Hunt*, 517 U.S. 899, 914 (1996).
[41] 478 U.S. 30 (1986)(hereinafter "*Gingles*").

district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."[42]

If a party establishes the threshold *Gingles* requirements, the Court will "proceed to analyze whether a violation has occurred based on the totality of the circumstances."[43] The totality of the circumstances determination is made by reference to the "Senate Factors," which are derived from a report of the Senate Judiciary Committee accompanying the 1982 amendments to the Voting Rights Act.[44] The United States Court of Appeals for the Fifth Circuit has held that "[n]o one of the factors is dispositive; the plaintiffs need not prove a majority of them; other factors may be relevant."[45]

At the totality of the circumstances stage, courts also consider "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area."[46] When a statewide districting plan is the subject of a vote dilution claim, "the proportionality analysis ordinarily is statewide."[47]

The redistricting process is emphatically within the province of the state legislatures.[48] Federal court review, then, represents "a serious intrusion on the most vital of local functions"[49] and calls for sensitivity to "the complex interplay of forces that enter

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[42] *Growe v. Emison*, 507 U.S. 25, 40 (1993)(citing *Gingles*, 478 U.S., at 50–51).
[43] *Bartlett v. Strickland*, 556 U.S. 1, 12 (2009).
[44] *See infra* for further discussion of the Senate Factors.
[45] *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991).
[46] *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *13 (N.D. Ala. Jan. 24, 2022)(quoting *LULAC*, 548 U.S. at 426).
[47] *Id*.
[48] *Wesch v. Hunt*, 785 F. Supp. 1491, 1497 (S.D. Ala.), aff'd sub nom. *Camp v. Wesch*, 504 U.S. 902, 112 S. Ct. 1926 (1992)("Congressional redistricting is primarily and foremost a state legislative responsibility").
[49] *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018).

a legislature's redistricting calculus."[50] Further, a "presumption of good faith . . . must be accorded legislative enactments."[51]

III. Statement of Claims and Defenses

A. Plaintiffs' Claims

Plaintiffs argue that the enacted map "artificially limits Black voters' influence" by packing them into CD 2 and cracking them throughout the other five districts. Plaintiffs contend that the maps, "coupled with high levels of racially polarized voting. . .greatly dilute the ability of the State's Black voters to elect their candidates of choice."[52] Relying on the illustrative plans prepared by their experts, Anthony Fairfax and William Cooper, Plaintiffs assert that "Louisiana's Black community is sufficiently large and geographically compact to comprise more than 50% of the voting-age population in a second congressional district that connects the Baton Rouge area and St. Landry Parish with the delta parishes along the Mississippi border."[53]

Plaintiffs argue that "[i]t is beyond dispute that Black voters in Louisiana have voted as a cohesive bloc,"[54] and that "white voters voted in bloc against the candidate supported by Black voters"[55] Thus, Plaintiffs aver that all of the threshold conditions of a vote dilution claim under *Gingles* are met here. Further, they contend that the vestiges of Louisiana's long and irrefutable history of discrimination have resulted in modern day disparate socioeconomic conditions, segregated communities, and unequal educational outcomes,

[50] *Miller v. Johnson*, 515 U.S. 900, 915–16 (1995).
[51] *Id*. at 916.
[52] Rec. Doc. No. 41-1, p. 12.
[53] Rec. Doc. No. 42-1 p. 9.
[54] *Id*. at pp. 11, 16.
[55] *Id*. at p. 18.

all of which contribute to a totality of circumstances that denies a meaningful opportunity for Black voters to elect their preferred candidates.

Absent an injunction preventing the enacted maps from controlling the 2022 congressional election, Plaintiffs allege, they will suffer irreparable harm. Moreover, they argue that "preserving the rights of Louisianans is strongly in the public interest and the threat of disenfranchising Black Louisianans vastly outweighs the minimal potential administrative burden that an injunction might impose on Defendant."[56] Though Plaintiffs acknowledge that the *Purcell* doctrine proscribes judicial intervention on the eve of an election, they distinguish *Purcell* and progeny factually and point out that here, "the election is over six months away" and that counsel for Louisiana's Speaker of the House and Senate President are on the record in companion state court redistricting lawsuits as representing 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."[57] Indeed, they explained, Louisiana's "election calendar is one of the latest in the nation."[58] Since Louisiana has only six congressional districts, and alternative maps with two majority-minority districts were introduced and debated during the legislative redistricting process, Plaintiffs submit that "only a brief period" should be necessary to craft a VRA-compliant map.[59] Plaintiffs argue that these challenges pale in comparison to the harm from proceeding with the 2022 elections under maps that violate Section 2 of the VRA.[60]

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[56] *Id*. at p. 22.
[57] GX-32, p. 8 (*Findings of Fact and Conclusions of Law* filed by the Legislative Intervenors in *Bullman, et al v. Ardoin*, No. C-716837, 19th Judicial District Court).
[58] GX-32, p. 5.
[59] Rec. Doc. No. 42-1, p. 26.
[60] *Id*.

B. Secretary of State Ardoin

Secretary Ardoin begins by questioning Plaintiffs' standing to maintain this action, arguing that although the *Galmon* Plaintiffs challenge the entire congressional plan, they "only have Plaintiffs living in Congressional Districts 2, 5, and 6."[61] Second, Secretary Ardoin contends that Plaintiffs are unlikely to succeed on the merits of their Voting Rights Act claim, arguing that their claim fails because the second majority-majority district they propose is not geographically compact. Specifically, the Secretary objects to the manner in which Plaintiffs' illustrative plans "combine[] portions of EBR [East Baton Rouge] with parishes in the far north of the state like East and West Carroll."[62] Citing the 1990s *Hays* redistricting cases,[63] Secretary Ardoin avers that such a plan is "absurd on its face" because "federal courts have twice rejected plans that used EBR to build a second majority black district on the ground that such districts were uncompact racial gerrymanders that did not satisfy the *Gingles* preconditions."[64] Further, the Secretary of State argues that the illustrative plans run afoul of the Equal Protection Clause by creating an "obvious racial gerrymander."[65]

Even if Plaintiffs' proposed districts were sufficiently compact, Secretary Ardoin disputes that the districts would "perform" – that is, that they would *actually* provide Black voters with an opportunity to elect the candidate of their choice – because Plaintiffs' illustrative plans create only a "bare majority"[66] of Black voting-age population ("BVAP") in the proposed second majority-minority districts. Further, Secretary Ardoin argues that

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[61] Rec. Doc. No. 101, p. 12.
[62] *Id.* at p. 13.
[63] *Hays v. Louisiana*, 839 F. Supp. 1188, 1195 (W.D. La. 1993) (*Hays I*); *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996) (*Hays IV*).
[64] Rec. Doc. No. 101, p. 18.
[65] *Id.* at p. 17.
[66] *Id.* at p. 18.

Plaintiffs cannot make the requisite showing of racially polarized voting and White bloc voting.

Secretary Ardoin next avers that the totality of the circumstances analysis "show[s] that minority voters possess the same opportunities to participate in the political process and elect their candidate of choice."[67] The Secretary urges that a second majority-minority district is untenable because Louisiana has a "substantial interest in maintaining the continuity of representation in its districting plans."[68] Per the Secretary, the Black population in Louisiana is "remaining flat or even declining"[69] such that drawing a second Black congressional district is not justified.

Lastly, Secretary Ardoin argues that the *Purcell* doctrine forecloses the possibility of judicial intervention in the form of an injunction for the 2022 election cycle. He cites a handful of recent cases where courts have applied *Purcell*, and the declaration of Louisiana election official Sherri Hadskey, who attests that the process of assigning Louisiana voters to their new districts in the state election database system is complicated and time-consuming, and that doing so before the 2022 cycle would cause "significant cost, confusion, and hardship."[70]

C. Intervenor Defendant - Attorney General Landry

The Attorney General argues that Plaintiffs are not substantially likely to succeed on their merits of their claims "as to the first and third *Gingles* preconditions."[71] Plaintiffs only *appear* to have proposed a sufficiently numerous and geographically compact

[67] *Id*. at p. 21.
[68] *Id*. at p. 22.
[69] *Id*.
[70] *Id*. at p. 24.
[71] Rec. Doc. No. 108, p. 6.

second majority-minority district, he explains, by using "statistical manipulation."[72] Specifically, Attorney General Landry argues, Plaintiffs' use of the "Any Part Black" metric, which is a census category including anyone who identifies as Black as well as those who identify as Black and any other race, pushes their proposed CD 5 over the 50% Black Voting Age Population (BVAP) threshold "by a razor's edge."[73] The Attorney General submits that if Any Part Black is not used to count Black voters, "the BVAP numbers do not rise above 50%."[74] Attorney General Landry advocates the use of what he calls "DOJ Black," namely, "those who are 'Black' and those who are 'Black and White.'"[75]

The Attorney General challenges the compactness of the illustrative plans as "combin[ing] Black communities from far-flung parts of Louisiana in the same district."[76] The proposed maps are an example of racial gerrymandering, he argues, which is impermissible "even when the purported purpose of the racial gerrymander is in seeking to comply with the dictates of the Voting Rights Act."[77] As for racially polarized voting, the Attorney General argues that partisan affiliation, not race, best explains the tendency of Black Louisianans to vote similarly.

The Attorney General also advances an argument recently credited by the District Court for the Eastern District of Arkansas in *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionment*,[78] finding that there is no private right of action under Section 2 of the Voting Rights Act. He suggests that this is an "open question" that has been flagged for potential consideration by the Supreme Court and the Fifth Circuit, and

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[72] *Id.*
[73] *Id.*
[74] *Id.* at p. 7.
[75] *Id.*, n. 3.
[76] *Id.* at p. 12.
[77] *Id.* at p. 13.
[78] No. 4:21-CV-01239-LPR, 2022 WL 496908 (E.D. Ark. Feb. 17, 2022).

that the Court should dismiss Plaintiffs' claims on that basis. Finally, the Attorney General echoes Secretary Ardoin's argument that the *Purcell* doctrine dictates that it is too late for relief to be granted as to the 2022 congressional election cycle.[79]

D. The Legislative Intervenors

The Legislators begin by noting that, in the push-pull of the VRA and the Equal Protection Clause, neither proportional representation nor a desire to maximize minority representation are sufficient reasons to create a new majority-minority district. After reviewing the history of the 1990s *Hays* litigation and the 2020 redistricting process, the Legislators argue that the enacted congressional map should not be invalidated because the "Legislature had before it no evidence justifying race-based redistricting."[80] The Legislators argue that race must have predominated in the drawing of Plaintiffs' illustrative plans because "[a] set of 10,000 computer-simulated redistricting plans generated without racial criteria and according to neutral principles produces *zero* majority minority congressional districts . . .let alone *two* as Plaintiffs demand."[81]

Further, the Legislators argue that the illustrative plans offered by Plaintiffs disregard communities of interest because they "combine[] urban Baton Rouge and its suburbs in some way with the distant rural communities of Louisiana's delta parishes. . . who share race in common and not much else."[82] Plaintiffs' plans, they argue, also ignore legislative priorities "such as preserving incumbencies and their constituencies and district cores."[83] Identifying communities of interest is "the Legislature's role . . . not the

[79] Rec. Doc. No. 108, p. 21.
[80] Rec. Doc. No. 119-1, p. 17-18.
[81] *Id*. at p. 19 (emphasis original).
[82] *Id*. at p. 21.
[83] *Id*.

Court's or Plaintiffs,'" they contend, and Plaintiffs' plans "dismantle the Legislature's legitimate and race-neutral goals."[84] Seconding Attorney General Landry, the Legislators also argue that the "DOJ Black" definition should be used to assess whether Plaintiffs' proposed maps feature two districts with greater than 50% BVAP.

The Legislators argue that "white bloc voting. . .is low enough (and crossover voting is high enough) to permit Black voters to elect their preferred candidates without 50% BVAP districts."[85] Thus, the cohesion of Black voters or the polarization of the electorate "carries no legal significance."[86] What may appear as cohesive Black voting is equally likely to be the product of partisan politics, the Legislators assert, noting that "[i]t is difficult for any Democratic candidate, white or Black, to win in Louisiana, except under special circumstances."[87]

The Legislators argue that Plaintiffs' case also fails under the totality of the circumstances because they "do not focus on alleged discrimination against a discrete group in a discrete locality, relying instead on statewide elections and statewide ideals of proportionality."[88] Overall, the Legislators assert, it is not clear whether Black Louisianans would be better off with the status quo of one majority-minority district with a strong BVAP of roughly 58%, or two majority-minority districts that only slightly exceed 50% BVAP. In any event, they argue, *Purcell* demands that the Court abstain from tinkering with the November election.

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[84] *Id*.
[85] *Id*. at p. 23.
[86] *Id*.
[87] *Id*. at p. 25.
[88] *Id*. at p. 26.

LAW AND EVIDENCE

I. STANDARD OF REVIEW

"[A] preliminary injunction is 'an extraordinary remedy never awarded as of right.'"[89] "To obtain a preliminary injunction, the movant must establish four elements: (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest."[90]

II. APPLICABLE LAW

"The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[91] *Thornburg v. Gingles* sets forth three threshold conditions for a claim of vote dilution under Section 2: "first, that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, "that it is politically cohesive"; and third, "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate."[92]

"The 'geographically compact majority' and 'minority political cohesion' showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district. And the 'minority political cohesion' and

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[89] *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018)(citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008)).
[90] *Jiao v. Xu*, 28 F.4th 591, 597–98 (5th Cir. 2022).
[91] *Gingles*, 478 U.S. 30, 47 (1986).
[92] *Growe v. Emison*, 507 U.S. 25, 40 (1993)(citing *Gingles*, 478 U.S., at 50–51).

'majority bloc voting' showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population."[93] "Unless these points are established, there neither has been a wrong nor can [there] be a remedy."[94] Consequently, if Plaintiffs fail to establish any one of these three conditions, the Court need not consider the other two.[95]

Under the first prong of *Gingles*, "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."[96] Because "only eligible voters affect a group's opportunity to elect candidates,"[97] this requirement is analyzed in terms of Black voting-age population (or "BVAP"). Proving the existence of a sufficiently *large* minority population does not end the inquiry; compactness is also required. If the minority population is dispersed such that a reasonably compact majority-minority district cannot be drawn, "Section 2 does not require a majority-minority district...."[98]

"While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries."[99] "Community of interest" is a term of art that has no universal definition in the redistricting context. Visual assessments are appropriate when assessing compactness. "[B]izarre shaping of" a district that, for example, "cut[s] across

[93] *Id.* (citations omitted).
[94] *Id*. at 40–41.
[95] *See Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).
[96] *Bartlett*, 556 U.S. at 19–20.
[97] *LULAC*, 548 U.S. at 429.
[98] *Vera*, 517 U.S. at 979.
[99] *LULAC*, 548 U.S. at 433 (internal quotation marks omitted).

pre-existing precinct lines and other natural or traditional divisions," suggests "a level of racial manipulation that exceeds what § 2 could justify."[100]

To determine whether Plaintiffs satisfy the first *Gingles* requirement, the Court compares the enacted plan with Plaintiffs' illustrative plans.[101] The Court's comparison is for the limited purpose of evaluating *Gingles I*, which requires a district that is "*reasonably* compact and regular";[102] compactness is not a "beauty contest[]"[103] where the most attractively shaped district carries the day.

The second and third requirements of *Gingles* require Plaintiffs to establish that voting in the challenged districts is racially polarized.[104] As the Supreme Court has explained, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters."[105]

If Plaintiffs establish all three *Gingles* requirements, the Court then analyzes whether a Section 2 violation has occurred based on the "totality of the circumstances." At this step, the Court considers the Senate Factors, which include:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political

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[100] *Vera*, 517 U.S. at 980–81.
[101] *Id*. (requiring "a comparison between a challenger's proposal and the 'existing number of reasonably compact districts'").
[102] *Vera, 517 U.S.* at 977 (emphasis original).
[103] *Id*.
[104] *See, e.g.,* LULAC, 548 U.S. at 427.
[105] *Voinovich*, 507 U.S. at 158 (quoting *Gingles*, 478 U.S. at 49 n.15).

> campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.[106]

Supreme Court precedent also dictates that the Court must consider whether the number of majority-Black districts in the enacted plan is roughly proportional to the Black share of the population in Louisiana.[107]

Not relevant to the Court's inquiry is whether the Louisiana Legislature *intended* to dilute the votes of Black Louisianans. The Court's Section 2 analysis "assess[es] the impact of the contested structure or practice on minority electoral opportunities on the basis of objective factors."[108] The Legislature's intent is therefore "the wrong question."[109] "The 'right question . . . is whether 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'"[110]

III. EVIDENCE PRESENTED[111]

A. *Gingles* I – Numerosity and Reasonable Compactness

To satisfy the first *Gingles* requirement, Plaintiffs must establish that Black voters as a group are "sufficiently large and geographically compact to constitute a majority in some reasonably configured legislative district."[112] To establish that, Plaintiffs rely upon the testimony of expert witness William Cooper ("Cooper").

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[106] *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *20 (N.D. Ala. Jan. 24, 2022)(citing *De Grandy*, 512 U.S. at 1010 n. 9).
[107] *See LULAC*, 548 U.S. at 426; *De Grandy*, 512 U.S. at 1000.
[108] *Gingles*, 478 U.S. at 44 (internal quotation marks omitted).
[109] *Id*.
[110] *Id*.
[111] The Court's citations to the record use abbreviated prefixes to reflect the party that offered the exhibit. GX = Galmon Plaintiffs; PR = Robinson Plaintiffs; ARD = Secretary Ardoin; AG = the Attorney General; and LEG = the Legislative Intervenors.
[112] *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted).

Defendants stipulated to Plaintiffs' tender of Cooper as an expert in redistricting, demographics, and census data. Drawing on his 30 years of experience as a demographer, including testifying in more than 50 voting-related federal cases, Cooper opines that "African Americans in Louisiana are sufficiently numerous and geographically compact to allow for two majority-Black U.S. House districts in a six-district plan."[113] Cooper offers four illustrative maps – all of which contain two majority-Black congressional districts based on his analysis.[114]

Cooper testified that between 2010 and 2020, Louisiana gained approximately 125,000 residents, with all of the gain attributable to minority populations, and about half attributable to gains in the Black population. Conversely, Cooper documented an overall decline in the White population in Louisiana since 1990. Cooper concludes that the Black population, counted using the Any Part Black metric, increased from 32.80% in the 2010 census to 33.13% in the 2020 census – an increase of 56,234 people. According to Cooper, Any Part Black "is the appropriate Census classification to use in Section 2 cases."[115] While Any Part Black is somewhat self-defining, Cooper explains it as encompassing "persons of one or more races that are some part Black."[116]Applying a single-race Black metric, Cooper found that the Black population decreased slightly, from 32.04% to 31.43%. The population data evidence is reflected below:

[113] GX-1, p. 5.
[114] GX-1 at 47-83; GX-29 at 10-22.
[115] GX-1, p. 7, n. 10.
[116] *Id*.

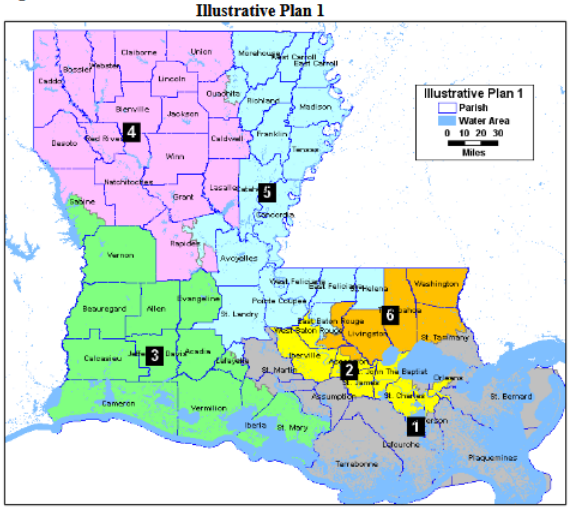
Louisiana – 1990 to 2020 Census
Population by Race and Ethnicity

All Ages	1990	Percent of Total Populatio	2000	Percent of Total Populatio	2010	Percent of Total Population	2020	Percent of Total Population
Total Population	4,219,973	100.00%	4,468,976	100%	4,533,372	100%	4,657,757	100.00%
NH White*	2,776,022	65.78%	2,794,391	62.53%	2,734,884	60.33%	2,596,702	55.75%
Total Minority Pop.	1,443,951	34.22%	1,674,585	37.47%	1,798,488	39.67%	2,061,055	44.25%
Latino	93,044	2.20%	107,738	2.41%	192,560	4.25%	322,549	6.92%
NH Black*	1,291,470	30.60%	1,443,390	32.30%	1,442,420	31.82%	1,452,420	31.18%
NH Asian*	39,302	0.93%	54,256	1.21%	69,327	1.53%	85,336	1.83%
NH Hawaiian and PI*#	NA	NA	24,129	0.54%	28,092	0.62%	1,706	0.04%
NH American Indian and Alaska Native	17,539	0.42%	1,076	0.02%	1,544	0.03%	25,994	0.56%
NH Other*~	2,596	0.06%	4,736	0.11%	6,779	0.15%	16,954	0.36%
NH Two or More Races#	NA	NA	39,260	0.88%	57,766	1.27%	156,096	3.35%
SR Black (Single-race Black)	1,299,281	30.79%	1,451,944	32.49%	1,452,396	32.04%	1,464,023	31.43%
AP Black (Any Part Black)	NA	NA	1,468,317	32.86%	1,486,885	32.80%	1,543,119	33.13%

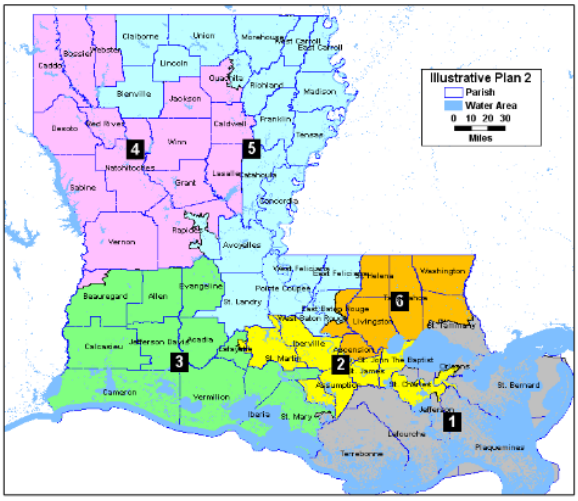
117

Cooper opines that, based on the new Census data, "[t]here are a variety of ways to draw two majority-Black congressional districts in Louisiana while adhering to traditional redistricting principles."[118] Cooper's four illustrative maps are reproduced below: [119]

Illustrative Plan 1



Illustrative Plan 2



[117] *Id.* at p. 6.
[118] *Id.* at p. 21.
[119] GX-1, p. 26; *Id.* at p. 28; *Id.* at p. 30; GX-29, p. 6.

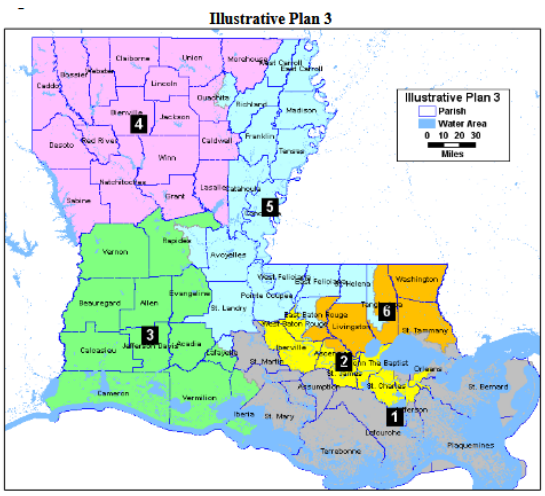
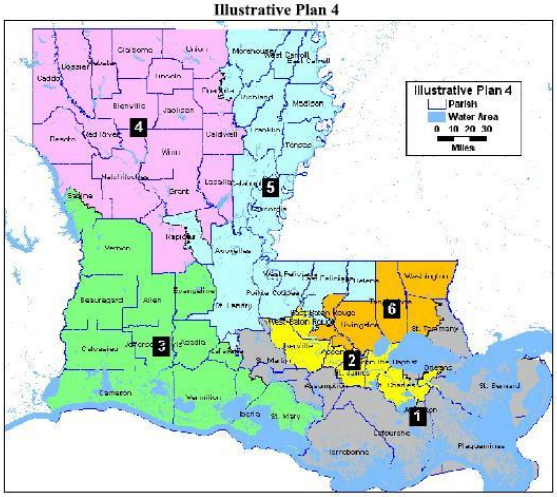


Figure 1
Illustrative Plan 4



Cooper's mapdrawing process began by obtaining the relevant census data and geographic files, then applying traditional redistricting principles and drawing a plan. Cooper testified that he relies upon the concepts of one person one vote, reasonable compactness and shape, political subdivision lines, contiguity, and preserving communities of interest. He considered the Legislature's Joint Rule 21 and the principles expressed therein. Cooper also stated that he was guided by the principle of avoiding dilution of minority voting strength. For this reason, he testified, he is "aware" of race to some extent with drawing maps. Overall, Cooper testified that he did not weigh these factors or give any one more emphasis – he "balanced them all."

Cooper's illustrative plans include two majority-Black congressional districts. A majority-Black district is one in which the Any Part Black Voting Age Population (APBVAP) exceeds 50% in the district. Cooper testified that APB is the obviously appropriate metric, since it has been accepted in many cases throughout the country since the 2003 Supreme Court case *Georgia v. Ashcroft*.[120] Cooper stated that he has relied upon APB since just before the 2010 census, and has applied it in several cases this year, as well as in the 2017 Louisiana case *Terrebonne NAACP v. Jindal*.[121] Cooper

[120] 539 U.S. 461, 461 (2003).
[121] 274 F. Supp. 3d 395 (M.D. La. 2017).

cross-referenced his BVAP data with a registered voter file provided by the Secretary of State in summer 2021, which verified that his CD 2 and CD 5 have over 50% Black *registered* voters, as well. Further, Cooper testified that even using the most conservative definition of BVAP possible, single race non-Hispanic citizen voting age population, CD 2 and CD 5 in his illustrative plans still exceeded 50% BVAP:

2016-2020 Citizen Voting Age Population by Plan

	% NH SR Black CVAP	% NH White CVAP	NH Black CVAP to NH White CVAP Margin	July 2021 Black Registered Voters
2022 Plan				
District 2	61.89%	31.34%	30.55%	61.52%
Illustrative Plan 1				
District 2	53.35%	39.31%	14.04%	52.33%
District 5	50.94%	46.19%	4.75%	51.84%
Illustrative Plan 2				
District 2	53.66%	39.53%	14.13%	52.72%
District 5	51.26%	45.92%	5.34%	51.53%
Illustrative Plan 3				
District 2	53.40%	39.31%	14.09%	52.33%
District 5	52.78%	44.86%	7.92%	53.35%

[122]

Cooper testified that he could have maximized the Black population in his proposed majority-minority districts to increase BVAP, but that doing so would have come at the expense of other traditional redistricting principles.

Analyzing H.B. 1, Cooper described the enacted map's CD 2 as serpentine, making inexplicable twists and turns. He stated that the enacted CD 2 is a "carbon copy" of its previous 2011 iteration, which was found to be the seventh least-compact congressional district in the nation. The Legislature's 2022 enacted CD 2 suffers from the same compactness deficiencies, in his opinion. Furthermore, the diffuseness of CD 2 gives rise to what Cooper called a non-compact "wraparound district" in CD 6, which traverses a large amount of territory from Livingston Parish to Terrebonne. Cooper noted

[122] GX-1, p. 36.

that the BVAP in the enacted CD 2 is 58.65%, while the other five districts have under 34% BVAP. Cooper concluded that the enacted plan "packs and cracks Black voters."[123]

Cooper explained that the purpose of the illustrative plans he drew, and of illustrative plans generally, is to demonstrate to the court that it is possible to draw a map with two majority-minority congressional districts that satisfies the first prong of *Gingles I* – numerosity and compactness – while adhering to traditional redistricting principles. Cooper noted that Plaintiffs did not engage him to produce such a plan no matter what; only to do so if it was feasible. He testified that in other cases, he has declined to draw illustrative maps where it was not possible to add majority-minority districts without violating traditional redistricting principles. This was not such a case. In his view, configuring Louisiana congressional maps with two majority-minority districts with fidelity to traditional redistricting principles was easy and obvious.

Cooper's illustrative maps all take roughly the same shape, reaching from East Baton Rouge and St. Landry Parishes in the south to the Delta Parishes along the Louisiana-Mississippi border. Cooper explained that one difference between his illustrative maps and the enacted map is that he made CD 2 and CD 6, which he considered to be irregularly shaped, more regular. On direct examination, he described how his maps perform with respect to traditional redistricting principles. First, he stated, all of his maps comply with one person-one vote; in fact, three of his four plans are zero-deviation plans, meaning that all of the districts have perfectly equal population sizes. Illustrative Plan 4 has an overall deviation of plus or minus 150 persons, which resulted from reconfiguring the maps to split zero precincts.

[123] *Id*. at p. 20.

Cooper opined that his plans "are across-the-board superior to the 2022 plan in terms of parish splits, municipal splits, and CBSA splits,"[124] as documented in the following charts:

Political Subdivision Splits

	Parish Splits	Populated 2020 VTD Splits	Populated Municipal Splits	Single-Parish Populated Municipal Splits*	CBSA splits
2022 Plan	15	0	30	25	18
Illustrative Plan 1	10	13	24	18	14
Illustrative Plan 2	11	7	30	22	16
Illustrative Plan 3	10	12	29	23	17

[125]

Figure 3
Political Subdivision Splits

	Parish Splits	Populated 2020 VTD Splits	Populated Municipal Splits	Single-Parish Populated Municipal Splits*	CBSA splits
2022 Plan (HB 1)	15	1	36	25	18
Illustrative Plan 4	10	0	30	21	14

[126]

To evaluate splits in political subdivisions, Cooper used Core Based Statistical Areas ("CBSAs"), which are regions defined by the Office of Management and Budget comprised of urban centers and the surrounding areas. The composition of CBSAs is influenced by commuting patterns, commercial activity, and communities of interest. Cooper testified that his illustrative plans split fewer CBSAs than the enacted map and that, overall, his maps better preserved CBSAs and other political subdivisions.

[124] GX-1, p. 34.
[125] *Id.*
[126] GX-29, p. 8.

Cooper testified, and all experts agreed, that the Reock and Polsby-Popper methods are the most widely accepted tools for measuring geographical compactness.[127] Cooper testified that his plans perform better on compactness compared to the enacted plan. The enacted plan earns an average Reock score of 0.37 and an average Polsby-Popper score of 0.16. His illustrative plans score as follows:

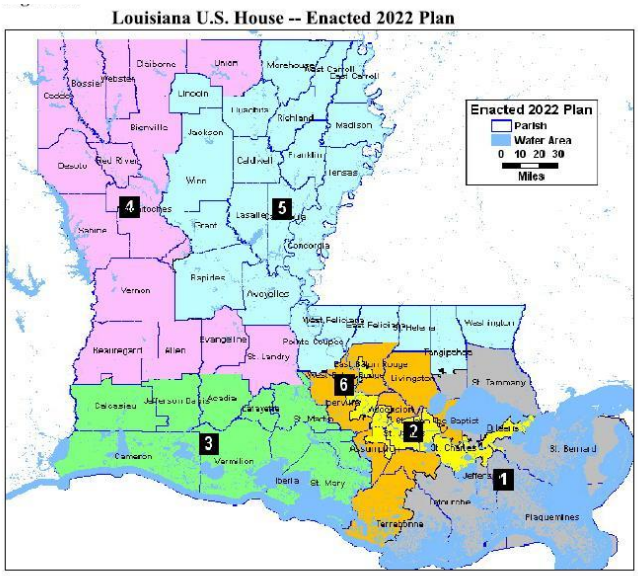
Plan	Reock			Polsby-Popper		
[redacted]	[redacted]	Low	High	[redacted]	Low	High
HB 1						
Mean of All Districts	.37	.18	.50	.16	.06	.34
CD 2	.18	[redacted]	[redacted]	.06	[redacted]	[redacted]
Illustrative Plan 1						
Mean of All Districts	.36	.23	.53	.19	.09	.27
CD 2	.23	[redacted]	[redacted]	.15	[redacted]	[redacted]
CD 5	.33	[redacted]	[redacted]	.09	[redacted]	[redacted]
Illustrative Plan 2						
Mean of All Districts	.41	.23	.53	.19	.09	.27
CD 2	.23	[redacted]	[redacted]	.12	[redacted]	[redacted]
CD 5	.33	[redacted]	[redacted]	.09	[redacted]	[redacted]
Illustrative Plan 3						
Mean of All Districts	.38	.23	.52	.18	.08	.31
CD 2	.23	[redacted]	[redacted]	.15	[redacted]	[redacted]
CD 5	.30	[redacted]	[redacted]	.08	[redacted]	[redacted]
Illustrative Plan 4						
Avg. of All Districts	.37	.23	.56	.18	.08	.29
CD 2	.23	[redacted]	[redacted]	.15	[redacted]	[redacted]
CD 5	.35	[redacted]	[redacted]	.09	[redacted]	[redacted]

[128]

[127] Quoting the documentation accompanying the Maptitude redistricting software, Cooper explains that the Reock test is "an area-based measure that compares each district to a circle, which is considered to be the most compact shape possible. For each district, the Reock test computes the ratio of the area of the district to the area of the minimum enclosing circle for the district. The measure is always between 0 and 1, with 1 being the most compact. The Reock test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan." The Polsby-Popper test, meanwhile, "computes the ratio of the district area to the area of a circle with the same perimeter: 4pArea/ (Perimeter2). The measure is always between 0 and 1, with 1 being the most compact. The Polsby-Popper test computes one number for each district and the minimum, maximum, mean and standard deviation for the plan." (GX-1, p. 31, n. 26).

[128] Rec. Doc. No. 164, p. 37 (derived from GX-1 Figure 18 and GX-29 Figure 4).

Cooper testified that the superior compactness achieved by his plans is easily verifiable by making a simple visual comparison of his plans to the enacted plan, with its "very oddly shaped" CD 2 and wraparound CD 6:



129

Cooper also testified that, in Louisiana cities, the Black population tends to be concentrated in very compact, easily definable areas, partly as a result of historical housing segregation which still prevails in the current day. For example, he explained, Black residents of Baton Rouge are highly concentrated in the northern part of the city, with the White population primarily located in the southern and eastern areas of the city. The Court takes judicial notice of this well-known and easily demonstrable fact.

Cooper reported that all of his illustrative maps have contiguous districts. Although the enacted plan can technically say the same, Cooper was critical of how that result was achieved. For example, he pointed out that CD 2 flanks both sides of Interstate 10 around the Mississippi River Bridge in Baton Rouge; although being bisected by a body of water

[129] *Id*. at p. 19.

does not technically vitiate the district's contiguity, it is not an ideal configuration. Likewise, looking at the enacted plan's District 6, Cooper commented that to get from parts of St. John Parish from the rest of the district, one would have to either swim across Lake Maurepas into Livingston Parish or take Interstate 55 and drive through another district entirely.

Based on Cooper's analysis, under the enacted plan, only 31% of Louisiana's Black population lives in a majority-minority district, while 91.5% of the White population lives in a majority-White district.[130] Cooper testified that in his illustrative plan, approximately 50% of Black people in Louisiana would live in a majority-Black district, while 75% of White people would live in a majority-White district.

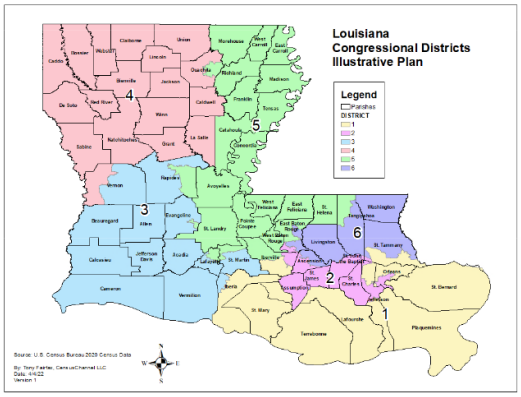
On cross-examination, Cooper again emphasized that although Plaintiffs did *ask* him to draw maps with two majority-minority districts, he did not have a goal of creating create two such districts no matter what. He asserted that he followed traditional principles and considered all of the relevant factors. Defendants' cross of Cooper focused heavily on the inclusion of East Baton Rouge and the Delta Parishes in one congressional district. Cooper testified that, based on the data, he found very clearly defined neighborhoods that were overwhelmingly Black in some areas. This compactness in the Black population made it easy to join Black areas to other Black areas to draw a majority-Black district. Socioeconomic factors also made the combination of East Baton Rouge and East Carroll Parish a natural one; Cooper testified that he found nothing unusual at all about including them in the same district, though he agreed that poverty is much higher

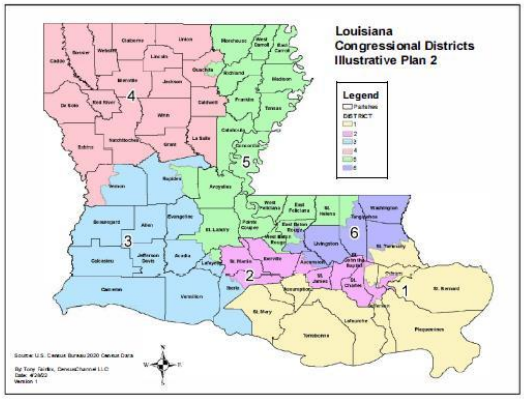
[130] *Id*. at p. 20.

in East Carroll Parish, with much lower median income for the Black population, and that educational attainment was likewise much lower in East Carroll Parish.

As for respecting communities of interest, Cooper agreed that there is no universal definition of a community of interest, but noted that he tried to keep the Acadiana region relatively intact in his maps, and believed that he did so successfully. Conversely, Cooper stated that nothing in his analysis indicated that the areas around Fort Polk should necessarily be joined as a community of interest, so he did not prioritize that.

Plaintiffs' expert Anthony Fairfax also gave opinion testimony related to *Gingles I.* Defendants stipulated to Fairfax's expertise in demography, redistricting, and census data. Fairfax prepared a report and two supplemental reports in this case,[131] advancing three illustrative maps, two of which are reproduced below. Fairfax's third map, Plan 2A, is not pictured because it involved a very minor change designed to avoid incumbent pairing and is not visually distinguishable from Plan 2.





[132]

[131] PR-15; PR-86; PR-90. Fairfax's reports were offered and admitted as substantive evidence without objection.
[132] PR-15, p. 5; PR-86, p. 4.

Fairfax opines that his illustrative maps prove that Louisiana's Black population is sufficiently large and geographically compact to "easily meet[] the first preconditions of [*Gingles*]."[133] Specifically, Fairfax opines that:

> It is possible to draw an Illustrative Plan that adheres to federal and state redistricting criteria and contains two majority-Black congressional districts. The Illustrative Plan was drawn with race not predominating and continues to perform as well or better than the enacted plan HB1 on eight out of eight redistricting criteria including: 1) population deviation (equal population or "one person, one vote"); 2) contiguity; 3) compactness; 4) political subdivision splits for parishes; 5) political subdivision splits for Voting Tabulation Districts ("VTDs"); 6) preserving communities of interest for census places; 7) preserving communities of interest for landmark areas; and 8) fracking.[134]

Fairfax testified that he started with the enacted plan as a baseline. Thus, his illustrative plans retain the current majority-Black district in CD 2, but with adjustments designed to "lessen the presence of District 2 in Baton Rouge and create a more single metro district"[135] anchored in New Orleans. Like Cooper, Fairfax drew various versions of CD 5 that connect the Baton Rouge area to the Delta Parishes along the Louisiana-Mississippi border. Also like Cooper, Fairfax used the Any Part Black definition to conclude that the majority-minority districts in his illustrative plans topped the 50% BVAP mark. Fairfax's Illustrative Plan 1 features a CD 2 with a BVAP of 50.96% and a CD 5 with 52.05% BVAP.[136] His Plans 2 and 2A also feature two majority-minority districts (with APBVAP ranging from 51.55% to 51.98%).[137]

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[133] PR-15, p. 10.
[134] *Id*.
[135] PR-15, p. 26, n. 48.
[136] *Id*. at p. 30.
[137] PR-86, p. 7; PR-90, p. 5.

Fairfax stated that APB is a commonly used and accepted definition in this type of analysis, but in response to Defendants' criticism of that measure, he also assessed his proposed districts' population using the Single-Race Black Non-Hispanic Citizen Voting Age Population category, which resulted in proposed districts with an even stronger Black majority.[138] Significantly, for each of his illustrative plans, regardless of the method used to count BVAP, Fairfax concluded that Black voters make up a majority of the voters in CD 2 and CD 5.

Fairfax testified that he looked at equal population, contiguity, compactness, splits, communities of interest, and fracking when drawing his maps. Consideration of Legislature's Joint Rule 21 was paramount in his process, but his overall strategy was to balance all of the relevant districting principles without allowing any single factor to predominate. Fairfax testified that all of his plans have contiguous districts and that all of his plans achieve population equality. He used the Reock, Polsby-Popper, and Convex Hull measures to assess compactness and demonstrated that his illustrative districts were more compact than the enacted map:

Table 1 - Illustrative Plan and HB 1 Mean Compactness Measurements

District	Reock	Polsby-Popper	Convex Hull	Performed Best
Illustrative Plan Mean	**.42**	**.18**	**.69**	**3 of 3**
Illustrative Plan 2 Mean	**.39**	**.20**	**.71**	**3 of 3**
Illustrative Plan 2A Mean	**.39**	**.20**	**.71**	**3 of 3**
HB1 Plan Mean	.37	.14	.62	0 of 3

[139]

As for parish splits, Fairfax's plans split either 12 or 14 parishes, while the enacted plan splits 15. Moreover, Fairfax explained that it was his belief, based on studying the

[138] Rec. Doc. No. 162, p. 19.
[139] Rec. Doc. No. 162, p. 36. Plaintiffs compiled this chart from Fairfax's reports; the Court has independently verified the figures presented therein from the evidence presented and finds no error.

enacted plan, that the Legislature prioritized the elimination of VTD splits – the enacted plan splits none of them. Fairfax's plans likewise split none. With respect to communities of interest, Fairfax testified that he analyzed them by considering the number of times his illustrative plans split census places and landmark areas. The category of "census places" includes government entities such as cities and towns, as well as Census Designated Places (CDPs).[140] While the enacted plan splits 32 census places, Fairfax's plans are superior on this index, splitting either 26 or 31. Fairfax defended his use of census places as communities of interest, explaining that even more than a city or town boundary, a census place is a locally well-known unit and a good indicator of the existence of a community of interest, even though it may not have a governmental body.

In his supplemental report, Fairfax addressed the performance of his Illustrative Plans 1 and 2 on state and traditional redistricting criteria, as compared to the enacted map:

Table 1 – Illustrative Plans 1, 2 and HB1 Plan Criteria Comparison

Criteria	Illustrative Plan 1	Illustrative Plan 2	HB1 Plan
Equal Population	**51**	**58**	65
Contiguity	Y	Y	Y
Parish Splits	**14**	**12**	15
VTD Splits	0	0	0
COI Census Places Splits	**31**	**26**	32
COI Landmark Splits	58	58	58
Compactness (mean)	**.42, .18, .69**	**.39, .20, .71**	.37, .14, .62
Fracking	**5**	**5**	8

Source: Illustrative and HB1 Plans extracted from Maptitude for Redistricting reports [141]

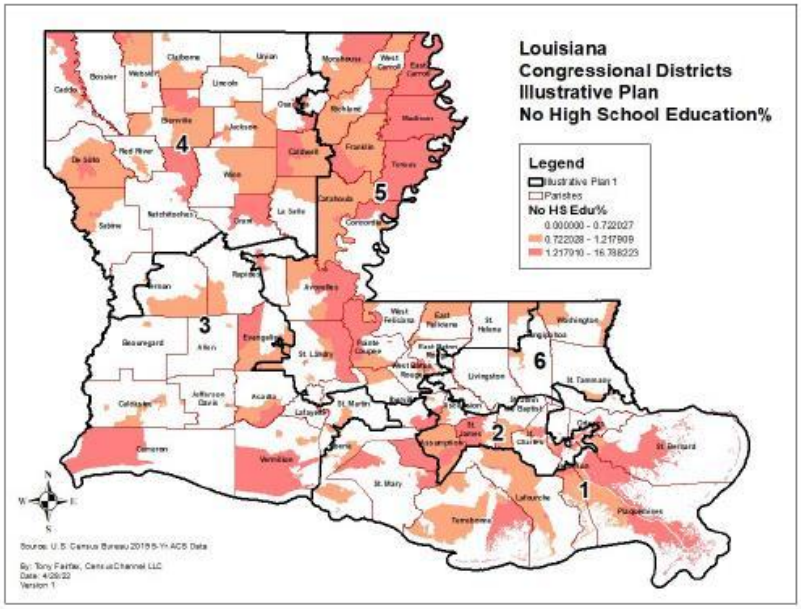
Fairfax concludes that his "Illustrative Plan 2 in addition to performing better than the HB1 Plan, exceeds many of Illustrative Plan 1's performance on state and traditional

[140] PR-15, p. 21.
[141] PR-86, p. 5.

redistricting criteria."[142] Fairfax explains that he considered the testimony of Louisiana residents from the roadshows held by the legislature during the redistricting process to validate his impressions of communities of interest. His supplemental report cites particular testimony and explains how the testimony specifically influenced his consideration of communities of interest.

Fairfax testified that socioeconomic data was another important guiding factor for assessing communities of interest and to ensure respect for commonalities in mapping the districts. He explained how he used the mapping software's capabilities to overlay data onto his proposed districts related to, for example, median household income, educational attainment, food stamp percentage, poverty level, percentage of renter households, and community resilience estimates. This information led him to conclude that areas in Ouachita Parish, Rapides Parish, Evangeline Parish, Baton Rouge, and Lafayette could be appropriately grouped together. For example, by overlaying data related to the percentage of the population with no high school education in a given area, it was easy to see that the areas shaded red and orange in the map below, indicative of more people with no high school education, followed a pattern that "clearly define[d] the boundaries of District 5."[143]

[142] *Id.*
[143] PR-86, p. 15.



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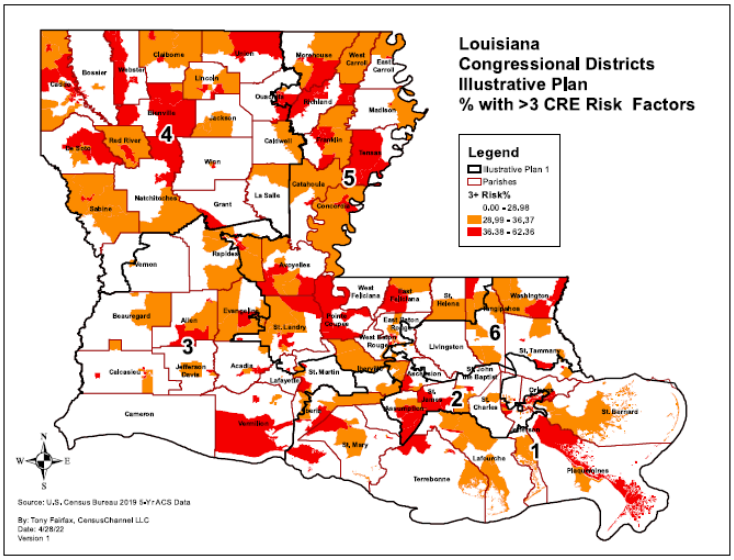
Likewise, by overlaying data from the U.S. Census Bureau's Community Resilience Estimate (CRE), Fairfax observed a commonality in the areas that he drew into CD 5:



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Specifically, the more heavily shaded orange and red areas are, according to the Census Bureau, united by a higher level of risk to the impact of disasters; risk factors include low

144 *Id*. at p. 99.
145 *Id*. at p. 100.

income, communication barriers, number of persons per room in the house, lack of health insurance, and others. So, Fairfax explains, this indicator also suggested to him that the areas in his CD 5 were appropriately grouped together.

On cross-examination, Defendants asked Fairfax to elaborate on how race factored into his drawing process. Fairfax confirmed that he had the ability to display BVAP in his mapping software, but that he only used that feature at the beginning of his process, to get a sense of possible areas where a majority-minority district could be drawn. After he got that initial sense of where BVAP levels were strong, Fairfax testified that he "turned off" the BVAP overlay and focused instead on socioeconomic data, which he used to make more granular mapping decisions. Fairfax did not deny that he considered race to some extent in order to determine if two majority-minority districts could be drawn. But he testified that race did not predominate as a factor because he does not look at the racial data constantly; he familiarizes himself with it on the front end and, as he put it, does not look any more than necessary to ascertain numerosity and compactness as per *Gingles I.*

Fairfax also elaborated on how his proposed CD 5 was developed. He testified that he started with the existing congressional map and began trimming the area to the west to make the Delta region in Northeast Louisiana a more substantial presence in the district. He then expanded down further to add different areas, starting in the north and working his way south. Fairfax clarified that he does not simply add territory to the district until he reaches the 50% threshold; the BVAP in the district goes up and down along with way based on the addition and subtraction of different areas. When Defendants asked Fairfax about the maps struck down in *Hays*, Fairfax stated that the districts at issue in

Hays were "extremely non-compact" and therefore not comparable to his illustrative plans. He testified that he would never draw districts like the ones in *Hays*.

Fairfax stated that it would be very difficult to create a second majority-Black district in CD 5 without including parts of East Baton Rouge Parish. Fairfax did not disagree that East Baton Rouge is distinguishable from the Delta parishes in some respects, such as educational attainment and income level. However, he testified that the Delta Parishes are also distinct in terms of socioeconomic factors from the parishes to their west, with which they are grouped in the enacted plan.

Plaintiffs 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 Plaintiffs' illustrative CD 5. Christopher Tyson, a professor at the Louisiana State University Law Center and the former CEO of Build Baton Rouge, testified that in the 1860s, his ancestors migrated from the Delta in Wilkinson County, Mississippi to Baton Rouge, the nearest big city. This pattern of migration from the Mississippi Delta to Baton Rouge was common, Tyson testified, explaining that the strong historical connection between East Baton Rouge and the Delta parishes makes combining them in the same congressional district natural. Tyson testified that he and other Black people in Baton Rouge have strong ties to the Delta region through faith, family, and culture. Tyson also cited educational ties between the Delta parishes and Baton Rouge, explaining that McKinley High School in Baton Rouge used to be the only high school option for Black students in a wide swath of Louisiana. Southern University likewise was and is a draw for rural students in the Delta seeking higher education.

Tyson's testimony illustrated a historical link that gives rise to enduring connections between Baton Rouge and the Delta region.

By contrast, Tyson testified, the enacted plans' linking of Baton Rouge and New Orleans in one congressional district is misguided because it fails to take into account urban dynamics besides race. Baton Rouge is a state capital and a university town, he said, while New Orleans relies heavily on tourism. In Tyson's view, Baton Rouge and New Orleans have distinct economies and different histories that require different representation. Tyson was critical of arguments surrounding redistricting that overemphasize "culture" – as in shared music and food tastes, for example – while overlooking the reality of people's experiences due to the effects of racism. Louisianans may use black pepper in some parts and red in others, he said, but in all the state, Black Louisianans were subject to Jim Crow. The pernicious effects of racism and segregation have affected Black Louisianans for hundreds of years, he testified, and congressional representation needs to be considered through the lens of Black experiences, not by reference to superficial cultural concerns. Congressional representation, he testified, brings federal resources to a district that can ameliorate the effects of that history that still exist today.

Plaintiffs also called Charles Cravins, a St. Landry Parish resident who testified regarding how redistricting affects his parish, specifically about how being placed in the same district with areas that share commonalities and communities of interest is critical to the political fate of St. Landry. Cravins is a lawyer in Opelousas and the descendant of free Black people from France. He attended the Southern University Law Center in Baton Rouge and noted that it is very common for St. Landry Parish residents to attend college

in Baton Rouge – five of his nine siblings did. Before integration, he testified, going to Baton Rouge was the only option for Black people seeking higher education.

St. Landry Parish is a relatively small area with not a lot of influence, Cravins testified, which means that in order for it to reach its full potential it needs to be paired in a congressional district with other centers of influence – historically, either Lake Charles, Lafayette, or Baton Rouge. According to Cravins, if St. Landry Parish is cut off from all three of those places – as it is in the enacted plan – voters in St. Landry are effectively disenfranchised. The enacted map pairs St. Landry with Shreveport, which Cravins says disenfranchises Black voters, noting that to his recollection, congresspeople from North Louisiana have typically not visited or taken an interest in St. Landry Parish.

Cravins testified that he hosts a radio program that blends public affairs discussion with zydeco music and that his program has a strong listenership in Baton Rouge. Although Baton Rouge and St. Landry are not technically part of the same "media market," he explained that St. Landry people consume a lot of Baton Rouge media, particularly TV stations and the newspaper. Both Baton Rouge and St. Landry have strong Catholic roots, vestiges of French and Spanish influence, and they both support the New Orleans Saints, he testified.

St. Landry and Baton Rouge share common policy concerns, in Cravins' view. The petrochemical industry is a significant economic driver in both, which is quite distinct, he said, from the natural gas economy in Northern Louisiana. The petrochemical connection brings shared environmental and climate concerns, Cravins said. Moreover, he noted, areas in South Louisiana share a strong interest in disaster relief policy, which is less relevant in North Louisiana, where hurricanes do not generally have as much impact.

Likewise, Cravins testified, St. Landry and Baton Rouge are sugar cane territory, another common economic driver.

Overall, Cravins testified, the illustrative maps prepared by William Cooper, which link St. Landry with Lafayette and Baton Rouge, would allow St. Landry to maintain connections with the centers of influence that are important to making their voice heard. Cravins testified that the number of polling places in St. Landry recently decreased. Previously, he explained, his polling place was 1.2 miles from his home; now, it's 17 miles away. Cravins stated that there was uproar in his local community about this change because people believe the change was made with a goal of diluting minority votes. Black precincts were combined with majority-White ones to make much larger precincts. Cravins testified that the official reason for the change was that there was a mandate from Secretary Ardoin to reduce costs. Cravins does not find this reason to be credible, he said, because he attended the parish council meeting where the precinct combination was on the agenda and there was no mention of cost. In fact, he testified, the parish will actually have one more precinct after the changes are implemented, so he is skeptical that there will be any cost reduction at all.

Defendants offered several experts to rebut Plaintiffs' contention that they have satisfied the first prong of *Gingles* with their illustrative maps. The first, Thomas Bryan, was tendered and accepted as an expert in the field of demographics, based on Plaintiffs' stipulation. Bryan was asked to determine whether Plaintiffs' illustrative maps meet the numerosity criteria from the first prong of *Gingles*, and whether there was evidence that race appeared to predominate in the design of any of the plans. At the hearing, Bryan testified that he did not examine compactness, communities of interest, or other traditional

redistricting criteria. In his words, he was asked to focus on the demographics. Bryan explains that he set out to "explore the demographic definition of minorities and show how different definitions can generate different conclusions about whether a district is 'majority' or not."[146] On this topic, Bryan opines that "only by the most generous definition of Black, the any part black (APB) measure, do any of the Illustrative Plans meet the traditional majority minority criteria of over 50% +1."[147] Bryan's demographic analysis is reflected in the following tables setting forth his findings regarding the BVAP of districts in the illustrative plans:

Table III.A.4 Robinson Illustrative Plan Black Share of Voting Age Population

Illustrative Plan	Black Alone	Black DOJ	Any Part Black
1	16.84%	17.24%	18.29%
2	**48.73%**	**49.39%**	**50.96%**
3	16.77%	17.29%	17.91%
4	30.76%	31.25%	31.90%
5	**50.63%**	**51.25%**	**52.05%**
6	15.31%	15.68%	16.19%

Table III.A.5 Galmon Illustrative 1 Plan Black Share of Voting Age Population

Illustratuve 1 Plan	Black Alone	Black DOJ	Any Part Black
1	16.95%	17.35%	18.18%
2	**47.77%**	**48.41%**	**50.16%**
3	18.55%	19.10%	19.75%
4	30.68%	31.17%	31.82%
5	**48.62%**	**49.22%**	**50.04%**
6	16.36%	16.74%	17.24%

Table III.A.6 Galmon Illustrative 2 Plan Black Share of Voting Age Population

Illustrative 2 Plan	Black Alone	Black DOJ	Any Part Black
1	15.29%	15.67%	16.51%
2	**48.27%**	**48.92%**	**50.65%**
3	20.39%	20.93%	21.59%
4	27.52%	28.00%	28.65%
5	**48.65%**	**49.25%**	**50.04%**
6	18.74%	19.14%	19.67%

[146] AG-2, p. 10.
[147] *Id.*

Table III.A.7 Galmon Illustrative 3 Plan Black Share of Voting Age Population

Illustrative 3 Plan	Black Alone	Black DOJ	Any Part Black
1	17.35%	17.74%	18.52%
2	**47.77%**	**48.41%**	**50.16%**
3	16.82%	17.35%	17.98%
4	31.79%	32.29%	32.96%
5	**50.23%**	**50.81%**	**51.63%**
6	15.14%	15.53%	16.09%

Bryan opined that all of the plans (though he did admittedly not examine Robinson Illustrative Plans 2 and 2A) only achieve two majority-Black districts by using the most expansive metric, Any Part Black.

Bryan testified regarding what he called his "splits analysis," which he used to conclude that "[b]ased on the surgical, divisive nature of the splits in each of the Plaintiffs' Illustrative Plans across Louisiana's places . . . race was the prevailing factor in their design."[149] He explained that his goal was to count how many pieces of geography are split by a given plan, then assess the impact of those splits by examining how many and what races are impacted by those splits. Bryan offered an "index of misallocation," which attempts to quantify "the degree to which a plan splits administrative geography by race."[150] The index works by "measuring how much of a minority population would be in a given piece – if it had an exact same proportionate share as the total population."[151]

For example, Bryan testified, under the illustrative plans, the city of Baton Rouge is split between CD 2 and CD 6. Roughly 65% of the total Baton Rouge population lives in CD 6, he said, but 94.59% of the White people in Baton Rouge live in CD 6. Conversely, although only about 34% of Baton Rouge residents live in CD 2, 57.21% of Black Baton

[149] *Id*. at p. 11.
[150] *Id*. at p. 24.
[151] *Id*.

Rougeans live in CD 2. Bryan testified that these numbers provide some evidence of "misallocation," stating that, if all else was equal, you would expect White residents to be allocated into the districts in the same way the total population is distributed. Instead, he claims, White voters are "over-indexed" in CD 6. Bryan's report includes a number of charts setting forth this "misallocation" analysis under different plans and in different localities.[152]

Bryan further testified regarding his impressions of "misallocation" in Lafayette and Monroe. In the illustrative plans, Lafayette is split between CD 3 and CD 5. According to Bryan, if the districts were drawn race-blind, there should be equal amounts of White and Black voters in each district. Instead, he claimed, they were drawn very precisely, such that blocks with 50% or more Black population ended up on the same side of the line. He testified that the same pattern is observable in Baton Rouge, where the district line, in his opinion, was drawn block by block to precisely divide the Black and White populations. Overall, Bryan testified, he found that all the splits he analyzed occurred in such a way that a disproportionate share of the Black population was drawn into a majority-minority district. Therefore, he concluded that race was a prevailing factor in the designs of the illustrative plans. Responding to a criticism of his report by Anthony Fairfax, Bryan admitted that he did not consider socioeconomic factors in drawing his conclusions.

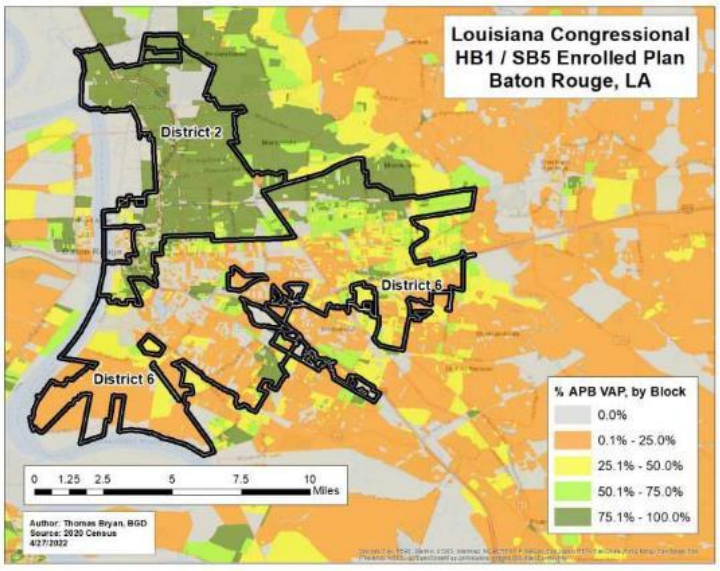
On cross-examination, Bryan agreed that the district court in *Caster v Merrill*, where he offered testimony, found that Any Part Black was the proper metric to apply in Section 2 cases. Bryan testified that he does not have an opinion about the appropriate

[152] *Id*. at p. 39, *et seq*.

definition to use. Using APB, he agreed, all of the Plaintiffs' illustrative plans have two majority-Black districts.

Bryan confirmed that his conclusion about racial predomination was based on data, a visual examination of the maps, and the index of misallocation. He testified that he has never produced an index of misallocation before, and that he is not aware of it ever being credited by a court. In response to questioning about the assumptions built into the "misallocation" inquiry, Bryan testified that the notion of populations being "misallocated" is based on two assumptions: first, that the Black population is evenly distributed in an area and that a split is created randomly. Plaintiffs' counsel asked Bryan to examine this map from his report:

AA. Baton Rouge HB1 / SB5 Enrolled Plan Split by % Any Part Black VAP



Bryan testified that, in the area depicted, the Black population is not distributed evenly; it is heavily concentrated in the north areas of the city. Asked whether the Legislature split Baton Rouge randomly, Bryan testified that he did not believe so; he believed that they followed a least-change approach and followed existing boundaries.

Plaintiffs' counsel further asked Bryan to explain how it can be gleaned whether a "misallocation" is due to Black population being concentrated in a certain area versus racial intent in the drawing of lines. Bryan stated that he *infers* misallocation, because although the map drawer could theoretically divide areas in any number of ways, based on his observation, the lines are drawn to maximize division by putting the line right between Black and White populations. Ultimately, however, he conceded that he cannot say how much of a given "misallocation" is attributable to race-based line drawing or highly segregated populations. Nor, he reiterated, did he examine socioeconomic data or other traditional redistricting principles in determining that race prevailed.

Defendants' next witness speaking to *Gingles I* was Dr. Christopher Blunt. Dr. Blunt, a PhD in political science with a public opinion consulting practice, was tendered and accepted as an expert in political science with an emphasis in quantitative political science and data analysis based on Plaintiffs' stipulation. Dr. Blunt was asked "to analyze and determine whether a race-blind redistricting process, following traditional districting criteria, would or would not be likely to produce a plan with two majority-minority districts."[153] He did so by simulating a set of 10,000 possible congressional maps using commercially available software called REDIST, and computing the BVAP percentage for each of the six districts in the computer-simulated plans, using the APB metric.

Dr. Blunt concluded that "[n]one of the simulated plans produces even one majority-minority congressional district."[154] The average BVAP of the highest BVAP district from each simulated plan is 38.56%, he testified. Although one simulated district did have 45.57% BVAP, overall, 90% of the plans generated by his simulation had less

[153] LEG-3, p. 3.
[154] *Id*. at p. 8.

than 42.2% BVAP.[155] Further, Dr. Blunt found, in only 75 plans out of the 10,000 he simulated did *two* districts each have 40% BVAP. Based on these results, Dr. Blunt concludes that "it would be extremely unlikely for a Louisiana redistricting plan that included two [majority-minority districts] to emerge from a process following only the traditional redistricting criteria [he] employed."[156]

Dr. Blunt testified that his simulations did not consider or account for race, partisanship, or prior district boundaries. Further, he explained that due to limitations of the simulation software he used, he was only able to preserve communities of interest to the extent that a community of interest was located entirely within the bounds of one parish. He stated that he was hesitant to include communities of interest in his simulation in any event, because the term has no firm legal definition, and because a community of interest could serve as a proxy for race, and his intent was to simulate a race-blind redistricting process.

Dr. Blunt opined that his simulated plans were more compact than the illustrative plans and split fewer parishes. He stated that, even when he set the constraints to allow unlimited splits, he found that the results did not change significantly. Simulations without split constraints yielded a highest BVAP district of 46.06% BVAP, but there was still not a single majority-minority district in any plan.

On cross-examination, Dr. Blunt testified that he has never run a simulation of electoral districts before, or, in fact, conducted any simulation analysis previously in his career. He explained that did not write the code for his simulations, but he did write the instructions to execute the underlying algorithm.

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[155] *Id.*
[156] *Id.* at p. 9.

Dr. Blunt agreed that the simulations do not provide a valid comparison if traditional redistricting principles are not part of the constraints. So, he stated, he looked to the Legislature's Joint Rule 21 and selected contiguity, compactness, parish splits, and population deviation as the principles included in his simulations. He admitted that he did not consider preservation of political subdivisions, although it was listed in Joint Rule 21, but he believed it was unlikely that too many subdivisions were split, because parishes were generally not split in his simulated plans. If a political subdivision crossed parish lines, he testified, it would be difficult to account for in the simulation. He also did not consider municipality splits. Dr. Blunt was unable to say how many of his simulated maps split Baton Rouge or New Orleans into three or more districts. Dr. Blunt stated that he was not sure how many majority-minority districts his simulation would have generated if a lower compactness constraint was imposed, but he expressed doubt that it would significantly change the results. Overall, Dr. Blunt opined that creating a map with two majority-minority districts would require prioritizing race – or some proxy for it – over the traditional criteria he followed.

Defendants also called Dr. M.V. Hood III, a political science professor at the University of Georgia, to testify as an expert in the fields of political science, quantitative political analysis, and election administration. Plaintiffs stipulated to this tender. Dr. Hood was asked to compare the district congruity, or core retention, of the enacted map and some of the illustrative plans. District core retention measures the percentage of the population in a district that is carried over from the corresponding benchmark district – here, Dr. Hood used the 2011 Louisiana congressional map as his benchmark. Core retention is a measure that ranges from 0 to 100, with a higher percentage reflecting that

a district is more similar to its former self. A district that is identical to the previous benchmark, for example, would produce a core retention score of 100%. Dr. Hood calculated core retention scores as follows:

Table 1. District Core Retention Comparisons

District	Enacted	Robinson	Galmon-1	Galmon-2	Galmon-3
1	97.9%	68.5%	71.4%	80.6%	63.6%
2	98.8%	81.3%	85.2%	80.6%	85.2%
3	100%	76.0%	80.9%	88.6%	72.3%
4	93.8%	72.3%	69.3%	70.8%	70.3%
5	89.1%	49.1%	52.3%	53.5%	47.0%
6	98.5%	55.4%	58.6%	64.7%	61.1%
Mean	96.4	67.1	69.6	73.1	66.6
S.D.	4.1	12.4	12.6	12.7	12.8
Range	10.9	32.2	32.9	35.1	38.2

[157]

Based on this data, Dr. Hood concluded that for the enacted plan, "most districts appear to be a close approximation of their corresponding configurations from the benchmark plan."[158] Dr. Hood opines that Plaintiffs' illustrative plans, by contrast, have lower overall core retention.

Dr. Hood also analyzed the same districts using a geographic similarity index, which is used to determine the degree to which districts share a common geography. Like core retention, the similarity index is expressed from 0 to 100%, with a higher score indicating more geographic overlap. Dr. Hood calculated that, comparing the 2022 enacted plan to the benchmark 2011 map, the districts have a mean similarity value of 88.3, which, he opines, is an indication that "the congressional districts in the 2022 enacted plan strongly resemble the previous districts from the benchmark plan."[159] The

[157] LEG-1, p. 4.
[158] *Id.*
[159] *Id.* at p. 5.

illustrative plans that he examined had lower mean similarity scores, ranging from 41.0 to 46.4%.[160] Thus, he concludes, "the plaintiff-proposed [districts] deviate to a greater degree from the benchmark plan."[161]

Dr. Hood also performed a racial composition analysis to determine the percentage of Black population contained within each congressional district for the 2011 map, the 2022 enacted map, and Plaintiffs' maps. He used the DOJ Black definition, which, he explains, "combines all single-race Black identifiers who are also non-Hispanic with everyone who is non-Hispanic and identifies as white and Black."[162] Applying his DOJ Black metric to the illustrative maps, Dr. Hood concluded that two of the plans he examined – *Robinson* 1 and *Galmon* 3 – exceeded 50% BVAP using the DOJ Black definition in only one district. Further, he asserts, the Galmon 1 and Galmon 2 plans would yield *no* majority-Black districts using DOJ Black. His calculations are summarized in the below chart:

Table 4. District Percentage Black Comparisons, 2020 Voting Age Population

District	Benchmark	Enacted	Robinson	Galmon-1	Galmon-2	Galmon-3
1	13.7%	12.5%	17.2%	17.4%	15.7%	17.7%
2	**57.0%**	**57.0%**	49.4%	48.4%	48.9%	48.4%
3	23.8%	23.9%	17.3%	19.1%	20.9%	17.4%
4	32.6%	33.1%	31.3%	31.2%	28.0%	32.3%
5	32.4%	32.3%	**51.2%**	49.2%	49.3%	**50.8%**
6	24.1%	23.3%	15.7%	16.7%	19.1%	15.5%

[163]

Dr. Hood agreed that a desire to maximize core retention is not a consideration that trumps compliance with the Voting Rights Act. He stated that he had no opinion on

[160] See table 2, LEG-1, p. 6.
[161] *Id.*
[162] *Id.*
[163] *Id.* at p. 7.

whether or how the Plaintiffs' illustrative plans comply with traditional redistricting principles.

Defendants tendered Dr. Alan Murray as an expert in the field of demographic analysis, spatial analytics as it relates to race, and statistics. Dr. Murray was asked to evaluate the spatial distribution of BVAP and WVAP[164] in Louisiana. Based on his spatial statistical analysis, he concluded that Black and White voters "are not at all similarly geospatially distributed, with significant clusters of concentrated groupings."[165] Rural areas, he noted, are "dominated by high percentages of white population, but urban areas have clusters of high percent white population as well."[166] Meanwhile, the Black population is clustered particularly in urban areas, "although these urban areas are separated from each other."[167] Additionally, in his report, Dr. Murray calculated the distance between the centers of various Louisiana cities and found, *inter alia*, that the cities of Monroe and Baton Rouge are 152 miles apart.[168]

On cross-examination, Dr. Murray stated that he had no basis to disagree with the opinions offered by any of Plaintiffs' experts. He testified that he has no opinion on whether two majority-minority districts can be drawn consistent with traditional redistricting principles. He further stated that he expresses no opinion on numerosity or compactness. He did not review any of Plaintiffs' illustrative plans as part of his analysis. Dr. Murray testified that he has never seen a population where the Black population is *not*

[164] White Voting Age Population.
[165] AG-4, p. 26.
[166] *Id*.
[167] *Id*.
[168] *Id*. at p. 25.

heterogeneously distributed. Therefore, he stated, Louisiana's distribution of Black and White residents is not unusual.

B. *Gingles II* and *III*

To satisfy the second and third *Gingles* requirements, namely that Black voters are "politically cohesive" and "that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate,"[169] Plaintiffs offered the opinions of two expert witnesses, Dr. Maxwell Palmer and Dr. Lisa Handley.

Defendants stipulated to Plaintiffs' tender of Dr. Palmer as an expert in redistricting with an emphasis in racially polarized voting and data analysis. An Associate Professor of Political Science at Boston University, Dr. Palmer has previously testified as an expert in eight federal court voting cases; he prepared a report and a rebuttal report in this case.[170] Dr. Palmer found "strong evidence of racially polarized voting across Louisiana," and "in each of the six individual congressional districts."[171] His analysis revealed that "Black-preferred candidates are largely unable to win elections in Louisiana," and that on a district level, "Black-preferred candidates are only regularly successful in the 2nd Congressional District, which is a majority-Black district."[172] Lastly, Dr. Palmer concluded that Black-preferred candidates would be "generally able to win elections in the Second and Fifth Congressional Districts"[173] under Plaintiffs' illustrative maps.

At the hearing, Dr. Palmer explained that racially polarized voting occurs when voters of different races prefer different candidates. He testified that racially polarized

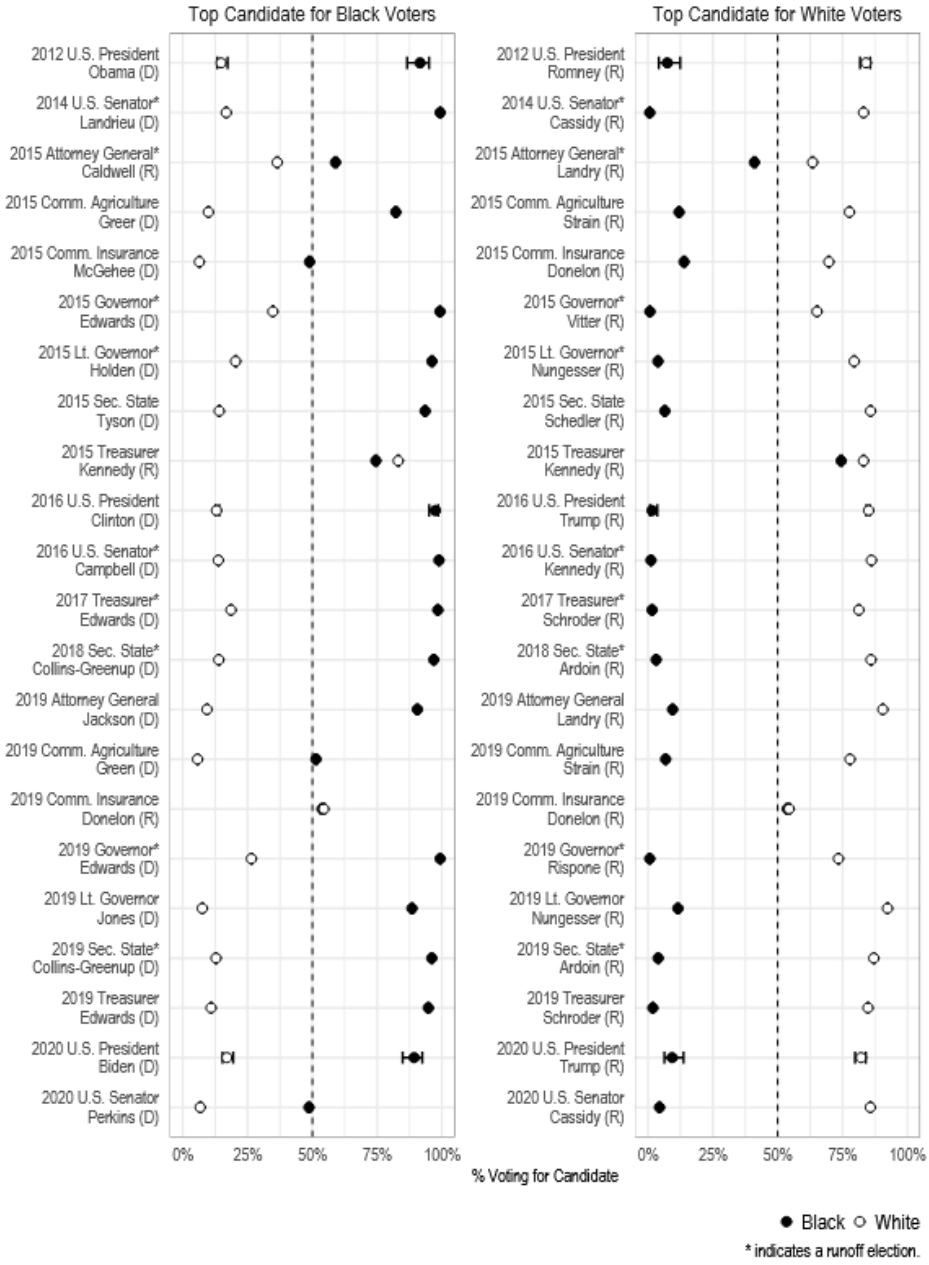
[169] *Growe v. Emison*, 507 U.S. 25, 40 (1993)(citing *Gingles*, 478 U.S., at 50–51).
[170] GX-2; GX-30, admitted as substantive evidence without objection.
[171] GX-2, p. 3.
[172] *Id.*
[173] *Id.*

voting is not always present; for example, in the *Bethune-Hill* case, he found it in some districts but not others. Dr. Palmer explained that his analysis is based on a statistical process known as ecological inference (EI), which estimates group-level preferences based on aggregate data. According to Dr. Palmer, EI is the best available method and has been widely recognized by courts. He emphasized that it is not his project, nor is it within the capabilities of EI, to investigate the reasons behind racially polarized voting. In other words, his analysis sets out to determine *how* different racial groups vote, not *why* they vote that way.

Dr. Palmer's analysis relied on precinct-level election results and voter turnout by race, as compiled by the Louisiana Secretary of State. That data was then paired with precinct-level shape files of the congressional districts. Dr. Palmer examined 22 statewide elections in Louisiana from 2012 to 2020, looking at the final round of voting for each race and the runoff rounds, when runoffs occurred. His analysis began by examining the support for each candidate in a given race by each demographic group, in order to determine if members of the group cohesively support a single candidate. Then, Dr. Palmer compared the preferences of White voters to the preferences of Black voters to see if there was evidence that they supported different candidates.

In 18 of the 22 elections he examined, Dr. Palmer found that there was a Black candidate of choice. In 21 of the 22, there was a White candidate of choice. Of the 18 elections with a Black candidate of choice, Dr. Palmer found that White voters had a different candidate of choice and strongly opposed the Black candidate of choice 17 times. Relatedly, Dr. Palmer found that the 18 Black candidates of choice were supported by 91.4% of Black voters and 20.8% of White voters. Among the 21 White candidates of

choice, the average candidate was supported by 81.2% of White voters and 10.3% of black voters. His findings are summarized in the following chart:[174]



Dr. Palmer also testified about the performance analysis he conducted of Plaintiffs' illustrative districts, opining that under Cooper's three illustrative maps, the Black

[174] GX-2, p. 6.

candidate of choice would statistically, more often than not, be able to win. He reached this conclusion by calculating the percentage of the vote won by the Black-preferred candidate (in the 18 elections where Black voters had a preferred candidate) for each district. In CD 2, he concluded that the Black-preferred candidate would win 17 of the 18 elections, with an average 69% of the vote. In CD 5, the Black-preferred candidate would win 15 of 18 elections under Maps 1 and 3, and 14 of 18 elections under Map 2. Black-preferred candidates in CD 5 averaged 56% of the vote under Map 1, 55% under Map 2, and 57% under Map 3.[175] In conclusion, Dr. Palmer opined that "[u]nder all three maps, Black candidates of choice are generally able to win elections in both of the majority-Black districts."[176]

Asked during his testimony about the possibility that polarized voting patterns may be attributable to partisan polarization, not race, Dr. Palmer stated again that his purview is to identify voting patterns that emerge, not to explain the reasons behind them. In other words, his inquiry is statistical, not social. Dr. Palmer offered a rebuttal of Defendants' expert Dr. Alford's argument that because President Obama, who is Black, received a smaller share of the Black vote than did Hillary Clinton, who is White, the relevant pattern is partisan in nature, not racial. Dr. Palmer disputed the assumption that the Black-preferred candidate is necessarily Black; according to his findings, in the 18 elections with a Black-preferred candidate, that candidate was Black only 9 times.

On cross-examination, Dr. Palmer clarified that his analysis was based on statewide elections and not congressional elections because there have not been any elections conducted under the current map, and it would be impossible to combine data

[175] GX-2, p. 8.
[176] *Id.*

from different districts to comport with the new boundaries, because there are different candidates on the ballot in each district. Statewide elections are the most germane to analysis because the same candidate is up for election in every precinct.

Defendants also queried Dr. Palmer about the impact of White crossover voting on his analysis. White crossover voting occurs when White voters vote for the Black-preferred candidate. Dr. Palmer agreed that, on account of White crossover voting, it could be possible for CD 2 and CD 5 to be drawn at below 50% BVAP and still elect Black-preferred candidates. Dr. Palmer testified that the existence of White crossover voting does not negate the existence of racially polarized voting, however.

Plaintiffs also presented opinion testimony on *Gingles II* and *III* requirements from Dr. Lisa Handley. Defendants stipulated to Dr. Handley's expertise in the area of redistricting with a focus on racially polarized voting. Relying on her 35 years as a redistricting expert and her previous testimony in dozens of voting rights cases, Dr. Handley opined that "[v]oting in the State of Louisiana is racially polarized."[177] This polarization, she explained, "impedes the ability of Black voters to elect candidates of their choice unless congressional districts are drawn that provide Black voters with an opportunity to elect their preferred candidates to the U.S. House of Representatives."[178] Based on her review of the illustrative maps prepared by Anthony Fairfax, Dr. Handley opined that "it is possible to create an additional congressional district that would provide Black voters with an opportunity to elect their candidates of choice."[179]

[177] PR-12, p. 1.
[178] *Id.*
[179] *Id.*

Dr. Handley testified that there is a "quite stark" pattern of racially polarized voting in Louisiana. She stated that voting is polarized if White and black voters vote differently. Or, to put it another way, she explained that if Black voters voting alone would elect a different candidate than White voters voting alone, an election is racially polarized. Dr. Handley testified that she uses three statistical techniques to assess racially polarized voting: homogenous precinct analysis (HP), ecological regression (ER), and ecological inference (EI).[180] HP and ER were used and accepted by the Supreme Court as far back as *Gingles*, she stated. EI, which was developed later, has since become a widely accepted technique, as well. Dr. Handley testified that if estimates of racially polarized voting are similar across statistical measures, the conclusions are more probative.

Dr. Handley analyzed recent statewide election contests that included Black candidates. In her report, she notes that courts consider election contests that include minority candidates to be more probative than contests with only White candidates, because this approach recognizes that it is not sufficient for minority voters to be able to elect their preferred candidate only when that candidate is White. Additionally, Dr. Handley explains that she conducted a racial bloc voting analysis for congressional elections with Black candidates from 2016 – 2020, because endogenous elections – elections for the office at issue in the suit – are considered "particularly probative in a vote dilution claim."[181]

[180] Dr. Handley defines HP as "comparing the percentage of votes received by each of the candidates in precincts that are racially or ethnically homogenous." ER, she states, "uses information from all precincts, not simply the homogenous ones, to derive estimates of the voting behavior of minorities and whites." EI "uses maximum likelihood statistics to produce estimates of voting patterns by race." (PR-12, p. 3-4).
[181] PR-12, p. 6.

Dr. Handley's analysis demonstrated that the 15 statewide contests that included Black candidates were racially polarized, with Black voters "very cohesive in support of their preferred candidates," and "white voters consistently bloc voted against these candidates."[182] Across the 15 contests she studied, the average percentage of Black voter support for the Black-preferred candidate was 83.8%, or an even stronger 93.5% in contests with only two candidates.[183] As for the nine congressional elections she analyzed, Dr. Handley testified that six of them – the ones that did not occur in majority-Black CD 2 – were quite racially polarized. Dr Handley's analysis is reproduced below.

Revised Appendix B Congressional Elections				Estimates for Black Voters					Estimates for White Voters				
	Party	Race	Vote	EI RxC	95% confidence interval	EI 2x2	ER	HP	EI RxC	95% confidence interval	EI 2x2	ER	HP
Congressional District 4													
2020 November													
Kenny Houston	D	B	25.5	70.3	(69.4, 71.1)	66.8	70.8	72.8	3.9	(3.5, 4.4)	3.9	1.2	5.6
Ryan Trundle	D	W	7.8	14.9	(14.2, 15.5)	15.4	14.9	14.9	3.5	(3.1, 3.9)	3.6	3.4	4.2
Mike Johnson	R	W	60.4	11.3	(10.4, 12.2)	12.2	10.8	9.3	85.7	(85.1, 86.3)	86.7	86.6	81.8
Ben Gibson	R	W	6.3	3.6	(3.1, 4.1)	3.6	3.5	3.0	6.8	(6.4, 7.3)	7.7	8.8	8.4
Black turnout/BVAP			*15.9*										
White turnout/WVAP			*13.4*										
Congressional District 5													
2021 March													
Julia Letlow	R	W	64.9	2.8	(1.6, 11.2)	5.8	-2.9	4.9	86.7	(82.6, 87.5)	85.3	88.3	85.9
Sandra Christophe	D	B	27.3	92.9	(82.1, 94.4)	90.4	98.1	90.4	4.8	(4.0, 9.5)	5.7	2.9	5.7
Chad Conerly	R	W	5.3	1.4	(1.0, 3.0)	0.4	1.0	1.1	6.6	(6.2, 6.8)	7.1	6.8	6.1
Others			2.5	3.0	(2.6, 3.6)	3.4	3.7	3.6	2.0	(1.7, 2.2)	2.4	2.0	2.2
Black turnout/BVAP			*14.6*										
White turnout/WVAP			*22.4*										
2020 November													
Sandra Christophe	D	B	16.4	43.2	(42.3, 44.1)	42.9	43.1	41.6	4.5	(4.1, 5.0)	3.6	3.9	4.8
Martin Lemelle	D	W	10.4	30.5	(29.8, 31.1)	30.4	32.1	34.5	1.8	(1.5, 2.1)	1.1	0.0	1.7
Other Dems (2)	D		5.4	13.7	(13.1, 14.3)	12.8	13.1	13.5	1.8	(1.5, 2.2)	1.8	1.7	1.9
Luke Letlow	R	W	33.1	3.8	(3.3, 4.4)	5.2	4.1	3.0	47.7	(47.1, 48.2)	46.6	50.1	44.7
Lance Harris	R	W	16.6	3.2	(2.7, 3.7)	3.4	2.2	2.8	20.1	(19.6, 20.5)	22.9	21.7	22.8
Others (3)			18.2	5.7	(5.0, 6.3)	5.0	5.5	4.5	24.1	(23.6, 24.6)	24.7	22.6	24.1
Black turnout/BVAP			*17.5*										
White turnout/WVAP			*14.7*										

[182] *Id.*, p. 7-8.
[183] *Id.* at p. 8.

Revised Appendix B Congressional Elections	Party	Race	Vote	Estimates for Black Voters: EI RxC	95% confidence interval	EI 2x2	ER	HP	Estimates for White Voters: EI RxC	95% confidence interval	EI 2x2	ER	HP
Congressional District 6													
2020 November													
Dartanyon Williams	D	B	25.6	74.9	(69.6, 76.3)	72.9	77.6	81.5	7.4	(6.6, 11.0)	6.2	3.3	8.1
Garret Graves	R	W	71.1	22.4	(21.0, 27.7)	22.5	17.8	14.7	91.1	(87.6, 91.8)	91.3	93.8	89.2
Others (2)			3.3	2.7	(2.2, 3.2)	4.6	4.7	3.7	1.5	(1.2, 1.8)	2.8	3.0	2.7
Black turnout/BVAP			*22.3*										
White turnout/WVAP			*16.4*										
2016 November													
Richard Lieberman	D	W	14.9	45.7	(40.3, 47.2)	48.8	48.4	44.0	5.6	(5.0, 8.6)	4.3	4.5	6.9
Jermaine Sampson	D	B	9.0	36.3	(33.4, 37.2)	38.6	36.8	36.2	1.1	(.8, 2.4)	0.6	0.0	2.1
Garret Graves	R	W	62.7	10.1	(8.4, 19.8)	7.4	5.2	13.1	79.8	(75.4, 80.5)	80.4	79.4	77.1
Bob Bell	R	W	10.2	5.0	(4.0, 5.8)	5.3	5.6	3.7	11.9	(11.6, 12.3)	11.7	12.7	10.9
Others (2)			3.3	2.9	(2.3, 3.4)	3.1	3.9	2.9	1.6	(1.3, 1.8)	2.9	3.3	2.9
Black turnout/BVAP			*51.7*										
White turnout/WVAP			*67.3*										
Congressional District 3													
2020 November													
Braylon Harris	D	B	17.9	65.8	(64.4, 67.0)	64.0	69.1	69.1	4.1	(3.5, 4.7)	3.2	1.7	6.1
Rob Anderson	D	W	11.6	22.8	(21.8, 23.8)	22.5	22.4	22.9	8.5	(7.9, 9.0)	8.1	7.9	8.6
Clay Higgins	R	W	67.8	10.0	(8.9, 11.2)	12.1	6.7	6.5	85.2	(84.6, 85.7)	85.7	87.5	82.3
Brandon LeLeux	L	W	2.8	1.4	(1.1, 1.8)	1.9	1.7	1.5	2.3	(1.9, 2.6)	3.1	3.0	2.9
Black turnout/BVAP			*12.9*										
White turnout/WVAP			*11.9*										
2016 November													
Jacob Hebert	D	W	8.9	30.8	(24.8, 32.3)	33.5	33.0	32.1	2.2	(1.6, 4.6)	1.5	1.4	3.4
Larry Rader	D	B	8.7	33.5	(27.5, 35.1)	35.4	37.2	36.0	1.6	(1.2, 3.9)	1.0	0.4	2.9
Clay Higgins	R	W	26.5	6.4	(4.4, 12.5)	3.1	4.4	4.2	32.0	(28.9, 32.9)	33.7	34.7	30.0
Scott Angelle	R	W	28.6	20.1	(19.0, 22.7)	16.2	17.3	16.9	31.6	(30.8, 32.0)	32.3	32.9	30.4
Other Reps (6)	R		25.6	7.0	(5.8, 9.9)	6.1	4.6	8.1	31.8	(31.0, 32.1)	31.6	29.4	32.1
Others (2)			1.7	2.3	(1.9, 2.8)	4.3	3.5	2.6	0.7	(.6, .9)	1.1	1.3	1.3
Black turnout/BVAP			*53.8*										
White turnout/WVAP			*65.8*										

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Dr. Handley stated that polarization was less evident in CD 2; in her report, she finds that the CD 2 contests were "probably not racially polarized."[185] At the hearing, she explained that CD 2 is distinguishable for its relatively high amount of White crossover voting.

Dr. Handley also analyzed whether the Legislature's enacted map provides opportunities for Black voters to elect the candidate of their choice. She analyzed this by recompiling election results from previous elections into the district boundaries in CD 2,

[184] PR-87, p. 9 *et seq.*
[185] *Id.*

3, 4, 5, and 6, to see how those elections would have played out.[186] In the enacted plan, Dr. Handley found, only CD 2 is an opportunity district:[187]

Enacted Plan District	Effectiveness Score #1: Percent of Contests Black-Preferred Candidate Wins or Advances to Runoff From All 15 Elections	Effectiveness Score #2: Percent of Two-Candidate Contests Black-Preferred Candidate Wins
1	0.0%	0.0%
2	100.0%	100.0%
3	6.7%	0.0%
4	26.7%	0.0%
5	26.7%	0.0%
6	6.7%	0.0%

Dr. Handley opines that, by contrast, Plaintiffs' illustrative plans feature two districts that perform for Black voters. She explained that a "district-specific, functional analysis of this plan reveals that it offers two districts that are likely to provide Black voters with an opportunity to elect the candidates of their choice to Congress: Districts 2 and 5."[189] Specifically, Dr. Handley concluded that in the CD 5 proposed in Cooper's Illustrative Plan 1, the Black-preferred candidate is likely to win or advance to a runoff in 80% of all election contests, and likely to win 77.8% of two-candidate contests.[190] And, in the CD 5 proposed in Cooper's Illustrative Plans 2 and 2A, Dr. Handley concluded that the Black-preferred candidate is likely to win or advance to a runoff in 86.7% of contests, and to win 77.8% of all two-candidate contests.[191] Her results appear in the following table from her report:

[186] Dr. Handley testified that she did not include CD 1 in this analysis because CD 1 provided no voters to the proposed CD 5.
[187] PR-12, p. 11.
[188] *Id.*
[189] *Id.* at p. 12.
[190] *Id.* at p. 13.
[191] PR-87, p. 6; PR-91, p. 3.

Table 6: Effectiveness Scores for Congressional Districts in Illustrative Plan

Illustrative Plan District	Effectiveness Score #1: Percent of Contests Black-Preferred Candidate Wins or Advances to Runoff From all 15 Elections	Effectiveness Score #2: Percent of Two-Candidate Contests Black-Preferred Candidate Wins
1	13.3%	0.0%
2	100.0%	100.0%
3	0.0%	0.0%
4	26.7%	0.0%
5	80.0%	77.8%
6	0.0%	0.0%

192

Based on her analysis of the data, Dr. Handley concluded that because of the clearly racially polarized voting in Louisiana, Black voters can only elect their candidate of choice if a district is drawn that gives them that opportunity.

On cross-examination, Dr. Handley agreed that it was theoretically possible for an "effective" district – that is, a district where Black voters have the opportunity to elect the candidate of their choice – to have less than 50% BVAP. On redirect, Dr. Handley discussed the BVAP percentages in Cooper's illustrative plans and asserted that her conclusions on the effectiveness of the proposed districts did not change depending on which definition of Black was used. Regardless, she stated, none of the enacted plan districts perform to allow Black voters an opportunity to elect their preferred candidate except for CD 2.

[192] PR-12, p. 13.

Defendants offered various expert witnesses on the inquiry into racially polarized voting. Dr. John Alford was tendered and accepted, pursuant to Plaintiffs' stipulation, as an expert on *Gingles* II and racially polarized voting. Dr. Alford was retained to provide analysis related to evidence of racially polarized voting in this case; his first step, he explained, was to attempt to replicate the ecological inference (EI) analysis performed by Plaintiffs' expert witnesses, Dr. Handley and Dr. Palmer. Dr. Alford opined at the hearing that EI is the most reliable and widely used of the available techniques in this area, and that it is the "gold standard" widely relied on by experts.

Dr. Alford reported that he very closely replicated Dr. Handley and Dr. Palmer's results, "with only the slight variation that one would expect given the inherent variation associated with [EI] estimations."[193] Because he found their data reliable, Dr. Alford relied for his report "entirely" on Dr. Handley and Dr. Palmer's EI conclusions on cohesiveness of voting among Black and White Louisianans. Overall, Dr. Alford opined that the observable polarization of voting in Louisiana is due not to race, but to partisanship. Black voters generally vote for Democratic candidates, he stated, regardless of the race of the candidate. In his report, Dr. Alford offers an example to illustrate how Black support is not in lockstep with the race of the candidate. Looking at Presidential election results in Louisiana, Dr. Alford states that Black voters supported the all-White ticket of Clinton/Kaine at a rate of 97.5%, while two tickets featuring Black candidates had less – Obama/Biden had 91.6% Black support, with Biden/Harris at 89.3%. On cross-examination, Dr. Alford agreed that in partisan contested elections, Black voters in Louisiana cohesively vote for the same candidates.

[193] AG-1, p. 3.

Defendants also offered the report and testimony of Dr. Jeffrey Lewis, tendered as an expert in the fields of political science, census data analysis, and statistics, specifically racially polarized voting. Plaintiffs stipulated to the tender of Dr. Lewis. In his report, Dr. Lewis describes the scope of his inquiry as calculating "the fraction of voters in the November 3, 2020 Presidential General election who identified as Black in the second and fifth districts of the illustrative Louisiana congressional district plans proposed by the plaintiffs."[194] Next, he attempted to "estimate the support of Black and of white (non-Black) voters for Biden/Harris in the same election among voters residing in each of those illustrative districts."[195] Lastly, Dr. Lewis set out to "calculate the support for Biden/Harris among all voters residing in each illustrative district and the support that Biden/Harris would have received in those same districts in the absence of any white 'crossover' voting."[196]

Dr. Lewis concludes that the illustrative districts proposed by Plaintiffs could be "effective" – that is, they could still provide Black voters an opportunity to elect the candidate of their choice – if they were drawn to have less than 50% BVAP. The reason, he asserts, is White crossover voting. Dr. Lewis testified that his analysis suggests that Biden/Harris would have received over 50% of the vote in all of the illustrative districts, "even if the BVAP in those districts was reduced to as low as 30 percent in the second district or as low as 48 percent in the fifth district."[197] His findings are set forth in the following chart from his report:

[194] LEG-2, p. 3.
[195] *Id.*
[196] *Id.* at p. 3-4.
[197] *Id.* at p. 7.

District 2

Plan	Percent Black voters	Percent support for Biden/Harris: All voters	Black voters (EI Estimate)	White voters (EI Estimate)	Without white cross-over votes
C130: Robinson/Fairfax	51.18	69.15	99.13	36.35	50.73
C131: Galmon-1/Cooper-1	49.94	68.96	98.57	39.01	49.23
C132: Galmon-2/Cooper-2	50.33	69.11	97.69	40.89	49.16
C133: Galmon-3/Cooper-3	49.79	68.76	98.52	38.85	49.06

District 5

Plan	Percent Black voters	Percent support for Biden/Harris: All voters	Black voters (EI Estimate)	White voters (EI Estimate)	Without white cross-over votes
C130: Robinson/Fairfax	49.66	55.34	96.91	12.10	48.13
C131: Galmon-1/Cooper-1	47.53	54.37	96.58	13.16	45.90
C132: Galmon-2/Cooper-2	46.88	53.24	96.28	13.18	45.14
C133: Galmon-3/Cooper-3	49.00	55.94	96.75	13.93	47.41

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Dr. Lewis conceded that his conclusion was based on a single exogenous election and that a "complete analysis. . .would require consideration of additional elections and more extensive consideration of whether EI estimates of support for each candidate were reliable in this context among other things."[199]

To address *Gingles III*, Defendants offered the opinion testimony of Dr. Tumulesh Solanky, tendered as an expert in the fields of mathematics and statistical analysis. Dr. Solanky was asked to examine voting patterns in the state of Louisiana, focusing in particular on East Baton Rouge Parish. Dr. Solanky opined that East Baton Rouge Parish votes "very differently" compared to the other parishes that are part of Plaintiffs' illustrative CD 5. Specifically, he stated, East Baton Rouge votes more strongly in favor of the minority-preferred candidate than other parishes. Dr. Solanky relies on the 2020 presidential election as the basis for his conclusion. He found that although there were 13.0% more White voters than Black voters who participated in the election, the minority-

[198] *Id.*
[199] LEG-2, p. 6.

preferred candidate (Biden) won by 13.0% in East Baton Rouge Parish. Therefore, Solanky opines, "it is apparent that. . .White voters did not vote as a bloc to defeat the black (minority) preferred candidate."[200]

On cross-examination, Dr. Solanky conceded that he is not a voting expert and that his only familiarity with the concept of racially polarized voting is derived from reading the other expert reports in this case. He emphasized that he did not conduct a racially polarized voting analysis in his report; instead, he investigated the assumption that Black and White voters vote similarly regardless of which parish they live in. He found that assumption not to be true.

C. The Senate Factors and Proportionality

Plaintiffs offered several expert witnesses who presented testimony relevant to the Court's consideration of the Section 2 totality of the circumstances inquiry, which is analyzed by reference to the Senate Factors, *inter alia*. The first such witness was Dr. Traci Burch, tendered as an expert in the fields of political behavior, political participation, and barriers to voting. An Associate Professor of Political Science at Northwestern University who has testified in several federal court cases related to voting rights, Dr. Burch testified that she was asked to evaluate the Senate Factors relevant to this case in Louisiana, particularly Factors 5, 6, 7, 8, and 9. In her report, she presents a useful summary of her opinions, reproduced below:

[200] ARD-2, p. 12.

1. Senate Factor 5: There are large gaps in educational attainment, unemployment, and other socioeconomic indicators between Black and White Louisianans. Research shows that these disparities are the result of contemporary and historical discrimination by government and market institutions and actors. Educational attainment and other socioeconomic indicators are important predictors of voting behavior.

2. Senate Factor 5: Several cities in Louisiana are marked by racial residential segregation, which has been shown to affect voting. These patterns of residential segregation are the result of contemporary and historical racial discrimination by government and market actors.

3. Senate Factor 5: Health outcomes vary by race in Louisiana; health is also an important predictor of voter turnout. Health disparities in Louisiana are shaped by government and market policies that affect the sites of environmental hazards as well as access to health care.

4. Senate Factor 5: Criminal justice involvement also affects voting, and criminal justice outcomes vary by race in Louisiana. Black people are overrepresented in Louisiana's correctional populations. Research has shown that racial discrimination played a role in racial disparities in criminal justice in Louisiana in the past and continues to do so today. Patterns of criminal justice outcomes cannot be explained fully by the differential commission of crimes by race.

5. Senate Factor 6: Political campaigns in Louisiana have historically been and remain marked by implicit and explicit racial appeals.

6. Senate Factor 7: Black people are one third of Louisiana's overall population, yet are underrepresented among elected officials at all levels of government, including among executives (such as Governor, Lieutenant Governor, and Mayors), federal and state legislators, and judges.

7. Senate Factor 8: Policy outcomes, such as with respect to infrastructure, do not track the specific needs of the minority community in several ways. Moreover, Black Louisianans often express the belief that they are not valued equally by elected representatives in both public comments and surveys.

8. Senate Factor 9: Although supporters of SB5 and HB1 offered several justifications for passing SB5 and HB1, including respect for traditional redistricting principles such as minimizing deviations from the ideal district population, compactness, keeping precincts and parishes whole, keeping traditional district boundaries, and maintaining communities of interest, the Legislature ultimately elected not to pass legislation proposing maps with two majority-minority districts that more closely conformed to these traditional redistricting principles than SB5 and HB1.

9. Senate Factor 9: Sponsors of SB5 and HB1 provided no evidence that they tried to draw an additional majority-minority district, nor did they provide evidence that adding a second majority-minority district would fail to allow Black Louisianans an opportunity to elect a candidate of their choice.

(PR-14, p. 6-7).

Dr. Burch also offered opinions on partisanship and race. She opines that, based on her examination of relevant political science literature, "racial identity and racial attitudes shape partisanship and party cohesion, and have become increasingly linked since 2008."[201] For example, Dr. Burch asserts, Black voters consistently identify strongly with the Democratic Party, a fact which scholars have concluded is not explained by socioeconomic status, policy preferences, or ideology.[202] Instead, Dr. Burch explains, this unified Democratic support is caused by the "sense of racial linked fate, or the degree to which a Black person believes that their fate is tied to the fate of the race, and in the social pressure to conform to group ideas of Black uplift."[203] Overall, in Dr. Burch's opinion, attributing the polarization of voting in Louisiana to party cohesion instead of race is flawed because it "ignores the rather strong evidence in the literature that race and racial attitudes increasingly drive partisanship and vote choice."[204]

[201] PR-89, p. 2.
[202] *Id*. at p. 5.
[203] *Id*.
[204] *Id*. at p. 6.

Plaintiffs offered the expert testimony of Dr. Allan Lichtman, a professor of American Politics at American University who has testified as an expert in roughly 100 cases, including voting rights cases considered by the Supreme Court, and in this Court in *Terrebonne Parish Branch NAACP v. Jindal*.[205] Dr. Lichtman opined that all nine of the Senate Factors are present in Louisiana contemporarily and operate to impede the ability of Black voters to participate in politics and elect candidates of their choice. The factors do not exist in isolation, he stated; instead, they synergistically work together to produce vote dilution.

As to Senate Factor 1, Dr. Lichtman opined that Louisiana has not only a history of voting discrimination, but an "ongoing history." He cited issues like at-large elections, the closure of polling places, and felon disenfranchisement as operating to affect voter access. Louisiana's poor educational attainment and outcomes also impairs Black Louisianans' ability to engage, he stated, since research indicates that education is a prime determinant of political participation.

Dr. Lichtman next addressed Senate Factor 2, which asks whether voting is racially polarized. Like Dr. Palmer and Dr. Handley, he opined that Louisiana has "extreme" racially polarized voting. According to Dr. Lichtman, Black voters vote almost unanimously for Democratic candidates, while Republicans bloc vote against those candidates of choice. This polarization, he explained, is inextricably tied to race. In his view, party labels by themselves are meaningless.

As to Senate Factor 5, which inquires as to "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such

[205] 274 F. Supp. 3d 395 (M.D. La. 2017).

areas as education, employment and health, which hinder their ability to participate effectively in the political process,"[206] Dr. Lichtman opines that Louisiana has "major" socioeconomic disparities, extending to almost every area of significance in people's lives. He cited income, unemployment, poverty, dependance upon welfare, homeownership rates, vehicle ownership, internet access, and educational attainment as areas in which Black Louisianans are significantly less well-off than White ones. The record evidence summarizes the socioeconomic disparities in the following charts:

Senate Factor 5

TABLE 10 ECONOMIC MEASURES, BLACK (INCLUDING MULTI-RACIAL) AND NON-HISPANIC WHITE PEOPLE, LOUISIANA		
MEASURE	**AFRICAN AMERICANS**	**NON-HISPANIC WHITES**
MEDIAN HOUSEHOLD INCOME	$32,631	$61,967
MEDIAN FAMILY INCOME	$42,430	$79.574
PER-CAPITA INCOME	$19,464	$34,690
ALL PERSONS IN POVERTY	29.4%	12.7%
CHILDREN IN POVERTY	43.2%	15.0%
UNEMPLOYED	8.0%	4.2%
EMPLOYED MANAGEMENT, PROFESSIONAL	26.3%	40.4%
HOUSEHOLD RECEIVED FOOD STAMPS LAST 12 MONTHS	27.0%	8.6%
HOMEOWNERS	48.8%	76.6%
MEDIAN HOME VALUE	$132,400	$186,700
NO VEHICLE AVAILABLE IN HOUSEHOLD	16.5%	4.7%
NO BROADBAND INTERNET	15.7%	27.8%
Source: U. S. Census, American Community Survey, 2019, 1-Year Estimates.		

[207]

[206] *Gingles*, 478 U.S. at 36–37 (quoting S. Rep. No. 97-417 at 28–29).
[207] GX-3, p. 81.

TABLE 12 HEALTH MEASURES, BLACK AND NON-HISPANIC WHITE PEOPLE, LOUISIANA		
MEASURE	AFRICAN AMERICANS	NON-HISPANIC WHITES
INFANT MORTALITY RATE PER 1,000 LIVE BIRTHS	12.4	5.3
LOW BIRTH WEIGHT BABIES	15.5%	7.8%
LIFE EXPECTANCY	72.4	76.7
ADULT MEN POOR OR FAIR HEALTH	25%	18%
ADULT WOMEN POOR OR FAIR HEALTH	28%	21%
COMPOSITION OF MEDICAL SCHOOL GRADS	8.3%	72%
NON-ELDERLY MEDICAID	47%	20%
WITH PRIVATE INSURANCE	43.3%	67.5%
WITH NO INSURANCE	8.9%	6.9%

TABLE 11 EDUCATION MEASURES, BLACK (INCLUDING MULTI-RACIAL) AND NON-HISPANIC WHITE PEOPLE, LOUISIANA		
MEASURE	AFRICAN AMERICANS	NON-HISPANIC WHITES
HIGH SCHOOL GRADUATES OR MORE AGE 25+	82.1%	88.9%
BACHELOR'S DEGREE+ AGE 25+	17.0%	28.9%
% AT OR ABOVE BASIC 8TH GRADE MATH	41%	77%
% AT OR ABOVE BASIC 8TH GRADE READING	52%	79%
HIGH SCHOOL GRADUATION RATE	73%	83%

[208] *Id.* at p. 83.
[209] *Id.* at p. 82.

Dr. Lichtman also testified about Senate Factor 6, related to the use of racial appeals in campaigns, concluding that Louisiana campaigns feature both subtle and overt racial appeals, and stated that such appeals are used by winning campaigns in Louisiana. Dr. Lichtman cited advertisements and campaign materials promoted by David Vitter, Mike Foster, Steve Scalise, Mike Johnson, John Kennedy, and various Republican-affiliated organization that, in his view, constituted racial appeals. As for Senate Factor 7, which calls for an analysis of "the extent to which members of the minority group have been elected to public office in the jurisdiction,"[210] Dr. Lichtman points out that no Black person has held statewide office in Louisiana since Reconstruction.

Dr. Lichtman further concluded that with respect to Senate Factor 8, which looks to whether elected officials are responsive to the particularized needs of the minority group, the state has not been responsive. In his report, he looks at five different areas: public education, health care, economic opportunity, criminal justice, and the environment, and concludes that chronic disparities that disproportionately affect Black Louisianans have gone largely unaddressed by elected officials.

Senate Factor 9 asks "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." Dr. Lichtman opines in his report that "Louisiana has no significant justification for its failure to create a second majority-Black district in the post-2020 redistricting process."[211] At the hearing, he disputed Defendants' assertion that the concept of "core retention" is a valid reason not to create another majority-minority district. First, core retention, while it may be a preference, is not a legal *requirement* like one

[210] *Gingles*, 478 U.S. at 36–37 (quoting S. Rep. No. 97-417 at 28–29).
[211] GX-3, p. 60.

person, one vote. Second, Dr. Lichtman testified that prioritizing core retention risks freezing in the inequities of the previous map. If core retention was the key factor in redistricting as Defendants assert, Dr. Lichtman stated, there would never be a remedy for Voting Rights Act violations, because states would be bound to replicate the same maps over and over again.

Nor, Dr. Lichtman testified, does the fact that the 2011 districting map was precleared by the Justice Department provide justification for enacting a carbon copy during this round of redistricting. After all, he explained, preclearance does not mean that a map is not violative of the Voting Rights Act; it only means that the plan is not *retrogressive* with respect to the previous plan; that is, it did not go from one majority-minority district to none, for example.

Dr. Lichtman opined that essentially all of the Senate Factors support a finding of vote dilution with respect to the Louisiana congressional maps. On cross-examination, he acknowledged that the Black candidate of choice prevailed in the last gubernatorial races in Louisiana, but cautioned that "one swallow does not make a spring." Asked whether the mayor of Baton Rouge is Black, Dr. Lichtman stated that she is, adding that the fact that the majority-Black city of Baton Rouge has a Black mayor only proves the point that Black-preferred candidates can win in Black jurisdictions, but they are being shut out in White jurisdictions and White districts.

Plaintiffs further offered the reports[212] and testimony of R. Blakeslee Gilpin, a history professor who was accepted as an expert in the field of Southern history with Defendants' stipulation. At the hearing, Dr. Gilpin testified about Louisiana's long history

[212] PR-13; PR-88.

of discrimination against its Black citizens, and how that history has contributed to voter disenfranchisement and discrimination, both historically and on an ongoing basis. Dr. Gilpin testified that Louisiana's history is marked by a remarkable amount of doggedness and determination to stop Black people from voting.

Dr. Gilpin cites property requirements, poll taxes, literacy tests, and the grandfather clause as historical examples of denying Black Louisianans the ability to vote. Dr. Gilpin notes that there is no record of "a single Black Louisianan elected to office until the 1940s," and from 1910 until 1949, "less than 1% of Louisiana's voting age African-American population was able to register to vote."[213] The passage of the VRA in 1965 was not a magic bullet, he asserts. In fact, he explains, the Voting Rights Act era saw widespread attempts to dilute Black voting strength in Louisiana, including reliance on at-large voting and racial gerrymandering. Dr. Gilpin reports that the Louisiana Parish Board of Supervisors has eliminated 103 polling places since 2012, requiring greater travel to vote, an issue which overwhelmingly impacts Black voters. Louisiana resisted compliance with the National Voter Registration Act, resulting in citizens not being given information about registering to vote when applying for public benefits. And, he states, there is evidence to suggest that poll workers in Louisiana continue to believe, incorrectly, that they can deny the vote to people without identification.

Dr. Gilpin cites very recent examples that, in his view, demonstrate ongoing discrimination against Black voters in Louisiana. In April 2021, the City of West Monroe entered into a consent decree after the Justice Department asserted that the at-large system used for the Board of Aldermen was proven to disenfranchise Black voters;

[213] PR-13, p. 32.

despite Black residents comprising 30% of the electorate, no Black candidate had ever been elected to the Board. West Monroe agreed to end the practice. Gilpin further cites Louisiana's resistance to expand absentee voting during the COVID-19 pandemic, which this Court in *Harding v. Edwards*[214] found placed undue burdens on Black voters.

In his supplemental report, Dr. Gilpin responds to the dispute in this case about the appropriate metric for counting Black voters, be it Any Part Black, "DOJ Black," or some other measure. Ironically, he explains, the state has long attempted to "designate anyone who could possibly be counted as Black to prevent them from voting."[215] Although Defendants' resistance to the use of Any Part Black cuts in the opposite direction, toward *restricting* who can be counted as Black, in Dr. Gilpin's opinion, the attempt "is disturbingly reminiscent of this long history of imposing racial categories to disenfranchise its Black citizens."[216]

Overall, Dr. Gilpin concludes, the "state of Louisiana's long history of racial discrimination is without dispute."[217] The powers that be in Louisiana, he opines, subscribe to the notion that there is an appropriate level of "white political control,"[218] which they have strived to maintain by consistent disenfranchisement efforts from 1868 to the present day. On cross-examination, Dr. Gilpin agreed that he did not refer to the *Hays* litigation in his overview of voting-related history in Louisiana, though, he conceded, it would have been appropriate to do so.

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[214] 487 F. Supp. 3d 498, 503 (M.D. La. 2020), *appeal dismissed sub nom. Harding v. Ardoin,* No. 20-30632, 2021 WL 4843709 (5th Cir. May 17, 2021).
[215] PR-88, p. 5.
[216] PR-88, p. 5.
[217] PR-13, p. 4.
[218] *Id*.

Several of Plaintiffs' lay witnesses offered testimony relevant to various Senate Factors, as well. Mike McClanahan, the state president of the Louisiana NAACP, testified that in his view, anyone with "one drop of Black blood" is Black, no matter what they look like on the outside. According to McClanahan, the Louisiana NAACP engages in voter registration, voter engagement, and voter training efforts involving Black Louisianans. His organization was acutely aware of the importance of the current redistricting cycle, he testified, and undertook efforts related to the Census because they knew the data collected would feed into the redistricting process. When the legislature was holding "roadshow" meetings to solicit public input on new maps, McClanahan participated in a weekly call to coordinate with members across the state to ensure attendance and participation at the roadshows. He himself testified at a roadshow, as well. Based on the maps that the Legislature enacted, McClanahan said, the legislators at the roadshows must have been asleep, or listening "with deaf ears." In his view, the enacted map was not responsive to the pleas of Black Louisianans – it did not reflect the data, the testimony of the public, or the issues raised in legislative hearings.

Once the map passed the Legislature, McClanahan testified that the Louisiana NAACP's strategy was to persuade the Governor to veto it. He explained that his membership did all in their power to get to the Governor, including calling him, holding rallies, engaging on social media, and having legislators contact him on their behalf. When the Governor did, in fact, veto the map, McClanahan felt optimistic but skeptical because of the possibility of a veto override. When the Legislature convened to vote on the veto override, McClanahan and some of his members went to the Capitol, attending session in both houses and, he said, walking the building to ensure their voices were

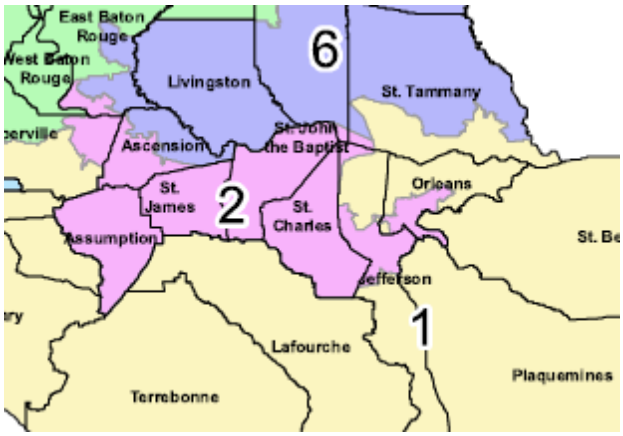
heard. When the vote came in to override Governor Edwards' veto, McClanahan testified that he saw legislators high-fiving one another, cheering, and jumping in the air. To him, this was a slap in the face of everyone who had participated in the process.

Asked about the effects of racism in Louisiana, McClanahan testified that he lives it, every day, all of his life. He testified that Black quality of life is reduced in so-called "Cancer Alley," a strip of parishes from Baton Rouge to New Orleans where, he said, chemical plants set up shop in Black neighborhoods and harm residents with their pollution. He cited officer-involved shootings and the fact that several police departments in Louisiana have operated under consent decrees as evidence that, for Black Louisianans, law enforcement does not serve and protect them equally. McClanahan testified that access to quality health care is limited for many Black Louisianans, and noted that during the COVID-19 pandemic Black people had a significantly higher death rate than the rest of the population. All of this, he believes, reflects a lack of elected official responsiveness to issues which disproportionately affect Black Louisianans.

On cross-examination, McClanahan agreed that he has been involved on various state committees related to police training, access to justice, and moving to closed party primaries. He testified that he believes that the state values the opinion of the NAACP. Asked to describe what principles a fair redistricting map would follow, McClanahan testified that, because Louisiana is roughly one-third Black, the maps should reflect that makeup. It was not his belief, he stated, that every Black voter should live in a majority-minority district. However, having two out of the six districts be majority-minority would give Black Louisianans another voice to speak for their issues, he said.

Plaintiff Dr. Dorothy Nairne offered fact testimony related to a number of the Senate Factors and to the real-world consequences of splitting parishes. Dr. Nairne is Black and resides in Napoleonville, in Assumption Parish. Dr. Nairne testified that she is a registered voter and a regular voter in CD 6, where she is represented by Rep. Garrett Graves. She stated that although she has contacted his office on several occasions, she does not see Rep. Graves at events in her community and he does not campaign in her community. Dr. Nairne explained that she lives "right on the cusp" of the split between CD 6 and CD 2. Her neighbors across the street are part of CD 2, while she is in CD 6. She testified that this disconnection makes it very difficult to organize and speak with one voice about issues affecting Assumption Parish. Dr. Nairne does community work in the river parishes area related to environmental justice and racial justice. She testified that the way the river parishes are split under the congressional map means that although they work together, but they don't vote together. Of this situation, Dr. Nairne said, "I do not believe my interests are represented. I am alienated."

Plaintiffs' counsel showed Dr. Nairne one of their illustrative maps – Fairfax's Illustrative Plan 1 – and zoomed in on her part of the state:



In this map, Dr. Nairne testified, she would be in the same district, CD 2, with the people she organizes with, the river parishes into Orleans and Jefferson. “This map makes sense to me,” she stated, adding that if this map was implemented, she knew exactly which households she would go visit to engage them in the political process.

Ashley Shelton is the President and CEO of Power Coalition, a Louisiana civil engagement organization and one of the Plaintiffs in this case. Shelton testified that she is a lifelong Baton Rouge resident and that her work with communities of color was heavily focused on redistricting this year. She testified that Power Coalition engaged one thousand Louisianans in the process, starting with the census, up through the roadshows and the special session of the Legislature. In her words, she worked to represent folks who asked for a fair redistricting process and did not receive it.

Shelton described that while citizens were speaking to legislators at the redistricting roadshows, the legislators were doodling, not looking up, and not paying attention while people told their story of generations of their families working to vote. Shelton testified that roadshow testimony consistently offered two messages to legislators: first, that the voters wanted a fair and equitable process, and second, that there should be a second majority-minority district to honor the increase in the Black population.

Shelton organized a rally of 250 people of color and allies at the state capitol to, in her words, say “hey, we’re watching you.” On the day of the veto override, Shelton testified, the vote was along racial lines. Conservative politicians cheered and celebrated, which Shelton said was deflating and felt like “a true sign of disenfranchisement.” Now,

Shelton explains, her organization is engaging with voters who feel disengaged because their efforts around redistricting were unsuccessful.

Shelton testified that Black voters in Louisiana face discrimination when it comes to voting. She stated that Black voters experience polling place changes or closures more frequently; a recent consolidation of a black polling location in New Orleans East, for example, made it a lot harder for chronic voters in that area to access the polls. Though the move was only a few miles, the new site required crossing Interstate 10. Often, Shelton explained, Black voters lack access to transportation. Many Black residents face housing insecurity and may not always be able to afford a cell phone or broadband internet.

In Shelton's view, no one makes an effort to talk to Black voters. In her experience with Power Coalition, when she creates a "universe" of voters to target for outreach, she can get 60-65% of them to turn out to vote. This proves to her that it is possible to engage Black voters but that no one is addressing Black concerns or including them in the process. Shelton testified that Black people do not vote for Democrats simply because they are Democrats – they vote for the candidate who they believe will vote with their interests. In her experience, she testified, White and conservative candidates have not centered the issues that she cares about and therefore, would not be her candidate of choice. Overall, she said, she feels that neither party has been particularly responsive to the Black community.

As exhibits to their memoranda in opposition to the *Motion for Preliminary Injunction*, Defendants offered the reports of Dr. Jeff Sadow[219] and Mike Hefner.[220] Dr.

[219] ARD-3.
[220] AG-4.

Sadow was called to testify at the hearing via videoconference, but due to difficulties with his internet connection, was not able to testify. The Court permitted Defendants to call him at a later time, but they did not. Nor did Defendants call Hefner as a witness at the hearing. Their reports were not offered as substantive evidence at the hearing. Additionally, the reports are hearsay, and there was no opportunity for cross-examination. Accordingly, the Court did not consider these reports.

D. The *Purcell* Doctrine

To address the *Purcell* issue in this case, namely, the parties' dispute over whether the November election cycle is too close to allow time for a remedy to be implemented, Plaintiffs called Matthew Block, executive counsel to Louisiana Governor John Bel Edwards. Block testified that he has experience working with the Secretary of State to develop special election plans that become necessary due to emergencies such as hurricanes and other natural disasters. He testified that during Governor Edwards' term, there have been nine instances where election dates, qualifying dates, polling locations, or other aspects of election administration had to be altered, most recently last year after Hurricane Ida. Block noted that after Ida, election dates were pushed back a month, from October/November to November/December, and that in 2020, the April/May elections were moved twice as a result of the COVID-19 pandemic.

Block testified that the state was able to successfully administer these elections, despite the need for last-minute change. 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. Overall, Block asserted, the Governor, the Secretary of State, and local officials have a lot of experience with adjusting

elections. Turning to the facts of this case, Block testified that, based on his experience working with the Legislature, it would be possible for the body to draw a new map, especially because there were bills previously filed that offer alternative maps for consideration, so the process would not be starting from scratch. The Governor has the power to call an extraordinary session of the Legislature, he stated, and the Legislature can also initiate one itself.

On cross-examination, Defendants engaged Block on the topic of Governor Edwards' efforts on behalf of the Black community in Louisiana. Block agreed that the Governor has Black support and tries to be responsive to the needs of the Black community. Block confirmed that Governor Edwards expanded Medicaid, is a proponent of criminal justice reform, helped pass a bill restoring voting rights for many felons, and supported a constitutional amendment requiring unanimous jury verdicts. Defendants listed several other examples that, in their view, represented Governor Edwards' responsiveness to the Black community – hiring Black officials in his administration, making Juneteenth a state holiday, convening a task force to track inequities in health care, and offering free COVID vaccines and testing – and Block confirmed that, indeed, Governor Edwards did all of the above. Block explained that the Governor vetoed the Legislature's enacted map because he believed that a second majority-minority district was necessary to comply with Section 2 of the VRA, and because he believed that a fair map would have a second majority-minority district.

Defendants called Sherri Hadskey, the Commissioner of Elections for the Louisiana Secretary of State. Hadskey oversees election operations and election administration, including implementation of new districting plans. Hadskey testified that

her office has already undertaken significant administrative work related to the Legislature's enacted map by reassigning and notifying voters who find themselves in a new congressional district under that plan. According to Hadskey, this effort involved voters in fifteen parishes, and 250,000 voting cards have been sent to voters who changed districts under the new map.

Hadskey noted the upcoming June 22, 2022 deadline for potential congressional candidates who wish to qualify for the ballot by the nominating petition process. She explained that candidates and voters need adequate notice of their district to allow them to decide where and how to run for office or, in the case of voters, who to vote for. If candidates do not use the nominating petition process, they must pay a filing fee and qualify between July 20-22. According to Hadskey, qualification by nominating petition is rare. Most candidates qualify by paying the filing fee.

Hadskey further testified that Louisiana's election administration resources have been strained by COVID-19 and the delay in receiving census data. If forced to implement one of Plaintiffs' illustrative plans, she testified that her office would have to undo the coding for the fifteen parishes that saw changes under the enacted plan; code the new changes under an illustrative plan; and timely notify voters and potential candidates of these changes. Hadskey expressed concern that the process would be rushed, potentially causing errors that would give rise to confusion. The process of updating records and notifying voters impacted by districting changes under the enacted map took about three weeks, she testified.

Citing a recent issue in Calcasieu Parish, where voter information was entered incorrectly, leading to the issuance of incorrect ballots, Hadskey testified that she fears

these issues could occur on a larger scale if a new map is handed down in June or July. Moreover, Hadskey testified that a national paper shortage could interfere with re-printing ballot envelopes, voter notification cards, and other items required under the law. Hadskey testified that she is "extremely concerned" about the prospect of administering the congressional election under a new map, noting that in her thirty-year career at the Secretary of State's office, she has never moved a federal election.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PRELIMINARY MATTERS

A. Standing

On the issue of standing, Secretary Ardoin is laboring under misapprehensions of both the facts and the law. As an initial matter, the jointly stipulated facts in this case establish that Plaintiff Edwin René Soulé resides in Congressional District 1,[221] and that the Louisiana NAACP, Plaintiff herein, has members "who live in every parish and in each of the six congressional districts in the enacted congressional plan."[222] Setting aside those factual corrections, the Court finds that, in the context of a vote dilution claim under Section 2, the relevant standing inquiry is not whether Plaintiffs represent every single district in the challenged map but whether Plaintiffs have made "supported allegations that [they] reside in a reasonably compact area that could support additional [majority-minority districts]."[223] In *Harding v. County of Dallas, Texas*,[224] the Fifth Circuit applied an

[221] Rec. Doc. No. 143, p. 7, ¶ 24.
[222] *Id*. at p. 9.
[223] *Pope v. Cnty. of Albany,* No. 1:11-CV-0736 LEK/CFH, 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014); *See also Perez v. Abbott*, 267 F. Supp. 3d 750, 775 (W.D. Tex. 2017), *aff'd in part, rev'd in part and remanded*, 138 S. Ct. 2305, 201 L. Ed. 2d 714 (2018)(three-judge panel holding that "plaintiffs reside in a reasonably compact area that could support an additional minority opportunity district have standing to pursue § 2 claims, even if they currently reside in an opportunity district").
[224] *Harding v. Cnty. of Dallas, Texas*, 948 F.3d 302 (5th Cir. 2020).

arguably more expansive view of standing in the vote dilution context, finding that the plaintiffs had standing where "[i]t is conceded that each voter resides in a district where their vote has been cracked or packed. That is enough."[225]

In the instant case, Plaintiffs allege that they have suffered the injury of vote dilution because Black voters in Louisiana are packed into one majority-Black district that hoards Black population to prevent another majority-minority district from being drawn, and because Black voters outside of that majority-Black district have been fractured across the congressional map to prevent them from concentrating their voting strength in a district where they would have an opportunity to elect the candidate of their choice. The Fifth Circuit in *Harding* explained that, "[i]n vote dilution cases, the 'harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district.'"[226] Plaintiffs herein have pled such harm and, as the Fifth Circuit counsels, "[t]hat is enough."[227] Accordingly, the Court rejects Defendants' argument that Plaintiffs lack standing.

B. Challenges to *Gingles*

Intervenor Defendant Attorney General Landry invites the Court to toss *Gingles* onto the trash heap, repeatedly arguing that the well-worn *Gingles* test is endangered and, possibly, bound for extinction. The Attorney General candidly acknowledges that *Thornburg v. Gingles* and its progeny are controlling,[228] but warns that the Supreme Court

[225] *Id*. at 307.
[226] *Id*.
[227] *Id*.
[228] "[U]nder the current understanding of claims under Section 2, Plaintiffs must meet the standard announced by *Thornburg v. Gingles* and its progeny" (Rec. Doc. No. 108, p. 4).

"has signaled. . .that it will be reviewing vote dilution claims under Section 2 and the *Gingles* standard in the coming term."[229] The Attorney General goes on to offer his analysis on the merits of the instant motion from a posture of "*[a]ssuming for now* that *Gingles* controls."[230] As Chief Justice Roberts recently observed, "[I]t is fair to say that *Gingles* and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim."[231] However, this Court is bound to apply the law as it is, not to speculate or venture into advisory opinions. The Court will apply *Gingles* and its progeny.

C. Private Right of Action Under Section 2 of the VRA

Defendants advance another argument premised on dicta: that Section 2 of the Voting Rights Act does not confer a private right of action. In *Morse v. Republican Party of Virginia*, the Supreme Court noted that "§ 2, like § 5, provides no right to sue on its face."[232] But the Court immediately went on to quote the Senate Report accompanying the 1982 amendments to the Voting Rights Act, which declare that "the existence of the private right of action under Section 2 ... has been clearly intended by Congress since 1965."[233] Based on that, the Court wrote, "[w]e, in turn, have entertained cases brought by private litigants to enforce § 2."[234]

Inviting this Court to disregard *Morse* and scores of Section 2 voting rights cases that have been tried on the merits, Defendants cite a concurrence by Justice Gorsuch, joined by Justice Thomas, in *Brnovich v. Democratic Natl' Comm.*,[235] observing that

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[229] *Id*.
[230] *Id*. at p. 5 (emphasis added).
[231] *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022)(Roberts, J., dissenting from grant of applications for stays).
[232] *Morse v. Republican Party of Virginia*, 517 U.S. 186, 232 (1996).
[233] *Id*. (quoting S.Rep. No. 97–417, at 30).
[234] *Id*. (citing *Chisom v. Roemer*, 501 U.S. 380 (1991); *Johnson v. De Grandy*, 512 U.S. 997 (1994)).
[235] 141 S. Ct. 2321 (2021).

"[o]ur cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2."[236] Justices Gorsuch and Thomas concurred in the majority opinion in *Brnovich*, which considered the merits of a private action brought under Section 2 of the VRA. Defendants further argue that concurring opinions in the 2020 Fifth Circuit case *Thomas v. Reeves*[237] nod at the notion that the private right of action under Section 2 is an undecided issue, and the District Court for the Eastern District of Arkansas recently engaged this question and concluded that "the text and structure of the Voting Rights Act does not "manifest[ ] an intent 'to create ... a private remedy' " for § 2 violations."[238]

While this issue has been flagged,[239] it is undisputed that the Supreme Court and federal district courts have repeatedly heard cases brought by private plaintiffs under Section 2.[240] *Morse* has not been overruled, and this Court will apply Supreme Court precedent. Defendants' private right of action challenge is rejected.

D. How to Count Black Voters

Because the numerosity of Black voters is central to the *Gingles I* inquiry, deciding who counts as Black is a threshold issue. Three definitions have been advanced by the parties' experts: Any Part Black, "DOJ Black," and Single-Race Black. For several reasons, the Court concludes that the Any Part Black metric is appropriate when

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[236] *Id*. at 2350.
[237] 961 F. 3d 800 (2020).
[238] *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment,* No. 4:21-CV-01239-LPR, 2022 WL 496908, at *14 (E.D. Ark. Feb. 17, 2022).
[239] Justice Gorsuch's concurrence raised the private action issue to "flag one thing it [the majority opinion] does not decide." *Brnovich*, 141 S. Ct. 2321, 2350.
[240] *See, e.g., Abbott*, 138 S. Ct. at 2331-32 (2018); *LULAC*, 548 U.S. at 409; See also *Pendergrass v. Raffensperger*, No. 1:21-CV-05339-SCJ, slip op. at 17-20 (N.D. Ga. Jan. 28, 2022); *Singleton*, 2022 WL 265001, at *78-79; *LULAC v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court); see also *Shelby County v. Holder,* 570 U.S. 529, 537 (2013)("Both the Federal Government and individuals have sued to enforce § 2").

considering the *Gingles* I precondition of numerosity. This conclusion is supported foremost by the United States Supreme Court's discussion of the issue in *Georgia v. Ashcroft*, a 2003 Voting Rights Act case. There, the Court wrote:

> Georgia and the United States have submitted slightly different figures regarding the black voting age population of each district. The differing figures depend upon whether the total number of blacks includes those people who self-identify as both black and a member of another minority group, such as Hispanic. Georgia counts this group of people, while the United States does not do so. . . Moreover, the United States does not count all persons who identify themselves as black. It counts those who say they are black and those who say that they are both black and white, but it does not count those who say they are both black and a member of another minority group. Using the United States' numbers may have more relevance if the case involves a comparison of different minority groups. *Here, however, the case involves an examination of only one minority group's effective exercise of the electoral franchise. In such circumstances, we believe it is proper to look at all individuals who identify themselves as black.*[241]

There is no question that the instant case is a case involving "an examination of only one minority group's effective exercise of the electoral franchise."[242] Thus, this Court will follow the Supreme Court and "look at all individuals who identify themselves as black."[243] This conclusion is further supported by the dissenting comments of Chief Justice Roberts in the Supreme Court's grant of an emergency application for stay in *Merrill v. Milligan*. Therein, Justice Roberts stated that the District Court for the Northern District of Alabama, which applied the Any Part Black metric in its analysis, had "properly applied existing law in an extensive opinion with no apparent errors for our correction."[244] If, in the eyes of the

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[241] *Georgia v. Ashcroft*, 539 U.S. 461, 474 (2003) (emphasis added).
[242] *Id*.
[243] *Id*.
[244] *Merrill v. Milligan*, 142 S. Ct. 879, 882 (2022)

Chief Justice, a court using Any Part Black "cannot be faulted for its application of *Gingles*,"[245] this Court would be remiss to apply another standard.

The Any Part Black definition is deeply rooted in Louisiana history; testimony established that the state employed a rigid system of categorizing its citizens as Black if they had any "traceable amount"[246] of Black blood. It 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. The Court declines to define Black Voting Age Population (BVAP) in a way that gatekeeps Blackness in the context of this Voting Rights case. Finally, the weight of the evidence presented shows that two majority-minority congressional districts that satisfy *Gingles* and respect traditional redistricting principles can be drawn in Louisiana even if more restrictive definitions of Black are applied.[247]

[245] *Id*.
[246] PR-88, p. 3.
[247] *See* conclusions on *Gingles I*, *infra*.

II. LIKELIHOOD OF SUCCESS ON THE MERITS

A. *Gingles I*

1. Numerosity

The Court finds that Plaintiffs have established that the Black Voting Age Population (BVAP) is "sufficiently large ... to constitute a majority"[248] in a second-majority minority congressional district in Louisiana. Defendants' sole argument to the contrary is their opposition to the use of the Any Part Black metric,[249] which the Court considered and rejected above. Defendants complain that none of Plaintiffs' illustrative maps feature a majority-minority district with a BVAP over 52.05%,[250] but they simultaneously concede that *Gingles I* requires only a showing that a remedial district could contain a *50 percent plus one* majority of minority citizens of voting age.[251]

Plaintiffs have put forth several illustrative maps which show that two congressional districts with a BVAP of greater than 50% are easily achieved. Defendants' expert witness Dr. Bryan concluded the same.[252] Moreover, Plaintiffs have established that they can meet the 50% plus threshold required by *Gingles* I even if a more restrictive metric is used. Cooper calculated the BVAP for his illustrative majority-minority districts using the Non-Hispanic Single-Race Black Citizen Voting Age Population definition and found that even using this most restrictive definition of Black, the *Gingles I* numerosity requirement was achieved. The statistical results of the impact of this narrow definition of 'Black" are reproduced from the record evidence below:

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[248] *Cooper*, 137 S. Ct. at 1470 (internal quotation marks omitted).
[249] In their *Proposed Findings of Fact and Conclusions of Law*, Defendants argue that Plaintiffs' failure to establish 50% + 1 "using any definition except for the most expansive. . .compels the conclusion that, as a matter of law, they have not carried their burden under *Gingles* Step I." (Rec. Doc. No. 159, p. 107).
[250] Rec .Doc. No. 159, p. 105.
[251] *Id*. at ¶ 441.
[252] AG-2, p. 20 *et seq.*

Figure 5
2016-2020 Citizen Voting Age Population by Plan

	% NH SR Black CVAP	% NH White CVAP	NH SR Black CVAP to NH White CVAP Margin	July 2021 Black Registered Voters
2022 Plan				
District 2	61.31%	31.45%	29.86%	61.46%
Illustrative Plan 1				
District 2	52.82%	39.31%	13.51%	52.33%
District 5	50.37%	46.19%	4.18%	51.84%
Illustrative Plan 2				
District 2	53.07%	39.53%	13.54%	52.72%
District 5	50.71%	45.92%	4.79%	51.53%
Illustrative Plan 3				
District 2	52.82%	39.31%	13.51%	52.33%
District 5	51.72%	44.86%	6.86%	53.35%
Illustrative Plan 4				
District 2	52.63%	39.53%	13.10%	52.23%
District 5	50.78%	45.75%	5.03%	52.17%

[253]

Likewise, Anthony Fairfax calculated that his Illustrative Plan 2 still has two majority-minority districts if the "DOJ Black" definition is used:

Table 2 – Illustrative Plan 2's Black Voting Age Population

District	DOJ BVAP	DOJ BVAP%	AP BVAP	AP BVAP%
1	97,079	16.07%	103,416	17.12%
2	**299,351**	**50.02%**	**308,535**	**51.55%**
3	103,263	17.60%	106,965	18.23%
4	186,380	31.25%	190,267	31.90%
5	**300,776**	**50.96%**	**305,661**	**51.79%**
6	97,834	16.46%	100,925	16.98%

Note: DOJ BVAP includes Not-Hispanic Black Alone plus Not-Hispanic Black and White combined race; APBVAP includes "Any Part" Black (which contains Hispanic Black VAP)

(PR-86, p. 7)

[253] GX-29, p. 15.

Dr. Hood also concluded that two of Plaintiffs' plans demonstrate that two majority-Black districts can be achieved using the 'DOJ Black' definition:

Table 3. District Percentage Black Comparisons, 2020 Total Population

District	Benchmark	Enacted	Robinson-2A	Galmon-4	LSU/Tulane
1	15.0%	13.7%	17.5%	18.9%	15.8%
2	**59.1%**	**59.1%**	**51.9%**	**50.3%**	41.7%
3	25.5%	25.7%	19.0%	20.6%	23.5%
4	34.4%	34.9%	32.9%	32.4%	32.9%
5	34.4%	34.4%	**53.7%**	**52.1%**	34.3%
6	25.6%	24.7%	17.5%	18.2%	44.4%

[254]

Although Defendants argue that Plaintiffs can only succeed at *Gingles I* using the Any Part Black definition, they fail to refute the record evidence to the contrary. Accordingly, the Court concludes that Plaintiffs are substantially likely to prove *Gingles I* numerosity should this matter proceed to the merits.

2. Compactness

For the reasons which follow, the Court finds that Plaintiffs have demonstrated that they are substantially likely to prove that Black voters are sufficiently "geographically compact"[255] to constitute a majority in a second congressional district. The Court heard opinion testimony on this topic from William Cooper and Anthony Fairfax, who were accepted as expert witnesses by the Court upon Defendants' stipulation to their expertise in the fields of redistricting, demographics, and census data.

Cooper and Fairfax offered several illustrative plans which included two majority-BVAP congressional districts, CD 2 and CD 5. Both Cooper and Fairfax testified that the illustrative plans they drew performed better than the enacted plan on well recognized and widely-used statistical measures of compactness. Specifically, they testified that

[254] LEG-78, p. 4.
[255] *Cooper*, 137 S.Ct. at 1470.

mean compactness score is the best way to compare compactness among different plans, and that their illustrative plans, almost without exception, demonstrate higher mean compactness scores than the enacted plan.

The record evidence and testimony established following mean compactness scores for the enacted plan as compared to the illustrative plans:

Plan	Reock	Polsby-Popper	Convex Hull
Enacted Plan	0.37	0.14	0.62
Fairfax Illustrative Plan 1	0.42	0.18	0.69
Fairfax Illustrative Plan 2	0.39	0.20	0.71
Fairfax Illustrative Plan 2A	0.39	0.20	0.71
Cooper Illustrative Plan 1	0.36	0.19	X[256]
Cooper Illustrative Plan 2	0.41	0.19	X
Cooper Illustrative Plan 3	0.38	0.18	X
Cooper Illustrative Plan 4	0.37	0.18	X

[256] Cooper did not calculate the Convex Hull score for his plans.

Cooper and Fairfax 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.

Like the question of numerosity, Defendants did not meaningfully refute or challenge Plaintiffs' evidence on compactness. Rather, Defendants challenged the Cooper and Fairfax illustrative maps as improperly, and Defendants submit unlawfully, motivated by considerations of race. Defendants offered opinion testimony from Drs. Bryan, Blunt, Hood and Murray to show that race was the predominant factor in configuring a second majority-BVAP congressional district in the illustrative plans.

On stipulation of the parties, the Court heard opinion testimony from Thomas Bryan, offered by the Defendants as an expert in the field of demographics. Bryan quite candidly acknowledged that he testified as an expert in a redistricting case for the first time earlier this year in *Caster v. Merrill*, and that the Alabama District Court afforded his testimony very little weight and found it to be "selectively informed" and "poorly supported."[257] After observing Bryan on the stand in this case, the Court finds that his demeanor was not so problematic as to disqualify him, but the Court found his methodology to be poorly supported. His conclusions carried little, if any, probative value on the question of racial predominance.

Bryan opined that race was a prevailing factor in the design of Plaintiffs' illustrative plans based on his "index of misallocation," which purports to flag areas where a disproportionate share of the Black population was grouped into a majority-minority

[257] *Caster v. Merrill,* No. 2:21-CV-1536-AMM, 2022 WL 264819, at *67 (N.D. Ala. Jan. 24, 2022). The Court found that Bryan "offered dogmatic and defensive answers that merely incanted his professional opinion and reflected a lack of concern for whether that opinion was well-founded." (at *62).

district. Bryan testified that he does not know if this "misallocation" analysis has ever been credited by a court in a voting rights case – he did not offer it in the Alabama case – and that he was unaware of any case in which the "index of misallocation" was accepted as probative or persuasive by a court in the voting rights context.

Even if this "misallocation" method is accepted, the factual assumptions upon which his conclusions rest are absent in this case. Hence, Bryan's conclusions are unsupported by the facts and data in this case and thus wholly unreliable. Bryan testified that his analysis is based on two assumptions – that the Black population is evenly distributed and that district splits are created randomly – both of which, he admitted, are not supported by the evidence in this case. Bryan testified that it is still possible to perform the misallocation analysis when those assumptions are not borne out, but he did not explain why, if the underlying assumptions are false, his resulting opinion is reliable. Ultimately, Bryan conceded that that he could not say how much of the "misallocation" he observed was attributable to a racially-motivated mapdrawing process, as opposed to being reflective of the reality that the Black population in Louisiana is highly segregated. This admission seriously undermines the reliability of his opinion that Plaintiffs' maps are the product of racial predominance. Furthermore, the Court accords Bryan's racial predominance opinion little weight because he testified that he did not account for compactness, communities of interest, or incumbent protection in concluding that race predominated in Plaintiffs' maps.

Finally, the Court finds that Bryan's analysis lacked rigor and thoroughness, which further undermines the reliability of his opinions. On cross-examination, Bryan was asked about Cooper's findings that his illustrative districts had greater than 50% BVAP even

using the single-race Black definition and several other methods for measuring BVAP. He testified that he looked at it but had no opinion to offer about it. For the foregoing reasons, the Court gives very little weight to Bryan's analysis and conclusions.

Defendants offered opinion testimony from Dr. Christopher Blunt, stipulated by the parties as an expert in the field of political science with an emphasis in quantitative political science and data analysis. Dr. Blunt opined that a computer simulation he used to generate congressional districts did not generate even a single majority-BVAP congressional district. Defendants argue that Dr. Blunt's simulations prove that the majority-BVAP districts produced in the illustrative plans are the product of racial predominance in the mapmaking process, i.e., racial gerrymandering. On compactness, Dr. Blunt testified that his simulated plans scored higher on the Polsby-Popper test for compactness than the illustrative plans.[258] This is both unsurprising and unpersuasive, considering Dr. Blunt's testimony that he did not account for all of the relevant redistricting principles and ran his simulations from scratch, without reference to the enacted plan. In any event, *Gingles I* does not require that Plaintiffs' illustrative plans outperform a set of computer-simulated districts on compactness. It requires only that they be reasonably compact.

The Court considers Dr. Blunt to be well-qualified by education and experience in the tendered field of expertise. However, Dr. Blunt has no experience, skill, training or specialized knowledge in the simulation analysis methodology that he employed to reach his conclusions. He testified that had never attempted a simulations analysis before this

[258] He reported the simulation maps as having a mean Polsby-Popper compactness score of .25 compared to an average of .18 or .19 for the illustrative plans (LEG-3, p. 11 (Figure 4)).

case and has never published on the topic, taught, or even taken a course on it. Dr. Blunt's simulation analysis experience is best described as novice.

Dr. Blunt testified that he downloaded publicly available code and wrote the instructions to execute the underlying algorithm. Several times, in response to questions about his analysis, Dr. Blunt admitted that he was limited in his ability to go "under the hood" of the code he was using to program in parameters that would account for certain redistricting criteria. Dr. Blunt conceded the importance of including all the relevant redistricting criteria variables into his simulations. However, he testified that he was only able to account for population equality, contiguity, compactness, and minimization of parish splits. Admittedly, his simulations were performed without regard to minimizing precinct splits, respecting communities of interest, incumbency protection, or even the criterion considered paramount by Defendants, core retention. In short, the simulations he ran did not incorporate the traditional principles of redistricting required by law. Accordingly, his opinions merit little weight.

The Court heard opinion testimony from Dr. M.V. Hood, offered by the Defendants and stipulated to be an expert in the fields of political science, quantitative political analysis, and election administration. Dr. Hood offered opinions on the performance of the illustrative plans by reference to the criteria of core retention, and opinions on compactness of BVAP statewide. The Court finds that he was generally credible but that his conclusions are not particularly helpful to the Court. The Court detects no error in Dr. Hood's core retention analysis and gives it some weight, though the conclusion that the illustrative plans have lower core retention than the enacted map, which was drawn using a target of "least-change," is hardly a blockbuster. Further, the Court notes that the

importance to be assigned to core retention as a traditional redistricting principle is hotly disputed in this case (see *infra*), and Dr. Hood willingly admitted and agreed that a desire to preserve core retention does not trump the Voting Rights Act. Dr. Hood's testimony on the numerosity of Plaintiffs' illustrative plans was likewise unilluminating, since he testified that he offers no opinion on whether DOJ Black or Any Part Black should be used to measure BVAP.

The Supreme Court directs that *Gingles I* compactness "refers to the compactness of the minority population, not to the compactness of the contested district."[259] As the Northern District of Alabama explains in *Caster v. Merrill*, "[i]f the minority population is too dispersed to create a reasonably configured majority-minority district, Section Two does not require such a district."[260] Dr. Hood opined that the Black population in Louisiana is heterogeneously distributed, a demographic characteristic not atypical of many States. In the Court's view, the fact that Louisiana's Black population is unevenly dispersed geographically when viewed statewide is not illuminating, first because congressional districts are not statewide, and second, it overlooks patterns of significant pockets or clusters of BVAP that are the result of segregated housing. The relevant question is whether the population is sufficiently compact to make up a second majority-minority congressional district *in a certain area of the state*. The fact that Plaintiffs' illustrative maps feature districts with 50% + BVAP while scoring well on statistical measures of compactness is the best evidence of compactness.

The Court accepted Defendants' witness Dr. Alan Murray as an expert in the fields of demographic analysis, spatial analytics as it relates to race, and statistics. The Court

[259] *LULAC*, 548 U.S. at 430 at 433 (quoting *Vera*, 517 U.S. at 997 (Kennedy, J., concurring))
[260] *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *63 (N.D. Ala. Jan. 24, 2022).

finds Dr. Murray's opinions unhelpful and unilluminating for several reasons. Dr. Murray employed "spatial analysis" to reach the conclusion that the Black and White populations in Louisiana are heterogeneously distributed. This is nothing more than a commonsense observation which is not a whit probative of the compactness of the districts in the Plaintiffs' illustrative plans. In fact, Dr. Murray never looked at the illustrative plans. The time-tested, generally accepted statistical measures of compactness used by other experts in this case are qualitatively superior evidence and far more probative of compactness.

Dr. Murray has no background or experience in redistricting; he did not review any of Plaintiffs' illustrative plans, and, most notably, he testified that he has no basis to disagree with any of the opinions offered by Plaintiffs' experts in this case. Lastly, Dr. Murray testified that he is not aware of any court considering the type of "spatial analysis" that he performed in the context of a Section 2 case. In short, based on Dr. Murray's testimony, it is clear to the Court that his expert opinion is untethered to the specific facts of this case and the law applicable to it. Accordingly, the Court disregards his testimony as it applies to the determination of compactness.

In weighing the opinions of the competing expert witnesses the Court finds the Plaintiffs' *Gingles I* experts Cooper and Fairfax qualitatively superior and more persuasive on the requirements of numerosity and compactness.

Cooper has extensive experience drawing maps for redistricting and has been repeatedly recognized and accepted as an expert in federal voting rights cases. Cooper has familiarity with the unique voting laws and processes in Louisiana, having worked on redistricting projects in in Shreveport and in Terrebonne, Point Coupee, Madison, and

East Carroll Parishes. The Court finds that Cooper's reports[261] in this case were clear, substantiated by unrefuted empirical and statistical data, methodologically sound, and therefore reliable. His testimony was candid, forthright and indicative of an in-depth comprehension of redistricting, demographics, and census data. On cross-examination, when Cooper was pressed for detail regarding his methodology, he was frank, not defensive, and provided reasonable and coherent responses. The Court found Cooper's opinions and conclusions helpful to the Court as the trier of fact and credits his testimony favorably. The Court particularly credits Cooper's testimony that race was only one of the several factors that he considered in reaching his conclusions and drawing illustrative maps and that race did not predominate in his analysis, nor did any other single criterion. Cooper candidly admitted that he was aware of race during the map drawing process, but his testimony about his methodology persuaded the Court that race was not a predominant consideration in his analysis and that he considered all of the relevant principles in a balanced manner. As stated by the Supreme Court, "race consciousness does not lead inevitably to impermissible race discrimination."[262]

Anthony Fairfax's thirty years of experience in preparing redistricting plans make him well-qualified, in the Court's view, and his report and supplemental reports are extremely thorough and methodologically sound. Like Cooper, Fairfax remained steady under cross-examination and candidly described his process in detail. The Court did not observe inconsistencies in his testimony, nor any reason to question the veracity of Fairfax's testimony. The Court credits in particular Fairfax's testimony where he discussed how race contributed to the illustrative plans that he drew. Fairfax did not deny that he

[261] GX-1; GX-29, admitted as substantive evidence without objection.
[262] *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

used his mapping software to assess the location of BVAP in Louisiana initially, but he was adamant and credible in his testimony that race did not predominate in his mapping process. Rather, he testified that he only considered race to the extent necessary to test for numerosity and compactness as required by *Gingles I.*

The weight afforded to Plaintiffs' experts, Cooper and Fairfax, is appropriate considering not a single defense expert disputed that Plaintiffs' illustrative plans are generally more compact than the enacted plan based on statistical measures.

The Court's assessment of reasonable compactness is also informed by a visual inspection of the shapes of the districts in Plaintiffs' illustrative plans. Overall, the Court observes that the districts proposed in the illustrative maps are regularly shaped, without "tentacles, appendages, bizarre shapes, or any other obvious irregularities,"[263] save a few narrow finger-shaped boundaries. Compared to the shape of CD 2 and the wraparound shape of CD 6 in the enacted plan, the illustrative plans are visually more compact.

Next, the Court turns to the question of whether Plaintiffs' illustrative plans demonstrate reasonable compactness when viewed through the lens of "traditional districting principles such as maintaining communities of interest and traditional boundaries."[264] As an initial matter, the Court will not extensively analyze the traditional criteria of equal population and contiguity, because the evidence makes clear that Plaintiffs' plans are contiguous and equalize population across districts, and these issues are not disputed.

The first factor to consider is whether Plaintiffs' illustrative plans respect existing political subdivisions, such as parishes, cities, and towns. The evidence presented by the

[263] *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *64 (N.D. Ala. Jan. 24, 2022).
[264] *LULAC*, 548 U.S. at 433 (internal quotation marks omitted).

parties largely related to parishes and to VTDs, also referred to as precincts. As for parish splits, the Court finds that Plaintiffs' illustrative plans split fewer parishes than the enacted plan. The enacted plan splits 15. Fairfax's Illustrative Plan 1 splits 14, while his Plans 2 and 2A split 12 parishes. Cooper's Illustrative Plans 1 through 4 split 10, 11, 10, and 10 parishes, respectively. Accordingly, the Court finds that Plaintiffs' illustrative maps respect political subdivision boundaries as much or more so than the enacted plan with regard to parish splits.

As for precinct splits, the Legislature's Joint Rule 21 states that districting maps should minimize precinct splits "to the extent possible."[265] The enacted plan splits no precincts, nor do any of the illustrative plans prepared by Anthony Fairfax. Likewise, it is undisputed that Cooper's Illustrative Plan 4 splits no precincts. Cooper explains in his report that, in his plans 1, 2, and 3, he only split a precinct when necessary to achieve perfect population equality among the districts. When splitting a precinct, he states that he did not do so randomly – he followed municipal boundaries, census block group boundaries, or census block boundaries. Accordingly, the Court finds that Plaintiffs' illustrative maps respect political subdivision boundaries with regard to precinct splits.

The Court next considers whether Plaintiffs' illustrative plans respect "communities of interest." The term "communities of interest" has no universally agreed-upon definition. The Legislature's Joint Rule 21 refers to the concept in the following provision:

> All redistricting plans shall respect the established boundaries of parishes, municipalities, and other political subdivisions and natural geography of the state to the extent practicable. However, this criterion is subordinate to and shall not be used to undermine the maintenance of communities of interest within the same district to the extent practicable.[266]

[265] GX-20.
[266] *Id.*

By its Joint Rule 21, the Louisiana Legislature expressly prioritizes consideration of communities of interest to goal of preserving political subdivisions, but does not elaborate on what, exactly, comprises a community of interest. Plaintiffs' experts employed different approaches to identifying communities of interests and considering them in their illustrative maps. Fairfax, for example, explains that he used census places and landmark areas to gauge how often his maps split communities of interest, as well as socioeconomic data and roadshow testimony from community members for insight into local ideas about communities of interest. A "census place" includes municipalities and census-designated places, which generally denotes a locally known or "named" place that does not have its own governmental body. Fairfax testified that in some ways, the census places metric is more indicative of a community of interest than actual cities, because they are locally defined areas. According to Fairfax, the enacted plan splits 32 census places, while his Illustrative Plans 1 through 3 split 31, 26, and 26 census places, respectively. Cooper analyzed communities of interest in terms of Core Based Statistical Areas (CBSAs) and found that his plans split fewer CBSAs than the enacted plan. His plans also split fewer populated municipalities.[267] The citizen viewpoint testimony of Christopher Tyson and Charles Cravins, *supra,* also contributed meaningfully to an understanding of communities of interest.

Defendants did not call any witnesses to testify about communities of interest. This strikes the Court as a glaring omission, given that Joint Rule 21 requires communities of interest to be prioritized over and above preservation of political subdivisions. While the Legislative Intervenors asserted in their *Opposition* that "it is the Legislature's role to

identify communities of interest, not the Court's or Plaintiffs,'"[268] Defendants have not offered any evidence related to whether or how the Legislature did so. The Legislative Intervenors argue that the enacted plan "accounts for communities of interest identified in committee hearings, including by grouping major military installations and military communities in CD 4, preserving the Acadiana region in CD 3, and joining major cities and their suburbs as much as possible,"[269] but the argument is unsubstantiated by probative record evidence.

In their post-hearing briefs, Defendants criticize the fact that "Mr. Cooper drew Vernon Parish, home of Fort Polk, and Shreveport, home of Barksdale Air Force Base, into different districts in his illustrative plans even though they were joined in the enacted plan."[270] Defendants offer no assessment of how Plaintiffs' maps treat their other two stated communities of interest, preserving the Acadiana region and joining cities with their suburbs. The Court does not find that splitting one argued community of interest is fatal to a finding that Cooper's districts are geographically compact without sacrificing communities of interest. Cooper analyzed the enacted plan and identified splits of 18 CBSAs and 30 populated municipalities. Defendants offered no evidence of why the splits in their plan are less offensive to traditional redistricting principles than the ones in Cooper's.

Regardless, the inquiry under *Gingles I* is not whether Plaintiff's illustrative maps represent the most perfect or preferable way to draw a majority-Black district; there is no need to show that the illustrative maps would "defeat [a] rival compact district[ ]" in a

[268] Rec. Doc. No. 109, p. 21.
[269] *Id*. at p. 13.
[270] Rec. Doc. No. 159, p. 33, ¶ 139.

"beauty contest[ ]."[271] The relevant question is whether, taking into account traditional redistricting principles including communities of interest, a reasonably compact and regular majority-Black district can be drawn.

Courts struggle with analyzing and giving meaning to the subjective redistricting criteria that counsels respect for "communities of interest." This Court offers no recipe for the definition of "community of interest," but based on the testimony and evidence, the Court finds that Plaintiffs' experts demonstrated that they gave careful thought to selecting objectively verifiable indicators to identify for assessing communities of interest and calculating how often their maps split them. By those metrics, Plaintiffs' maps split locally relevant areas less often than the enacted map. To the extent that "communities of interest" is a term susceptible to clear definition, the Court finds that Plaintiffs made a strong showing that their maps respect them and even unite communities of interest that are not drawn together in the enacted map (St. Landry Parish and East Baton Rouge, for one). Defendants have not meaningfully disputed that Plaintiffs' illustrative maps respect communities of interest. Based on the testimony in this matter, the Court finds that Plaintiffs' plans consider and preserve communities of interest to a practical extent.

Next, the Court turns to the final two traditional redistricting criteria: incumbency protection and core retention. Avoiding incumbent pairing was not one of the criteria that the Legislature included in its Joint Rule 21, and incumbency protection is generally regarded as less a less important criterion.[272] Nevertheless, the Court finds that in all of Cooper's illustrative plans, each of Louisiana's six congressional incumbents would still

[271] *Vera*, 517 U.S. at 977–78.
[272] *See, e.g., Larios v. Cox*, 300 F. Supp. 2d 1320, 1348 (N.D. Ga. 2004), aff'd, 542 U.S. 947 (2004).

reside in the district where they currently live.[273] Further, Fairfax demonstrated that he could avoid incumbent pairing through slight adjustments in his Illustrative Plan 2A;[274] his earlier plans had paired two incumbents in CD 5. Although Defendants' expert Dr. Hood testified that, in his view, it would be harder for people to vote for incumbents in Plaintiffs' proposed districts because they have lower core retention than the enacted map, he did not contradict Fairfax's or Cooper's statements that they have developed plans that protect existing incumbents. In any event, "[t]here is no legal basis"[275] for a rule that every illustrative plan must protect every incumbent, but all of Cooper's maps and one of Fairfax's do so anyway. The Court concludes that Plaintiffs' maps demonstrate adherence to the traditional redistricting principle of protecting incumbents.

Lastly, the Court considers core retention. Defendants' expert Dr. Hood testified that the core retention scores for the illustrative plans are lower than those for the enacted plan, reflecting that the enacted plan retains more of the benchmark district cores than the illustrative plan. The Court does not question this conclusion – in fact, it finds that nothing could be more obvious. Plaintiffs' illustrative maps were intended to demonstrate that it is possible to draw, minding the other necessary criteria, two majority-minority districts in Louisiana instead of one. Naturally, their maps are less similar to the benchmark.

Moreover, the Court struggles to grasp why Defendants elevate the importance of core retention. They cite no case which treats core retention as dispositive of, or even central to, the *Gingles* I inquiry. Furthermore, the Legislature's own redistricting rule is

[273] GX-1, p. 25.
[274] PR-90, p. 3.
[275] *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *67 (N.D. Ala. Jan. 24, 2022).

silent on core retention. As Plaintiffs highlight, Joint Rule 21 *does* include a core retention-related requirement with respect to its criteria for the *state* Legislature: 21(D)(4), which governs state redistricting provides that "[d]ue consideration shall be given to traditional district alignments to the extent practicable."[276] However, Joint Rule 21(E), which governs congressional redistricting, does not include that provision. And, although 21(E) does specify a list of other paragraphs from the Rule that apply to congressional districting as well, (D)(4) is not one of them.

Thus, the Court concludes that, although Plaintiffs' illustrative maps have lower core retention than the enacted plan, that fact is entitled to essentially no weight under the *Gingles I* inquiry. Even if core retention was demonstrated to be a relevant redistricting principle, Defendants provide the Court with no benchmark for assessing it. How much core retention is "enough"? How much of a district core must be preserved to make an illustrative map legally adequate? Ultimately, it is irrelevant. Core 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. As Defendants' own expert Dr. Hood testified, core retention does not trump the Voting Rights Act.

Ultimately, the Court finds that the illustrative plans developed by Plaintiffs' experts satisfy the reasonable compactness requirement of *Gingles* I. In Defendants' post-hearing brief, they assert that "it is only through a very specific set of contortions that a second majority-minority district can be extracted from Louisiana's demographics."[277] If Plaintiffs' maps are the result of improper "contortions," those contortions somehow went

[276] GX-20.
[277] Rec. Doc. No. 166, p. 81.

undetected by the numerous statistical measures employed to demonstrate their adherence to traditional districting principles. Plaintiffs' maps have roughly zero population deviation, contiguous districts, districts that are at least as geographically compact as the districts in the enacted plan – in fact, they are almost always more geographically compact. Plaintiffs' maps protect incumbents, reflect communities of interest, and respect political subdivisions, splitting fewer parishes than the enacted map. Cooper and Fairfax both offered persuasive testimony regarding how they balanced all of the relevant principles, including the Legislature's Joint Rule 21, without letting any one of the criteria dominate their drawing process. For these reasons, the Court finds that the illustrative plans developed by Plaintiffs' experts satisfy the reasonable compactness requirement of *Gingles* I.

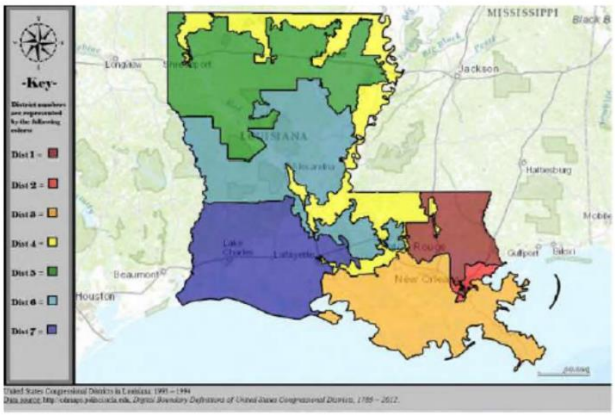
3. Equal Protection: *Hays* and Racial Gerrymandering

Defendants insist that the illustrative maps are racial gerrymanders as a matter of law. They cite the *Hays* series of cases from the 1990s, wherein Louisiana congressional maps with two majority-minority districts were invalidated as racial gerrymanders.[278] In 1993, the District Court for the Western District of Louisiana took up *Hays v. State of Louisiana* (*Hays I*), a private action which challenged a legislatively-enacted congressional map on Equal Protection grounds. At the time, Louisiana was apportioned seven congressional seats; the Legislature's map had two majority-Black districts, CD 2 and CD 4.

The Western District found that the *Hays I* map (depicted below) was the result of racial gerrymandering. The Court colorfully described the map as follows:

[278] *Hays v. Louisiana*, 839 F. Supp. 1188, 1195 (W.D. La. 1993) (*Hays I*); *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996) (*Hays IV*).

> Like the fictional swordsman Zorro, when making his signature mark, District 4 slashes a giant but somewhat shaky "Z" across the state, as it cuts a swath through much of Louisiana. It begins north of Shreveport—in the northwestern corner of Louisiana, just east of the Texas border and flush against the Arkansas border—and sweeps east along that border, periodically extending pseudopods southward to engulf small pockets of black voters, all the way to the Mississippi River. The district then turns south and meanders down the west bank of the Mississippi River in a narrow band, gobbling up more and more black voters as it goes. As it nears Baton Rouge, the district juts abruptly east to swallow predominantly black portions of several more parishes. Simultaneously, it hooks in a northwesterly arc, appropriating still more black voters on its way to Alexandria, where it selectively includes only predominantly black residential neighborhoods. Finally, at its southern extremity, the district extends yet another projection—this one westward towards Lafayette—adding still more concentrations of black residents. On the basis of District 4's physiognomy alone, the Plan is thus highly irregular, suggesting strongly that the Legislature engaged in racial gerrymandering.[279]



280

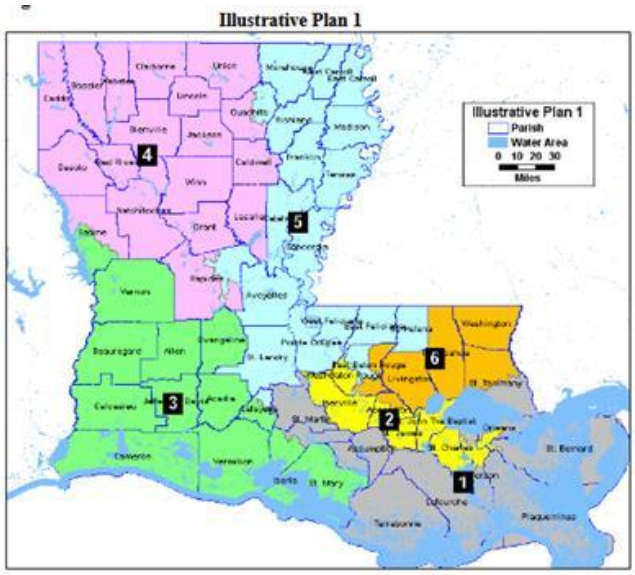
After the Western District's ruling, the Legislature adopted a new redistricting plan, and the finding of racial gerrymandering was vacated and remanded for further consideration in light of the new plan.

Defendants have repeatedly invoked *Hays* as a cautionary tale in this litigation, suggesting that because a map with two majority-Black districts was previously invalidated by a court, there can never be an acceptable map with two Black districts. In

[279] *Id*. at 1199–200 (W.D. La. 1993).
[280] ARD-3, p. 6.

fact, the Legislative Intervenor Defendants use the word "insanity" to describe efforts to draw two, quipping in their *Opposition* to the *Motion for Preliminary Injunction* that "[i]nsanity is doing the same thing over and over and expecting different results."[281] For the 2020 redistricting cycle, they assert, the Louisiana Legislature kept *Hays* in mind and "did not succumb to this malady."[282]

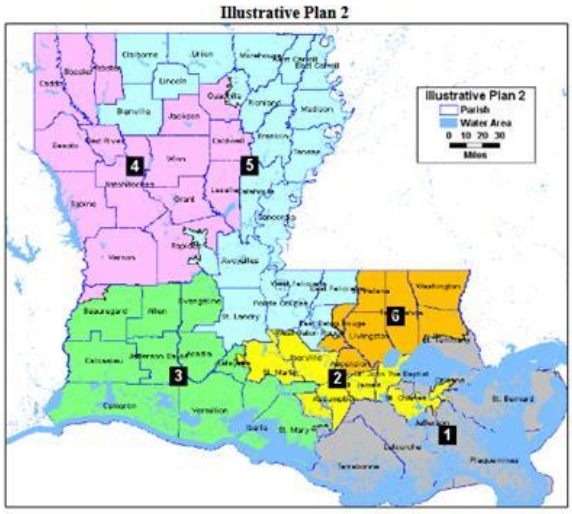
Defendants' assertion that *Hays* automatically vitiates the validity of Plaintiffs' illustrative plans is refutable by a cursory visual inspection of the *Hays* maps. In the *Hays I* map, District 2 appears on the map of Louisiana with the coherence of a sneeze. It is not disputed that Plaintiffs' illustrative plans draw a second majority-Black district by connecting parts of East Baton Rouge Parish with the Delta Parishes in their proposed CD 5. But apart from that commonality, the layout of their CD 5 is scarcely similar to *Hays* I's CD 4. Take, for example, Cooper's Illustrative Plan 1:



283

[281] Rec. Doc. No. 109, p. 12.
[282] *Id.*
[283] GX-1, p. 26.

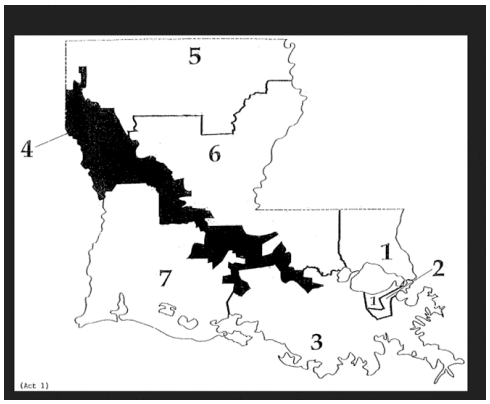
Instead of a narrow and jagged band reaching from the far northwest of the state all the way south toward the Gulf Coast, Cooper's map appears as a relatively compact, reasonable shape. Cooper's Illustrative Plan 2 reaches further to the northwest, but still avoids the plunge to the coast:



[284]

Likewise, Anthony Fairfax's illustrative maps connect East Baton Rouge to the Delta Parishes in compact form and have none of the deranged twists and turns of the map at issue in *Hays I*.

The Legislature's second crack at redistricting in *Hays* era was also invalidated on Equal Protection grounds as a racial gerrymander. The *Hays II* map looked like this:



[284] GX-1, p. 28.

The district shown in black, CD4, was a majority-minority district that the Western District described as "an inkblot which has spread indiscriminately across the Louisiana map."[285] Notably, this CD 4 does not commit what Defendants make out to be the cardinal sin of including East Baton Rouge Parish and the Delta Parishes in the same district. Clearly, then, it was not the combination of those areas that the Western District rejected – it was the diffuse and nonsensical configuration of the majority-minority districts. Plaintiffs' expert Anthony Fairfax testified that the majority-minority districts in *Hays* were extremely non-compact, to the point that he would never draw them.

The invocation of *Hays* is a red herring. By every measure, the Black population in Louisiana has increased significantly since the 1990 census that informed the *Hays* map. According to the Census Bureau, the Black population of Louisiana in 1990 was 1,299,281.[286] At the time, the Census Bureau did not provide an option to identify as more than one race. The 2020 Census results indicate a current Black population in Louisiana of 1,464,023 using the single-race Black metric, and 1,542,119 using the Any Part Black metric.[287] So, by the Court's calculations, the Black population in Louisiana has increased by at least 164,742 and as many as 242,838 since the *Hays* litigation. *Hays,* decided on census data and demographics 30 years ago, is not a magical incantation with the power to freeze Louisiana's congressional maps in perpetuity. *Hays* is distinguishable and inapplicable. Defendants argue vociferously that race was the predominant factor in the creation of CD 2 and CD 5 in Plaintiffs' illustrative maps. A plan that links locations solely on the basis of race is suspect race-based redistricting, they argue, and cannot satisfy

[285] *Hays v. State of La.,* 936 F. Supp. 360, 364 (W.D. La. 1996).
[286] https://www2.census.gov/library/publications/decennial/1990/cp-1/cp-1-20.pdf.
[287] *See* chart *infra*, p. 22.

Gingles I. Defendants assert that Cooper and Fairfax had "racial target[s]"[288] and that drawing two majority-minority districts was "non-negotiable"[289] for them. Because race was "the overriding reason for choosing one map over others,"[290] Defendants argue, quoting *Bethune-Hill*, their illustrative plans are unconstitutional.

The Court rejects this argument, for both legal and factual reasons. As discussed *supra*, there is an inherent tension between the Voting Rights Act and the Equal Protection Clause. Because "the Equal Protection Clause restricts consideration of race and the [Voting Rights Act] demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability."[291] "In an effort to harmonize these conflicting demands, [the Supreme Court has] assumed that compliance with the [Voting Rights Act] may justify the consideration of race in a way that would not otherwise be allowed."[292] More specifically, the Court has found "that complying with the [Voting Rights Act] is a compelling state interest, and that a State's consideration of race in making a districting decision is narrowly tailored and thus satisfies strict scrutiny if the State has good reasons for believing that its decision is necessary in order to comply with the [Voting Rights Act]."[293]

The Supreme Court explicitly acknowledges that some *consideration* of race is permissible in the context of the Voting Rights Act, and lower courts have recognized the sound logic of this "obvious"[294] result, reasoning that "a rule that rejects as unconstitutional a remedial plan for attempting to satisfy *Gingles I* would preclude any

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[288] Rec. Doc. No. 165, p. 6.
[289] *Id*.
[290] *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 792 (2017).
[291] *Abbott*, 138 S. Ct. at 2315 (internal quotation marks omitted).
[292] *Id*.; *Cooper*, 137 S. Ct. at 1464.
[293] *Abbott*, 138 S. Ct. at 2315.
[294] *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *80 (N.D. Ala. Jan. 24, 2022).

plaintiff from ever stating a Section Two claim."[295] Indeed, as the Northern District of Alabama observed in *Caster*, every element of *Gingles* past *Gingles I* would be rendered superfluous if it was unconstitutional to account for race in the effort to satisfy numerosity. How can a plaintiff demonstrate that it is possible to draw a district exceeding 50% BVAP without locating areas of Black population and, accounting for all of the other traditional redistricting principles, trying to draw a majority-Black district that includes them? The Supreme Court in *Shaw v. Reno* captured this reality, stating that

> redistricting differs from other kinds of state decision making in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination.[296]

Plaintiffs argue that Defendants' effort to import a requirement that map-making be demonstrably race neutral into *Gingles I* was explicitly rejected by the Fifth Circuit in the 1996 case *Clark v. Calhoun County*.[297] In *Clark*, the Fifth Circuit considered whether racial predominance is a factor in the *Gingles I* inquiry and concluded, quite clearly, that it is not. In *Clark,* the Fifth Circuit considered Calhoun County's argument that, because the plaintiffs' predominant concern in drawing their proposed districts was race, those proposed districts did not satisfy *Gingles I*. For that proposition, the County relied upon *Miller v. Johnson*,[298] arguing that under *Miller*, "the gravamen of an Equal Protection claim is not the shape of the district but rather the legislature's motivation or purpose in drawing the district as it did."[299]

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[295] *Id*.
[296] *Shaw v. Reno*, 509 U.S. 630, 646 (1993).
[297] 88 F.3d 1393.
[298] 115 S.Ct. 2475, 2488 (1995).
[299] 88 F.3d 1393, 1406 (5th Cir. 1996).

The *Clark* court "agree[d] with the County's reading of *Miller* but disagree[d] that *Miller* is relevant to the first *Gingles* factor."[300] "In contrast to *Miller*'s focus on motivation," the Fifth Circuit wrote, "the first *Gingles* factor requires that the plaintiff demonstrate that the minority group is 'sufficiently large and geographically compact to constitute a majority in a single-member district.'"[301] This demonstration is typically made, the court observed, by drawing hypothetical majority-minority districts. Based on Supreme Court precedent,[302] the *Clark* court held:

> *Miller*'s emphasis on purpose does not apply to the first *Gingles* precondition. In neither case did the Court suggest that a district drawn for predominantly racial reasons would necessarily fail the *Gingles* test. To the contrary, the first *Gingles* factor is an inquiry into causation that necessarily classifies voters by their race.[303]

The court went on:

> [W]e do not understand *Miller* and its progeny to work a change in the first *Gingles* inquiry into whether a sufficiently large and compact district can be drawn in which the powerful minority would constitute a majority. To be sure, this test of causation insists upon a compact district, and a remedial response narrowly tailored to remedying a found violation must also be compact. As we will explain, however, that tailored response must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the found wrong.[304]

Further, the *Clark* court drew a distinction between the districts proposed by the plaintiffs, which "were 'simply presented to demonstrate that a majority-black district is feasible in Calhoun County'"[305] under *Gingles I*, and the remedial map that would ultimately be developed by the County in response to the court's ruling. A remedial map, the court

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[300] *Id*.
[301] *Id*.
[302] *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899 (1996).
[303] *Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393, 1406–07 (5th Cir. 1996).
[304] *Id*. at 1407.
[305] *Id*. (quoting *Clark*, 21 F.3d at 95).

explained, "must use race at the expense of traditional political concerns no more than is reasonably necessary to remedy the found wrong."[306] This makes sense, since illustrative maps drawn by demographers for litigation are not state action and thus the Equal Protection Clause is not triggered. On the other hand, a Court-imposed or legislatively-enacted map would be squarely subject to Equal Protection review.

In a strained attempt to get around the well-reasoned holding of *Clark* and piggyback an Equal Protection analysis onto *Gingles I*, Defendants argue that "Supreme Court and Fifth Circuit precedent have both since held that the remedial and liability inquiries are not separate but are one in the same."[307] Therefore, they contend, it is "no longer a legally available possibility that, as *Clark* assumed, a predominance analysis is appropriate at the remedial phase but not at the liability phase."[308] Defendants cite three cases in support of this argument.

In the first, *Abbott v. Perez*,[309] the Supreme Court invalidated a lower court's decision to "defer[] a final decision on the § 2 issue and advise[] the plaintiffs to consider [it] at the remedial phase of the case."[310] This is no more than a recognition of the hornbook legal principle that liability must be decided before a remedy can be ordered. *Abbott* does not hold that the liability inquiry and the remedial inquiry are the same. The *Abbott* court pointed out the lower Court's error in deferring part of the Section 2 liability inquiry to the remedial phase based on speculation that the plaintiff *might* succeed on its § 2 claim."[311]

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[306] *Id*. at 1408.
[307] *Id*.
[308] *Id*.
[309] 138 S. Ct. 2305 (2018).
[310] *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018).
[311] *Id*. ("[c]ourts cannot find § 2 effects violations on the basis of uncertainty")(emphasis original).

The other case advanced by the Defendants, *Anne Harding v. County of Dallas, Texas*,[312] is likewise unavailing.[313] Finally, the Court finds that *Wright v. Sumter Cnty. Bd. of Elections & Registration*,[314] an Eleventh Circuit case, also poses no obstacle here. In *Wright*, the court instructed that "a district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings."[315] With that in mind, the Eleventh Circuit affirmed the district court's decision, finding that the challenged "district map impermissibly diluted black voting strength in violation of section 2 of the Voting Rights of 1965."[316] The district court then, "with the help of a well-qualified special master, drew new district boundaries that plainly remedied the violation."[317] *Wright* is not authority for the proposition that the legal analysis applicable to liability and remedy are "one and the same." *Wright* states the obvious, that the liability and remedial phases are highly interrelated; it does not state that all legal theories applicable to the remedy apply with equal force during liability. As keen as Defendants are to bake the racial predominance inquiry into *Gingles I*, the Court finds no legal basis for doing so. *Clark* clearly sets forth the Fifth Circuit's rejection of the conflation of the racial gerrymandering doctrine with the vote dilution claims raised by Plaintiffs here.

Defendants also argue that, in *Bethune-Hill*, the Supreme Court clarified that a plan that meets the *Gingles* preconditions may nonetheless be unconstitutional.[318] In other

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[312] 948 F.3d 302, 310 (5th Cir. 2020).
[313] Like in *Abbott*, the Fifth Circuit in *Anne Harding* did not hold, generally, that liability and remedy are collapsed into one inquiry. It held that it was inappropriate to move to the remedy phase without a clear showing of liability; the court found that liability was not established because the plaintiffs had not demonstrated that their proposed district would "perform" for Latino voters and give them an opportunity to elect a candidate of their choice.
[314] 979 F.3d 1282, 1302–03 (11th Cir. 2020)
[315] *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302 (11th Cir. 2020).
[316] *Id*. at 1311.
[317] *Id*.
[318] Rec. Doc. No. 165, p. 14.

words, a remedial plan that satisfies the *Gingles* factors must withstand Equal Protection scrutiny at the implementation or remedy stage. There is *no factual evidence* that race predominated in the creation of the illustrative maps in this case. 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. As discussed above, it is crystal clear under the law that some level of consideration of race is not only permissible in the Voting Rights Act context; it is *necessary* if Congress's intent in passing the Voting Rights Act is to be given effect. "Race consciousness does not lead inevitably to impermissible race discrimination."[319]

In any event, the "Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in *legislative* districting."[320] Equal Protection "prevent[s] a *State*, in the absence of sufficient justification, from separating its citizens into different voting districts on the basis of race."[321] Defendants' insistence that illustrative maps drawn by experts for private parties are subject to Equal Protection scrutiny is legally imprecise and incorrect. Regardless, the record does not support a finding that race predominated in the illustrative map-making.

Plaintiffs' expert witnesses William Cooper and Anthony Fairfax explicitly and credibly testified that they did not allow race to predominate over traditional districting principles as they developed their illustrative plans. Defendants dismiss this testimony as "semantic,"[322] and they cite both Cooper and Fairfax's statements that they used 50% BVAP as a threshold as evidence that they employed unconstitutional racial targets. They

[319] *Shaw*, 509 U.S. 630, 646 (1993).
[320] Cooper v. Harris, 137 S.Ct. 1455 (U.S.N.C., 2017) (emphasis added)
[321] *Id*. (emphasis added)
[322] Rec. Doc. No. 166, p. 82.

further cite Cooper's statement that he "was specifically asked to draw two [majority-minority districts] by the plaintiffs."[323] 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."[324] And Fairfax's testimony established how he considered socioeconomic data extensively in deciding where to draw his lines. Overall, the Court found Cooper and Fairfax to be highly credible witnesses, and it credits their testimony that race did not predominate in their drawing as sincere.

Defendants also accuse Fairfax of drawing race-predominant maps because he testified that he consulted race data at the beginning of his drawing process to get a sense of where BVAP was located in Louisiana, then proceeded without reference to race data, though he did occasionally pull up the BVAP percentages to check his work. The Court emphasizes yet again that "race consciousness" is not prohibited during the drawing of illustrative maps. If this was a racial gerrymandering case, Defendants' hypercritical parsing of the mapdrawers' statements for evidence of intent would be more relevant. But all Defendants have demonstrated is that the mapdrawers considered race after they

[323] Rec. Doc. No. 166, p. 79. The official transcript of the hearing is not yet available; here, the Court adopts Defendants' quotation, which they derived from the transcript prepared by their private court reporter.
[324] Rec. Doc. No. 164, p. 47.

were asked to consider race – that is, to analyze whether it is possible to draw an illustrative plan adhering to traditional criteria and satisfying the first condition of *Gingles*. This does not offend the Constitution.

In any event, if Plaintiffs' experts engaged in race-predominant map drawing, their illustrative plans would surely betray this imbalanced approach by being significantly less compact, by disregarding communities of interest, or some other flaw. But the Court found that Plaintiffs' plans outperformed the enacted plan on every relevant criteria. Moreover, the accusations that Defendants level at Plaintiffs' illustrative plans – that they pick up areas of BVAP with "surgical precision" and unite far-flung areas with little in common – apply equally to the enacted plan's CD 2. Testimony at the hearing established that the enacted CD 2 is very non-compact and includes Baton Rouge and New Orleans, two major cities with significantly different economies and representation needs, in the same district.

Race-blind map drawing is not required by precedent – in fact, racially *conscious* map drawing has been recognized as necessary to comply with the Voting Rights Act. Justice Kagan, joined by Justices Breyer and Sotomayor, addressed the issue of simulated districts in her dissent from the grant of stay in *Merrill v. Milligan*, writing:

> In Alabama's view . . the advent of computerized districting should change the way the first *Gingles* condition operates. Plaintiffs can now use technology to generate millions of possible plans, without any attention to race. Alabama claims that some number of those plans (what number is unclear) must contain an additional majority-Black district for Section 2 plaintiffs to satisfy the first *Gingles* condition. But whatever the pros and cons of that method, this Court has never demanded its use; we have not so much as floated the idea, let alone considered how it would work.[325]

[325] *Merrill v. Milligan*, 142 S. Ct. 879, 887 (2022).

This Court declines to supplant thirty years of guiding precedent in vote dilution cases in favor of simulation maps created by someone who was performing such a simulation *for the first time* and whose maps bear absolutely no resemblance to the enacted plan or the previous plan.

B. *Gingles II* and *III* – Racially Polarized Voting

Gingles II asks whether Black voters are "politically cohesive,"[326] and *Gingles III* whether White voters vote "sufficiently as a bloc to usually defeat [Black voters'] preferred candidate."[327] Based on the testimony and reports of expert witnesses at the preliminary injunction hearing, the Court finds that the Plaintiffs are substantially likely to prove both prongs.

Gingles II asks whether Black voters are "politically cohesive" – in other words, whether Black voters usually support the same candidate in elections. On this factor, Plaintiffs offered opinions from Dr. Maxwell Palmer and Dr. Lisa Handley and the Defendants offered opinions from Dr. John Alford.

Dr. Palmer was offered by Plaintiffs as an expert in the field of redistricting with an emphasis in racially polarized voting and data analysis. Defendants stipulated to Dr. Palmer's expertise in the tendered field. Dr. Palmer opines that Louisiana has "a clear pattern of racially polarized voting," where "Black voters have a clear candidate of choice in most statewide elections,"[328] and "Black and White voters consistently support different candidates."[329]

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[326] *Cooper*, 137 S. Ct. at 1470
[327] *Id.*
[328] GX-2, p. 7.
[329] *Id.* at p. 3.

Dr. Handley was tendered and accepted, based on Defendants' stipulation, as an expert in redistricting with an emphasis in racially polarized voting and data analysis. She reached the same conclusion as Dr. Palmer, opining that "[v]oting in recent elections in Louisiana is starkly racially polarized."[330] The opinions of Drs. Handley and Palmer were based on a significant amount of historical voting data that they gathered and analyzed. Their conclusions were not seriously disputed at the hearing. Defendants' expert Dr. Alford testified that he found no errors in Dr. Palmer's and Dr. Handley's work. Defendants' expert witness Dr. Solanky testified that he does not dispute Palmer's and Handley's conclusions with respect to *Gingles II.*

Dr. John Alford testified as an expert for the Defendants on racially polarized voting. He does not dispute that voting in Louisiana is polarized as between Black and White voters; rather, it is his opinion that polarized voting in Louisiana is attributable to partisanship, not race. The Court does not credit this opinion as helpful, as it appears to answer a question that *Gingles II* does not ask and in fact squarely rejects,[331] namely, *why* Black voters in Louisiana are politically cohesive. Further, the Court finds that Dr. Alford's conclusions conflict with the opinions of other experts in this case who employed more robust methodology. Dr. Alford merely looked at the results reported by Dr. Palmer and Dr. Handley and opined that polarized voting "may be correlated with race, but whatever accounts for the correlation, the differential response of voters of different races

[330] PR-12, p. 7.
[331] *Gingles*, 478 U.S. 30, 63 (1986) ("The first reason we reject appellants' argument that racially polarized voting refers to voting patterns that are in some way caused by race, rather than to voting patterns that are merely correlated with the race of the voter, is that the reasons black and white voters vote differently have no relevance to the central inquiry of § 2").

to the race of the candidate is not the cause."[332] Not only does this statement appear to concede that Dr. Alford does not know exactly why voting is polarized ("whatever accounts for the correlation"), Dr. Palmer's well-accepted ecological inference analysis contradicts it. Dr. Palmer 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. The Court finds that Dr. Alford's opinions border on *ipse dixit*. His opinions are unsupported by meaningful substantive analysis and are not the result of commonly accepted methodology in the field. Other courts have found the same.[333]

The Court rejects Defendants' attempt to append an additional requirement to *Gingles II*, namely, that Black voters' cohesion must be shown to be caused by or attributable to race instead of something else, like partisanship. The Court finds no basis for this requirement in the law.[334]

The Court credits Dr. Palmer's opinions and conclusions, finding that his methods were sound and reliable. His testimony was clear and straightforward, raising no issues that would cause the Court to question his credibility. Likewise, the Court credits the testimony and conclusions of Dr. Lisa Handley, who was accepted as an expert in redistricting with a focus on racially polarized voting. Dr. Handley's extensive expertise in the area of redistricting and voting rights is reflected in her CV and was apparent from her testimony, which was thorough, careful, well-supported by data, facts and soundly

[332] AG-1, p. 9.
[333] *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 (N.D. Ga. Feb. 28, 2022); *NAACP, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.,* 462 F. Supp. 3d 368, 381 (S.D.N.Y. 2020).
[334] For further discussion of the evidence that polarized voting in Louisiana is race-related, see the section below on Senate Factor 2.

reasoned. The Court finds the opinion testimony of Drs. Palmer and Handley to be both probative and reliable.

Defendants offered Dr. Tumulesh Solanky as an expert in the fields of mathematics and statistical analysis, to which Plaintiffs stipulated. While the Court does not question Dr. Solanky's credentials in the fields of mathematics and statistical analysis, the Court finds there is little, if any, connection between his expertise and his opinions. Solanky opined that "there is no evidence of legally significant racially polarized voting in [East Baton Rouge Parish],"[335] and that the second minority-majority district proposed by Plaintiffs is created by "pull[ing] out Black voters primarily from [East Baton Rouge Parish]."[336] According to his testimony, he has no experience in analyzing racially polarized voting patterns. Solanky used an admittedly narrow data set as the basis for his conclusions. He analyzed only East Baton Rouge Parish, which he conceded is not populous enough to form its own congressional district and would need to be analyzed with as many as 18 other parishes to form an opinion regarding the degree of polarization in a district. Dr. Solanky does not offer any opinion about majority bloc voting in any congressional district under the enacted or illustrative plans. The Court finds that Dr. Solanky's analysis is of limited utility, since at most it speaks to White voting behavior in one parish out of 64. Moreover, Dr. Solanky himself observed that East Baton Rouge is an outlier in terms of White crossover voting compared to surrounding parishes. Voting behavior in a small area that is concededly an outlier is not probative of voting patterns districtwide. Dr. Solanky's opinions are unhelpful and do not inform the Court's analysis under *Gingles II*.

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[335] Rec. Doc. No. 101, p. 20.
[336] *Id.*

Based on the evidence and the opinions of experts, the Court concludes that Plaintiffs have demonstrated that Black voters in Louisiana are politically cohesive.

Gingles III requires an inquiry into whether White voters in Louisiana vote "sufficiently as a bloc to usually defeat [Black voters'] preferred candidate."[337] This question was addressed by Plaintiffs' experts Dr. Palmer and Dr. Handley, who both concluded that they do. Dr. Handley opines that White voters "consistently bloc vote to defeat the candidates of choice of Black voters," both "statewide, in previous congressional elections in all but Congressional District 2, and in the enacted plan districts that would contribute voters to an additional Black opportunity congressional district."[338] According to her analysis, the average percentage of White voter support for Black-preferred candidates in statewide contest was 11.7%,[339] and no Black-preferred candidate was elected to statewide office in the 15 elections she examined. Dr. Palmer analyzed a different set of elections and found that White voters supported the Black-preferred candidate with 20.8% of the vote, on average.[340]

The Fifth Circuit and the Supreme Court have held that "the question here is not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'"[341] Defendants posit that White bloc voting is not legally significant if "white crossover voting is sufficient to enable the Black community to elect its preferred candidates of choice in districts below 50 percent BVAP."[342] In *Covington v. North Carolina*, which was affirmed by the Supreme Court in 2017, the District Court for the

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[337] *Cooper*, 137 S. Ct. at 1470.
[338] PR-12, p. 15.
[339] *Id*. at p. 8.
[340] GX-2, ¶ 18.
[341] *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993)(quoting *Gingles*, 478 U.S. at 55)
[342] Rec. Doc. No. 166, p. 108.

Middle District of North Carolina held that "a general finding regarding the existence of any racially polarized voting, no matter the level, is not enough."[343] Because a statistically significant level of racially polarized voting could be found at, say, 51%-49%, the court explained, merely statistically significant levels "cannot be construed as conclusive evidence of the third *Gingles* factor."[344]

The *Covington* court criticized the plaintiff's experts because they "never conducted an inquiry to determine whether racially polarized voting sufficient to enable the majority usually to defeat the candidate of choice of African-American voters was present in the challenged districts."[345] The same cannot be said of Plaintiffs' experts in this case. Both Dr. Palmer and Dr. Handley 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.

The Court also finds, based on the work of Dr. Palmer and Dr. Handley, that Plaintiffs' illustrative districts would not be opportunity districts in name only but would actually perform to allow Black voters a genuine opportunity to elect the candidate of their choice. Defendants seize on the fact that Plaintiffs' experts all agreed, during their testimony, that it is possible for districts drawn below 50% BVAP to still "perform" because there may be enough White crossover voting to allow Black voters an opportunity to elect their preferred candidate. It is true that the *Covington* court called for an analysis of crossover voting under *Gingles III*, noting that high levels of crossover voting undermine

[343] *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016), aff'd, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017)
[344] *Id*. at 170.
[345] *Id*. at 168.

a finding of legally significant polarized voting.[346] But the experts advanced by Defendants on this topic, Drs. Solanky and Lewis, do not move the needle. As previously noted, Dr. Solanky's analysis was confined only to East Baton Rouge Parish. His opinion that "for the 2020 presidential election it does not appear that White voters are voting as a bloc to defeat the black preferred candidate"[347] is unreliable because it is based on his analysis of one exogenous election and limited to one parish, which Solanky concedes is an "outlier." The Court was presented with no basis by which to extrapolate the voting characteristics of voters in a single outlier parish to Plaintiffs' illustrative CD2 and CD 5 generally.

The Court accepted Defendants' witness Dr. Jeffrey Lewis as an expert in the fields of political science, census data analysis, and statistics, specifically racially polarized voting. Dr. Lewis advances the opinion that majority minority districts are unnecessary because in his view, Black voters have a meaningful opportunity to elect candidates of their choice owing to White crossover voting. Dr. Lewis's analysis is informed by a single election, the 2020 Presidential general election. Using data from that single election, he constructs a hypothetical in illustrative CD 2 and CD 5 where there are no White crossover votes for the Black-preferred candidate, from which he concludes that, without White crossover voting, the Black-preferred candidates, Biden/Harris, would not have been elected except in one illustrative district.[348] This hypothetical based on limited data is not helpful to the Court's assessment of whether Plaintiff's illustrative maps "perform" for Black-preferred candidates. Likewise, Dr. Lewis's conclusion that districts with as little as

[346] *Id*. at 167.
[347] ARD-4, p. 14.
[348] LEG-2, p. 7.

30% BVAP could perform for Black-preferred candidates due to White crossover voting was based on his analysis of one exogenous election. His opinion is simply unsupported by sufficient data and is accordingly unreliable. Dr. Lewis states that further analysis was not possible due to "time limitations."[349] The Court finds this excuse less than persuasive, especially since Dr. Lewis performed his analysis using the data gathered by Dr. Palmer.[350]

White crossover voting was inherently included in the analysis performed by Dr. Palmer and Dr. Handley, and the levels they found were insufficient to swing the election for the Black-preferred candidate in any of the contests they examined. The fact that Plaintiffs' experts agreed, hypothetically, that a sub-50% BVAP district *could* perform under unspecified circumstances, is not sufficient to overcome the conclusions reached by their robust statistical analysis. Although Defendants insist on "legally significant" proof of Plaintiffs' burden, they offer only generalized speculation in rebuttal (e.g. "Dr. Palmer admitted that there *can be* meaningful white crossover voting"[351]; Dr. Handley acknowledged that there *may be* 'pockets of Louisiana where the crossover vote is higher"[352]). Defendants, having generated a theoretical factual issue, then conclude that the issue is evidence of "substantial unclarity"[353] in Plaintiffs' case that, at a minimum,

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[349] LEG-2, p. 6.
[350] Throughout these proceedings, Defendants have complained that the deadlines imposed by the Court left them unable to prepare a full defense. It had been widely known and reported on at least six months before the *Complaints* were filed in these cases that the enacted maps would likely be the subject of litigation. Defendants can hardly claim surprise, especially when they were already participating in related litigation in state court when this suit was filed. And Attorney General Landry and the Legislators chose to participate in this suit by intervention, rendering any prejudice they suffered strictly self-imposed. Moreover, the Court accommodated Defendants' request to re-set the preliminary injunction hearing after they complained that the timeline was too tight. Overall, the Court finds that Defendants' attempt to use the Court-imposed deadlines as a shield is meritless. A preliminary injunction hearing is expedited by its nature.
[351] Rec. Doc. No. 166, p. 36.
[352] *Id*. at p. 39
[353] *Id*. at p. 120.

counsels in favor of judicial deference to the discretion of the Legislature. "The choice of one safe seat [in the enacted CD 2] or two less safe seats falls well within the Legislature's discretionary choices."[354] The Court declines to follow Defendants down this very attenuated road. The hard evidence adduced by Plaintiffs' expert witnesses demonstrates that *Gingles III* is met, even by the high standard imposed in *Covington*. If there is evidence of a successful crossover district[355] in Louisiana, neither side has presented it. Defendants' insinuation that somewhere, somehow, a less than 50% BVAP district *could* regularly elect Black-preferred candidates is contradicted by the substantial record developed by Plaintiffs.

C. Senate Factors and Proportionality

Gingles counsels that a Section 2 violation is established:

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial minority group] ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[356]

Courts have concluded that "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances."[357] Indeed, here the Court finds that Plaintiffs have established that they are substantially likely to prevail in showing that the totality of the circumstances weighs in their favor. The Court first analyzes the

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[354] *Id*. at p. 121.
[355] A "district in which members of the majority help a 'large enough' minority to elect its candidate of choice" (Cooper v. Harris, 137 S. Ct. 1455, 1470 (2017)).
[356] *Gingles*, 478 U.S. at 36, 106 S.Ct. at 2759
[357] *Ga. State*, 775 F.3d at 1342 (internal quotation marks omitted).

Senate Factors (beginning with Factors 2 and 7, which *Gingles* marks as the "most important"[358]) and then turns to the proportionality issue.

1. Senate Factor 2

Senate Factor 2 examines "the extent to which voting in the elections of the state or political subdivision is racially polarized."[359] The Court already found, *supra*, that voting in Louisiana is racially polarized based on the substantial and mostly unrebutted evidence brought forward by Plaintiffs' expert witnesses, who opined that the polarization is "stark." Further, contra Defendants' assertion that polarization is attributable to partisanship and not race, 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. The realignment of Black voters from Democrat to Republican is strong evidence that, party affiliation notwithstanding, Black voters cohesively for candidates who are aligned on issues connected to race. Plaintiffs' experts Dr. Gilpin and Dr. Lichtman recounted how, in the 1860s, the Louisiana Democratic Party was the party of the Ku Klux Klan, while the Louisiana Republican Party worked for Black suffrage. During Reconstruction, Black voters in Louisiana were fervently Republican, while White voters were aligned with the Democratic party. Plaintiffs' expert Dr. Burch explains that the historic alignment began to break down after the New Deal, as Democrats were increasingly identified with racial liberalism, and Republicans with racial conservatism. Dr. Burch opines that "[t]he most important trend in voter registration in the South during the last 25 years has been the defection of White voters from the Democratic party" because of the party's association with liberal racial policies and the participation of Black

[358] *Gingles*, 478 U.S. at 48, n. 15.
[359] *Id.* at 36-37.

Democratic candidates. The passage of the Voting Rights Act in 1965, Dr. Lichtman observes, was the catalyst to this political party realignment.

Dr. Lichtman summarized that the Democratic and Republican parties have undergone a role reversal since the 1860s, and that Black voters were loyal not to the "label" of Republican but to their racial identity. Dr. Lichtman testified at the hearing that party labels have no meaning; what matters to voters is what candidates represent. "[P]arty identification is conjoined with race, although party labels ha[ve] come to mean the opposite of what they once were,"[360] he writes. Dr. Handley's report also cites peer-reviewed scholarly studies which show that the racial attitudes of the parties, and their positions on race-related issues, are what drives support for a particular party.

The analytical evidence of voter polarization which forms the bases for Drs. Palmer and Handley's opinions is bolstered and substantiated by the historical voting patterns described by Drs. Lichtman and Gilpin. The polarization evidence is further bolstered by fact testimony, such as Ashley Shelton 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. The Court finds that Senate Factor 2 weighs heavily in favor of Plaintiffs.

2. Senate Factor 7

This factor assesses "the extent to which members of the minority group have been elected to public office in the jurisdiction." It is undisputed that there has not been a Black candidate elected to statewide office in Louisiana since Reconstruction.[361] Since 1991,

[360] GX-3, p. 29.
[361] GX-3, p. 46-47; PR-14, p. 6.

only four Black Louisianans have been elected to Congress.[362] Before 1991, there was one Black Congressperson elected, and it was during Reconstruction.[363] Louisiana has never had a Black Congressperson elected from a non-majority-Black district.[364] This underrepresentation persists at other levels of government, as well. While the state is roughly one-third Black, Louisiana's State Senate is 23.1% black, and the House 22.9%.[365] There has been no Black Louisiana Governor since P.B.S. Pinchback during Reconstruction, and less than 25% of mayors in Louisiana are Black. Senate Factor 7 weighs heavily in favor of Plaintiffs.

3. Senate Factor 1

This inquiry considers "[t]he extent of any history of official discrimination in the state ... that touched the right of the members of minority group to register, to vote, or otherwise to participate in the democratic process."[366]

The Legislative Intervenors candidly concede that Louisiana has a "sordid history of discrimination."[367] In another recent voting rights case in this District, the Court found it "indisputable that Louisiana has a long history of discriminating against black citizens."[368] The expert historians who testified also recounted well-documented, undisputed historical facts of discriminatory voting laws and practices. Dr. Gilpin reported about voting restrictions like poll taxes, property ownership requirements, and literacy tests, which were first implemented before Black Louisianans were granted the right to vote. These mechanisms were first enforced against immigrants, and later against Black

[362] *Id*. at 47.
[363] *Id*.
[364] *Id*.
[365] *Id.* at 47-48.
[366] *Gingles*, 478 U.S. at 36-37.
[367] Rec. Doc. No. 109, p. 20.
[368] 274 F. Supp. 3d 395 (M.D. La. 2017).

Louisianans after their right to vote was recognized. Dr. Gilpin recounted that Black voting in Louisiana reached its peak in 1896, when Black voters made up almost 45% of registered voters.[369] This ushered in a period of onerous restrictions, which rendered Black voting all but futile. For example, the Grandfather Clause, enacted in 1898, prohibited a Black citizen from voting unless they could establish that either their father or grandfather had voted before January 1, 1867.[370] As a result, Black voting plummeted dramatically. Registration purges, the Understanding Clause, and other restrictions disenfranchised Black voters to the point that, between 1910 and 1948, fewer than 1% of Black Louisianans of voting age were able to register to vote.[371] By the passage of the 1965 Voting Rights Act, only one third of the Black population was registered.[372]

Nor did the Voting Right Act foretell an era free from racially motivated voting discrimination in Louisiana. Instead, the Act's provision for supervision of state practices meant that Louisianans were more aware of attempts to disenfranchise Black voters. From 1965 to 1999, the U.S. Attorney General issued 66 objection letters to more than 200 voting changes, and from 1990 until the end of preclearance in 2013, an additional 79 objection letters were issued.[373] Recently, in 2021, the City of West Monroe entered into a consent decree with the Department of Justice related to its use of all at-large districts for elections to the Board of Aldermen; Dr. Gilpin explains that at-large elections commonly result in disenfranchisement of Black voters.

[369] PR-13, p. 28.
[370] GX-3, p. 9.
[371] *Id*.
[372] *Id*. at p. 10.
[373] PR-13, p. 36.

Dr. Gilpin opines that Black voter suppression results from modern day practices such as restricting access to polling places, restrictions on early voting, and limited mail voting.[374] For example, Dr. Lichtman cites a report by the U.S. Commission on Civil Rights which found that there are fewer polling locations per voter in heavily Black areas.[375] The parish with the third-highest Black population, Caddo, was found to have only one polling location for its 260,000 residents.[376] This pressure on access to polling locations is not limited to Caddo Parish, as shown by the uncontroverted testimony of Charles Cravins, an Opelousas native who described recent closing and consolidation of predominately Black polling places in St. Landry Parish, and Ashley Shelton who testified about relocation of predominately Black polling places in New Orleans East.

Defendants argue that "Plaintiffs did not present any meaningful *recent* evidence of official discrimination."[377] While "tragic," they say, "it is in the distant past and is not especially probative of this Section 2 case in 2022."[378] Defendants tout the fact that Louisiana was recently ranked 7th in the nation for election integrity[379] and the fact that there is White crossover voting[380] as evidence that discrimination is a thing of the past. They assert that the State's abysmal preclearance history is merely indicative of "backsliding"[381] and not discrimination.

Senate Factor 1 explicitly calls for an inquiry into any *history* of voting-related discrimination, but as discussed above, practices which result in barriers to Black voters

[374] *Id*. at p. 47.
[375] GX-3, p. 14.
[376] *Id*.
[377] Rec. Doc. No. 159, p. 123 (emphasis original).
[378] *Id*.
[379] *Id*. at p. 126.
[380] *Id*. at p. 123-124.
[381] *Id*. at 125.

continue. In this context, taking a broader look is well justified. A Black Louisianan born in 1965, the year the Voting Rights Act was passed, is only 57 years old today. This is not ancient history. Defendants' contention that there is no evidence of Black voters being denied the right to vote is irrelevant. This case presents claims of vote *dilution*.

The Court is not persuaded by the facts adduced by Defendants in support of their argument that the "State of Louisiana has made significant strides in addressing its inequitable past as part of its recent history."[382] It is laudable that, for example, the LSU African-American Diversity Organization hosts programs including Umoja, a welcome event for freshman and transfer students;[383] that the Legislature recently created a task force to study the lack of minority candidates for athletic director and head coach positions in the state;[384] or that Juneteenth has been recognized as a holiday and that "many" members of the Louisiana State Bar Association have agreed to by abide by a Statement of Diversity Principles.[385] But to the extent these facts are offered as mitigation of the repugnant history of discrimination in Louisiana, they fall completely flat.

Lastly, the Court finds that Louisiana's history of discrimination has been recognized by other federal courts. In the 2017 case *Terrebonne Par. Branch NAACP v. Jindal*, Judge James Brady analyzed Senate Factor 1, finding that "Louisiana consistently ignored its preclearance requirements under Section 5,"[386] and that "Louisiana and its subdivisions have a long history of using certain electoral systems that have the effect of diluting the black vote."[387] In 1983, the District Court for the Eastern District of Louisiana

[382] Rec. Doc. No. 159, p. 15.
[383] AG-19.
[384] AG-13.
[385] AG-18.
[386] 274 F. Supp. 3d 395, 440 (M.D. La. 2017), *rev'd sub nom. Fusilier v. Landry,* 963 F.3d 447 (5th Cir. 2020).
[387] *Id*.

concluded that "Louisiana's history of racial discrimination, both de jure and de facto, continues to have an adverse effect on the ability of its black residents to participate fully in the electoral process."[388] In 1988, that same Court took "judicial notice of Louisiana's past *de jure* policy of voting-related racial discrimination. Throughout the earlier part of this century, the State implemented a variety of stratagems including educational and property requirements for voting, a "grandfather" clause, an "understanding" clause, poll taxes, all-white primaries, anti-single-shot voting provisions, and a majority-vote requirement to 'suppres[s] black political involvement.'"[389]

There is no sincere dispute regarding Senate Factor 1. The evidence of Louisiana's long and ongoing history of voting-related discrimination weighs heavily in favor of Plaintiffs.

4. Senate Factor 3

The Court next examines "[t]he extent to which the state ... has used ... voting practices or procedures that may enhance the opportunity for discrimination against the minority group."[390] Plaintiffs cite Louisiana's open primary system and majority-vote requirement as an example of discriminatory voting procedures, explaining that if a Black candidate wins a plurality of the vote in a White jurisdiction, they will have to face the White-preferred candidate in a runoff, where Black candidates rarely win. According to Dr. Lichtman, this system was enacted in 1975 to protect White incumbents from electoral challenges.[391] Defendants dispute that the system was motivated by racial bias, arguing

[388] *Major v. Treen*, 574 F. Supp. 325, 339–40 (E.D. La. 1983).
[389] *Chisom v. Edwards*, 690 F. Supp. 1524, 1534 (E.D. La.), *vacated sub nom. Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988).
[390] *Gingles* at 47.
[391] GX-31, p. 7.

that Louisiana configured its primaries in this manner after a previous system was struck down by the Supreme Court in *Foster v. Love*.[392]

Dr. Lichtman points to the 2015 Lieutenant Governor race, the 2017 Treasurer race and the 2018 Secretary of State race as evidence that Louisiana's open primary system hinders the ability of Black-preferred candidates to win. The Court credits Dr. Lichtman's conclusion that the Black-preferred candidate lost in the runoff in each of these three elections, but the Court is unpersuaded that the results of three exogenous elections prove the point. The Court finds Senate Factor 3 neutral.

5. Senate Factor 4: Candidate Slating

There is no slating process for Louisiana's congressional elections, so this factor is not relevant and the Court makes no finding.[393]

6. Senate Factor 5

Factor 5 concerns "[t]he extent to which members of the minority group in the state ... bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process." Defendants concede the facts which overwhelmingly establish that Black Louisianans "...bear the effects of discrimination in such areas as education, employment, and health." The sobering facts set forth in Dr. Lichtman's tables[394] went undisputed. Defendants argue that Senate Factor 5 requires a showing that disparities *actually* prevent political participation, i.e., "proof that participation in the political process is in fact depressed

[392] 522 U.S. 67 (1997).
[393] The parties agree; see Rec. Doc. No. 162, p. 82, and Rec. Doc. No. 159, p. 135.
[394] GX-3, p. 81 - 83.

among minority citizens."[395] Defendants argue that evidence of disparities does not demonstrate a nexus between disadvantage and participation.

Common sense suggests that a Louisianan who is barely getting by, who has limited access to transportation, who is in poor health, or who is functionally illiterate, is ill-equipped to exercise the franchise. However, a plain reading of Senate Factor 5 requires a showing of hindrance. The Court further agrees the Court's observation in *Caster* requiring explicit proof of impaired participation overlooks "the question whether the lasting effects of discrimination make it *harder* for Black [voters] to participate at the levels that they do."[396] Nonetheless, the Fifth Circuit counsels Courts to require "evidence of reduced levels of black voter registration, lower turnout among black voters, or any other factor tending to show that past discrimination has affected their ability to participate in the political process." [397] Without specific evidence that these disparities manifest themselves in political participation outcomes, the Court finds that Senate Factor 5 is neutral.

7. Senate Factor 6

Plaintiffs' experts Dr. Burch and Dr. Lichtman spoke to "[w]hether political campaigns have been characterized by overt or subtle racial appeals."[398] They cite the following examples of racial appeals in Louisiana politics, among others:

[395] *Clements*, 999 F.2d at 867.
[396] *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *73 (N.D. Ala. Jan. 24, 2022).
[397] *Clements*, 999 F.2d 831, 867.
[398] *Gingles*, 478 U.S. at 37.

- David Duke, a former Grand Wizard of the Ku Klux Klan, won three statewide elections (1990 U.S. Senate, 1991 gubernatorial open primary, and a 1991 gubernatorial runoff) by appealing "to white racial fears";[399]
- Former Governor Mike Foster, during the 1995 gubernatorial runoff election, stated that predominantly White Jefferson Parish "is right next to the jungle in New Orleans and it has a very low crime rate";[400]
- Incumbent Republican Senator David Vitter in 2010 released a campaign ad depicting Hispanic immigrants sneaking through a hole in a fence and being welcomed by people holding the banner of his opponent and a giant check made out to "all illegal aliens";[401]
- Another ad by Vitter that photoshopped Governor Edwards next to President Barack Obama and stated that Edwards and Obama were scheming to release 5,500 dangerous "thugs" and "drug dealers" back onto the streets;[402]
- Eddie Rispone, a 2019 gubernatorial candidate, produced an ad blaming Governor John Bel Edwards for crimes committed by people released from prison, featuring mugshots of Black men, then accused Governor Edwards and his family of "taking advantage of black people in Louisiana. . .since Louisiana was born."[403]

[399] PR-14, p. 26.
[400] GX-3, p. 40.
[401] *Id*.
[402] *Id*. at p. 42.
[403] PR-14, p. 26.

This is some evidence that racial appeals are used in Louisiana politics, but the persuasive weight of the evidence is minimal. The Court finds that this factor weighs neither for nor against Plaintiffs.

8. Senate Factor 8

Senate Factor 8 invites inquiry related to "[w]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group."[404]

Plaintiffs rely on the reports of Dr. Burch and Dr. Lichtman for this factor, arguing that the disparities in health, housing, employment, education, and criminal justice faced by Black Louisianans are "indicative of a failure on the part of elected officials to address the needs of Black residents."[405] Plaintiffs highlight the roadshow testimony of various Louisianans cited by Dr. Burch as evidence that Black Louisianans have a sense of being overlooked by politicians.[406] On the other hand, Defendants argue persuasively that evidence of disparities is not, in and of itself, evidence of non-responsiveness.

The Defendants elicited testimony from Governor Edwards' executive counsel Matthew Block that the Governor supported Medicaid expansion, criminal justice reform, and has appointed black officials to positions of authority. Though not overwhelming, this is evidence of at least one elected official's responsiveness to "particularized needs."

Plaintiffs' showing on this factor was somewhat anecdotal and indirect, and the Court does not have sufficient evidence before it to conclude that there is a significant lack of responsiveness by elected officials in Louisiana. This factor favors Defendants.

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[404] *Gingles*, 478 U.S. at 37.
[405] Rec. Doc. No. 164, p. 92.
[406] *See* PR-14, p. 29-32.

9. Senate Factor 9

Lastly, in considering the totality of the circumstances, the Court assesses "[w]hether the policy underlying the Plan is "tenuous." While the Legislative Intervenors joined this suit on the premise that they could represent "the policy considerations underpinning"[407] the enacted plan, Defendants offered no direct evidence on that point. Not a single elected official testified about the policies or considerations underpinning the enacted plan. By contrast, Dr. Burch examined the legislative record and points to specific evidence that the reasons in favor of enacted plan offered by legislators "lacked empirical support, were vague or contradictory, or were based on misunderstandings."[408]

For example, although several members cited population equality as one of their foremost priorities for the new map, when Senator Fields presented an amendment with lower population deviation and a second majority-minority district, Senator Hewitt retreated from the previously expressed need for "zero-deviation" districts, stating that "what the courts have ruled is that . . . anything less than a hundred was kind of the objective."[409] Similarly, proposed maps with higher levels of compactness and with zero split precincts were rejected when they had two majority-minority districts. Dr. Burch recounts extensive evidence gleaned from the legislative record which amply supports her conclusion that lawmakers did not stand by their proffered justifications when they voted for the enacted map.

Defendants' advancement of the importance of core retention is, in this Court's view, evidence of the tenuousness of the justifications for the enacted plan. As ably stated

[407] Rec. Doc. No. 10, p. 10.
[408] PR-14, p. 32.
[409] *Id.*

by Dr. Lichtman, core retention is nothing more than a guarantee that inequities in the map will be frozen in place despite changes in population. Defendants' argument that they prioritized avoiding racial gerrymanders, anemically pointing to the *Hays* maps, is likewise unconvincing. The Defendants offered no persuasive or legally relevant illumination of the policies served by H.B. 1. The Court finds this his factor weighs in favor of Plaintiffs.

10. Proportionality

Section 2 expressly provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population;"[410] however, the Supreme Court has held that "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area" is a "relevant consideration" in the totality-of-the-circumstances analysis.[411] "[P]roportionality ... is obviously an indication that minority voters have an equal opportunity, in spite of racial polarization to participate in the political process and to elect representatives of their choice...."[412]

The Court finds that Black representation under the enacted plan is not proportional to the Black share of population in Louisiana. This fact is not disputed. Although Black Louisianans make up 33.13% of the total population and 31.25% of the voting age population, they comprise a majority in only 17% of Louisiana's congressional districts.[413] Accordingly, the Court finds that the proportionality consideration weighs in favor of Plaintiffs.

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[410] 52 U.S.C. § 10301(b).
[411] *LULAC*, 548 U.S. at 426
[412] *De Grandy*, 512 U.S. at 1020 (internal quotation marks omitted).
[413] GX-1, p. 6.

The Court concludes that on the record before it, the totality of the circumstances weighs in favor of Plaintiffs' request for relief and finds that the Plaintiffs are substantially likely to prevail on the merits of their vote dilution claim.

III. IRREPARABLE HARM

The Court concludes that Plaintiffs have demonstrated that they will suffer an irreparable harm if voting takes place in the 2022 Louisiana congressional elections based on a redistricting plan that violates federal law. Voting is a "fundamental political right, because it is preservative of all rights."[414] "[O]nce the election occurs, there can be no do-over and no redress"[415] for voters whose rights were violated, and votes diluted by the challenged plan.

Defendants do not dispute or directly address Plaintiffs' arguments about irreparable harm. Instead, they posit that the real threat of irreparable harm is an injunction from this Court, which they claim "would pose an unacceptable risk of constitutional injury to hundreds of thousands of Louisiana residents"[416] because this Court would be re-imposing a map with two majority-minority districts, which was struck down as an unconstitutional racial gerrymander in *Hays* almost thirty years ago. The Court considered and rejected Defendants' contention that *Hays* maps are useful comparators here or that *Hays* is instructive, applicable, or otherwise persuasive. It is not. Accordingly, the Court finds that Plaintiffs will suffer an irreparable harm without a preliminary injunction. If the 2022 election is conducted under a map which has been

[414] *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019) (internal quotation marks omitted)(alterations accepted). *See also Purcell v. Gonzalez*, 549 U.S. 1, 4, (2006)("the 'fundamental political right' to vote")(quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).
[415] *League of Women Voters of N.C.,* 769 F.3d at 247.
[416] Rec. Doc. No. 166, p. 138.

shown to dilute Plaintiffs' votes, Plaintiffs' injury will persist unless the map is changed for 2024.

IV. BALANCE OF EQUITIES

Elements three and four of the preliminary injunction test, "[t]he balance of the equities and the public interest[,] "merge when the Government is the opposing party."[417] The Court concludes that protecting voting rights is quite clearly in the public interest, while allowing elections to proceed under a map that violates federal law most certainly is not. The irreparable harm to Plaintiffs' voting rights outweighs the administrative burden articulated by Defendants.

The Court further concludes that the implementation of a remedial congressional map is realistically attainable well before the 2022 November elections in Louisiana. In the 2006 case *Purcell v. Gonzalez*, the Supreme Court vacated a lower court injunction enjoining Arizona's voter identification procedures because the injunction came "just weeks before an election."[418] The High Court reasoned that "Court orders affecting elections . . .can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase."[419] The Supreme Court vacated the lower court's injunction for the reasons that "[g]iven the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter

[417] *Nken v. Holder*, 556 U.S. 418, 435 (2009).
[418] *Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7, 166 L. Ed. 2d 1 (2006).
[419] *Id*. at 5.

identification rules."[420] Defendants call *Purcell* a "seminal opinion"[421] which requires that this Court do nothing.

As the *Caster* court points out, *Purcell* is not the only opinion ever advanced by the Supreme Court on the subject of timing. In *Reynolds v. Sims*, for example, the Court explained that "once a State's legislative apportionment scheme has been found to be unconstitutional, 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."[422] "However," the Court recognized, "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid."[423] The Court explained that "[i]n awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles."[424]

A necessity standard was endorsed in *Upham v. Seamon*, where the Supreme Court stated that "we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor

[420] *Id*. at 5-6.
[421] Rec. Doc. No. 166, p. 140.
[422] 377 U.S. at 585.
[423] *Id*.
[424] *Id*.

in these situations."[425] Defendants urge consideration Justice Kavanaugh's concurrence in *Merrill v. Milligan*, where he opined that:

> Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges. The District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion.[426]

The Court concludes that neither *Purcell* nor any other case compels this Court to withhold immediate relief. The evidence presented at the hearing demonstrates that, although the administrative tasks that would be necessitated by a new congressional map would challenge the Secretary of State's office, the effort required would not be a heroic undertaking. Sherri Hadksey, the Commissioner of Elections, testified 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*. The number of voters affected by a remedial map would likely be greater than the number affected by the change from the 2011 map to the 2022 map. Nevertheless, even if it took twice as long to accomplish, six weeks would be enough. Hadskey further testified that she was concerned that, if the process was rushed, her office may code voter information incorrectly, leading to incorrect information on ballots.

The Court finds that, although Hadskey's testimony demonstrated general concern about the prospect of having to issue a new round of notices to voters, she did not provide any specific reasons why this task cannot be completed in sufficient time for November elections, nearly 6 months from now. Likewise, the Court is not persuaded that the

[425] 456 U.S. 37, 44 (1982) (citations omitted).
[426] *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022).

national paper shortage referenced by Hadskey in her testimony presents a significant burden. There was no evidence that State's paper demands would be impacted by map changes. Plaintiffs question, as does the Court, how paper usage is affected by the shape of Louisiana's congressional districts. Further, the Court finds that the mailing of paper notices is not the only source of information for voters. Secretary Ardoin's Geaux Vote mobile app and website, touted by Defendants during this litigation as an award-winning example of voter outreach, can also provide information about any district changes. Ultimately, Hadskey testified that she would rely upon her 30 years of experience and work to fulfill her responsibility to administer the election on schedule.

Defendants repeatedly claim that June 22, 2022 is a critically impending deadline. June 22 is the deadline for potential congressional candidates to qualify by nominating petition. Notably, Hadskey testified that it is "extremely rare" for candidates to qualify by nominating petition. The evidence was that most pay the filing fee and qualify during the July 20-22 qualifying period. July 20 is more than six weeks from now. And Louisiana's unique election schedule, with the open primary not occurring until November, allows the State 6 months to accomplish what needs to be done.

Defendants warn the Court against issuing an injunction that would "act like [a] hurricane[],"[427] but the Court finds the metaphor shallow. Placing a bureaucratic strain on a state agency in order to rectify a violation of federal law is not analogous to a natural disaster.

Most importantly, the Court finds that the credibility of Defendants' assertions regarding the imminence of deadlines lacks credence. The Legislative Intervenors in this

[427] Rec. Doc. No. 165, p. 27.

case, President Cortez and Speaker Schexnayder, made judicial admissions to the contrary in March 2022 in a currently pending state court case regarding the very congressional redistricting at issue here.[428] President Cortez and Speaker Schexnayder asserted that: "the candidate qualification period could be moved back, if necessary, as other states have done this cycle, without impacting voters."[429] 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."[430] There was no rush, they assured the court, because Louisiana's "election calendar is one of the latest in the nation."[431]

In the context of the state court suit, the Legislative Intervenors were attempting to demonstrate that judicial intervention to resolve the impasse on redistricting was not necessary, and in that context, they painted a very different picture than the one they paint for this Court. The Court sees no reason why the statement that qualifying deadlines could be moved without ill effect does not apply with equal force in this context.

Likewise, the Court relies upon the statement of Secretary Ardoin's counsel in the state court proceeding that Louisiana does not have "a hard deadline for redistricting,"[432] and "the Legislature. . .can also amend the election code if necessary to deal with congressional reapportionment."[433]

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[428] *Bullman, et al v. R. Kyle Ardoin*, in his official capacity as Louisiana Secretary of State, No. C-716690, 2022 WL 769848 (19th Judicial Dist. Ct.); *NAACP Louisiana State Conference et al v. Ardoin*, No. C-716837 (19th Judicial Dist. Ct.). After the veto of H.B. 1 by the Governor, but before the legislative override, when there was effectively no congressional district map in place, Plaintiffs petitioned the state court to impose a congressional map for 2022.
[429] GX-32, p. 8.
[430] *Id*.
[431] *Id*. at p. 5.
[432] GX-33, p. 32, lines 3-20.
[433] *Id*.

Defendants have not pointed to a single piece of evidence that an order from this Court would require the type of "heroic efforts" that Justice Kavanaugh warns about. The Court credits the testimony of Matthew Block that state election officials and officeholders have significant experience with adjusting the time, place, and manner of elections, thanks to natural disasters like Hurricane Ida and the COVID-19 pandemic. Major deadlines are still months away; overseas absentee ballots are not due to be mailed until September 24, 2022, and limited early voting begins October 18, 2022.[434] And the qualifying deadline is adjustable, according to Defendants themselves.

There are a number of recent Supreme Court actions that merit consideration on this topic. In *Moore v. Harper*, the Supreme Court denied an application for stay out of North Carolina, with Justice Kavanaugh explaining his vote to deny stay as follows:

> In light of the *Purcell* principle and the particular circumstances and timing of the impending primary elections in North Carolina, it is too late for the federal courts to order that the district lines be changed for the 2022 primary and general elections, just as it was too late for the federal courts to do so in the Alabama redistricting case last month.[435]

From the dissent, penned by Justice Alito and joined by Justices Thomas and Gorsuch, this Court is given to understand that the application for stay was received by the Supreme Court "only seven days before the deadline for candidates to file on March 4."[436] This stands in stark contrast to the timing in the instant case, where the most commonly-utilized method of candidate qualifying does not begin for more than six weeks. Remarkably, the dissent stated that even seven days before qualifying, "promptly granting a stay would have been only minimally disruptive."[437]

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[434] ARD-1, p. 4.
[435] *Moore v. Harper*, 142 S. Ct. 1089 (2022).
[436] *Id.* at 1091.
[437] *Id.*

In a *per curiam* opinion in *Wisconsin Legislature v. Wisconsin Elections Commission*, the Supreme Court reversed the imposition of redistricting maps and remanded to the Wisconsin Supreme Court, expressing confidence that the court would have "sufficient time to adopt maps consistent with the timetable for Wisconsin's August 9th primary election."[438] The Court's statement came on March 23, 2022, when the August 9th primary date was 139 days away. Louisiana's open congressional primary will occur on November 8, 2022, more than 150 days from now. Under the Supreme Court's guiding precedent, this provides "sufficient time" for the State to adjust its procedures and accomplish the tasks necessary to administer the election.

In *Merrill v. Milligan*, Justice Kavanaugh explained that in his view, a stay of the Caster court's order was necessary because "the primary elections begin (via absentee voting) just seven weeks from now, on March 30."[439] This timing is distinguishable from the instant case, where the candidates for office will not even be known until late July and early voting begins in October.

The Court finds that a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion. Defendants' assertion that "an entirely new congressional plan"[440] will be required at significant cost and hardship rings hollow. The Legislature would not be starting from scratch; bills were introduced during the redistricting process[441] that could provide a starting point, as could the illustrative maps in this case, or the maps submitted by the *amici*.[442]

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[438] *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022).
[439] *Merrill v. Milligan*, 142 S. Ct. 879 (2022)
[440] Rec. Doc. No. 166, p. 142.
[441] GX-12.
[442] *See* Rec. Doc. No. 97.

Other courts that have invalidated redistricting plans have imposed deadlines in the range of ten days to two-and-a-half weeks for the legislature to craft a new plan.[443] With a new map in place by mid-June, the Secretary of State would have roughly five weeks before the July 20 qualifying period begins to update records and notify voters. This effort "does not rise to the level of a significant sovereign intrusion."[444] Given 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 Court finds that the State has sufficient time to implement a new congressional map without risk of chaos.

V. REMEDY

Defendants argue that a preliminary injunction is improper because Plaintiffs seek relief that "would establish a state of affairs that never before existed and does not preserve the *status quo* pending trial."[445] The Court finds useful instruction in the Fifth Circuit's analysis of the "status quo" issue in *Canal Auth. of State of Fla. v. Callaway*:

> It must not be thought, however, that there is any particular magic in the phrase 'status quo.' The purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The

[443] *See Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016); *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 691 (M.D.N.C.); *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); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1357 (N.D. Ga. 2004).
[444] *Covington v. North Carolina*, 270 F. Supp. 3d 881, 895 (M.D.N.C. 2017).
[445] Rec. Doc. No. 165, p. 23.

> focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.[446]

The Fifth Circuit has recognized that irreparable injury may necessitate an injunction that imposes mandatory preliminary relief instead of merely maintaining the status quo, though it notes such relief is disfavored unless the law and facts clearly favor the moving party.[447] Especially in the context of Plaintiffs' fundamental voting rights, the Court finds that prevention of injury, not fealty to the status quo, is paramount. And courts frequently issue preliminary injunctions that order relief beyond mere preservation of the status quo. This Court previously issued a preliminary injunction mandating changes to state election procedures upon a showing that the plaintiffs would suffer irreparable harm under the status quo,[448] as have other federal courts in similar cases.[449]

The Court pays heed to the principle that "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that 'reapportionment is primarily the duty and responsibility of the State.'"[450] Thus, "[f]ederal courts are barred from intervening in state apportionment in the absence of a violation of federal law precisely because it is the domain of the States, and not the federal courts, to conduct apportionment in the first place."[451] The State has a "sovereign interest in implementing its redistricting plan."[452]

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[446] *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974)(internal citations omitted). See also *Second Baptist Church v. City of San* Antonio, No. 5:20-CV-29-DAE, 2020 WL 6821334, at *3 (W.D. Tex. Feb. 24, 2020).
[447] *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976).
[448] *Harding v. Edwards*, 487 F. Supp. 3d 498, 526 (M.D. La. 2020), appeal dismissed sub nom. Harding v. Ardoin, No. 20-30632, 2021 WL 4843709 (5th Cir. May 17, 2021).
[449] *Caster*, 2022 WL 264819, at *1 (N.D. Ala. Jan. 24, 2022); *Democratic Nat'l Comm. v. Bostelmann*, 488 F. Supp. 3d 776, 783 (W.D. Wis. 2020).
[450] *Miller*, 515 U.S. at 915 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).
[451] *Voinovich*, 507 U.S. at 156.
[452] *Vera*, 517 U.S. at 978.

The Supreme Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt."[453] Upon a federal court's finding that a redistricting plan violates the federal law, "it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet [applicable federal legal] requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan. The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate"[454] federal law.

After a determination that a redistricting plan violates Section 2, "[s]tates retain broad discretion in drawing districts to comply with the mandate of § 2."[455] The State may elect to use one of Plaintiffs' illustrative plans, but is not required to do so, nor must it "draw the precise compact district that a court would impose in a successful § 2 challenge."[456] Overall, "the States retain a flexibility that federal courts enforcing § 2 lack, both insofar as they may avoid strict scrutiny altogether by respecting their own traditional districting principles, and insofar as deference is due to their reasonable fears of, and to their reasonable efforts to avoid, § 2 liability."[457]

The Court's imposition of a particular map becomes necessary only if the Legislature fails to adopt its own remedial map according to the Court's deadline. "Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state

[453] *Wise*, 437 U.S. at 539–40 (opinion of White, J.).
[454] *Id*. at 540.
[455] *Shaw II*, 517 U.S. at 917 n.9.
[456] *Vera*, 517 U.S. at 978 (internal quotation marks omitted).
[457] *Id*.

election makes it impractical for them to do so, it becomes the unwelcome obligation of the federal court to devise and impose a reapportionment plan pending later legislative action."[458]

Accordingly, this Court provides the Legislature an opportunity to enact a new map that is compliant with Section 2 of the Voting Rights Act. The Court hereby **STAYS** the nominating petition deadline for a brief period, until July 8, 2022, which it finds will be sufficient.

IT IS ORDERED.

Baton Rouge, Louisiana, this 6th day of June, 2022.

SHELLY D. DICK
CHIEF DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

[458] *Wise*, 437 U.S. at 540 (opinion of White, J.) (internal quotation marks and citation omitted).

EXHIBIT B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, et al., *Plaintiffs,* v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, *Defendant.*	Civil Action No. 3:22-cv-00211-SDD-SDJ Chief Judge Shelly D. Dick Magistrate Judge Scott D. Johnson
EDWARD GALMON, SR., et al., *Plaintiffs,* v. R. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, *Defendant.*	Consolidated with Civil Action No. 3:22-cv-00214-SDD-SDJ

LEGISLATIVE INTERVENORS' NOTICE OF APPEAL

Notice is given that Legislative Intervenors Clay Schexnayder, Speaker of the Louisiana House of Representatives, and Patrick Page Cortez, President of the Louisiana Senate, in their respective official capacities, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the order of June 6, 2022 issuing an injunction, Doc. 173, and all orders related to, or forming the basis of, that injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 6, 2022, this document was filed electronically on the Court's electronic case filing system. Notice of the filing will be served on all counsel of record through the Court's system. Copies of the filing are available on the Court's system.

/s/ Erika Dackin Prouty
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EXHIBIT C

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, *et al*

versus

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana

CIVIL ACTION

22-211-SDD-SDJ

consolidated with

EDWARD GALMON, SR., *et al*

versus

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana

CIVIL ACTION

22-214-SDD-SDJ

RULING

This matter is before the Court on the *Joint Motion to Stay Pending Appeal*[1] filed by Defendant, Louisiana Secretary of State Kyle Ardoin, and the Intervenor Defendants, Senate President Page Cortez, Speaker Clay Schexnayder, and Attorney General Jeff Landry. The *Galmon* and *Robinson* Plaintiffs filed separate *Oppositions*.[2] For the reasons that follow, the *Motion* is DENIED.

On a motion to stay, the Court "considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[3]

[1] Rec. Doc. No. 177.
[2] Rec. Doc. Nos. 180, 181.
[3] *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Defendants have not shown that the Court erred in its application of the prevailing law to the facts adduced at the hearing.

Defendants' argument that they will be irreparably harmed absent a stay is disingenuous. Defendants contend that a stay is necessary to avoid "compromising the State's election administration during an election year."[4] But, in March 2022, Senate President Cortez and House Speaker Schexnayder represented to another court that Louisiana's "election calendar is one of the latest in the nation";[5] that "the election deadlines that actually impact voters do not occur until October 2022";[6] and that "there remains several months. . .to complete the process."[7]

The Court finds that Plaintiffs will suffer substantial harm if a stay is granted. Given that there has been no showing of error in the Court's application of the prevailing law, and considering that the Legislators' representations indicate that there is ample time to consider and enact remedial maps, a halt to the remedy process "will substantially injure the other parties."[8] A stay increases the risk that Plaintiffs do not have an opportunity to vote under a non-dilutive congressional map until 2024, almost halfway through this census cycle.

Finally, the Court finds that the public interest lies in conducting elections under a legal map.

Defendants argue for a "'relaxed' interpretation"[9] of the stay standard, citing Justice Kavanaugh's concurrence in *Merrill v. Milligan*, wherein he discussed the propriety of a stay "in the period close to an election."[10] The Court finds the concurrence inapplicable. Where, as here,

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[4] Rec. Doc. No. 177-1, p. 9.
[5] Rec. Doc. No. 173, p. 11 (citing GX-32, p. 8).
[6] *Id*. (citing GX-32, p. 5).
[7] *Id*.
[8] Note 3, *supra.*
[9] Rec. Doc. No. 177-1, p. 4.
[10] *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

"election deadlines that actually impact voters do not occur until October 2022,"[11] we are not in "a period close to an election."[12]

Nor is the Court persuaded that the rules of the legislature requiring seven days' notice of an extraordinary session, three days for bill readings and committee hearings, among other things, indicate the necessity of a stay. If Defendants need more time to accomplish a remedy for the Voting Rights Act violation, the Court will favorably consider a *Motion* to extend the time to allow the Legislature to complete its work. As Plaintiffs point out, allowing for seven days' notice of the start of the session and three days for bill reading would require ten days total, and this Court gave the Legislature fourteen. So, seven days are available to comply with this Court's order. Defendants' argument about the "unworkable" deadline is insincere and not persuasive.

The Court also declines to enter an administrative stay. This decision "falls within the 'power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'"[13]

ACCORDINGLY,

IT IS HEREBY ORDERED that Defendants' *Joint Motion to Stay*[14] is DENIED.

Signed in Baton Rouge, Louisiana this 9th day of June, 2022.

CHIEF JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[11] Note 5, *supra*.
[12] Note 10, *supra*.
[13] *In re Abbott*, 800 F. App'x 296, 298 (5th Cir. 2020)(quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)).
[14] Rec. Doc. No. 177.

No. 22-30333

In the United States Court of Appeals

for the Fifth Circuit

PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE, EDWIN RENE SOULE, ALICE WASHINGTON, CLEE EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS, AMBROSE SIMS, NAACP LOUISIANA STATE CONFERENCE, AND POWER COALITION FOR EQUITY AND JUSTICE,
PLAINTIFFS-APPELLEES

v.

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

EDWARD GALMON, SR., CIARA HART, NORRIS HENDERSON, AND TRAMELLE HOWARD,
PLAINTIFFS-APPELLEES

v.

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA (CIV. NO. 22-0211 & CIV. NO. 22-0214)
(THE HONORABLE SHELLY D. DICK, C. J.)

ROBINSON **APPELLEES' RESPONSE IN OPPOSITION TO MOTIONS TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**

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No. 22-30333

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v.

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These

representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Parties	**Counsel and Law Firms**
National Association for the Advancement of Colored People Louisiana State Conference **Plaintiff – Appellee** also known as: NAACP	Paul, Weiss, Rifkind, Wharton, & Garrison, L.L.P., Adam P. Savitt, Amitav Chakraborty, Briana Sheridan, Daniel Sinnreich, Jared Evans, Jonathan H. Hurwitz, Robert A. Atkins, Ryan Rizzuto, Yahonnes Cleary
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	American Civil Liberties Union Foundation, Inc., Samantha Osaki, Sarah Brannon, Sophia Lin Lakin, Tiffany Alora Thomas
	Louisiana Justice Institute Tracie Washington
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Ciara Hart, Edward Galmon, Sr., Norris Henderson, Tramelle Howard. **Plaintiffs – Appellees**	Walters Papillion Cullens Thomas, L.L.C., , Darrel J. Papillion, Jennifer Wise Moroux, Renee Chabert Crasto Elias Law Group L.L.P., Abha Khanna, Jacob D. Shelly, Jonathan Patrick Hawley, Lalitha D. Madduri, Olivia Sedwick
Kyle Ardoin, in his official capacity as Secretarty of State for Louisiana **Defendant – Appellant**	Nelson Mullins Riley & Scarborough LLP, Alyssa M. Riggins, Cassie A. Holt, John E. Branch III, Phillip Strach, Thomas A. Farr Shows, Cali & Walsh, L.L.P., John C. Walsh
Clay Schexnayder Patrick Page Cortez **Intervenor Defendants – Appellants** State of Louisiana by and through Attorney General Jeff Landry **Intervenor Defendant – Appellant**	BakerHostetler L.L.P., Michael W. Mengis, Richard Bryan Raile, E. Mark Braden, Erika Dackin Prouty, Katherine L. McKnight, Patrick T. Lewis Louisiana's Office of the Attorney General, Elizabeth Baker Murrill, Shae McPhee, Morgan Brungard, Angelique Duhon Freel, Carey T. Jones, Jeffrey Michael Wale Holtzman Vogel Baran Torchinsky & Josefiak PLLC, Dallin Holt, Jason B. Torchinsky, Phillip Michael Gordon

Vincent Pierre Chairman LLBC **Movant**	Arthur Thomas & Associates, Arthur Ray Thomas Earnest L. Johnson I
Louisiana Legislative Black Caucus **Movant**	Stephen M. Irving Ernest L. Johnson I
Lisa J. Fauci Robert Lipton Nicholas Mattei Michael Mislove **Amicus**	Jenner & Block, LLP, Alex S. Trepp, Andrew J. Plague, Jessica Ring Amunson, Keri L. Holleb Hotaling, Sam Hirsch Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., Judy Y. Barrasso, Viviana Helen Aldous

/S/ *John Adcock*
JOHN ADCOCK

Attorney of Record
for Appellees

JUNE 10, 2022

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PRELIMINARY STATEMENT

After hearing the testimony of 22 witnesses and reviewing 244 exhibits offered during a five-day in-person evidentiary hearing, and having considered hundreds of pages of briefs, expert reports, and post-hearing proposed findings of fact and conclusions of law, the district court concluded that Louisiana's congressional redistricting map dilutes the votes of the State's Black citizens in violation of Section 2 of the Voting Rights Act of 1965. The district court also found that it is administratively feasible to remedy that violation before Election Day. The district court's 152-page preliminary injunction opinion carefully considered the evidence presented at the hearing, set forth its detailed findings of fact and credibility assessments, and comprehensively analyzed appellants' legal arguments in light of well-established legal standards. Those findings are entitled to substantial deference by this court and can only be disturbed if they are clearly erroneous. *See Dennis Melancon, Inc.* v. *City of New Orleans*, 703 F.3d 262, 267 (5th Cir. 2012).

Defendants now ask this Court, by three separate emergency motions, to stay the district court's ruling and allow the State to

conduct the 2022 congressional elections based upon a redistricting plan that the district court held to be illegal. Their motions rest in large part on asking this Court to disregard the district court's findings of fact, ignoring or mischaracterizing the district court's legal analysis and the evidentiary record, and urging arguments that are contrary to binding case law. On the record, there is no basis for allowing the State to conduct the coming election in likely violation of federal law and the rights of the State's Black voters.

Gingles III. The legislative intervenors assert that the district court erred in concluding that plaintiffs established, as required by *Thornburg* v. *Gingles*, 478 U.S. 30, 50–51 (1986), that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidates." *Id.* at 51. The intervenors assert that plaintiffs' "experts admitted their own analyses show its predicates do not exist," and that plaintiffs "failed to prove, or even address, this element." ECF No. 18 at 2, 8. Not so. The district court found, based on the testimony of plaintiffs' highly qualified voting experts, "that White voters consistently bloc vote to defeat the candidates of choice of Black voters." Sec. Mot. Ex. 16 ("Op.") 124. That conclusion was

undisputed: not one of the nine expert witnesses that defendants called at the hearing testified to the contrary. In reaching that conclusion, the district court properly focused on the ability of Black voters to elect their candidates of choice in the actual congressional districts at issue—not on speculation by defendants about unspecified hypothetical districts that the Legislature did not enact into law.

Gingles I. No more persuasive are defendants' assertions that plaintiffs' illustrative congressional districting maps, presented to satisfy their burden under *Gingles* to show that it is possible to "create[e] more than the existing number of reasonably compact districts 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) were predominantly driven by race and thus constitute unlawful racial gerrymanders. Concerns about racial gerrymandering do not apply to illustrative plans offered to establish a Section 2 violation. *Clark* v. *Calhoun Cty.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996). Even if they did, the district court found that "[t]here is *no factual evidence* that race predominated in the creation of the illustrative maps in this case." Op. 116 (emphasis in original).

Contrary to the intervenors' unsupported assertion that plaintiffs' illustrative plans "link[] distinct locations on the basis of race," Leg. Int. Mot. at 12 (internal quotation and citation omitted), the district court found as a fact that plaintiffs' maps respect existing communities of interest and otherwise comply with traditional redistricting principles and the State Legislature's own redistricting guidelines. Op. 103.[1]

Equities and Purcell. As the district court correctly held, the equities favor a preliminary injunction because "protecting voting rights is quite clearly in the public interest, while allowing elections to proceed under a map that violates federal law most certainly is not." Op. 142. Defendants' reliance on the Supreme Court's stay in *Merrill* v. *Milligan*, 142 S. Ct. 879 (2022), is misplaced because, as the district court noted, the primary elections in that case were scheduled to begin just a few weeks after the Court's ruling. Op. 148. Here, Election Day is five months away. In contrast to their misplaced reliance on *Merrill*, defendants do not even mention the Supreme Court's on-point ruling in *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 142 S.Ct. 1245, No. 21A471 (2022) (per curiam), on which the district court heavily

[1] No appellant disputes that plaintiffs have satisfied Gingles II.

relied. *See* Op. 148. There, the Court required the State of Wisconsin to redraw its state legislative maps 139 days before the state's primary—*less* time than the 150 days until Louisiana's election at issue here. *Wisconsin Elections Comm'n*, 142 S.Ct. at 1248. The Court concluded that its order gave the state "sufficient time" to adopt new maps consistent with the Court's ruling and the state's election calendar. *Id.* Defendants' argument also disregards the district court's finding, based on the testimony of the state's senior elections administrator and the Governor's chief counsel, that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." Op. 148. This finding and *Wisconsin Legislature* are fatal to defendants' *Purcell* argument on these motions.

BACKGROUND

Factual History

The 2020 U.S. Census confirmed that Louisiana is home to the second-highest percentage of Black citizens in the country. Black Louisianians represent approximately 31.2% of the State's voting age population. Sec. Mot. Ex. 6 at 4. The 2020 census also shows that

Louisiana's population growth over the last decade was driven entirely by growth in minority populations. Sec. Mot. Ex. 1 at 15, Table 1.

Following the delivery of the 2020 census results in April 2021, Op. 3, the Legislature conducted public hearings across the State to solicit the views of the State's citizens about redistricting. Numerous speakers urged the Legislature to enact a plan incorporating two Congressional districts in which the Black voters had an opportunity to elect their candidates of choice. Op. 129-130. Voting rights advocates, including some of the plaintiffs, provided detailed submissions to the Legislature demonstrating that such a plan was required by the Voting Rights Act. Op. 21. Legislators submitted multiple bills providing for congressional redistricting plans with two majority Black districts and that complied with respecting traditional districting principles and the standards established by the Legislature's Joint Rule 21 regarding congressional redistricting. Sec. Mot. Ex. 1 at 24-27; Trial Ex. PR-82.

On February 18, 2022, the Legislature passed two substantially identical bills adopting congressional plans with only a single majority Black district, and five districts with large white majorities. Op. 4. On March 9, 2022, the Governor vetoed both bills, expressing his "firm

belief" that the enacted plan "violates Section 2 of the Voting Rights Act" and "disregard[s] the shifting demographics of the state." Sec. Mot. Ex. 6 at 5-6.

Shortly after the Governor's veto, plaintiffs in these consolidated cases commenced actions in state court against the Secretary of State alleging that the 2010 map in place at the time was malapportioned, and that the state government appeared to be at an impasse. *Bullman, et al v. R. Kyle Ardoin*, No. C-716690, 2022 WL 769848 (19th Judicial Dist. Ct.); *NAACP Louisiana State Conference et al v. Ardoin*, No. C-716837 19th Judicial Dist. Ct.). The Secretary, together with the legislative intervenors and the Attorney General, argued that the actions were premature because the legislative process had not run its course, and accordingly that they should be dismissed. The legislative intervenors specifically argued that there was no need for the state court to address the plaintiffs' claims at that juncture because Louisiana's "election calendar is one of the latest in the nation," "the candidate qualification period could be moved back, if necessary, . . . without impacting voters," and "the election deadlines that actually impact voters do not occur until October 2022." Op. 146.

On March 30, 2022, the Legislature overrode the Governor's veto, *id.* at 5—the first successful veto override in over a quarter century. Sec. Mot. Ex. 6 at 6. Every Black legislator in both houses voted against the override. *Id.*

As the district court found, the enacted plan dilutes Black voters' influence by "packing" them into one district (CD 2) and "cracking" them among the State's five remaining districts. These district lines, coupled with bloc voting by Black voters for their candidates of choice and high levels of white bloc voting against candidates preferred by Black voters, dilute the ability of the State's Black voters to elect their candidates of choice. The State's history dramatically illustrates the point. State voters have elected only four Black members of Congress since Reconstruction—all from majority Black districts. Sec. Mot. Ex. 6 at 19. No majority white congressional district has ever elected a Black representative in the State's history. Louisiana has not had a Black Governor or Lieutenant Governor since Reconstruction. It has never had a Black U.S. Senator, Secretary of State, or Attorney General. Black people are persistently underrepresented at every level and in every branch of the State's government. Sec. Mot. Ex. 12 at 84-85.

Procedural History

Plaintiffs commenced these actions against the Secretary of State the same day that the plan became law. They alleged that the plan violated 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. Sec. Mot. Ex. 1. Thereafter, the Legislative Intervenors, the Attorney General, and the Legislative Black Caucus were granted leave to intervene. Sec. Mot. Ex. 16 at 5.

At a status conference on April 13, the Court set a putative hearing date on a motion for preliminary injunction on April 25, 2022. ECF No. 33. At the insistence of the Secretary and the Legislative and State intervenors that the original schedule did not provide adequate time for them to prepare, the court subsequently adjourned the hearing by 2 weeks, to May 9. Sec. Mot. Ex. 16 at 6; ECF No. 35. On April 15, 2022, plaintiffs moved for a preliminary injunction.

Over the course of the five day hearings, the court reviewed 244 exhibits and heard testimony from 22 witnesses, including 15 expert

witnesses and seven fact witnesses. *See generally* Sec. Mot. Ex. 18-24. At the conclusion of the hearing on May 13, the court set a deadline of May 18, 2022, for post-trial briefs and proposed findings of fact and conclusions of law. The parties submitted post-hearing briefs and proposed findings of fact and conclusions of law on May 18, 2022.

On June 6, 2022, two and one half weeks after the parties' post-hearing submissions, the court issued a 152-page Ruling and Order granting plaintiffs' motion for a preliminary injunction. The court held that plaintiffs were substantially likely to prevail on the merits of their claim under Section 2 and that there was sufficient time before the election to enact a new redistricting plan compliant with the VRA. *See generally* Op. The court further found that plaintiffs will suffer irreparable harm through the dilution of their votes absent injunctive relief. *Id.* at 149. The court provided the Legislature with an opportunity to enact a new map compliant with Section 2 by June 20, 2022, and stated that if the Legislature was unable to pass a remedial plan by that date "the Court will issue additional orders to enact a remedial plan compliant with the laws and Constitution of the United States." *Id.* at 2, 152.

In accordance with the court's order, on June 7, 2022, the Governor called for an extraordinary session of the Legislature to run from June 15 to 20 to consider a new congressional redistricting plan. *See* Gov. Edwards Issues Call for Special Session, Office of the Governor (Jun. 7, 2022), https://gov.louisiana.gov/index.cfm/newsroom/detail/3703.

ARGUMENT

I. The District Court's Finding that White Bloc Voting Results in the Usual Defeat of Black-Preferred Candidates Is Supported by Overwhelming and Unrebutted Evidence and is Consistent with Applicable Precedent.

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. Here, the district court found, based on an extensive review of the record, that plaintiffs were substantially likely to satisfy this standard. The court made no error in finding ample evidence that in the plan drawn by the legislature, white voters would have, almost without exception, defeated the candidate preferred by Black voters in every Louisiana congressional district that does not have a majority-Black voting age population. Op. 123. One of plaintiffs' experts, Dr. Handley

found, based on an analysis of recompiled election results, that the Black-preferred candidate was defeated by white voters in every district except CD2 in every one of the 15 statewide elections she analyzed, as well as in all six congressional elections she reviewed that occurred in districts other than CD2. *Id.* at 58-59, 123; Trial Exs. PR-12, PR-87. Dr. Palmer found similar results, Sec. Mot. Ex. 16 at 123; Trial Ex. GX-2, while Appellants offered no contrary evidence. Based on this robust record, the court concluded that, unlike in *Covington*, "white voters consistently bloc vote to defeat the candidates of choice of Black voters," and that Appellees had therefore satisfied the third *Gingles* precondition. Op. 124, 127 (citing *Covington* v. *North Carolina*, 315 F.R.D. 117, 167 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017)). This factual finding cannot be overturned absent clear error. *See Dennis Melancon, Inc.*, 703 F.3d at 267.

Mischaracterizing the case law, the evidence, and the district court's findings, the Appellants argue, incorrectly, that the existence of limited white crossover voting in parts of the state conclusively establishes that white bloc voting is not "legally significant" and overcomes Appellees' *Gingles* III showing. Leg.Mot. at 8-12. Appellants' contention that the existence of any amount of crossover voting invariably defeats a finding that *Gingles* III is satisfied is

contrary to the plain language of *Gingles* itself and would effectively preclude relief under Section 2 in virtually all cases.[2] As the district court concluded, that is not the law. Op. 123-24. On the contrary, *Gingles* held 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." *Gingles*, 478 U.S. at 31 (emphasis added). This standard recognizes that the existence of some white crossover voting can coexist with "legally significant" white bloc voting. *See id.* at 58-59 (finding legally significant white bloc voting where crossover voting was as high as 50%); *see also Teague* v. *Attala County*, 92 F.3d 283, 291-92 (5th Cir. 1996); *Westwego Citizens for Better Gov't* v. *City of Westwego*, 946 F.2d 1109, 1118-20 (5th Cir. 1991); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1249 (5th Cir. 1988) (all finding a Section 2 violation despite evidence of crossover voting). The question *Gingles* III poses is thus not whether any crossover voting exists but whether, under the actually enacted plan, white bloc voting usually results in the defeat of the minority-preferred candidate.

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[2] The AG's contention that "Plaintiffs must prove that *extreme* white bloc voting renders a majority-minority district the only way to ensure that a minority community has an equal opportunity to elect the candidate of that community's choice" is also unsupported by any citation and is contrary to the law. AG Mot. at 25 (emphasis in original).

The precedents Appellants rely on only emphasize this point. For example, *Covington*, on which Appellants principally rely (*see* Leg. Mot. at 9-12), recognizes that the touchstone under the third *Gingles* precondition is whether the "majority [group] votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Covington*, 316 F.R.D. at 167. The district court found that standard easily satisfied here, because Appellees' evidence showed that Black-preferred candidates would usually be defeated in the enacted districts other than CD2. By contrast, in *Covington*, "in thirty-three out of the fifty-three elections studied, African-American and non-African-American voters preferred the same candidate. . . . That is, in thirty-three of the elections, a majority of non-African-American voters preferred the African-American voters' candidate of choice." *Covington*, 316 F.R.D. at 170-71. Likewise, in *Abrams*, the district court correctly found a lack of "legally significant" bloc voting not because of the existence of crossover voting per se, but because, due to the composition of the district at issue, Black-preferred candidates were winning elections with support from white voters despite high levels of racially polarized voting ("RPV"). *Abrams* v. *Johnson*, 521 U.S. 74, 92 (1997). Here, by contrast, Black preferred candidates are not winning and, "if no remedial district [is] drawn," *Covington*, 316 F.R.D. at 168, will not

win. Accordingly, the district court did not clearly err in finding legally significant white bloc voting.

Contrary to Appellants' assertions, Leg. Mot. at 11-12, the district court expressly considered whether there was "legally significant" white bloc voting sufficient to satisfy *Gingles* III, and recognized that "high levels" of white crossover voting could undermine a finding of legally significant polarized voting. Op. 123–24. However, crossover voting defeats *Gingles* III only where there is evidence that minority voters could *in fact* elect their candidates of choice in the districts that have actually been drawn in which they are not the majority. *See*, *e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1471-72 (2017). Here, the district court credited the uncontested testimony by Drs. Palmer and Handley that white crossover voting was "insufficient to swing the election for the Black-preferred candidate in any of the contests they examined," and thus, it was insufficient to overcome Appellees' *Gingles* III showing. Op. 126.[3]

[3] Appellants take out of context the district court's comment that "white crossover voting was inherently included in the analysis performed by Dr. Palmer and Dr. Handley" to argue that the court "failed to ask the correct legal question." Leg. Mot. at 11-12. In fact, the court's complete conclusion was that, even after taking crossover voting into account, Black-preferred candidates were still consistently defeated by white voters voting as a bloc. Op. 126. That is exactly the question *Gingles* III asks, and the district court's findings on that question are not clearly erroneous and are therefore entitled to deference. *Dennis Melancon, Inc.*, 703 F.3d at 267.

Appellants point to testimony from Appellees' experts indicating that a hypothetical district (the contours of which Appellants nowhere specified) with a BVAP below 50% could be drawn that would allow Black voters the opportunity to elect candidates of the choice and argue that this hypothetical possibility means that Appellees cannot, as a matter of law, establish the third *Gingles* precondition.[4] In essence, Appellants' argument amounts to an assertion that if they could have satisfied their VRA obligations by drawing a crossover district, they cannot be liable for a violation of the VRA even when they choose not to draw that district and even if all of the *Gingles* preconditions are satisfied. However, Appellants identify no case holding that the possibility of a purely hypothetical plan that includes an opportunity district in which the minority voting age population is below 50% vitiates *Gingles* III. On the contrary, the law is clear that appropriate plan to analyze for purposes of *Gingles* III is the plan that is being challenged, not the illustrative plan or a hypothetical plan that could

[4] Appellants' assertion that Dr. Handley "concede[d] that the success of the Black preferred candidates in [in the illustrative plans] occurs only with white cooperation" is false. First, Dr. Handley was referring to crossover voting in elections that occurred in the prior enacted districts, not in any illustrative district. And more importantly, Dr. Handley said nothing whatsoever about crossover votes being required for the Black preferred candidate to win. She merely acknowledged that crossover voting occurred in CD2, the lone existing majority-Black district.

have been drawn. *See*, *e.g.*, *League of United Latin Am. Citizens v. Abbott*, No. 3:21-CV-259, 2022 WL 1631301, at *15 (W.D. Tex. May 23, 2022) ("the third precondition must be established for the challenged district[s]") (citing *Cooper*, 137 S. Ct. at 1470; *LULAC*, 548 U.S. at 427; *Growe*, 507 U.S. at 40) (emphasis added). In *Cooper*, 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 with despite comprising less than 50% pf the black voting age population. 137 S. Ct. at 1465-66, 1471-72.[5] Accordingly, as the court held here, "[t]he fact that Plaintiffs' experts agreed, hypothetically, that a sub-50% BVAP district *could* perform under unspecified circumstances, is not sufficient to overcome the conclusions reached by their robust statistical analysis" showing that white bloc voting usually results in the defeat of Black-preferred candidates. Op. 126.[6]

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[5] In addition, in the testimony Appellants cite, Dr. Handley stated that an opportunity district with a BVAP below 50% could possibly be drawn in the area of CD2, where the Legislative Appellants themselves have asserted that the VRA requires a district with over 50% BVAP.

[6] For the same reason, the amicus brief filed by the Tulane and LSU math and science professors is irrelevant to the question whether *Gingles* III has been satisfied. It proposes a hypothetical remedy that would create two crossover districts, but has no bearing on whether white bloc voting is sufficient to usually defeat Black-preferred candidates in the plan actually enacted by the legislature. The district court found that it is, and this Court should defer to that finding.

Appellants next argue, citing *Covington*, that "white bloc voting becomes legally significant only if it 'exist[s] at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy.'" Leg. Mot. at 9. To this restatement of the standard announced by the Supreme Court in *Gingles*, the Appellants attempt to add a new requirement: that a "VRA remedy is a 50% minority voting-age population … district." *Id.* In so doing, they conflate the requirements for VRA liability with the scope of a possible VRA remedy, a distinction explained by the Supreme Court in *Cooper*. The *Cooper* court explained that while *Bartlett* had held that a Section 2 does not *require* a crossover district (and thus, a crossover district cannot be used to establish liability), it may nevertheless be *satisfied* by one. *See Cooper*, 137 S. Ct. at 1461 (citing *Bartlett*, 556 U.S. at 13 (2009)). In other words, to show that Section 2 has been violated, a plaintiff must demonstrate that a reasonably compact district can be drawn in which the minority voting age population exceeds 50% (*Gingles* I), and that without a remedy, the candidates in support of whom the minority group votes cohesively (*Gingles* II) will usually be defeated (*Gingles* III). *Cooper* does not change that standard. Nor does it stand for the proposition that Section 2 liability does not lie when a hypothetical district could be (but has not been) drawn where Black

voters are able to elect candidates of choice as a result of some crossover voting. Instead, it merely makes clear that once a Section 2 violation is established, the minority voting age population of the remedial district need not exceed 50% if a crossover district can be created that provides minority voters the ability to elect their preferred candidates.

The nature of any remedial plan is not at issue on these motions. Having found that "if no remedial district [is] drawn," *Covington*, 316 F.R.D. at 168, white bloc voting will continue to prevent Black-preferred candidates from being elected outside of CD2, the district court gave the legislature the first opportunity to craft a remedial plan that complies with Section 2. Op. 152. Under *Cooper*, the legislature is free to develop a plan, taking account of crossover voting, in which Black voters have the opportunity to elect their candidates of choice.

The AG contends that legally significant bloc voting does not exist where RPV can be explained by party affiliation. To the extent party preference is relevant to the Section 2 inquiry, it comes in in the analysis of the "totality of the circumstances," not in the assessment of racially polarized voting under *Gingles* II and III. *Teague*, 92 F.3d at 292 ("A defendant may try to rebut plaintiff's claim of vote dilution via evidence of objective, nonracial factors under the totality of the circumstances standard.") (cleaned up). Here, in analyzing the totality of the

circumstances, the court credited Appellees' evidence that race explained party alignment rather than the other way around. *See* Op. 128. Appellees have failed to carry their burden to rebut Appellees' showing that legally significant white bloc voting exists and that, in the totality of the circumstances, Black voters have less opportunity than others to participate in the political process and elect candidates of choice. The district court's findings on this issue are well supported and this Court should not disturb them.

In making this argument, the AG ignores that the district court rejected the expert evidence on which it is based. Specifically, the court found that "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." *Id.* at 121. The court credited "Dr. Palmer's well-accepted ecological inference analysis [which] demonstrated that [contrary to Dr. Alford's opinion] Black voters support Black candidates more often in a statistically observable way." *Id.*

Moreover, the AG is wrong on the law. In *Gingles*, the Supreme Court plurality made clear that "[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." 478 U.S. at 63. That holding is consistent with the purpose of the Voting Rights Act and the *Gingles* doctrine—to give minority voters the same opportunity as white voters to elect the candidates they believe are most likely to further their interests and address their concerns. Moreover, it is error to place the burden on Section 2 plaintiffs to disprove that factors other than race account for RPV, *see Teague*, 92 F.3d at 290, as the AG suggests, see AG Mot. at 27. On the contrary, once Appellees had demonstrated the existence of RPV, it was Appellants' burden to rebut that showing. The district court found Appellants' evidence insufficient to carry that burden. Op. 121.

Finally, the Appellants argue that the district court improperly shifted the burden to them to prove the lack of white bloc voting. Leg. Mot. at 12. The district court in fact did nothing of the kind. It found that Appellees had offered "hard evidence" demonstrating that "*Gingles* III is met even by the high standard imposed in Covington," and that Appellants had failed to offer any substantial evidence in rebuttal. Op. 127. Finding a failure to rebut a plaintiffs strong evidentiary showing does not constitute improperly shifting the burden.

Appellees have failed to carry their burden on these motions to rebut Appellees' showing that legally significant white bloc voting exists and that, in the totality of the circumstances, Black voters have less opportunity than others to participate in the political process and elect candidates of choice. The district court's findings on this issue are well supported and this Court should not disturb them.

II. Plaintiffs Showed It Is Possible to Create an Additional Reasonably Compact District With a Sufficiently Large Black Population to Elect Candidates of Its Choice

The first prong of *Gingles* requires "a party asserting § 2 liability [to] show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Bartlett*, 556 U.S. at 19-20. *Gingles* I also requires Section 2 plaintiffs demonstrate the compactness of the minority population. *LULAC*, 548 U.S. at 433. As the district court correctly noted, "[w]hile no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." Op. 18-19.

The court correctly concluded that plaintiffs satisfied their *Gingles* I burden. The court found that the six illustrative maps presented by plaintiffs' experts established that, consistent with traditional redistricting principles, the Black population of Louisiana is sufficiently

large and geographically compact to constitute a majority in two reasonably compact, majority Black congressional districts. Op. 4-7. Again, this evidence is undisputed. None of defendants' experts testified that plaintiffs' illustrative maps were not majority Black under the methodology approved by the Supreme Court in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), or that the maps were not reasonably compact both visually and using standard and well-accepted compactness measures.

Defendants' argue that plaintiffs' illustrative maps "qualify as racial gerrymanders," because they link "distinct locations" on the basis of race. AG Mot. at 15. But defendants mischaracterize settled law and disregard the district court's meticulous factual findings when they argue that "racial predominance in the illustrative map … is evidence of a lack of compactness of the minority population," because "if the minority community was sufficiently compact, then there would be no need for race to predominate in the drawing of the illustrative plans," AG Mot. at 23. The district court considered these hollow claims and found no evidence to support defendants' claim that race was the predominant consideration of plaintiffs' mapmakers in drawing the illustrative plans. Instead, the court found, plaintiffs' illustrative plans adhered to traditional and the state's own redistricting criteria as well or better than the State's enacted plan. Op. 105-06.

First, by faulting Appellants for using a threshold of 50% Black voting age population in drawing their illustrative districts, defendants ignore that this threshold was established by the Supreme Court: For purposes of satisfying the first Gingles precondition, the minority voting age population of an illustrative district must be "greater than 50 percent." *Bartlett*, 556 U.S. at 20 (2009).

Second, defendants mischaracterize settled law. The racial predominance standard the Supreme Court extended to redistricting schemes in *Shaw v. Reno* under the Equal Protection Clause of the Fourteenth Amendment does not apply to *Gingles* I 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)). As the district court found, the "Defendants' insistence that illustrative maps drawn by experts for private parties are subject to Equal Protection scrutiny is legally imprecise and incorrect." Op. 116.

Defendants also improperly conflate the requirements applicable to illustrative and remedial maps under Section 2, claiming that *LULAC* erased any distinction between those two categories of maps.

But there is little reason to assess the constitutionality of a § 2 plaintiff's illustrative districts before the remedial phase because, as explained above, defendants need not remedy a § 2 violation with a plaintiff's proposed single-member district or any other single-member or majority-minority district. *See, e.g., Baltimore Cnty. Branch of NAACP v. Baltimore County*, No. 21-cv-03232-LKG, 2022 WL 888419, at *4 (D. Md. Mar. 25, 2022) (approving remedial plan with reconfigured district where Black voters would not constitute numerical majority but would still "have an opportunity to elect a representative of their choice"); *Cooper*, 174 S. Ct. at 1461; *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971); *Barnett v. City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998) (Posner, C.J.) ("The plaintiff is not required to propose an alternative map that is 'final' in the 'final offer' arbitration sense, . . . the fine-tuning of the alternative can be left to the remedial stage of the litigation.").

The other cases on which defendants rely likewise did not alter this standard. In *Abbott* v. *Perez*, 138 S. Ct. 2305 (2018), the Supreme Court invalidated a lower court's decision to "defer[] a final decision on the § 2 issue and advise[] the plaintiffs to consider [it] at the remedial phase of the case" because, as the *Abbott* court pointed out, the lower Court's erred in deferring part of the Section 2 liability inquiry to the

remedial phase based on speculation that the plaintiff might succeed on its § 2 claim. *Abbott*, 138 S. Ct. at 2333. As the district court noted, "[t]his is no more than a recognition of the hornbook legal principle that liability must be decided before a remedy can be ordered." Op. 114. Likewise, in *Anne Harding v. County of Dallas, Texas*, the Fifth Circuit did not hold generally that liability and remedy are collapsed into one inquiry but only "that it was inappropriate to move to the remedy phase without a clear showing of liability." Op. 115, n. 313; 948 F.3d 302, 310 (5th Cir. 2020).

Third, the district court found, based on the testimony and written reports of the plaintiffs' experts and lay witnesses and its assessment of their credibility, that plaintiffs' *Gingles* I experts "both offered persuasive testimony regarding how they balanced all of the relevant [traditional redistricting] principles, including the Legislature's Joint Rule 21, without letting any one of the criteria dominate their drawing process" and that "Plaintiffs 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." Op. 103, 106. The defendants' hollow appeals to *LULAC* and reiteration of the standard that "a district that combines two far-flung segments of a racial group with disparate interests" is belied by

the evidence admitted in this case. Here, plaintiffs proffered, and the district court credited, significant testimony demonstrating that, unlike in *LULAC*, the communities joined in plaintiffs' illustrative district 5 share characteristics, needs, and interests, which are reflected in the lay testimony presented at the preliminary injunction hearing and publicly available socio-economic data relied upon by plaintiffs' experts in drawing the illustrative plans.

For example, the court credited the testimony of Mr. Fairfax, one of plaintiffs' experts, "that he used census places and landmark areas to gauge how often his maps split communities of interest, as well as socioeconomic data and roadshow testimony from community members for insight into local ideas about communities of interest." Op. 101. The court also found Mr. Fairfax considered "socioeconomic data extensively in deciding where to draw his lines." Op. 117; Op. 34 ("He … used the mapping software's capabilities to overlay data onto his proposed districts related to, for example, median household income, educational attainment, food stamp percentage, poverty level, percentage of renter households, and community resilience estimates. This information led him to conclude that areas in Ouachita Parish, Rapides Parish, Evangeline Parish, Baton Rouge, and Lafayette could be appropriately grouped together. For example, by overlaying data related to the

percentage of the population with no high school education in a given area, it was easy to see that the areas shaded red and orange in the map below, indicative of more people with no high school education, followed a pattern that "clearly define[d] the boundaries of District 5").

The district court also considered testimony from lay witnesses who spoke to the shared interests, history, and connections between East Baton Rouge Parish and two areas included together with it in plaintiffs' illustrative CD 5. Op. 37 ("Tyson testified, explaining that the strong historical connection between East Baton Rouge and the Delta parishes makes combining them in the same congressional district natural. Tyson testified that he and other Black people in Baton Rouge have strong ties to the Delta region through faith, family, and culture."); *Id.* at 39-40 ("The enacted map pairs St. Landry with Shreveport, which Cravins says disenfranchises Black voters, noting that to his recollection, congresspeople from North Louisiana have typically not visited or taken an interest in St. Landry Parish…. Overall, Cravins testified, the illustrative maps prepared by William Cooper, which link St. Landry with Lafayette and Baton Rouge, would allow St. Landry to maintain connections with the centers of influence that are important to making their voice heard.").

The court found, based on her assessments of the demeanor and credibility of plaintiffs' map-drawing experts and the substance of the illustrative maps they presented, that race was not the predominant factor in creating plaintiffs' illustrative maps. On the contrary, the court found that "[t]here is no factual evidence that race predominated in the creation of the illustrative maps in this case." Op. 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.* In contrast, the court noted, defendants offered no testimony at the hearing about communities of interest. As the court noted, this is "a glaring omission, given that Joint Rule 21 requires communities of interest to be prioritized over and above preservation of political subdivisions." *Id.* at 101.

Defendants' attempts to appeal to the irrelevant testimony of their experts should also be given little weight, as it was given in the district court. As the district court found, "Dr. Blunt agreed that the simulations do not provide a valid comparison if traditional redistricting principles are not part of the constraints" *Id.* at 47. Accordingly, the district court considered the evidence presented by Dr. Blunt but gave his opinions "little weight" because "the simulations he

ran did not incorporate the traditional principles of redistricting required by law." *Id.* at 95. And Dr. Murray stated on cross-examination "that he had no basis to disagree with the opinions offered by any of Plaintiffs' experts," and "that he has no opinion on whether two majority-minority districts can be drawn consistent with traditional redistricting principles." *Id.* at 50. Moreover, as the plaintiffs proved and the district court found "Plaintiffs' plans outperformed the enacted plan on every relevant [redistricting] criteria." *Id.*

III. The *Purcell* Principle Does Not Require a Stay

The district court was correct to distinguish *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006). The Supreme Court in *Milligan* v. *Merrill* stayed an injunction issued by a three-judge panel of the Eleventh Circuit, which would have enjoined Alabama's 2021 U.S. Congressional districting plan as a violation of Section 2 of the Voting Rights Act, on February 7, 2022. *Merrill* v. *Milligan*, 595 U.S. ____ (2022). The application for a stay or injunctive relief was presented to Justice Thomas and granted. Justice Kavanaugh, with whom Justice Alito joined, wrote a concurrence in the grant of the applications for stays to explain the majority's vote. *Id.* (Kavanaugh, J., concurring). Justice Kavanaugh explained that, contrary to the principal dissent's criticism, "[t]he stay order does not make or signal any change to voting rights law. The stay

order is not a ruling on the merits, but instead simply stays the district court's injunction pending a ruling on the merit." *Id.* The stay instead was meant to effectuate existing "election-law precedents, which establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Id.* (citing *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (*per curiam*).

Here, Louisiana is not "close to an election." *Id.* Election Day will not occur for another five months. As the district court found, there is ample time for the State to adopt and implement a congressional map that complies with the Voting Rights Act. Op. 148.[7]

The district court's order lies squarely outside the outer limits of *Purcell* set by the Supreme Court in *Wis. Legislature* v. *Wis. Elections Comm'n.*, 142 S. Ct. 1245 (2022) (per curiam). There, the Wisconsin governor and legislature reached an impasse in the redistricting process,

[7] On May 24, 2022, a district court sitting in the Fifth Circuit denied a motion seeking a stay in a similar matter based on the Supreme Court's merits decision in *Merrill v. Milligan*. *See* May 24, 2022 Order, *United States of America* v. *Galveston County*, Case 3:22-cv-00093, (S.D.TX)(Doc. 28). That court allowed the case to proceed, choosing not to "speculate" whether the Supreme Court will alter the standard; and noted that there was no precedent for staying on-going litigation before the court "simply because a higher court may substantially change its own precedent." *Id.* at 1–2. This Court should similarly not grant a stay based on speculation about future changes in the standard.

leading the Wisconsin Supreme Court to adopt a new map of state legislative districts. *Id.* at 1247. On appeal, in an order entered approximately five months before the coming primary election, the Supreme 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 (2022) (per curiam).

Wisconsin should be dispositive here. As the district court noted, the amount of time before the Louisiana election is *more* than that between the Supreme Court's ruling in *Wisconsin Legislature* and the Wisconsin primary. Op. 148 (Louisiana does not conduct separate primaries before the November election.) For similar reasons, defendants' reliance on *Milligan* is misplaced. AG Mot. at 12-13 (citing *Merrill*, 142 S. Ct. at 881); Leg. Mot. at 17. The primary elections in Alabama at issue were scheduled to begin four months from the district court's ruling, *id.* at 879; here the district court's decision was issued more than five months before Election Day. *See* Op. 148.

Defendants contest the district court's factual finding that adopting and implementing a new congressional district map would be "realistically attainable well before the 2022 November elections." AG Mot. at 10 (citing ECF 173 at 142–44). But they do not come close to

establishing, as they must, that the district court committed clear error. That an election administrator was "extremely concerned" about timely implementation does not—without more—defeat the court's finding, particularly in light of fact that, as the district court noted, the administrator "did not provide any specific reasons why this task cannot be completed in sufficient time for November elections." Op. 144. Defendants point to the administrator's testimony regarding the State's computerized voter registration system, AG Mot. 19, but the administrator simply described how the program worked; neither the administrator nor defendants gave any indication of why it would be burdensome to change district plans in that system. *Id.*

In contrast, the district court had ample evidence that the few inconveniences described by the administrator did not amount to real burden. In particular, the same election administrator testified that her office "was able to update their records and send out mailings to all impacted voters in less than three weeks" after the Legislature overrode Governor Edwards's veto. Op. 145. The district court rightly found—and defendants provide no reason to doubt—that five months was ample time to make the corresponding updates after a remedial map is enacted by the Legislature or district court. *Id.* In addition, defendants' contention that there is insufficient time to enact a new

map ignores the district court's invitation to them to request additional time, and its statement that it would look favorably on such a request. In light of the district court's statement, defendants' complaint about the amount of time available to enact a new map rings hollow.

As the district court also noted, defendants' contention that there is insufficient time to adopt and implement a new map before Election Day is also contrary to the representations the Legislative Intervenors and the Attorney General made to the state court in the prior impasse case that "there remains several months on Louisiana's election calendar to complete the [redistricting] process." Op. 145–46 (quoting Trial Ex. GX 32, at 8). Defendants try to harmonize that and similar statements they made to the state court with their current position by asserting that the statements were made in March 2022 and that impasse litigation is a "different animal." Leg. Mot. at 19 n.2. But no judicial map-drawing was underway when defendants made those representations to the state court. To the contrary, defendants made those representations in support of their argument that the plaintiffs' claims in those cases were *too early* (in their words, "unripe" and "nonjusticiable") and that the state court need not take up any challenge to 2022 redistricting until some unspecified time after the legislative session that ended on June 6 was complete. Trial Ex. GX 32 at 5–8. Now, in this case—commenced the

same day after the Legislature's veto override vote—defendants argue that plaintiffs' challenge is *too late*. The district court properly concluded that defendants cannot have it both ways. Op. 145.

The factors Justice Kavanaugh identified in his concurrence in *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), also do not justify a stay. As the district court's opinion demonstrates, the underlying merits overwhelmingly favor plaintiffs, and plaintiffs will suffer irreparable harm absent an injunction from the dilution of their votes.

Nor have plaintiffs "unduly delayed bringing the complaint to court." *Merrill*, 142 S. Ct. at 881. On the contrary, as noted, plaintiffs filed their complaints the same day that the challenged maps were enacted. By contrast, it was defendants who repeatedly sought to delay this litigation, first successfully urging the court to adjourn the hearing date it originally set by 2 weeks; then unsuccessfully moving three weeks later for a stay of the proceedings; and now seeking a stay of the district court's order. Defendants' repeated complaints that the district court took over 20 days from the close of the hearing to issue its opinion is overstated, because it ignores the need for the court to consider the parties' hundreds of pages of post-hearing submissions, and ignores that the hearing was adjourned at defendants' request. More fundamentally, defendants' complaint about the timing of the Court's

order are hollow in view of the fact that, as the district court noted in its Opinion, defendants had been on notice for at least six months before enacting the challenged plan that a congressional map with only one majority-Black district would become the subject of litigation. Op. 126 n. 350.

CONCLUSION

This Court should deny defendants' motion.

Respectfully submitted,

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JUNE 10, 2022

CERTIFICATE OF SERVICE

I, John Adcock, a member of the Bar of this Court and counsel for appellees certify that, on June 10, 2022, a copy of Appellees' Response in Opposition to Appellant's Motion to Stay Preliminary Injunction was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/S/ *John Adcock*
JOHN ADCOCK

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, John Adcock, a member of the Bar of this Court and counsel for appellees certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.3, that the Appellees' Response in Opposition to Appellant's Motion to Stay Preliminary Injunction is proportionately spaced, has a typeface of 14 points or more, and contains 7798 words.

/S/ *John Adcock*
JOHN ADCOCK

JUNE 10, 2022

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 12, 2022
Lyle W. Cayce
Clerk

No. 22-30333

Press Robinson; Edgar Cage; Dorothy Nairne; Edwin Rene Soule; Alice Washington; Clee Earnest Lowe; Davante Lewis; Martha Davis; Ambrose Sims; National Association for the Advancement of Colored People Louisiana State Conference, *also known as* NAACP; Power Coalition for Equity and Justice,

Plaintiffs—Appellees,

versus

Kyle Ardoin, *in his official capacity as* Secretary of State for Louisiana,

Defendant—Appellant,

Clay Schexnayder; Patrick Page Cortez; Louisiana Attorney General Jeff Landry,

Intervenor Defendants—Appellants,

Edward Galmon, Sr.; Ciara Hart; Norris Henderson; Tramelle Howard,

Plaintiffs—Appellees,

versus

KYLE ARDOIN, *in his official capacity as* SECRETARY OF STATE FOR LOUISIANA,

Defendant —Appellant,

CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ; LOUISIANA ATTORNEY GENERAL JEFF LANDRY,

Movants—Appellants.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC Nos. 3:22-CV-211 & 3:22-CV-214

Before SMITH, HIGGINSON, and WILLETT, *Circuit Judges*.

PER CURIAM:

Before the court are three emergency motions to stay, pending appeal, an order of the district court that requires the Louisiana Legislature to enact a new congressional map with a second black-majority district. Although we must acknowledge that this appeal's exigency has left us little time to review the record, we conclude that, though the plaintiffs' arguments and the district court's analysis are not without weaknesses, the defendants have not met their burden of making a "strong showing" of likely success on the merits. Nor do we conclude that the cautionary principle from *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), prevents the ordered remedy from taking effect. So we vacate the administrative stay and deny the motion for stay pending appeal.

Nevertheless, we expedite this appeal to the next available merits panel, to be selected at random from the regular merits panels already

scheduled to hear cases the week of July 4, 2022. Either before or after argument that week, that merits panel may, in its discretion, opt to reimpose a stay, and its more comprehensive review may well lead it to rule in the defendants' favor on the merits. The plaintiffs have prevailed at this preliminary stage given the record as the parties have developed it and the arguments presented (and not presented). But they have much to prove when the merits are ultimately decided.

I.

A fuller account of this case's factual background and procedural history can be found in the district court's thorough opinion. *Robinson v. Ardoin*, No. 22-CV-211, 2022 WL 2012389 (M.D. La. June 6, 2022). For purposes of this expedited decision, we summarize only the salient points. This case arises from Louisiana's congressional redistricting process. After the 2020 census, the state was apportioned six seats , the same number as during the previous redistricting cycle. The Louisiana Legislature thus enacted a map that, like the one in force during the last decade, created just one black-majority district, in the state's southeast. The Governor vetoed the map, but the Legislature overrode his veto on March 30, 2022. Later that day, the plaintiffs brought this action.

The plaintiffs claim that, under the Voting Rights Act ("VRA") as interpreted by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), Louisiana was required to create a second black-majority district. They sought a preliminary injunction to require the Legislature to do so in time for the 2022 election.

After a five-day evidentiary hearing, the district court issued a 152-page ruling and order granting the plaintiffs' motion. The district court concluded that the plaintiffs had carried their burden under *Gingles*. That ruling meant that the plaintiffs had shown that (1) Louisiana's black population is

sufficiently large and compact to form a majority in a second district, (2) the black population votes cohesively, and (3) whites tend to vote as a bloc usually to defeat black voters' preferred candidates. *Id.* at 50–51. The district court gave the Legislature until June 20 to enact a remedial plan that would then be used in the November primary election.[1]

The defendant, along with two intervenors (collectively "the defendants"), appealed that decision, and that appeal will be decided in due course by a merits panel of this court. Today, as a motions ("administrative") panel, we consider only the defendants' emergency motions for stay pending appeal. To decide those motions, we consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quotation omitted).

We review the district court's legal conclusions *de novo* and its factual findings for clear error. *NAACP v. Fordice*, 252 F.3d 361, 364–65 (5th Cir. 2001). A finding is clearly erroneous where, after reviewing the entire record, we are "left with the definite and firm conviction" that the district court erred. *Id.* at 365 (quotation omitted).

[1] We take judicial notice that on June 7, 2022, in response to the order *a quo*, the Governor called a special session of the Legislature to begin June 15. By letter to the legislative leadership dated June 10, partly in response to this panel's administrative stay, the Governor expressed hope that that stay would be lifted but concluded by stating, "Should the [Fifth Circuit] retain a stay over [the district court's] decision, I agree that further action of the legislature should be delayed until the Fifth Circuit can review the merits of [that] decision."

II.

We begin with the defendants' likelihood of success on the merits. The defendants posit four ways the district court erred. *First*, they say the court used an unduly expansive measure of the black voting-age population (BVAP). Landry Mot. at 16–17. *Second*, they claim the plaintiffs' illustrative plans relied on insufficiently compact districts. Ardoin Mot. at 8; Schexnayder Mot. at 12–15; Landry Mot. at 17–22. *Third*, they aver that if the state had implemented the plaintiffs' illustrative plans, it would have engaged in an unconstitutional racial gerrymander. Ardoin Mot. at 5–6; Schexnayder Mot. at 12–15; Landry Mot. at 23–24. *Fourth*, they contend that the plaintiffs failed to show white bloc voting in light of evidence indicating substantial white crossover voting. Ardoin Mot. at 7; Schexnayder Mot. at 8–12; Landry Mot. at 24–27.

A.

The first *Gingles* precondition requires plaintiffs to show that a minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. To do that, plaintiffs must first define the minority group.

The plaintiffs defined Louisiana's black population to include anyone who identifies as at least partially black. *Robinson*, 2022 WL 2012389, at *9. That metric, which the parties call "Any Part Black," would count as black a potential voter who identifies, for example, as both black and American Indian. The parties discussed two alternative metrics. One is "DOJ Black," which counts as black a voter who identifies as either solely black or as both black and white. *Id.* at *20. The "DOJ Black" metric would not count as black a voter who identifies, for example, as both black and Asian. The other alternative, which the parties call "Single-Race Black," counts a voter as black only when the voter identifies as black and no other race. *Id.* at *34.

The district court adopted the "Any Part Black" metric. *Ibid.* The defendants claim that decision "contorted" the first *Gingles* precondition. Landry Mot. at 16. They observe that the "Any Part Black" metric "includes persons who may be 1/7th Black and who also self-identify as both Black and Hispanic." Landry Mot. at 17.

True. But we do not appreciate that observation's significance. As the district court noted, the Supreme Court has confronted this question before.[2] It explained that the DOJ Black metric "may have more relevance if the case involves a comparison of different minority groups." *Ibid.* But where "the case involves an examination of only one minority group's" voting strength, the Court considered it "proper to look at *all* individuals who identify themselves as black." *Ibid.*

We have no reason to part from that holding. This case, like *Georgia v. Ashcroft*, presents no need for comparing minority groups. The plaintiffs seek another BVAP-majority district at the expense of a white-majority district. So the district court did not err by using the "Any Part Black" metric to calculate BVAP. The defendants are unlikely to succeed on that basis.

B.

The defendants' next claim also relates to the first *Gingles* precondition—specifically, its requirement that the minority group be "reasonably compact." *LULAC v. Perry*, 548 U.S. 399, 430 (2006). They say that the population of black voters in the plaintiffs' new majority-minority district cannot satisfy that precondition. Landry Mot. at 15–24; Ardoin Mot.

[2] *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003), *superseded by statute on other grounds*, Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577, *as recognized in Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276–77 (2015).

at 8; *see also* Schexnayder Mot. at 12–15. That new district is Congressional District 5 ("CD 5"). Although its exact borders vary,[3] CD 5 stretches from Louisiana's northern border down to Baton Rouge and Lafayette. *See Robinson*, 2022 WL 2012389, at *10, *12.

The plaintiffs' showing of compactness is not airtight. But to warrant a stay, the defendants must make a "strong showing" that they are likely to succeed on the merits. *Nken*, 556 U.S. at 434. And from the record before us, we cannot conclude that the district court erred in holding that the plaintiffs satisfied *Gingles*'s compactness requirement. As the court observed, the "[d]efendants did not meaningfully refute or challenge Plaintiffs' evidence on compactness." *Robinson*, 2022 WL 2012389, at *36. Instead, they put all their eggs in the basket of racial gerrymandering, which we discuss below.

That tactical choice has consequences. It leaves the plaintiffs' evidence of compactness largely uncontested. And based on that evidence, we hold that the defendants have not shown that they are likely to succeed on the merits.

Before explaining why, we should first relate the law governing *Gingles*'s compactness requirement. Importantly, that requirement relates to the compactness of the *minority population* in the proposed district, not the proposed district itself. *LULAC*, 548 U.S. at 433. Although *Gingles* itself described the precondition as a requirement that the minority population be "geographically compact," 478 U.S. at 50, there is more to compactness than geography. Unfortunately, the Supreme Court has not developed a "precise rule" for evaluating all facets of that requirement. *LULAC*, 548 U.S. at 433.

[3] The plaintiffs have introduced six illustrative maps.

But it has identified a few factors.

Beyond geography, plaintiffs must also show that putting the minority population into one district is consistent with "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Ibid.* (quotation omitted); *see also id.* at 432 (noting the importance of the district's population having similar "needs and interests"). Thus, combining "discrete communities of interest"—with "differences in socio-economic status, education, employment, health, and other characteristics"—is impermissible. *Id.* at 432 (quotation omitted). Finally, compactness must be shown on a district-by-district basis, for a "generalized conclusion" cannot adequately answer "the relevant local question whether the precondition[ ] would be satisfied as to each district." *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022) (per curiam) (quotation omitted).

The plaintiffs introduced evidence sufficient to show that the population of black voters in their illustrative CD 5 likely satisfied the first *Gingles* precondition.

First, like the district court, we think the illustrative CD 5 appears geographically compact upon a visual inspection. *See Robinson*, 2022 WL 2012389, at *39. To assess geographical compactness, we may examine the shape of proposed districts. *See Bush v. Vera*, 517 U.S. 952, 980–81 (1996). And the illustrative versions of CD 5 largely appear compact to the naked eye. They all have their rectangular core in the parishes in the northeastern region of Louisiana between its border with Arkansas and Baton Rouge. *Robinson*, 2022 WL 2012389, at *10, *12. Indeed, the illustrative CD 5 typically appears just as compact as the benchmark CD 5, if not more so. All have their core in the delta parishes of northeast Louisiana. *See Robinson*, 2022 WL 2012389, at *2, *10, *12. And although the illustrative versions of CD 5 have small tendrils that jut into parts of central Louisiana, they also

eliminate part of a tendril in the benchmark CD 5 that extends deep into southeastern Louisiana, capturing all but one parish that borders Mississippi. *Compare id.* at *10, *12, *with id.* at *2.

The district court, however, also assessed geographic compactness with mathematical measures provided by the plaintiffs' map-drawing experts, William Cooper and Anthony Fairfax. *See id.* at *35–36. Those experts showed that the districts in their illustrative plans had better Reock, Polsby-Popper, and Convex Hull scores on average than the districts in the benchmark plan. *See id.* at *36. The problem with that analysis is that it addresses compactness on a plan-wide basis, not a district-by-district basis—as the first *Gingles* precondition requires. *Wis. Legislature*, 142 S. Ct. at 1250. Thus, we cannot rely on that evidence to conclude that the minority population in the plaintiffs' proposed district is geographically compact. Even so, our visual inspection of the proposed CD 5 leads us to agree with the district court that the plaintiffs likely showed that it was geographically compact.

Second, as the district court concluded, the illustrative maps respect traditional redistricting criteria. Both map-drawers testified that they took criteria such as "political subdivision lines, contiguity" and "the Legislature's Joint Rule 21" into account when drawing their maps. *Robinson*, 2022 WL 2012389, at *10, *13. Fairfax also said he grouped populations with similar economic demographics together and attempted to keep census designated places together when possible. *Id.* at *13–14. 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. *Id.* at *11. The district court found both of those experts credible based on their extensive experience in this area, the analytical quality of their reports, their perceived candor, and their ability to respond to cross-examination persuasively. *Id.* at *38–39. Thus, their 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.

Unfortunately, the district court also made the same mistake here that it did in analyzing geographical compactness—namely, analyzing consistency with traditional redistricting criteria on a plan-wide basis. Specifically, the court corroborated the experts' representations by comparing the number of split political subdivisions in the illustrative and benchmark plans. *See id.* at *39. But once again, the *Gingles* inquiry relates to specific districts—not redistricting plans as a whole. *Wis. Legislature*, 142 S. Ct. at 1250. The district court thus erred by failing to focus on the compactness of the black population in the plaintiffs' specific proposed districts. Even so, the rest of its analysis is enough to show that the plaintiffs are likely to succeed in showing the first *Gingles* precondition. We thus do not disturb the district court's finding on this point.

Finally, as the district court concluded, the illustrative CD 5 preserves communities of interest. The plaintiffs introduced extensive lay testimony supporting their claim that the black populations in the illustrative CD 5 were culturally compact. Those witnesses testified that the black populations in those regions share family, culture, religion, sports teams, and the media they consume. *Robinson*, 2022 WL 2012389, at *15. They also emphasized the educational ties between northeastern Louisiana and the Baton Rouge area, including the fact that many residents of the delta parishes attend college at Southern University in Baton Rouge. *Ibid.* Likewise, they noted that the black voters in those regions share the same economic interests in the petroleum and sugarcane industries. *Id.* at *16. And all this testimony went unrebutted: The "[d]efendants did not call any witnesses to testify about communities of interest." *Id.* at *40. Accordingly, we must agree with the district court that the plaintiffs showed that their proposed CD 5 respected

communities of interest.

Granted, the plaintiffs' evidence has weaknesses. But at this pre-merits stage, it is stronger than the evidence produced by the defendants. Again, as the district court observed, the "[d]efendants did not meaningfully refute or challenge Plaintiffs' evidence on compactness"; they instead tried to show racial gerrymandering. *Id.* at *36. Indeed, 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 motions for a stay. Although that would be grounds enough for us to reject the defendants' position in this posture, we discuss what little evidence the defendants introduced in the interest of showing that the district court's conclusion on compactness was not erroneous despite its analytical errors. That's because the testimony the defendants introduced in the district court only obliquely and unpersuasively supports their claim that CD 5's black population is not compact.

First, the defendants' expert Dr. Thomas Bryan observed that the illustrative districting exercised "surgical" precision in splitting Baton Rouge and Lafayette between congressional districts such that the black neighborhoods were included in CD 5. *Id.* at *17. Those split political divisions tend to show that CD 5 breached a traditional redistricting criterion in those locations and raise the possibility that CD 5 divides communities of interest based in a single municipality. But providing 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 any implication that the proposed CD 5 splits up communities of interest in Baton Rouge and Lafayette is outweighed by the plaintiffs' direct testimony that the black populations in CD 5 are culturally compact.

Second, the defendants' expert Dr. Christopher Blunt introduced evidence relating to simulations of redistricting. Dr. Blunt ran 10,000 simulations of redistricting in Louisiana and concluded that his simulated districts never had a majority of black voters and were more compact than those in the illustrative plans. *Id.* at *18–19. By his own admission, however, he did not take communities of interest, previous district boundaries, or municipal boundaries into account when programming his simulations. *Id.* at *19. And as the district court observed, "Dr. Blunt has no experience, skill, training or specialized knowledge in the simulation analysis methodology that he employed to reach his conclusions." *Id.* at *37. Thus, because of Dr. Blunt's shortcomings as a witness and the fact that his simulations "did not incorporate the traditional principles of redistricting required by law," the district court concluded that "his opinions merit little weight." *Ibid.* In accord with that finding of fact, we discount his opinion as well for whatever purpose it could serve in showing the compactness (or lack thereof) among the black voting population.

Third, the defendants' expert Dr. M.V. Hood III analyzed the core retention of the districts in the illustrative and benchmark plans. *Id.* at *19–20. He testified that the districts in the plaintiffs' illustrative plans—including CD 5—had lower core retention on average than the districts in the enacted plan. *Ibid.* But that analysis has little value, for the defendants have not explained why Louisiana's previous districting should be used as a measuring stick for compactness. Accordingly, Dr. Hood's analysis has little value in evaluating whether the plaintiffs satisfied the compactness requirement.

Finally, the defendants also introduced the testimony of their expert Dr. Alan Murray, who analyzed the spatial distribution of the black voting age population and the white voting age population in Louisiana. *Id.* at *20. He concluded that "the Black and White populations in Louisiana are

heterogeneously distributed" across the state. *Id.* at *38. But that statewide analysis 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. Therefore, the district court did not err in giving that analysis little weight.

The arguments that the defendants make on appeal fare no better—especially since they have the burden to make a "strong showing" that the district court erred. *Nken*, 556 U.S. at 434. *First*, they say that CD 5 spans long distances. Landry Mot. at 21–22; Ardoin Mot. at 8; Schexnayder Mot. at 13. But they do not explain 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. Accordingly, that observation does not displace the district court's conclusion that plaintiffs had satisfied the compactness inquiry.

Second, the defendants say that the plaintiffs' proposal combines populations of voters that are not culturally compact. *See LULAC*, 548 U.S. at 430–35. The Attorney General maintains that the plaintiffs "reach[ed] out to grab small and apparently isolated minority communities" to pack into CD 5 by stretching some of their illustrative districts down to Lafayette and Baton Rouge, splitting those cities and including only black neighborhoods in CD 5. *See* Landry Mot. at 17–21 (quoting *LULAC*, 548 U.S. at 433). The Secretary of State also observes that the illustrative CD 5 combines rural populations in northern Louisiana with urban populations in Baton Rouge, which have distinct interests. Ardoin Mot. at 8. But Dr. Bryan made the same observations before the district court, and we reject these arguments here for the same reasons. That evidence only moderately weighs against a finding of compactness, and it is outweighed by the evidence plaintiffs introduced in favor of that finding.

Finally, the defendants claim that the district court analyzed only the compactness of the plaintiffs' proposed districts when it should have analyzed the compactness of the black population instead. Landry Mot. at 22–23; Ardoin Mot. at 8. The district court, the defendants observe, credited the plaintiffs' expert testimony that their districts were more compact on average throughout the state. Landry Mot. at 22–23; Ardoin Mot. at 8. As we have explained, we agree that was error (although for a different reason).[4] But once again, we conclude that that error is not fatal to the district court's overall finding that plaintiffs have shown that the black voting population in CD 5 is likely to be compact.[5]

In sum, the plaintiffs have much to prove when the merits are ultimately decided. But our review is limited by the evidence and arguments that defendants chose to present in the district court and on appeal, with the burden on the defendants to show that a stay is appropriate. *Nken*, 556 U.S. at 434. When we consider the record as the parties have developed it, the defendants have not shown they are likely to succeed on the merits of their appeal.

[4] It is a correct statement of law to say that the compactness of the minority population—not the proposed district—is what matters for the first *Gingles* precondition. *LULAC*, 548 U.S. at 433. But the geographic compactness of a district is a reasonable proxy for the geographic compactness of the minority population *within* that district, which is one factor in the compactness inquiry.

[5] The Attorney General also complains that the plaintiffs ran their calculations using an incorrect measure of the size of the black population and that their proposed districts barely qualify as majority-black districts. *See* Landry Mot. at 16–17. But we have already explained why the plaintiffs' measure is consistent with Supreme Court precedent. And if their measure is accurate, then the fact that their proposed districts have only small majorities of black voters does not prevent them from satisfying the first *Gingles* precondition.

C.

The defendants further suggest that they will succeed on the merits because the "Plaintiffs' illustrative plans are plainly racial gerrymanders." Ardoin Mot. at 5; *see also* Schexnayder Mot. at 13, Landry Mot. at 23. Race was undoubtedly a factor in the drawing of the illustrative maps. But, as the district court noted, 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, or that complying with the district court's order would require the Legislature to adopt a predominant racial purpose.

Racial gerrymandering is prohibited by the Equal Protection Clause of the Fourteenth Amendment. *Shaw v. Reno*, 509 U.S. 630, 642 (1993). A state racially gerrymanders when it assigns its citizens to legislative districts based on their race, such that "one district [contains] individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin." *Id.* at 647. The Supreme Court has, however, recognized high bars to challenging supposed racial gerrymanders. For a legislative map to constitute a racial gerrymander, a challenger must show that race was the "predominant factor" in its design, such that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The defendants point out that the illustrative maps presented by the plaintiffs were drawn with race in mind. Cooper, a key expert relied on by plaintiffs to meet the first prong of *Gingles*, freely admitted that the plaintiffs had "specifically asked" him to draw maps with two minority-majority

districts.[6] *Robinson*, 2022 WL 2012389, at *47. And as noted above, the maps proposed by the plaintiffs featured districts that, the defendants say, split cities and encompass geographically divergent communities. The defendants also point to the work of their own experts, including Dr. Blunt, who ran thousands of random simulations but was unable to produce any black-majority districts. *Id.* at *18.

But despite that evidence, the defendants have not overcome the district court's factual findings indicating that the illustrative maps are not racial gerrymanders. Cooper and the plaintiffs' other key expert, Anthony Fairfax, both testified that, while they considered race, they did not subordinate race to other redistricting criteria, and the district court deemed that testimony credible. *Id.* at *47. As explained above, both experts weighed racial considerations alongside traditional factors such as communities of interest and respect for political subdivisions. On the other hand, the defendants' experts often ignored those same traditional factors. That omission, along with other shortcomings of expertise and demeanor, led the district court to deem the testimony of the defendants' experts on the question of predominant racial purpose to be "poorly supported," *id.* at *36, "merit[ing] little weight," *id.* at *37, and "unilluminating," *id.* at *38.

Neither are the plaintiffs' proposed maps so bizarrely shaped as to be "unexplainable on grounds other than race." *Shaw*, 509 U.S. at 643 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). As explained above, other factual 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

[6] Cooper's "admission" is unsurprising because determining whether another majority-minority district can be drawn consistent with traditional districting principles is the purpose of a *Gingles* claim.

principles such as communities of interest. The proposed districts also tend to be as geographically compact as the current map, and neither our visual inspection nor the defendants' analysis indicates that any districts are particularly unnatural. Though the plaintiffs considered race, the defendants have not shown that that consideration predominated over more traditional redistricting principles. The inference of racial intent is an intensely factual process, *see Arlington Heights*, 429 U.S. at 266, and the unchallenged findings of the district court foreclose the defendants' contention that the plaintiffs' illustrative maps are racial gerrymanders.

Moreover, 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. The Legislature need not enact any of them. For similar reasons, we have rejected the proposition that a plaintiff's attempt to satisfy the first *Gingles* precondition is invalid if the plaintiff acts with a racial purpose. *See Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1406–07 (5th Cir. 1996).[7]

The plaintiffs have proposed several alternative maps, and the Legislature has previously considered maps that would create two minority-majority districts. *Robinson*, 2022 WL 2012389, at *5. The Legislature will be free to consider all those proposals or come up with new ones and to weigh whatever factors it chooses alongside the requirements of *Gingles*. The task will no doubt be difficult, but the Legislature will benefit from a strong

[7] Contrary to the Attorney General's position, that holding has not been overruled by the Supreme Court's observation that *Gingles* plaintiffs must demonstrate that their proposed districts will perform to elect minority-preferred candidates. *See Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018); *Harding v. Cnty. of Dallas*, 948 F.3d 302, 309–11 (5th Cir. 2020).

presumption that it acts in good faith. *See Miller*, 515 U.S. at 915.

The defendants observe that all the plaintiffs' maps have one feature in common: They combine "East Baton Rouge [Parish] with the Delta Parishes." Schexnayder Reply at 6. They claim that the first *Gingles* precondition cannot be satisfied without that feature, but that its "racial design" is "clear." *Ibid*. Yet as we have explained, the plaintiffs advanced race-neutral reasons supporting that combination, and the district court accepted them. Moreover, it does not necessarily follow that, for a *Gingles* claim to succeed, there must be more than one way to draw a compliant, non–racially gerrymandered district. The plaintiffs have shown that it is possible to draw a second *Gingles* district while giving due weight to traditional redistricting criteria; that is enough.

We do not rule out that a *Gingles* showing transparently dependent on racial gerrymandering might fail under *Gingles*'s totality-of-the-circumstances assessment. *Gingles*, 478 U.S. at 43; Schexnayder Reply at 5–6. But where, as here, the district court's findings suggest that racial gerrymandering is far from inevitable, that doctrine presents no obstacle to orders like the one issued by the district court.

The defendants and their *amici* are not the first to point out that the doctrine of racial gerrymandering exists in some tension with *Gingles*. Weigh race too heavily and a legislature risks violating the Constitution; weigh it too lightly and a legislature risks violating the VRA. *See, e.g.*, *Perez*, 138 S. Ct. at 2315. Legislators who are found to have racially gerrymandered often insist that they were merely seeking to comply with *Gingles*. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1468–69 (2017). But that friction remains part of the law, and it is not for us to resolve. If the plaintiffs' *Gingles* showing is invalid because of racial gerrymandering, it is difficult to see how any *Gingles* showing could be successful. *Gingles* remains good law, and so the defendants have

not shown that they are likely to succeed on that basis.

D.

The defendants' final merits challenge concerns the third *Gingles* precondition. Plaintiffs seeking to compel states to create more majority-minority districts must show that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51. The plaintiffs must show that such bloc voting would be present in the *challenged* districting plan. *Harris*, 137 S. Ct. at 1470; *LULAC*, 548 U.S. at 427; *Growe v. Emison*, 507 U.S. 25, 40 (1993). And that conclusion must be true for voters in a particular location; recall that a "generalized conclusion" cannot adequately answer "the relevant local question whether the preconditions would be satisfied as to each district." *Wis. Legislature*, 142 S. Ct. at 1250 (quotation omitted).

So 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"? *Covington v. North Carolina*, 316 F.R.D. 117, 171 (M.D.N.C. 2016) (three-judge court) (emphasis omitted), *aff'd*, 137 S. Ct. 2211 (2017) (mem.). Although the answer will likely depend in some measure on the number of white voters who buck racial trends and vote for the minority-preferred candidate, 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. *See, e.g.*, *Westwego Citizens for a Better Gov't v. City of Westwego*, 946 F.2d 1109, 1119 (5th Cir. 1991).

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. *Robinson*, 2022 WL 2012389, at *50–51. The court primarily relied on the plaintiffs' two experts, who explained that, despite some white crossover voting, "no Black-preferred candidate" had won a statewide or congressional race in the elections they examined except in CD 2, the preexisting majority-minority district. *Id.* at *50. And it dismissed the testimony of the defendants' experts, who pointed to some examples where whites did not vote as a bloc or where black voters would have been able to elect the candidates of their choice if the proposed maps had been in place. *Id.* at *50–51. It reasoned that those experts' examples were based on a single, unusual election—the 2020 Presidential Contest—and relied on "limited data" or "outlier[s]," unlike the analyses offered by the plaintiffs' experts. *Id.*

Whether bloc voting will usually defeat black voters' attempts to elect their preferred candidates is a question of fact. *Rangel v. Morales*, 8 F.3d 242, 245 (5th Cir. 1993). Nevertheless, we review *de novo* the district court's application of the legal standard for bloc voting.

The defendants challenge that application. They say the "district court failed to ask the correct legal question." Schexnayder Mot. at 11. And they claim that the plaintiffs "failed to prove, or even address," the question of whether white crossover voting was "legally significant," which is to say that it would normally cause minority voters' preferred candidates to lose. *Id.* at 8–9 (quotation omitted). In their telling, the plaintiffs' experts established only that "black voters and white voters voted differently." *Id.* at 9 (quotation omitted).

We disagree. The district court framed the legal question correctly. Although it discussed crossover voting, it explained that "crossover voting was *inherently* included in" the plaintiffs' experts' analysis. *Robinson*, 2022 WL 2012389, at *51 (emphasis added). It concluded 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." *Id.* In other words, 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. *Contra* Schexnayder Reply at 3. And the plaintiffs' experts tailored their analysis to that question. They considered the outcomes of elections, not the abstract behavior of voters by race. *Robinson*, 2022 WL 2012389, at *50.[8]

Next, the defendants claim that *Covington* supports their position. Schexnayder Mot. at 8–12; Schexnayder Reply at 3. They correctly observe that the question under *Covington* is whether, without a VRA remedy, the minority voters' preferred candidate will usually lose. 316 F.R.D. at 170–71. But the defendants then explain that this case is like *Covington* because all experts acknowledge that some parts of Louisiana enjoy significant white crossover voting. Schexnayder Mot. at 10–11.

That contention loses the plot. As the defendants themselves have explained, crossover voting is not relevant *per se*; it is relevant only for its effect on the *outcome* of elections.[9] Crossover voting in unspecified locations

[8] As we did in the context of the first *Gingles* precondition, we reiterate that what matters for the third *Gingles* precondition is whether black voters *in the proposed district* could elect the candidates of their choice under the challenged districting, not whether black voters in all parts of the state could. *See Wis. Legislature*, 142 S. Ct. at 1250. Thus, the experts' analysis of white bloc voting statewide was not strictly relevant. But those experts also analyzed voting behavior "in the enacted plan districts that would contribute voters to an additional Black opportunity congressional district." *Robinson*, 2022 WL 2012389, at *50. Accordingly, their analysis is enough to support the district court's conclusion that the plaintiffs were likely to succeed on their claims—especially given the defendants' weak evidence and the deference we owe to the district court.

[9] *See* Schexnayder Reply at 1 ("The [third precondition] question does not turn on 'any' crossover voting but on *whether it is sufficiently robust that 'a VRA remedy' is unnecessary to ensure equal opportunity*." (emphasis added)).

that can range as high as "26%," Schexnayder Mot. at 11, is not enough to defeat the district court's conclusions about the likely future outcomes of elections. Doing so would require more persuasive evidence that reveals the likely outcomes in elections in a particular district at issue. *See Wis. Legislature*, 142 S. Ct. at 1250.

Even less relevant is the defendants' observation that a hypothetical district could elect black-preferred candidates with as little as 40% BVAP. Landry Mot. at 25–26; Schexnayder Mot. at 11; *see* Schexnayder Reply at 3. That observation fails to account for the third *Gingles* precondition's focus on the *actual* challenged districting. *Harris*, 137 S. Ct. at 1470; *LULAC*, 548 U.S. at 427; *Growe*, 507 U.S. at 40. As the plaintiffs observe, 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. Robinson Response at 16. To the extent that the defendants intend to contest the district court's factual findings, this observation is inadequate to show clear error, at least for the purposes of our preliminary review in deciding these motions for a stay.

The defendants also claim that the court's decision is incompatible with *Harris*. Ardoin Mot. at 7; Schexnayder Reply at 2–3. After *Harris*, the plaintiffs cannot rely, defendants say, on the "black population in [East Baton Rouge Parish], where there is substantial crossover voting." Ardoin Mot. at 7. Because they cannot satisfy the first *Gingles* precondition without those voters, the argument goes, the plaintiffs cannot succeed. *Ibid.*

That position misconstrues *Harris*. There, the Supreme Court confronted a wholly different scenario. Race predominated in the state's districting process, *Harris*, 137 S. Ct. at 1468–69, and the state claimed that that predominance was necessary to comply with the VRA, *id.* at 1469. Part of its

stated rationale included the mistaken assumption that, to satisfy the VRA, minority groups who satisfied the first and second *Gingles* preconditions but could not satisfy the third precondition on account of crossover voting were nonetheless entitled to a majority-minority district. *See id.* at 1472; *see also Bartlett v. Strickland*, 556 U.S. 1, 14–15 (2009) (plurality opinion). But the Court reaffirmed the principle that the third precondition is a *sine qua non* of a *Gingles* claim. *Harris*, 137 S. Ct. at 1472. If a minority group can already elect its preferred candidates, it does not matter whether that ability accrues in a majority-minority or a performing crossover district.

Harris means these plaintiffs could not satisfy the third *Gingles* precondition if they *usually* were able to elect candidates of their choice. But that is not what the district court found. *Harris* does not mean that the third *Gingles* precondition is unsatisfied if some black voters necessary to form a majority happen to reside near white voters who share their political beliefs. That fact could *influence* the dispositive question, but the defendants have not presented sufficient evidence for us to conclude that the district court's factual findings were clearly erroneous.[10]

Finally, the defendants say the district court improperly "shift[ed] the [plaintiffs'] burden" to prove white bloc voting onto the defendants. Schexnayder Mot. at 12. They claim the court relied on the defense's failure to produce "sufficient data." *Ibid.* (quoting *Robinson*, 2022 WL 2012389,

[10] We do not address the related question whether the third *Gingles* precondition can be satisfied where a substantial portion of the minority voters included in the *Gingles* coalition will already be able to elect candidates of their choice under the enacted plan because they live in a majority-minority district. That could be true of East Baton Rouge Parish voters who live in the enacted CD 2, which is a majority-minority district that is likely to elect black-preferred candidates. But no party has asked us to decide that question. *See United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). The defendants have instead focused on the presence of white crossover voting around those minority voters.

at *51).

But the defendants mischaracterize the district court's analysis. It said that one of the defendants' experts failed to support his *opinion* with "sufficient data," *Robinson*, 2022 WL 2012389, at *51, not that the defendants had failed to produce sufficient data to support a hypothetical burden. A court does not impose a burden of proof on a party by observing that the party's rebuttal evidence is uncompelling. Instead, it concludes that the other party has met its burden of proof.

* * *

None of the defendants' merits challenges to the district court's order carries the day. We thus conclude that the defendants have not met their burden of showing likely success on the merits. Because likelihood of success is "arguably the most important factor," that fact weighs heavily against the stay. *Tesfamichael v. Gonzales*, 411 F.3d 169, 176 (5th Cir. 2005).

III.

It is beyond dispute that the defendants would suffer irreparable harm absent a stay. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013). That harm is especially clear in voting rights cases: Wrongly enjoined maps may be restored, but "[s]etting aside an election is a drastic remedy" that courts seldom undertake. *Rodriguez v. Bexar Cnty.*, 385 F.3d 853, 859 n.2 (5th Cir. 2004). Not using the state's enacted maps will irreparably injure the defendants, so this prong favors the requested stay.

IV.

We next decide whether the balance of equities and the public interest

favor a stay. *See Tex. Democratic Party v. Abbott*, 961 F.3d 389, 397 (5th Cir. 2020). The equities favor a stay if it would benefit the defendants more than it would harm the nonmovants. *See Nken*, 556 U.S. at 434. We then must ask whether a stay would serve the public interest. *Ibid.* Those factors merge where the state seeks to stay an injunction against its legislative enactments. That's because the state's interest in enforcing its laws merges with the public's interest in the same. *E.g.*, *Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). Thus, if the equities favor the nonmovants, so will the public interest. *See Tex. Democratic Party*, 961 F.3d at 412.

The defendants offer three reasons why those factors favor a stay. *First*, they say that *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), precludes an injunction months before the November primaries. *Second*, they contend that we should stay the case pending the outcome of *Merrill v. Milligan*, which the Supreme Court will hear next term. *Third*, they complain that the district court did not give the Legislature enough time to adopt remedial maps.

None of those grounds supports a stay.

A.

The defendants first invoke the principle of election nonintervention, which they attribute to *Purcell*. Enjoining election laws before an election may confuse voters, and that risk, *Purcell* says, "will increase" as the election nears. *Id.* at 5. We and the Supreme Court have applied *Purcell* to stay injunctions that threaten to confuse voters, unduly burden election administrators, or otherwise sow chaos or distrust in the electoral process.[11] In one

[11] *See, e.g.*, *Tex. All. for Retired Ams. v. Hughs*, 976 F.3d 564, 566–67 (5th Cir. 2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (per curiam); *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (per curiam); *Moore v. Harper*, 142

formulation, *Purcell* asks whether obeying the district court's injunction would "be feasible without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). If not, the defendants might be entitled to a stay.

But the defendants have not identified a comparable case where we or the Supreme Court has applied *Purcell*'s principle. Here, the primary elections are five months away. The earliest impending deadline by which candidates must qualify for the primaries is June 22. *Robinson*, 2022 WL 2012389, at *60. Most candidates qualify for the primaries later by paying a small filing fee; the deadline for that is more than a month away. *Ibid.* Overseas absentee ballots need not be mailed until late September, and early voting begins in October. *Ibid.*

The classic *Purcell* case is different. It concerns an injunction entered days or weeks before an election—when the election is already underway. In *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014), we stayed an injunction entered nine days before the start of early voting. In *Texas Alliance*, we stayed an injunction entered eighteen days before the start of early voting. 976 F.3d at 567. In *Texas Democratic Party*, we stayed an injunction entered "weeks" before the start of in-person voting. 961 F.3d at 411. *Purcell* itself stayed an order changing election laws twenty-nine days before an election. *Tex. All.*, 976 F.3d at 567. And the Supreme Court has blocked injunctions entered five,[12] thirty-three,[13] and sixty days[14] before Election Day. Even *Merrill*, an

S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring); *Merrill v. Milligan*, 142 S. Ct. 879, 880–81 (2022) (Kavanaugh, J., concurring).

[12] *RNC*, 140 S. Ct. at 1206–07.

[13] *Tex. All.*, 976 F.3d at 566 (citing *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014)).

[14] *Id.* at 567 (citing *Husted v. Ohio State Conf. of the NAACP*, 573 U.S. 988 (2014)).

outlier cited by the defendants, Schexnayder Reply at 10, stayed an election less than four months away, where absentee voting would start in about two months, 142 S. Ct. at 888 (Kagan, J., dissenting).

That is not to say that *Purcell* is just a tallying exercise. It is not. Even where an election is many months away, the movant's showing a likelihood of success on the merits, for example, may counsel in favor of staying a district court's injunction.[15] But previous applications of *Purcell* differ enough from this case that we must inquire further.

In hopes of showing that the district court's injunction implicates *Purcell*, the defendants highlight the testimony of Sherri Hadskey, the state elections commissioner. Ardoin Mot. at 14–15. According to the defendants, Hadskey stressed three injuries that might result from the injunction.

First, Hadskey represented that "a new congressional plan," *id.* at 14, would require the state "to reassign voters who are in new congressional districts" under the enjoined maps to the remedial districts required by the district court, *id.* at 15. About 250,000 of those voters already have received notice of their districts under the enacted maps, and the defendants say informing those voters of yet another change to their districts could confuse them. *Ibid.*

We don't doubt that multiple mailings could confuse some voters. But at this early stage, any confusion would be minimal. More than enough time remains for the state to assuage any uncertainty before the primary elections. This is not a case, for example, where many voters already have cast ballots

[15] *Cf. Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (noting that *Purcell*'s application reflects "ordinary stay principles"); *see also Nken*, 556 U.S. at 434 ("The first two factors of the traditional standard" for evaluating a stay—irreparable injury and the likelihood of success on the merits—"are the most critical.").

or submitted ballot applications, such that conducting an election with new lines would throw into doubt whether those votes would count or whether voters should request new ballots. *See, e.g.*, *LULAC v. Abbott*, No. 1:21-CV-991, 2022 WL 1410729, at *31 (W.D. Tex. May 4, 2022) (three-judge court). Here, weeks remain before the earliest candidate filing deadline, and months remain before the primary elections.

Second, Hadskey noted that the June 22 deadline for candidates to qualify for office by petition is fast approaching. *Ibid.* "If congressional candidates do not meet" that deadline, the defendants state, "the candidates will have to pay a filing fee and qualify by" late July. Ardoin Mot. at 15.

But the defendants have not shown that those deadlines implicate the *Purcell* principle. The June 22 deadline applies only to the few candidates who choose to qualify by nominating petition, and the record suggests that adjusting that deadline would not impact voters. *Robinson*, 2022 WL 2012389, at *60. It merits mention that even this June 22 deadline was extended by the district court to July 8. *Robinson*, 2022 WL 2012389, at *63. On that score, we also remind the parties and the district court that as this litigation progresses, "[i]f time presses too seriously, the District Court has the power appropriately to extend" that deadline and other "time limitations imposed by state law." *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972). And we agree with the district court that the State has enough time to implement new maps without having to change the more popular July filing deadline. *See Robinson*, 2022 WL 2012389, at *59. After all, as the district court recounted, Hadskey herself testified that after the enacted map became law, her office updated their records and notified affected voters in less than three weeks. *Ibid.* Yet almost six weeks remain before the July filing deadline. Those facts also discredit the defendants' assertion that the district court's injunction will rush election administrators, causing them to make more mistakes. *See* Ardoin Mot. at 17. The risk of mistakes is

relevant under *Purcell*, but we agree with the district court that the injunction does not meaningfully increase that risk.

Third, Hadskey identified other administrative burdens that an injunction would cause. The defendants highlight several of those burdens, including the need to "conduct[ ] yearly maintenance on scanners and voting equipment" and to review the voter rolls for accuracy—a process that the defendants say began on May 23. *Id.* at 15. Hadskey also noted the risk posed by a national paper shortage, which could threaten the state's ability to produce enough ballot envelopes. *Robinson*, 2022 WL 2012389, at *32.

We agree 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 *60. Notably, the district court credited the testimony of the Governor's executive counsel, who explained that Louisiana has significant experience adjusting the time, place, and manner of elections and has the administrative capacity to draw a new map before this election. *See id.* at *31, *60. On the other hand, the district court found unconvincing the aforementioned testimony of Hadskey. Ultimately, the district court found that "although the administrative tasks that would be necessitated by a new congressional map would challenge the Secretary of State's office, the effort required would not be a heroic undertaking." *Id.* at *59. The court further explained that it did not perceive any specific reasons why voter notices could not be sent out in time. *Ibid.*; *see also Purcell*, 549 U.S. at 5 (finding error for court of appeals not to defer to discretion of district court).

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." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). Here, the burdens threatened by the injunction are, as far as the defendants have shown, entirely ordinary.

Take, for example, the national paper shortage that the defendants invoked at the district court. Though we can imagine a case where a paper shortage would augment the hardship of an injunction, this is not that case. No 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. *Robinson*, 2022 WL 2012389, at *59. Changing the lines would mean that the defendants must mail new notices to many voters. But the district court doubted that a paper shortage, even if it complicated matters, could prevent the State from notifying voters of their districts before the elections months away. Moreover, the district court found that the State's digital voter outreach "can also provide information about any district changes." *Ibid.*

The defendants cite no case applying *Purcell* to stay an injunction this far from an election. Nor have they shown that the risks of chaos, distrust, or voter confusion at the heart of *Purcell* are present here. As Justice Kavanaugh made clear, the *Purcell* doctrine is about voter confusion and infeasibility, not administrative convenience. So we will not stay the order on that ground.

B.

The defendants next maintain that this proceeding should have been stayed pending the Supreme Court's decision in *Merrill*. The district court denied a similar motion, Dkt. 135, but that decision is not before us. Here, we decide only whether *Merrill*'s pendency justifies staying the injunction, and it does not.

It is true that *Merrill* (Sup. Ct. 21-1086), concerns many of the same issues as this case: The *Merrill* plaintiffs sued under *Gingles*, claiming that the VRA required the state of Alabama to create an additional minority-

majority district. The Court's resolution of that case might, or might not, shed light on this one.

But the Court plans to consider *Merrill* during October Term 2022. That means that 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. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936).[16] We do not grant the defendants' requested stay on this ground.

C.

The defendants also urge us to stay the district court's order to give the Louisiana Legislature more time to enact a remedial plan. Schexnayder Mot. at 18. But they have not explained why they cannot enact a new plan in the time that the district court allotted, so we will not stay the injunction on that ground.

The defendants complain that the district court gave the Louisiana Legislature only fourteen days—until June 20—"to enact a remedial plan." *Robinson*, 2022 WL 2012389, at *1. Because the Legislature's regular session has ended, Schexnayder Mot. at 18, the defendants say that any redistricting effort would have to proceed in a special session, LA. CONST. art. III, § 2(B). But a special session requires seven days' notice, *ibid.*, and the

[16] *See also Merrill*, 142 S. Ct. at 879 (Kavanaugh, J., concurring in grant of stay) ("[T]he principal dissent is wrong to claim that the Court's stay order makes any new law regarding the Voting Rights Act. The stay order does not make or signal any change to voting rights law."); *id.* at 882 (Roberts, C.J., dissenting from grant of stay) ("I respectfully dissent from the stays granted in these cases because, in my view, the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction.").

Legislature cannot enact a bill without reading it "at least by title on three separate days in each house" and holding a public hearing, *id.* art. III, § 15(D). Those requisites would leave the Legislature only five working days to craft new redistricting maps. Schexnayder Mot. at 18. So the defendants conclude that "[t]he district court set the Legislature up to fail." *Ibid.*

In theory, that complaint could justify narrowing the district court's remedy. A stay pending appeal "suspends judicial alteration of the status quo," *Veasey*, 870 F.3d at 392 (cleaned up); the Supreme Court has stressed that courts should afford legislatures "a reasonable opportunity" to fix constitutionally defective maps, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); and unduly shortening the time to enact curative maps could rob a legislature of that opportunity. That lost chance would burden the defendants, and "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

But the defendants request a stay—not more limited relief. And while five legislative days is not much time, the defendants do not explain, beyond bare assertion, how or why that period is too short. And the record suggests that period *would* suffice. Before enacting the maps contested here, the Legislature considered "alternative maps with two majority-minority districts." *Robinson*, 2022 WL 2012389, at *5. Thus, the special session would not start from scratch. *Id.* at *31. We conclude that a stay is not necessary. This is especially so because, as the district court stressed in refusing to stay its order pending appeal, "[i]f Defendants need more time" to draw a new map, the district court would "favorably consider a Motion to extend the time to allow the Legislature to complete its work." Dkt. 182 at 3 (emphasis omitted).

V.

For the foregoing reasons, the administrative stay is VACATED, and the motions for stay pending appeal are DENIED. This appeal is *sua sponte* EXPEDITED.

We direct the Clerk to issue an expedited briefing schedule and to calendar this matter for argument before the next available randomly selected merits panel that is already scheduled to hear arguments during the week of July 4, 2022. Our ruling here concerns only the motions for stay pending appeal; "our determinations are for that purpose" only "and do not bind the merits panel." *Veasey*, 870 F.3d at 392. At this preliminary, non-merits stage, the defendants have merely fallen short of carrying their burden. That said, neither the plaintiffs' arguments nor the district court's analysis is entirely watertight. And it is feasible that the merits panel, conducting a less-rushed examination of the record in the light of differently framed arguments, may well side with the defendants.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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Suite 115
NEW ORLEANS, LA 70130

June 12, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-30333 Robinson v. Ardoin
USDC No. 3:22-CV-211
USDC No. 3:22-CV-214

Enclosed is the opinion entered in the case captioned above.

An expedited briefing schedule will issue under separate cover.

Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

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United States Court of Appeals

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June 28, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-30333 Robinson v. Ardoin
USDC No. 3:22-CV-211
USDC No. 3:22-CV-214

The parties are requested to file letters by July 6, 2023 addressing whether this court should remand the appeal to allow the district court to consider the new authority.

Also, the Court requests that the parties file supplemental briefs addressing the Supreme Court's June 8, 2023, decision in No. 21-1086, Allen v. Milligan, and any other developments or caselaw that would have been appropriate for Rule 28(j) letters over the past year had the case not been in abeyance. The appellants' brief is due 40 days from this date. The appellees' brief is due 30 days after the appellants' brief has been filed. The appellants may file a reply brief 21 days after the appellees' briefs have been filed.

Sincerely,

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July 6, 2023

VIA ELECTRONIC FILING

Lyle W. Cayce
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Robinson v. *Ardoin*; *Galmon* v. *Ardoin*, No. 22-30333

Dear Mr. Cayce:

Plaintiffs-Appellees in this consolidated appeal submit this letter in response to the Court's Memorandum of June 28, 2023. The Memorandum requests the parties to address whether, following the Supreme Court's decision in *Allen* v. *Milligan*, No. 21-1086 (June 8, 2023), the Court should remand the appeal of this matter to allow the district court to consider the new authority. The Memorandum also directs the parties to submit supplemental briefs addressing *Milligan* and any other developments or caselaw that would have been appropriate for Rule 28(j) letters over the past year.

As Appellants have acknowledged, following *Milligan*, "the law in the section 2 context has not substantially changed." Letter from Jeff Landry to Hon. Scott S. Harris in *Ardoin* v. *Robinson*, No. 21A814 (Sup. Ct. June 14, 2023), at 3. In *Milligan*, the Supreme Court reaffirmed the standards governing actions under Section 2 of the Voting Rights Act that the Court first adopted thirty-seven years ago in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), and squarely "reject[ed] Alabama's invitation to change existing law." *Milligan*, slip op. at 22. Applying those settled standards, the Court affirmed the judgment of the three-judge panel that the Alabama congressional redistricting plan at issue likely violated Section 2. *Id*.

Milligan thus reaffirms the applicability of the *Gingles* standards applied by the district court and a motions panel of this Court in this case. The district court, in a comprehensive and thoughtful 152-page opinion, rejected Appellants' suggestion that "the well-worn *Gingles* test is endangered and, possibly, bound for extinction," and instead "appl[ied] *Gingles* and its progeny" to conclude that Louisiana's congressional redistricting plan likely violated Section 2. *Robinson* v. *Ardoin*, 605 F. Supp. 3d 759, 818

(M.D. La. 2022). A motions panel of this Court applied the same standards when it concluded that Appellants "ha[d] not met their burden of showing likely success on the merits" and denied their motion for a stay pending appeal. *Robinson* v. *Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022) (Smith, Higginson, and Willett, JJ.); *see also id.* at 224 ("*Gingles* remains good law, and so the defendants have not shown that they are likely to succeed on that basis.").

Because *Milligan* reaffirmed the standards that the district court applied, Appellees respectfully submit that the Court need not remand for the district court to consider *Milligan*, and should instead allow the appeal to proceed in the ordinary course following the submission of the parties' supplemental briefs.

Date: July 6, 2023

Respectfully submitted,

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Counsel for Robinson Plaintiffs

cc: All counsel of record (via electronic filing)

July 6, 2023

Unites States Court of Appeals for the Fifth Circuit
600 S. Maestri Place,
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Re: No. 22-30333 *Robinson v. Ardoin*

USDC No. 3:22-CV-211
USDC No. 3:22-CV-214

To the Honorable Court:

Appellants the State of Louisiana, by and through its Attorney General Jeff Landry; Louisiana Secretary of State Kyle Ardoin; Clay Schexnayder; and Patrick Page Cortez (collectively, "Appellants") write pursuant to the Court's June 28, 2023 Memorandum to Counsel. (Doc. 242.) The Court requested that the parties file letters "addressing whether this court should remand the appeal to allow the district court to consider" new Supreme Court authority. (*Id.* at 1.) It is Appellants' position that this Court should vacate and remand this matter to permit the district court to adjudicate Plaintiffs' claims on the merits in light of *Allen v. Milligan*, 143 S. Ct. 1487 (2023), and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 20-1199, 2023 WL 4239254 (Jun. 29, 2023) ("*SFFA*").

"As a court for review of errors," this Court does not "decide facts or make legal conclusions in the first instance" but rather "review[s] the actions of a trial court for claimed errors." *Browning v. Kramer*, 931 F.2d 340, 345 (5th Cir. 1991). "In other words, a court of appeals sits as a court of review, not of first view." *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017) (quotation marks omitted). Applying that rule, this Court's general practice in cases impacted by "material changes of fact or law . . . during the pendency of an appeal" is vacatur and remand. *Fanning v. City of Shavano Park, Texas*, 853 F. App'x 951 (5th Cir. 2021) (discussing *Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 649–50 (5th Cir. 1978), and *Montano v. Texas*, 867 F.3d 540, 546–47 (5th Cir. 2017)); *see also, e.g.*, *Spell v. Edwards*, 849 F. App'x 509, 509 (5th Cir. 2021) (explaining that "[i]n making its determinations, the district court did not have the benefit of considering the Supreme Court's recent cases" and vacating and remanding for reconsideration "in light of Supreme Court authority"); *SEC v. Team Res., Inc.*, 815 F. App'x 801, 801 (5th Cir. 2020) ("In this case, the district court did not have the benefit of [a recent Supreme Court case's] guidance when it determined the amount of disgorgement. Application of [that case] to the facts of this case should be left in the first instance to the district court's sound judgment.").

In appeals from injunctions, the rule is no different; the standard practice in cases impacted by intervening authority is to vacate the injunction and remand for the district court to consider the impact of that authority in the first instance. *See, e.g.*, *Rhode v. Bonta*, No. 20-55437, 2022 WL 17099119, at *1 (9th Cir. Nov. 17, 2022) ("The district court's April 23, 2020, preliminary injunction order is vacated, and this case is remanded to the district court for further proceedings

consistent with the United States Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v.* Bruen, 597 U.S. —— (2022)."); *Courthouse News Serv. v. Yamasaki*, 950 F.3d 640 (9th Cir. 2020) ("The district court's preliminary injunction order, summary judgment order and order entering final judgment are vacated, and the case is remanded for further proceedings consistent with this court's opinion in *Courthouse News Service v. Planet*, 947 F.3d 581 (9th Cir. 2020)."); *Nextg Networks of California, Inc. v. City of Huntington Beach*, 294 F. App'x 303 (9th Cir. 2008) ("The City of Huntington Beach, California appeals two preliminary injunctions entered by the district court in this case. We vacate the injunctions and remand to the district court for further consideration in light of our recent decision in *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F.3d 571 (9th Cir. 2008) (en banc), reversing *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir.2001)."); *Edwards v. City of Santa Barbara*, 70 F.3d 1277 (9th Cir. 1995) ("We vacate the district court's preliminary injunction and remand for reconsideration of the motion for the preliminary injunction in light of *Sabelko v. The City of Phoenix*, No. 94–15495, slip op. 13739 (9th Cir. Oct. 19, 1995)."); *Int'l Rectifier Corp. v. IXYS Corp.*, 188 F. App'x 1001 (Fed. Cir. 2006). This Court's authority for these actions is well established. *See* 28 U.S.C. § 2106; *Johnson v. Sawyer*, 120 F.3d 1307, 1333 (5th Cir.1997) (describing "[a] federal appellate court['s] supervisory powers").

Here, the Court should adhere to its general practice, vacate the district court's June 6, 2022, preliminary injunction, remand this case for further proceedings, and direct the district court to conduct a trial on the merits and reach a final judgment in advance of the 2024 congressional elections in Louisiana. It should do so for at least three reasons.

1. This is the paradigmatic case where a trial court should address intervening authority in the first instance. Two Supreme Court decisions that bear on this case have been issued during the pendency of the appeal: (1) *Milligan*, 143 S. Ct. 1487 (2023); and (2) *SFFA*, No. 20-1199, 2023 WL 4239254 (Jun. 29, 2023).

In *Milligan*, the Supreme Court addressed Section 2 of the Voting Rights Act for the first time in 14 years, *see Bartlett v. Strickland*, 556 U.S. 1 (2009), and provided guidance not available to the district court when it ruled on Plaintiffs' motion for a preliminary injunction. *Milligan* reaffirmed the three preconditions of *Thornburg v. Gingles*, 478 U.S. 30 (1986), *see* 143 S. Ct. at 1503–04, but clarified how those preconditions apply under the fact-intensive Section 2 inquiry, *see id*. at 1504–06. In particular, the Court demonstrated "how traditional districting criteria limit[] any tendency of the VRA to compel proportionality," *id.* at 1509, yet the district court in this case founded its injunction at least in part on a proportionality goal that is no longer tenable, *see Robinson v. Ardoin*, 605 F. Supp. 3d 759, 851 (M.D. La. 2022) ("The Court finds that Black representation under the enacted plan is not proportional to the Black share of population in Louisiana."). Further, *Milligan* emphasized the centrality of communities of interest in the Section 2 analysis, *see* 143 S. Ct. at 1505, and a motions panel of this Court has already concluded that the district court's analysis of this element is "not without weaknesses," *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022). In short, it is possible, if not probable, that the district court will reach a different conclusion under *Milligan*, and it should have the first opportunity to consider the scope of this intervening authority.

Additionally, *SFFA* has considerably altered the landscape of cases, such as this one, that involve state action requiring racial classifications. 2023 WL 4239254, at *12 ("Eliminating racial

discrimination means eliminating all of it."). Indeed, the *SFFA* Court made clear that as statutes requiring race-based classification achieve their intended ends, they will necessarily become obsolete. *See id.* at *14–21 (explaining that *Grutter v. Bollinger*, 539 U. S. 306 (2003), "made clear that race-based admissions programs eventually had to end" and that the instant facts demonstrated that the time had come). And we have seen similarly once-permissible racial classifications be held unconstitutional when the facts justifying their existence were no more—specifically in the Voting Rights Act ("VRA") context. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013) (holding part of the VRA unconstitutional because "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions"). Consequently, the district court should be permitted to address, in the first instance, whether the facts on the ground here similarly warrant a rejection of Section 2 of the VRA, as applied, because it is no longer necessary. *See id.* at 536 ("[C]urrent burdens . . . must be justified by current needs." (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009))).

Notably, this temporal argument was acknowledged by members of the *Milligan* Court but, because it was not properly raised, the Court did not consider it. 143 S. Ct. at 1519 (Kavanaugh, J., concurring) ("Justice Thomas notes, however, that even if Congress in 1982 could constitutionally authorize race-based redistricting under §2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future. See *post*, at 1543–1544 (dissenting opinion). But Alabama did not raise that temporal argument in this Court, and I therefore would not consider it at this time."). Indeed, eight Justices in *Milligan* appeared to conclude that the first *Gingles* precondition cannot be satisfied where race is the predominant factor in the creation of an illustrative comparator. *See* 143 S. Ct. at 1510–12; *id.* at 1527 (Thomas, J., dissenting). That predominance test is essential to mitigate the problem of race-based classifications identified in *SFFA*, and the district court should address the interplay of these decisions, as applied to this case, in the first instance on remand.

2. Plaintiffs' request for a preliminary injunction is now moot, and they cannot show irreparable harm pending trial. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Accordingly, a plaintiff "must demonstrate a likelihood of irreparable injury—not just a possibility—in order to obtain preliminary relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). By consequence, a request for provisional relief generally "is mooted by the occurrence of the action sought to be enjoined." *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir. 1998) (citation omitted); *see also Matos ex rel. Matos* v. *Clinton Sch. Dist.*, 367 F.3d 68, 72 (1st Cir. 2004) (Selya, J.) (same).

In this case, the district court held that "Plaintiffs have demonstrated that they will suffer an irreparable harm if voting takes place in the 2022 Louisiana congressional elections" under the enacted plan. *Robinson*, 605 F. Supp. 3d at 851. But Louisiana conducted its 2022 congressional elections under the challenged redistricting plan, and Plaintiffs can no longer claim an entitlement to relief as to those elections. Thus, they have no live claim of irreparable harm. With reasonable diligence, Plaintiffs can prosecute their claims to final judgment in advance of the 2024 congressional elections and have no need for a preliminary injunction in the meantime. Additionally, the district court's basis for seeking to impose a remedial redistricting plan as "mandatory preliminary relief" was the then-impending 2022 congressional elections. *See id.* at

856–57. But the case the district court cited, *Canal Auth. of Florida v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974), applies a rule of necessity that cannot be satisfied here, where there is no need for a status quo-altering remedial injunction pending trial. There would, in turn, be no purpose to litigating Plaintiffs' entitlement to a preliminary injunction in this appeal.

3. Vacatur and remand is the optimal case-management approach under the circumstances. The district court issued the June 6, 2022 injunction after highly expedited proceedings, and it did not have the benefit of a fulsome record. *Compare Milligan*, 143 S. Ct. at 1502 (noting that "the three-judge District Court" in the underlying litigation "received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and upwards of 350 exhibits, and considered arguments from the 43 different lawyers who had appeared in the litigation"). With the benefit of time and a complete record, the district court will stand in a better position to adjudicate the difficult, fact-intensive issues this case presents. This orderly process will permit the parties to brief any issues with respect to recent Supreme Court authority in the normal course without the need for a preliminary injunction proceeding that should have no bearing on any elections as there is sufficient time—should the district court move expeditiously—to have a full trial on the merits (or alternatively a ruling on Summary Judgment) before the next congressional elections. This process will also clarify that a trial on the merits has not already occurred, and that the merits of the case must be properly addressed by the district court. *See Robinson*, 605 F. Supp. 3d at 856 (conducting a preliminary injunction hearing as though it was a bifurcated trial of liability and remedies).

For the forgoing reasons, Appellants request that the court (1) vacate the district court's June 6, 2022, preliminary injunction, (2) remand this case back to the district court, and (3) order the district court to conduct a trial on the merits and reach a final judgment before the end of 2023, allowing plenty of time for resolution of the matter before the 2024 elections.

Respectfully submitted,

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 22, 2023

No. 22-30333 Robinson v. Ardoin
USDC No. 3:22-CV-211
USDC No. 3:22-CV-214

Dear Counsel:

The above referenced case has been scheduled for oral argument on October 6, 2023. It will be held in New Orleans - West Courtroom at 9:00 a.m. The Oral Argument session number is A3.

Arguing counsel is responsible for electronically filing the Oral Argument Acknowledgment Form by no later than September 22, 2023. To submit your form, log in to CM/ECF and select the event 'Oral Argument Acknowledgment Form Filed.' Please include your session number when completing the Oral Argument Acknowledgment Form.

IMPORTANT: Please confer with all counsel on your side regarding the order and division of time before submitting the form. This step is critical to ensure you are providing the court with accurate information. The court will not allow any changes except in emergency situations.

The Oral Argument Acknowledgment Form is available on our website at https://www.ca5.uscourts.gov/oral-argument-information/attending-oral-arguments. Also available on this page are links to the 'Court and Special Hearings Calendar' and 'Court Policy on Electronic Devices'.

If you have not electronically filed a "Form for Appearance of Counsel," you must do so before filing the Oral Argument Acknowledgment Form. You must name each party you represent, See Fed. R. App. P. and 5th Cir. R. 12. The form is available at https://www.ca5.uscourts.gov/appearanceform. Attorneys appointed under the Criminal Justice Act are exempt from the requirement to file a Form for Appearance of Counsel.

To ensure that we can provide all pertinent materials to the court before argument, we must receive any additional filings in this office by noon on the workday immediately preceding the day your case is scheduled for argument. Exceptions will be made for emergencies only.

Notice to Court Appointed Counsel: Please review for information on CJA travel at https://www.ca5.uscourts.gov/oral-argument-information/attorney-information/cja-travel-information.

All questions regarding the scheduling and argument of this case should be directed to the assigned courtroom deputy, Kim Pollard, at 504-310-7635 .

Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

By:_____
Charles B. Whitney, Calendar Clerk
504-310-7679

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NEW ORLEANS, LOUISIANA
WEST COURTROOM

The Court has scheduled the following cases for oral argument in Room 265 of the John Minor Wisdom United States Court of Appeals Building, 600 Camp Street, NEW ORLEANS, LOUISIANA on the day shown:

COUNSEL FOR EACH PARTY MUST PRESENT ARGUMENT UNLESS EXCUSED BY THE COURT. CASES MARKED * ARE LIMITED TO 20 MINUTES PER SIDE; CASES WITH NO * ARE LIMITED TO 30 MINUTES PER SIDE UNLESS PREVIOUSLY GRANTED ADDITIONAL TIME. "SIDE" REFERS TO PARTIES IN THEIR POSITION ON APPEAL. IF IN DOUBT, CONSULT THE CLERK'S OFFICE.

FRIDAY, OCTOBER 6, 2023 – *COURT CONVENES AT 9:00 A.M.*

No. 22-30333 Press Robinson, Et Al. v. Kyle Ardoin, Et Al., Appellants. **(30 MINUTES PER SIDE)**

LYLE W. CAYCE
CLERK OF COURT

NEW ORLEANS, LA 08/22/23-A3

IMPORTANT NOTES

1. Counsel presenting argument must report to Room 265 of the Wisdom Courthouse between 8:15 and 8:30 a.m.

2. Click on this link to listen live to an oral argument: West Courtroom. (Note, this link is active only during the hearing.) If the live stream is not functioning properly during the hearing, call 504-310-7804 to report the problem.

3. Click on this link to listen to a recording of the argument after the hearing: Oral Argument Recordings. (Recordings are posted shortly after the hearing.)

4. To receive notices of actions in the case, follow instructions at these links:

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PLEASE VISIT OUR WEBSITE AT WWW.CA5.USCOURTS.GOV. FOR UPDATES TO THE CALENDARS AND TO OBTAIN THE NAMES OF THE PANEL JUDGES, WHICH WILL BE POSTED ON THE CALENDARS ONE WEEK BEFORE THE BEGINNING OF THE COURT WEEK.

United States Court of Appeals

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Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

By:_____
Charles B. Whitney, Calendar Clerk
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NEW ORLEANS, LA 08/22/23-A3

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No. 23-_____

In the United States Court of Appeals for the Fifth Circuit

IN RE JEFF LANDRY,
IN HIS OFFICIAL CAPACITY AS THE LOUISIANA ATTORNEY GENERAL, ET AL.

PETITION FOR A WRIT OF MANDAMAS

On Petition for a Writ of Mandamus from the
United States District Court
for the Middle District of Louisiana
No. 3:22-cv-00211 (Hon. Shelly D. Dick)

JEFF LANDRY
Louisiana Attorney General
ELIZABETH B. MURRILL
Solicitor General
SHAE MCPHEE
Deputy Solicitor General
MORGAN BRUNGARD
Assistant Solicitor General
ANGELIQUE DUHON FREEL
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Counsel for R. Kyle Ardoin, in his official capacity as Secretary of State of Louisiana

CERTIFICATE OF INTERESTED PERSONS

Under the fourth sentence of Fifth Circuit Rule 28.2.1, the Petitioners are governmental parties and therefore need not furnish a certificate of interested parties.

Dated: September 15, 2023

/s/ Jason B. Torchinsky
JASON B. TORCHINSKY

STATEMENT REGARDING ORAL ARGUMENT

The case giving rise to this petition for a writ of mandamus involves ongoing litigation over the State of Louisiana's congressional-district boundaries. The district court has scheduled a hearing on a preliminary-injunction motion that sought relief before the congressional elections held in November 2022 (roughly nine-months ago), and it has refused to set a trial date for final adjudication of the Plaintiffs' claims, even though resolution of their claims (including conclusion of the appellate process) is essential before the November 2024 congressional elections. The Petitioners, Louisiana Attorney General Jeff Landry and Louisiana Secretary of State R. Kyle Ardoin (collectively, "the State"), respectfully submit that oral argument (set expeditiously) is likely to assist the Court in resolving this petition for a writ of mandamus.

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STATEMENT OF THE RELIEF SOUGHT

The State seeks an order directing the district court to vacate the currently scheduled preliminary-injunction remedial hearing and to instead set a trial date regarding the Plaintiffs' Section 2 Voting Rights Act challenges to the State of Louisiana's congressional districts.

STATEMENT OF THE ISSUE

The issue giving rise to this petition for a writ of mandamus is whether a district court may rely upon a preliminary-injunction order it entered in 2022 that specifically and solely granted relief regarding the 2022 congressional elections to forego a final trial on the merits of the Plaintiffs' Voting Rights Act claims in advance of the 2024 congressional elections.

INTRODUCTION

For thirty years, the State of Louisiana's congressional districts included one that was majority-Black. When the State twice tried to create a second majority-Black district, a federal court struck its maps as unconstitutional under the Fourteenth Amendment's Equal Protection Clause. *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). Despite this history, two sets of Plaintiffs challenged Louisiana's 2022 congressional-district maps, asserting that Section 2 of the Voting Rights Act forbids the State from establishing a map with fewer than two majority-Black congressional districts. *See, e.g.*, ECF No. 1.[1] Along with their complaint, they sought preliminary-injunctive relief premised solely and explicitly on their desire to secure new maps before the November 2022 midterm elections. ECF Nos. 41, 42. The district court acquiesced, and after a tremendously expedited hearing, granted their requested relief, ECF No. 173, only to have its order stayed by the United States Supreme Court, *see Ardoin v. Robinson*, 142 S. Ct. 2892, 2892 (2022).

The 2022 midterm elections have come and gone, which renders moot the district-court-ordered remedial hearing and clears the way for

an ultimate, fulsome, and timely trial on the merits of the Plaintiffs' claims. The district court, however, has refused to set a trial date for ultimate resolution of the Plaintiffs' Voting Rights Act challenges. Instead, it has ordered "that the preliminary injunction hearing stayed by the United States Supreme Court, and which stay has been lifted, be and is hereby reset to October 3–5, 2023 . . . ." ECF No. 250. It has since made clear that this hearing will consider solely the remedial map that the court will order the State of Louisiana to implement. *See* ECF Nos. 267, 275.

In so doing, the district court is poised to exceed its jurisdiction, trammel the fundamental fairness of the proceedings before it, and flout new, binding authority issued by the United States Supreme Court. Logic dictates that the federal courts cannot enter *prospective* relief based on a preliminary-injunction request premised on a purported need for resolution by a date that passed more than two-hundred days ago. Rudimentary elements of this Nation's adversarial tradition forbid a court from striking a legislative act as unconstitutional without first allowing the

[1] All ECF citations are to the dockets consolidated at *Robinson v. Ardoin*, No. 3:22-cv-211 (M.D. La.).

State a chance to fully and fairly defend its actions, which necessarily takes longer than the expedited, preliminary hearing that the district court held roughly a year ago. And prudence dictates that, given the Supreme Court's latest Section 2 and Equal Protection jurisprudence, a full trial needs to occur.

The Court should grant the State's petition for a writ of mandamus, vacate the remedial hearing scheduled to begin on October 3, and order the district court to set a trial on the Plaintiffs' Voting Rights Act claims.

STATEMENT OF THE CASE

A. After the 2020 decennial census, Louisiana retained six congressional districts. Between June 2021 and February 2022, the Legislature began preparations for redrawing its districts in accordance with all state and federal statutory and constitutional requirements. After an extraordinary session that convened on February 1, 2022, Louisiana adopted a map that maintained the "core districts as they [were] configured" to "ensure continuity of representation." ECF No. 159. As has been the case for three-decades, one of the six congressional districts is majority-Black.

Two sets of plaintiffs immediately sued the Louisiana Secretary of State. *See* ECF No. 1. Both argued that Section 2 of the Voting Rights Act

mandated that the State's congressional voting maps contain a second majority-Black district. *See* ECF No. 1. General Landry (among others) intervened in defense of the maps, ECF No. 30, the district court eventually consolidated the two actions, ECF No. 33, and weeks after filing their respective complaints, the Plaintiffs moved for a preliminary injunction in advance of the November 2022 midterm elections, ECF Nos. 41, 42.

Over the State's objection, the district court rammed through a frantically rushed preliminary-injunction hearing. Expert-witness reports, for example, had to be prepared in two-weeks. ECF No. 35, 63. After an evidentiary hearing, the district court took no action for twenty-four days. *See* ECF No. 173. On June 6, 2022, however, it granted the Plaintiffs' request for a preliminary injunction and began to prepare for a hearing regarding remedial maps. ECF No. 173. The district court's order arrived on the last day of Louisiana's legislature's Regular Session, but it ordered the State to procure a legislatively created remedial map by June 20, 2022, ECF No. 173, despite testimony from Louisiana's chief election official that it was infeasible to implement a new congressional plan before the November 2022 congressional elections, ECF No. 177-1, at 9.

B. The State immediately moved the district court to stay the preliminary-injunction order pending appeal. ECF No. 177. Among other things, the State pleaded with the district court that "the Legislature ha[d] no ability to meet th[e] deadline" the court had set, ECF No. 177-1, at 11, because "the Legislature must now convene a new Extraordinary Session to consider redistricting legislation," ECF No. 177-1, at 11 (citing La. Const. art. 3, § 2(B)). The Louisiana Constitution sets a seven-day notice period "prior to convening the legislature in extraordinary session," *id.*, and it also imposes a nondiscretionary requirement that "each bill shall be read at least by title on three separate days in each house," La. Const. art. 3, § 15(D). The district court denied the motion but stated in its order that "[i]f Defendants need more time to accomplish a remedy, . . . the Court will favorably consider a *Motion* to extend the time to allow the Legislature to complete its work." ECF No. 182, at 3 (italics in original).

The State accepted the district court's offer and moved for an extension of time to enact a remedial map, noting that the extraordinary-session requirements meant that, as scheduled, "the Legislature will have 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. Because five days is not enough time for the Legislature to complete "the most difficult task a legislative body ever undertakes," *Covington v. North Carolina*, 316 F.R.D. 117, 125 (M.D.N.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 2211 (2017) (citation omitted), the State asked the district court for (at a minimum) ten extra days, ECF No. 188-1, at 2. The district court responded by ordering the Speaker of the Louisiana House of Representatives and the President of the Louisiana Senate to "appear **IN PERSON**" for a hearing on the extension request, ECF No. 189 (bolding and capitalization in original), and then denied it from the bench, ECF No. 196.

C. Meanwhile, the proceedings on appeal continued. This Court denied the State's motion to stay but expedited briefing and oral argument. *See* Robinson v. Ardoin, 37 F.4th 208, 232 (5th Cir. 2022). On June 28, 2022, however, the United States Supreme Court (1) granted the State's application for a stay of the district court's preliminary-injunction order, (2) construed the State's application for a stay as a petition for a writ of certiorari before judgment, (3) granted certiorari before judgment, and

(4) held the case in abeyance pending *Merrill v. Milligan*, No. 21-1086 and No. 21-1087. *See Ardoin v. Robinson*, 142 S. Ct. 2892, 2892 (2022).

On June 8, 2023, the Supreme Court issued its opinion in *Allen v. Milligan*. 143 S. Ct. 1487, 1502 (2023). Two weeks later, it dismissed the writ in the Louisiana's case and ordered "the matter to proceed before the Court of Appeals for the Fifth Circuit for review *in the ordinary course* and in advance of the 2024 congressional elections in Louisiana." *Ardoin v. Robinson*, 2023 U.S. LEXIS 2684, *1 (Jun. 26, 2023) (emphasis added). This Court has since calendared oral argument for October 6, 2023 (less than a month from now). *See* 8/22/2023 Notice of Calendaring, *Robinson v. Ardoin*, No. 22-30333 (5th Cir.).

D. In light of the Supreme Court's reactivation of this case, the district court conducted a status conference on July 12, 2023. ECF No. 246. On July 17, 2023, it issued an order stating that "*the preliminary injunction* hearing stayed by the United States Supreme Court, and which stay has been lifted, be and is hereby reset to October 3–5, 2023." ECF No. 250 (emphasis added). The parties submitted competing scheduling orders; the Plaintiffs proposed a schedule that would allow "for any party . . . to submit a new or amended map along with supporting expert evidence,"

ECF No. 256, at 2, while the Defendants explained why doing so on an expedited basis cannot work, since new plans mean redoing all the expert analyses required to litigate those plans, ECF No. 255.

In an attempt to avoid another fiasco, the State, on August 25, 2023, filed an emergency motion to cancel the hearing on remedy and to instead enter a scheduling order for trial. ECF No. 260. In it, the State, first, set out the obvious: without a scheduling order, briefing, new maps, or exchange of expert material, it would be impossible to prepare for a three-day fact-intensive remedial-map hearing in the six weeks. ECF No. 260-1, at 4–7. It also reminded the district court that it had not yet actually ruled on merits of the Plaintiffs' Section 2 claims, and pointed out that it is error to "improperly equate[] 'likelihood of success' with 'success,'" especially given "the significant procedural differences between preliminary and permanent injunctions." ECF No. 260-1, at 7–10 (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981)). And, finally, it pointed out that the Court had no jurisdiction to conduct a remedial hearing in *October 2023* based on a preliminary-injunction motion advanced by the Plaintiffs solely to seek *temporary*, *prospective* relief before *November 2022*. ECF No. 260-1, at 10.

The district court denied the motion on August 29, 2023, in an order that addressed none of the substantive objections that the State raised. ECF No. 267. Instead, the district court stated, essentially, (1) a lot of stuff happened in 2022,[2] and (2) "there is adequate time to update the discovery needed in advance of the hearing to take place October 3–5, 2023." ECF No. 267. It declined to elaborate further why it thought the time was sufficient.

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[2] This isn't a hyperbolic description. The entirety of the district court's reasoning is as follows:

> This case has been extensively litigated. The parties have conducted expansive discovery, presented testimony from twenty-one witnesses, introduced hundreds of exhibits into evidence throughout a five-day preliminary injunction hearing, and filed hundreds of pages of pre- and post-hearing briefing—all of which culminated in this Court's 152-page Ruling on liability. On the eve of the remedial hearing, this matter was stayed by the United States Supreme Court. The preparation necessary for the remedial hearing was essentially complete. The parties were ordered to submit proposed remedial maps. The Defendants elected not to prepare any remedial maps. The Plaintiffs disclosed proposed remedial maps; witnesses and exhibits were disclosed; expert reports were disclosed; and Defendants deposed Plaintiffs' identified experts. The only remaining issue is the selection of a congressional district map—a limited inquiry—which has been the subject of disclosure and discovery in the run up to the June 29, 2022 remedy hearing that was stayed on the eve of trial.

ECF No. 267, at 2.

SUMMARY OF ARGUMENT

Although mandamus is an extraordinary remedy, the Court will encounter few cases more appropriate for its use than this one. The district court has refused to set a trial on the merits of the Plaintiffs' Voting Rights Act Section 2 claims, and instead it plans to rely on its resolution of a preliminary-injunction order that (1) was justified based on an event that has since passed (the November 2022 congressional elections), (2) was rushed so terrifically that the State was not able to fully defend its work, and (3) relied on now-outdated Section 2 and Equal Protection jurisprudence. Each of these factors demonstrate that the State has a clear and indisputable right to relief; taken together, they compel that conclusion.

The State has also satisfied the other mandamus criteria. If the writ does not issue, the Louisiana electorate will experience profound and irreparable injury because the issues the State advanced here will not be fully litigated before the 2024 congressional elections, at which point Louisiana voters will suffer through an election with congressional districts that are likely gerrymandered based on race. And even though a merits

panel of this Court will hear oral argument this coming October, the preliminary-injunction posture divests it of jurisdiction to address errors arising after the district court's Summer 2022 preliminary-injunction order. In other words, the State has no other avenue for vindicating the interest of Louisianans, and irreparable injury will ensue unless immediate relief arrives. And because foundational issues regarding the franchise and the Equal Protection Clause are at play, the circumstances here counsel in favor of this Court's prompt action.

REASONS WHY THE WRIT SHOULD ISSUE

The Court should issue the State's requested writ of mandamus. Specifically, (1) it has a clear and indisputable right to it, (2) it has no other adequate means of relief, and (3) issuance is plainly appropriate under the circumstances." *In re Gee*, 941 F.3d 153, 157 (5th Cir. 2019) (per curiam); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc). Given that all three prongs are satisfied, mandamus is appropriate.

I. BECAUSE THE DISTRICT COURT CANNOT ISSUE A REMEDY WITHOUT FIRST DECIDING THE MERITS OF THE PLAINTIFFS' SECTION 2 CLAIMS, THE STATE IS INDISPUTABLY ENTITLED TO RELIEF.

A. As noted above, the Plaintiffs filed their motions for a preliminary injunction specifically requesting that the district court issue immediate relief before the 2022 congressional elections. ECF Nos. 41, 42. When the district court granted their motions, it explicitly reasoned that the "Plaintiffs have demonstrated that they will suffer an irreparable harm if voting takes place in the 2022 Louisiana congressional elections" under the enacted maps. ECF No. 173, at 141. Had it not reached this conclusion regarding the 2022 Louisiana congressional elections, it could not have found that the Plaintiffs demonstrated the purported irreparable injury necessary for issuance of a preliminary injunction.

The 2022 congressional elections were held nine months ago. An injunctive remedy is necessarily and solely prospective. This means that the need for a remedial map to avoid a purported injury inflicted during the 2022 congressional election no longer exists (i.e., it is now moot). And *that* means that the district court no longer has jurisdiction to issue a preliminary-injunctive remedy.

If a petition for a writ of mandamus seeks to "confine a trial court to a lawful exercise of its prescribed authority," this Court "should issue the writ almost as a matter of course." *In re Reyes*, 814 F.2d 168, 170 (1987) (quoting *United States v. Denson*, 603 F.2d 1143, 1145 (5th Cir. 1979) (en banc)) (quotations omitted). Given that the district court lacks jurisdiction to "reset" to *October 2023* a preliminary-injunction remedial hearing considering whether action was necessary before elections held in *November 2022*, the district court is plainly acting outside of its prescribed power. *See* ECF No. 250. And when a "judicial usurpation of power" arises, mandamus should issue. *In re Reyes*, 814 F.2d at 170 (quoting *Will v. United States*, 389 U.S. 90, 95 (1967)).

B. Even if the district court had jurisdiction to "reset" the now-moot preliminary-injunction remedial hearing (and it does not), the district court still erred by declining to resolve the merits of the Plaintiffs' Section 2 claims by way of a full trial. The State has not had the opportunity to fully and fairly litigate the merits of its enacted maps, given the remarkably expedited preliminary-injunction proceedings. Whether enshrined in the due process clause, principles of federalism, or basic fairness, it remains true that "*all litigants*[]" have a "right to the 'integrity

and accuracy of the fact-finding process,'" *United States v. Thoms*, 684 F.3d 893, 900 (9th Cir. 2012) (quoting *United States v. Bergera*, 512 F.2d 391, 393 (9th Cir. 1975)), which would be trampled if the district court is permitted to move past the full and fair resolution of the merits and onto considerations of a remedy.

These procedures matter. It is constitutional-level error to "improperly equate[] 'likelihood of success' with 'success,'" especially given the "the significant procedural differences between preliminary and permanent injunctions." *Camenisch*, 451 U.S. at 394. "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties *until a trial on the merits can be held*." *Id.* at 395 (emphasis added). "Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Id.*

Most critically, "[a] party . . . is *not required to prove his case in full* at a preliminary-injunction hearing, . . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits." *Id.* (emphasis added). And, for more than

a century, the Supreme Court has enshrined the notion that *every* litigant must be afforded "an opportunity to present" its defense *and then* to have a "question" *actually* "decided" against it before a remedy may issue. *Fayerweather v. Ritch*, 195 U.S. 276, 299 (1904).

For this reason, the district court cannot "force the parties" via Rule 65(a)(2) consolidation "to sacrifice their right to fully present the available evidence." *Dillon v. Bay City Const. Co.*, 512 F.2d 801, 804 (5th Cir. 1975). Simply put, deciding that a claim is "likely to succeed" is not the same as "actually litigat[ing] and resolv[ing]" a claim. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). And providing a remedy for a claim that has not yet been "actually litigated and resolved" offends *every* notion of fundamental fairness. *Id.*; *see also Fayerweather*, 195 U.S. at 299.

These are the stakes. The State was prevented from fulsomely defending its case by virtue of the expedited preliminary-injunction proceedings, and the resulting preliminary-injunction opinion from the Court did not fully resolve—and as a matter of law, could not have fully resolved—the merits of the Plaintiffs Section 2 claims. "[A]t preliminary injunction stage, "the court is called upon to assess the *probability* of the plaintiff's ultimate success on the merits" and "[t]he foundation for that

assessment will be more or less secure" depending upon multiple factors, including"—critically relevant here—"the pace at which the preliminary proceedings were decided." *Sole v. Wyner*, 551 U.S. 74, 84–85 (2007). The State has fought vigorously for the mere opportunity to make its case, and at every turn, the district court has expedited, truncated, and—most recently—flat out refused to allow the State to defend its enacted maps.

The State raised these issues to the district court. *See* ECF No. 260. In response, the district court retorted that "[t]he parties have conducted expansive discovery, presented testimony from twenty-one witnesses, introduced hundreds of exhibits into evidence throughout a five-day preliminary injunction hearing, and filed hundreds of pages of pre- and post-hearing briefing—all of which culminated in this Court's 152-page Ruling on liability." ECF No. 267, at 2. But this sort of bean-counting does not suffice, and has never sufficed, to show that a claim has been fully and fairly adjudicated. Resolving Section 2 claims require "'an intensely local appraisal' of the electoral mechanism at issue, as well as a 'searching practical evaluation of the 'past and present reality,'" *Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)), which means mountains of expert and fact discovery. And both

the quantity *and* the quality of the evidentiary presentation matters, especially as a court weighs "the most difficult task a legislative body ever undertakes." *Covington*, 316 F.R.D. at 125 (three-judge court), *aff'd*, 137 S. Ct. 2211 (2017). Despite the district court's superficial recitation of the evidentiary *quantity* before it during the preliminary-injunction proceedings, the lack of evidentiary *quality*, given the rushed nature of the proceedings during the run-up to the 2022 congressional elections, is what renders a full trial on the merits critical to ensuring that the district court reaches a correct and just outcome before the 2024 congressional elections.

C. There is, moreover, the changing legal landscape in the wake of *Allen v. Milligan* and *Students for Fair Admissions v. University of North Carolina*, both of which the Supreme Court issued while it held the case below in abeyance. In the former, the Supreme Court addressed Section 2 of the Voting Rights Act for the first time in fourteen years, and it clarified how the *Gingles* preconditions apply. Relevant to this case, the Supreme Court elucidated "how traditional districting criteria limit[] any tendency of the VRA to compel proportionality," *id*. at 1509, which means

that the district court's reliance (in part) on a proportionality as a legitimate goal is no longer tenable and must be revisited. *See Robinson v. Ardoin*, 605 F. Supp. 3d 759, 851 (M.D. La. 2022). *Milligan* also emphasized the centrality of communities of interest in the Section 2 analysis, which has featured prominently at every stage of this case. *See* 143 S. Ct. at 1505. And Justice Kavanaugh's concurring opinion in *Milligan* stressed that it is the compactness of the minority community—not solely the compactness of the proposed districts—that must be evaluated. *Id.* at 1518 (Kavanaugh, J., concurring).

The latter case, in turn, changed fundamentally the way in which States may consider race when taking state action. The *Students for Fair Admissions* Court underscored that as race-based legislative acts reach their intended ends, they become obsolete and less likely to survive Equal Protection scrutiny. This principle followed the Court's decision in *Shelby County v. Holder*, which struck as unconstitutional a different Voting Rights Act provision because "[o]ur country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." 570 U.S. 529, 557 (2013).

* * *

There is no legally defensible reason to allow the district court's preliminary-injunction order to control its resolution of the Plaintiffs' claims on the merits. The district court no longer has jurisdiction to issue the relief they sought. The truncated timeline under which it was adjudicated the Plaintiffs' preliminary-injunction motion prejudiced the State's right to a fulsome adversarial process and ran afoul of the notion that "[w]hen the vindication of important legal rights necessarily hangs in the balance, the law must require whatever is essential to preserve the integrity of the fact-finding process," even if the State is a litigant. *Bergera*, 512 F.2d at 393. And the governing law has changed. In other words, the State plainly has a clear right to the relief he is seeking via this petition.

II. THE STATE'S ONLY ADEQUATE REMEDY IS MANDAMUS

Under these circumstances, the State has no other adequate means of vindicating the State's rights. The district court's decision *not* to set a trial and to instead rely on its preliminary-injunction order is not immediately appealable under any statute or doctrine for which the under-

signed is aware. And resolution on appeal after the district court's remedial hearing will ossify the injury inflicted onto the State into one that cannot be remedied.

Specifically, the 2024 congressional elections are roughly sixteen-months away. This is *just* enough time to hold a trial on the merits of the Plaintiffs claims and to allow the appellate process to run its course in advance of those elections. It will *not* be enough time, however, if the State is forced to wait until *after* the district court resolves the now-moot preliminary-injunction motion to raise the issue (i.e., whether the district court erred by not holding a trial *at all*). The district court's resolution of the now-moot preliminary-injunction remedial proceedings will not occur until mid-October at the earliest, which means that an appeal from the anticipated injunction to administer a particular map will likely not be resolved until early 2024, and the trial that the district court should schedule for late-2023 will not be scheduled until mid-to-late 2024.[3] At that point, the citizens of Louisiana are again left without any certainty

[3] The Secretary of State's calendar demonstrates that filing for Congress takes place in July of 2024, and maps need to be in place weeks before that deadline: https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2024.pdf.

as to their congressional districts in the run up to a Congressional election, and the prospect of the need for the State to seek relief from any such late election related orders under the *Purcell* doctrine becomes a far more likely outcome.

Direct appeal will not suffice to remedy a district court's error. By the time this court sees this case again, the error "will have worked irreversible damage and prejudice by the time of final judgment." *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 289 (5th Cir. 2015). That is precisely the situation facing every one of Louisiana's eligible voters if this litigation is not resolved in its entirety before the 2024 congressional elections.

And forthcoming resolution of the preliminary-injunction appeal does not provide a pathway for the relief that the State seeks through this petition for a writ of mandamus. The merits panel addressing that portion of this case does not have appellate jurisdiction to address any of the irreparable injuries that have been, or will be, inflicted *after* the summer 2022 order giving rise to that appeal. All *those* errors, including the ones alleged via this Petition, merge into the final judgment or another

interlocutory appeal of the remedial map for purposes of this Court's jurisdiction, which means (as noted), they cannot be remedied (given the passage of time).[4]

Whether or not the State prevails before the preliminary-injunction merits panel this coming Fall, the harms will persist. *See Camenisch*, 451 U.S. at 394 ("Because the only issue presently before us—the correctness of the decision to grant a preliminary injunction—is moot, the judgment of the Court of Appeals must be vacated and the case must be remanded to the District Court for trial on the merits."). Delaying now accomplishes nothing but a guarantee that the 2024 election cycle will witness the same pandemonium as the 2022 election cycle. For this reason, the State has satisfied the second mandamus-petition consideration.

[4] *See* 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3905.1 ("[T]he general rule [is] that an appeal from final judgment opens the record and permits review of all rulings that led up to the judgment."); *id.* § 2962 ("Upon an appeal from the final decree every interlocutory order affecting the rights of the parties is subject to review in the appellate court."); *see also Satanic Temple, Inc. v. Texas Health & Hum. Serv. Comm'n*, No. 22-20459, 2023 WL 5316718, at *2 (5th Cir. Aug. 18, 2023).

III. MANDAMUS IS PLAINLY APPROPRIATE GIVEN THE CIRCUMSTANCES.

Finally, the circumstances plainly warrant an exercise of this Court's discretion. At issue are the constitutional and statutory voting rights of hundreds of thousands (maybe millions) of Louisiana citizens when they cast their ballots during the 2024 congressional elections. It is, of course, "always in the public interest to prevent the violation of a party's constitutional rights," *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014), which in and of itself counsels in favor of this Court's immediate action. Additionally, its bears reiterating that the district court's preliminary-injunction order requires the State to consider race in redistricting *more* than it has already, and the more that the State does so, the more it offends the fundamental Equal Protection Rights enshrined in the Fourteenth Amendment. Because "race-based sorting of voters" may be allowed *only* if doing so "serves a 'compelling interest' and is 'narrowly tailored' to that end," *Cooper v. Harris*, 581 U.S. 285, 292 (2017), the Court should err on the side of acting now to make sure the State has the opportunity to defend against the race-based sorting that the Plaintiffs request.

CONCLUSION

For the foregoing reasons, the Court should grant mandamus relief and instruct the district court to set expeditiously a trial on the merits of the Plaintiffs' Voting Rights Act claims.

Dated: September 15, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it is 4,876 words, excluding the parts that are exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Century Schoolbook font, a proportionally spaced typeface with serifs.

Dated: September 15, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2023, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via email and Federal Express on the following parties:

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I hereby further certify that on September 15, 2023, a true and correct copy of the foregoing was caused to be delivered to the district court by Federal Express:

Hon. Shelly D. Dick
U.S District Court, Middle District of Louisiana
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Baton Rouge, LA 70801

Dated: September 15, 2023

/s/ Jason B. Torchinsky
JASON B. TORCHINSKY

United States Court of Appeals

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September 15, 2023

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No. 23-30642 In re: Landry
USDC No. 3:22-CV-211
USDC No. 3:22-CV-214

Dear Mrs. Freel, Mr. Jones, Ms. Murrill, Mr. Strach, Mr. Torchinsky, Mr. Wale, and Mr. Walsh,

We have docketed the petition for writ of mandamus, and ask you to use the case number above in future inquiries.

Filings in this court are governed strictly by the Federal Rules of **Appellate** Procedure. We cannot accept motions submitted under the Federal Rules of **Civil** Procedure. We can address only those documents the court directs you to file, or proper motions filed in support of the appeal. See FED. R. APP. P. and 5TH CIR. R. 27 for guidance. We will not acknowledge or act upon documents not authorized by these rules.

All counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" naming all parties represented within 14 days from this date, see FED. R. APP. P. 12(b) and 5TH CIR. R. 12. This form is available on our website www.ca5.uscourts.gov. Failure to electronically file this form will result in removing your name from our docket. Pro se parties are not required to file appearance forms.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov. Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

ATTENTION ATTORNEYS: Direct access to the electronic record on appeal (EROA) for pending appeals will be enabled by the U S District Court on a per case basis. Counsel can expect to receive notice once access to the EROA is available. Counsel must be approved for electronic filing and must be listed in the case as attorney of record before access will be authorized. Instructions for accessing and downloading the EROA can be found on our website at http://www.ca5.uscourts.gov/docs/default-source/forms/instructions-for-electronic-record-download-feature-of-cm. Additionally, a link to the instructions will be included in the notice you receive from the district court.

Sealed documents, except for the presentence investigation report in criminal appeals, will not be included in the EROA. Access to sealed documents will continue to be provided by the district court only upon the filing and granting of a motion to view same in this court.

We recommend that you visit the Fifth Circuit's website, www.ca5.uscourts.gov and review material that will assist you during the appeal process. We especially call to your attention the Practitioner's Guide and the 5th Circuit Appeal Flow Chart, located in the Forms, Fees, and Guides tab.

ATTENTION: If you are filing Pro Se (without a lawyer) you can request to receive correspondence from the court and other parties by email and can also request to file pleadings through the court's electronic filing systems. Details explaining how you can request this are available on the Fifth Circuit website at http://www.ca5.uscourts.gov/docs/default-source/forms/pro-se-filer-instructions. This is not available for any pro se serving in confinement.

Special guidance regarding filing certain documents:

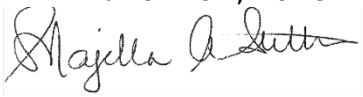
General Order No. 2021-1, dated January 15, 2021, requires parties to file in paper highly sensitive documents (HSD) that would ordinarily be filed under seal in CM/ECF. This includes documents likely to be of interest to the intelligence service of a foreign government and whose use or disclosure by a hostile foreign government would likely cause significant harm to the United States or its interests. Before uploading any matter as a sealed filing, ensure it has not been designated as HSD by a district court and does not qualify as HSD under General Order No. 2021-1.

A party seeking to designate a document as highly sensitive in the first instance or to change its designation as HSD must do so by motion. Parties are required to contact the Clerk's office for guidance before filing such motions.

Sealing Documents on Appeal: Our court has a strong presumption of public access to our court's records, and the court scrutinizes any request by a party to seal pleadings, record excerpts, or other documents on our court docket. Counsel moving to seal matters must explain in particularity the necessity for sealing in our court. Counsel do not satisfy this burden by simply stating that the originating court sealed the matter, as the circumstances that justified sealing in the originating court may have changed or may not apply in an appellate proceeding. It is the obligation of counsel to justify a request to file under seal, just as it is their obligation to notify the court whenever sealing is no longer necessary. An unopposed motion to seal does not obviate a counsel's obligation to justify the motion to seal.

Sincerely,

LYLE W. CAYCE, Clerk



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cc:
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Mrs. Andree Matherne Cullens
Mr. Joseph Elton Cullens Jr.
Mr. Jared Evans
Ms. Abha Khanna

Mr. Michael L. McConnell
Mr. Adam Savitt
Ms. Tiffany Alora Thomas

Provided below is the court's official caption. Please review the parties listed and advise the court immediately of any discrepancies. If you are required to file an appearance form, a complete list of the parties should be listed on the form exactly as they are listed on the caption.

Case No. 23-30642

In re: Jeff Landry, In his official capacity as the Louisiana Attorney General; Kyle R. Ardoin, in his official capacity as Louisiana Secretary of State,,

Petitioners

United States Court of Appeals for the Fifth Circuit

No. 23-30642

IN RE JEFF LANDRY, *In his official capacity as the Louisiana Attorney General*; ET AL.

Petition for a Writ of Mandamus
to the United States District Court
for the Middle District of Louisiana
USDC No. 3:22-CV-211
USDC No. 3:22-CV-214

RESPONSE

In the exercise of its case management discretion, the Court set a date to resume its hearing in this case after the stay, entered by the Supreme Court on the on the eve of the final phase of the preliminary injunction hearing, was lifted.[1] The background was addressed in the Court's *Ruling* on the State's *Motion to Cancel Hearing on Remedy and to Enter a Scheduling Order for Trial*.[2] Prior to resetting the hearing date, the Court conferred with the parties via telephonic status conference.[3]

After the merits panel completes its review, should this matter proceed to a trial on the merits, the Court will be guided by this Court's merit panel ruling and the most recent

[1] Fed. R. Civ. P. 16.
[2] Rec. Doc. 267.
[3] Rec. Doc. 246.

pronouncement of the United States Supreme Court. There is no risk of redundant proceedings because the evidence adduced at the injunction hearings is admissible at trial and becomes part of the trial record along with any new evidence admitted at trial.[4]

Completing the process which is well underway respects and is faithful to the Supreme Court's admonition to proceed "in the ordinary course and in advance of the 2024 congressional elections in Louisiana."[5] Any argument by the Petitioners that "the State was prevented from fulsomely defending its case by virtue of the expedited preliminary-injunction proceedings" should be accorded equal treatment with that provided by this Court's administrative panel, which noted that the State's decision to "put all their eggs in the basket of racial gerrymandering" was a "tactical choice [that] has consequences" (*e.g.*, precluding the State from showing that they were likely to succeed on the merits).[6]

Respectfully submitted on this 20th day of September, 2023.

Shelly D. Dick

CHIEF JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[4] Federal Rules of Civil Procedure Rule 65(a)(2).
[5] *Ardoin v. Robinson*, 143 S.Ct. 2654 (2023).
[6] *Robinson v. Ardoin*, 22-30333 (5th Cir. June 12, 2022).

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 28, 2023
Lyle W. Cayce
Clerk

No. 23-30642

IN RE JEFF LANDRY, *In his official capacity as the Louisiana Attorney General*; KYLE R. ARDOIN, *in his official capacity as Louisiana Secretary of State*,

Petitioners.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC Nos. 3:22-CV-211, 3:22-CV-214

Before JONES, HIGGINSON, and HO, *Circuit Judges*.

BY EDITH H. JONES, *Circuit Judge*:

Louisiana's Attorney General has filed this request for mandamus relief seeking to vacate the district court's hearing scheduled to begin on October 3 and require the district court to promptly convene trial on the merits in this congressional redistricting case. We GRANT IN PART, ORDERING the District Court to VACATE the October Hearing.

The reasons for this grant of relief are as follows:

Redistricting based on section 2 of the Voting Rights Act, 52 U.S.C. § 10301, is complex, historically evolving, and sometimes undertaken with looming electoral deadlines. But it is not a game of ambush.

Since 1966, the Supreme Court has repeatedly reminded lower federal courts that if legislative districts are found to be unconstitutional, the elected

body must usually be afforded an adequate opportunity to enact revised districts before the federal court steps in to assume that authority. In *Reynolds v. Sims*, the Court stated that "legislative reapportionment is primarily a matter for legislative consideration and determination."[1] In subsequent cases,

> [t]he Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the courts should make every effort not to preempt. When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.

Wise v. Lipscomb, 437 U.S. 535, 540, 98 S. Ct. 2493, 2497 (1978) (citations omitted). This is the law today as it was forty-five years ago.[2]

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[1] 377 U.S. 533, 586, 84 S. Ct. 1362, 1394 (1964).

[2] *See North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018) ("[S]tate legislatures have primary jurisdiction over legislative reapportionment[.]") (quotation marks and citation omitted); *McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30, 101 S. Ct. 2224, 2236 (1981) ("Moreover, even after a federal court has found a districting plan unconstitutional, redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.") (quotation marks and citation omitted); *Wise v. Lipscomb*, 437 U.S. at 540; *Connor v. Finch*, 431 U.S. 407, 414-15, 97 S. Ct. 1828, 1833-34 (1977) ("[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally-mandated framework. . .. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name."); *Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 766 (1975) ("We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through hits legislature or other body, rather than of a federal court."); *Gaffney v. Cummings*, 412 U.S. 735, 749, 93 S. Ct. 2321, 2329 (1973) ("Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and

The district court did not follow the law of the Supreme Court or this court. Its action in rushing redistricting via a court-ordered map is a clear abuse of discretion for which there is no alternative means of appeal.[3] Issuance of the writ is justified "under the circumstances" in light of multiple precedents contradicting the district court's procedure here.

This case was remanded after the Supreme Court stayed lower court proceedings to decide *Alabama v Milligan*, 143 S. Ct. 1487 (2023). *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022) (cert. dismissed as improvidently granted and stay vacated by 143 S. Ct. 2654 (2023)). The district court here had held, in June 2022, after an expedited preliminary injunction proceeding, that Louisiana's congressional districts violate section 2, requiring an additional majority black congressional district. *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 766 (M.D. La. 2022). The district court then ordered the state legislature to reconfigure such an additional district within five legislative days. *Robinson v. Ardoin*, 37 F.4th 208, 232 (5th Cir. 2022). Landry pursued an immediate appeal and a motion to stay in this court. This court denied a stay, *id.*, but

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performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental choices about the nature of representation. . . is primarily a political and legislative process.") (citation omitted); *Burns v. Richardson*, 384 U.S. 73, 85, 86 S. Ct. 1286,1293 (1966) ("[J]udicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having an adequate opportunity to do so.") (quotation marks and citation omitted).

[3] The dissent contends that the ordinary appellate process suffices. But the dissent does not challenge the notion that if the remedial hearing goes forward, the merits of the preliminary injunction will be on a separate appellate track from the remedy order. Nor does the dissent explain how the panel that will hear the merits of the preliminary injunction would have jurisdiction to order relief to the state on the scheduling of the fifteen-month-later separately litigated remedy hearing, as no Rule 28(j) letter can manufacture appellate jurisdiction under 28 U.S.C. § 1291 over the non-final trial setting order.

expedited the appeal—until the Supreme Court entered its stay. *Ardoin v. Robinson*, 142 S. Ct. at 2892.

A year later, the Supreme Court's stay was lifted, *Ardoin v. Robinson*, 143 S. Ct. at 2654, and the parties completed briefing the merits of the preliminary injunction, which another panel of this court will hear in oral argument on October 6.

Undeterred by the pendency of appeal on the merits, the district court opted to go ahead on October 3-5 with an expedited hearing to determine a court-ordered redistricting map. But the court provided merely five weeks for the state's preparation. No mention was made about the state legislature's entitlement to attempt to conform the districts to the court's preliminary injunction determinations.

This post-merits activity prompted the state to seek a writ of mandamus from this court pursuant to 28 U.S.C. § 1651. In this court, "mandamus will be granted upon a determination that there has been a clear abuse of discretion." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 309 (5th Cir. 2008) (en banc). As "one of the most potent weapons in the judicial arsenal, three conditions must be satisfied" before mandamus may be issued. *In re Gee*, 941 F.3d 153, 157 (5th Cir. 2019) (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380, 124 S. Ct. 2576, 2587 (2004)). The Supreme Court has elaborated that:

> First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process. Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney, 542 U.S. at 380-81 (quotation marks and citations omitted).

After reviewing the mandamus factors, we conclude that the state is entitled to partial mandamus relief.

1. *The state has no other means of relief and is not seeking to use mandamus as a substitute for appeal.*

The only issue before this panel is the scheduling of the remedial hearing and potential scheduling for trial on the merits. The events leading to this writ application post-date the merits-only preliminary injunction by fifteen months. In ruling on this application, we do not discuss the merits. Likewise, the decision on the merits of a Section 2 violation of the Voting Rights Act has no direct relationship with nor factual nor legal overlap with the scheduling issues this panel confronts.

That this application presents an unusual posture for mandamus is not a contrivance of Landry or this panel but the result of the district court's unique rush to remedy when circumstances did not require it. Moreover, because this application is wholly different from the merits of the appeal, the state has no adequate remedy by way of appeal.

The plaintiffs respond that the state may adequately appeal following the decision formulating a court-ordered redistricting plan. That outcome would embarrass the federal judiciary and thwart rational procedures. Denying mandamus effectively means a two-track set of appeals on the merits

and the court-ordered plan. No matter the outcome—or timing—of this court's merits panel determination, one side will seek relief in the Supreme Court. Similarly, the anticipated court-ordered redistricting plan will be appealed to this court and likely to the Supreme Court. And all of this will persist well into the 2024 election year. The likelihood of conflicting courts' scheduling and determinations will create uncertainty for the state and, more important, the candidates and electorate who may be placed into new congressional districts. In sum, while there is on paper a right to appeal whatever decision the district court renders on drawing its own redistricting maps, the paper right is a precursor to legal chaos.

2. *Clear and Indisputable Right*

The state contends that it has a clear right to relief because the court's remedial redistricting plan should not be ordered before it has a fulsome opportunity to defend itself on the merits of plaintiffs' section 2 claim.[4] That the state lacked a full opportunity to mount a defense on the merits is likely accurate. Plaintiffs' testimony showed that they had been planning a lawsuit for months before the legislature effectuated its 2022 redistricting. But under the district court's expedited scheduling, the state had less than four weeks to prepare for what became a five-day evidentiary hearing.[5]

This court's order denying a stay pending appeal repeatedly noted that the panel's conclusions were only tentative and the plaintiffs' case had clear weaknesses. The court referenced the importance of final adjudication.

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[4] The state also argues that the plaintiffs' case became moot after the 2022 election cycle ended. This is incorrect, because the district court enjoined all future elections pursuant to the allegedly violative state plan, and this reflected the scope of the plaintiffs' demand for relief.

[5] The state says it had only two weeks before the preliminary injunction hearing to prepare expert witness reports, which are critical in legislative redistricting cases.

Robinson, 37 F.4th at 222 ("[T]he plaintiffs have much to prove when the merits are ultimately decided.").[6] Of course, an order denying stay pending appeal cannot be a "merits" ruling and is subject to reconsideration by this court, either in the upcoming oral argument or on review of a final judgment. *Id.* at 232 ("Our ruling here concerns only the motion for stay pending appeal; our determinations are for that purpose only and do not bind the merits panel[.]") (quotation marks and citations omitted). But the point is that this court recognized the hasty and tentative nature of the district court's decision and, at least implicitly, the need for further development of factual and legal aspects. *Id.* ("[N]either the plaintiffs' arguments nor the district court's analysis is entirely watertight[.]").

The progress of the Alabama redistricting litigation in some ways parallels this case but is instructive as to full and fair procedures *not* accorded here. First, while that case progressed to a seven-day preliminary injunction hearing within about two months after the legislature finalized congressional districts, Alabama has never contended that its defense was unduly truncated. *Allen v. Milligan*, 143 S. Ct. 1487, 1502 (2023) (noting that the three-judge district court's preliminary injunction hearing lasted seven days, during which it received live testimony from 17 witnesses, reviewed more than 1000 pages of briefing and upwards of 350 exhibits while considering arguments from 43 different lawyers); *Singleton v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 5691156, at *10 (N.D. Ala. Sept. 5, 2023) (noting that at the Alabama remedial hearing, the parties agreed that the Alabama three-judge

[6] This court also said the state put all its eggs in one basket, litigating essentially that only with race-predominant considerations could the plaintiffs justify a second majority-black congressional district. *Robinson*, 37 F.4th at 217. No litigant, however, is bound at trial on the merits to a defense strategy that failed to succeed on a preliminary injunction.

district court would consider all evidence admitted during the preliminary injunction hearing unless counsel raised a specific objection).

Second, and also pertinent, in the Alabama case on remand from the Supreme Court, the three-judge panel afforded the state legislature six weeks to propose a new districting plan. *See contra Singleton*, 2023 WL 5691156 at *6-*7 (noting that the Alabama three-judge district court delayed remedial proceedings for six weeks after remand from the Supreme Court to allow the legislature to pass a new congressional redistricting plan). Last year, with the 2022 elections fast approaching, the district court prescribed an impossibly short timetable for state legislative action amounting to only five legislative days. Whatever the propriety of that timetable (about which we express no opinion) at that time, there is no warrant for the court's rushed remedial hearing by the first week of October 2023, months in advance of deadlines for districting, candidate filing, and all the minutiae of the 2024 elections. Even more significant, the Alabama court on remand from the Supreme Court afforded the state an adequate opportunity to accomplish a redistricting compliant with final judgment. Here, of course, there is no final judgment on the merits. But the district court acted ultra vires in rushing to prescribe its own maps.

As demonstrated above, a court must afford the legislative body that becomes liable for a Section 2 violation the first opportunity to accomplish the difficult and politically fraught task of redistricting. That is *required* for redistricting litigation to proceed according to its "ordinary course and in advance of the 2024 congressional elections in Louisiana"—as the Supreme Court's remand in this case mandated. *Ardoin v. Robinson*, 143 S. Ct. at 2654. Not only has the Supreme Court serially reinforced this duty of lower courts, but this court has carefully adhered to these rulings. Nearly forty years ago, this court criticized a district court's rushed, court-ordered redistricting plan less than a month and a half following final judgment. *Jones v. City of Lubbock*,

727 F.2d 364, 387 (5th Cir. 1984). We admonished that the court's procedures

> *if challenged, would have required that we vacate this order*. For the sake of future parties, we reiterate briefly some of the principles that the district court should bear in mind. Apportionment is principally a legislative responsibility. . .. A district court should, accordingly, afford to the government body a reasonable opportunity to produce a constitutionally permissible plan. . ..

Id. (internal citations omitted) (emphasis added).[7] The district court here had no warrant to undertake redistricting (A) through a court-ordered plan (B) with no elections impending, (C) on a severely limited pretrial schedule, and (D) without having afforded the Louisiana legislature the first opportunity to comply with its ruling.

"A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts. On mandamus review, we review for these

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[7] *See also United States v. Brown*, 561 F.3d 420. 435 (5th Cir. 2009) ("[A]t least in redistricting cases, district courts must offer governing bodies the first pass at devising a remedy[.]"); *Rodriguez v. Bexar County*, 385 F.3d 853, 869-70 (5th Cir. 2004) ("[D]istrict courts should use a great deal of caution in invalidating the results of a duly held election and ordering the implementation of its own alternative districting plan. The primary responsibility for correcting Voting Rights Act deficiencies rests with the relevant legislative body. . .. Both the Supreme Court and this court have admonished district courts to afford local governments a reasonable opportunity to propose a constitutionally permissible plan and not haphazardly to order injunctive relief.") (citations and footnote omitted); *Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988) ("[R]esponsible state or local authorities must be first given an opportunity to correct any constitutional or statutory defect before the court attempts to draft a remedial plan. In the case at bar, that means that should the court rule on the merits that a statutory or constitutional violation exists the Louisiana Legislature should be allowed a reasonable opportunity to address the problem. We have no reason whatsoever to doubt that the governor and legislature will respond promptly.").

types of errors, but we only will grant mandamus relief when such errors produce a patently erroneous result." *In re Volkswagen of Am.,* 545 F.3d at 310 (citing *McClure v. Ashcroft,* 335 F.3d 404, 408 (5th Cir.2003)). Here, we find that the district court's errors produced a patently erroneous result.

3. *Appropriate under the circumstances*

If this were ordinary litigation, this court would be most unlikely to intervene in a remedial proceeding for a preliminary injunction. Redistricting litigation, however, is not ordinary litigation. Of course, the law as set forth by the Supreme Court's interpretation of the Constitution and section 2 must be vindicated. But the remedy necessarily involves the exercise of discretion by federal courts whose judgments will interfere with a primary constitutional structural device of self-government: making decennial districting choices about representation in legislative bodies. Ever since its initial forays into legislative districting, the Supreme Court has explained the proper procedure to implement federal court judgments while accommodating to the greatest extent the legislatures' ability to confect their own remedial plans. The district court here forsook its duty and placed the state at an intolerable disadvantage legally and tactically.

Accordingly, we VACATE the remedial order hearing. Further scheduling in the case must be done by the district court pursuant to the principles enunciated herein.

JAMES C. HO, *Circuit Judge*, concurring:

I concur. I write to respond to my distinguished dissenting colleague.

I agree that mandamus is not ordinarily a substitute for appeal. I also agree that whatever the district court might have done pursuant to its October 3 hearing would eventually be subject to appeal.

But that does not end the analysis. "[E]xceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam). So it doesn't matter that "uncorrectable damage may not result if petitioners are forced to wait for a remedy on direct appeal"—"the clearly erroneous nature of the district court's order [may] call[] for a more immediate remedy." *In re Impact Absorbent Techs., Inc.*, 106 F.3d 400, 1996 WL 765327, *3 (6th Cir. 1996) (unpublished table decision) (granting mandamus relief to compel dismissal of case). *See also*, *e.g.*, *Holub Indus., Inc. v. Wyche*, 290 F.2d 852, 856 (4th Cir. 1961).

Moreover, mandamus relief may be especially warranted where the stakes of the litigation are unusually significant. *See*, *e.g.*, *Abelesz v. OTP Bank*, 692 F.3d 638, 651 (7th Cir. 2012) (granting mandamus relief to compel dismissal of case involving "appreciable foreign policy consequences" and "astronomical" "financial stakes").

Consider, for example, *In re Trinity Industries, Inc.*, No. 14-41067 (5th Cir. Oct. 10, 2014). It was asserted there (as here) that the district court had no legal basis to hold a particular proceeding (there, it was a trial under the False Claims Act). It was further argued that "the litigation stakes . . . are unusually high"—namely, the risk of a $1 billion adverse judgment. *Id.*

Notably, the mandamus panel did not deem the matter beyond the scope of the writ—even though any damages award can obviously be

reversed later on appeal (as indeed later occurred in that case). To the contrary, the mandamus panel acknowledged that "this is a close case." *Id.* It ultimately denied relief. But the panel went out of its way to caution the district court not to proceed. It said that "[t]his court is concerned" about the impending proceedings, and warned that the petitioner had presented a "strong argument" that the case should not go to trial. *Id.* The district court nevertheless proceeded to trial. So this court subsequently reversed. In doing so, this court specifically noted that the district court went to trial "despite . . . a caution from this court that the case ought not proceed." *United States ex rel. Harman v. Trinity Indus., Inc.*, 872 F.3d 645, 647 (5th Cir. 2017).[1]

As with *Trinity Industries*, this case presents "unusually high" stakes. It doesn't just delineate how Louisiana voters may exercise their right to vote for their elected representatives in the House. It could also impact the course of national policy decisions made by Congress—after all, every member of Congress has a voice, and a vote, in those deliberations. Whatever the final outcome of Louisiana's redistricting process may be, the people of Louisiana, and the country, are entitled to an orderly process that they can trust.

As the majority explains, it would fly in the face of decades of Supreme Court precedent for a district court to usurp the prerogative of the state Legislature to take the first crack at drawing a remedial map. Yet that appears

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[1] I suppose that this mandamus panel could have followed the example in *Trinity Industries* by sounding a similar firm note of warning to the district court here, while ultimately denying rather than granting mandamus relief. *See*, *e.g.*, *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 347 n.4 (5th Cir. 2017) (noting that "this court has routinely held, sometimes in published opinions, that a district court erred, despite stopping short of issuing a writ of mandamus") (collecting cases). But that's a matter of discretion, not restriction. Moreover, if our court's experience in *Trinity Industries* teaches us anything, it's that sometimes you need a writ, not a warning.

to be what is being contemplated here. As the majority notes, the district court gave the State only five legislative days to produce a remedial map.

The dissent responds that that was a year ago, and suggests that "this yearlong process" should have given the State ample time to work. But that doesn't strike me as a realistic understanding of the legislative process. This matter has been pending on appeal throughout this period of time—not to mention subject to an extended stay by the Supreme Court. And naturally, the whole point of any appeal is that the district court ruling could be set aside—thereby obviating the need for any remedial effort by the Legislature.

It seems impractical, to say the least, to expect busy elected officials and their staffs to set aside all of the other responsibilities of public office, just to focus all of their attention on negotiating a hypothetical remedial plan that the courts have not yet even resolved is necessary. And not only impractical, but unfair to the citizens of Louisiana, who no doubt seek the attention of their elected representatives on countless other pressing matters of importance to their communities.

* * *

I concur in the grant of mandamus relief.[2]

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[2] The dissent observes in passing that this mandamus proceeding could have been assigned to the pending appeal panel in No. 22-30333. I certainly agree that judges should work collaboratively and in a spirit of comity when it comes to the assignment and transfer of cases. I'm reminded of our court's experience in *Defense Distributed v. Platkin*, 55 F.4th 486 (5th Cir. 2022), and *Defense Distributed v. Platkin*, 48 F.4th 607 (5th Cir. 2022), involving the unfortunate refusal of a federal district court in New Jersey to heed a request to transfer a Texas case back to the relevant district court within our circuit. Had the panel in No. 22-30333 requested transfer of this mandamus proceeding to its current docket, I imagine I would've agreed. But no such request was made.

STEPHEN A. HIGGINSON, *Circuit Judge*, dissenting:

The Supreme Court has been clear, cautioning long ago that mandamus is a "drastic and extraordinary remed[y] . . . reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). Thus, settled caselaw confirms that mandamus is *not* a tool to manage a district court's docket; nor can mandamus substitute for appeal. Yet review of this matter's procedural history shows that mandamus here improperly does both.

I. Procedural History

This petition, filed by Louisiana Attorney General Jeff Landry and Louisiana Secretary of State Kyle Ardoin ("the State"), concerns ongoing litigation over Louisiana's congressional maps. On June 6, 2022, the district court preliminarily enjoined the State from conducting any congressional elections under the map enacted by the Legislature and ordered the Legislature to enact a remedial plan on or by June 20, 2022, at which point the district court would otherwise issue additional orders to enact a remedial plan. *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 766-67 (M.D. La. 2022). The district court even invited the State to seek more time should it need it, explaining that "[i]f Defendants need more time to accomplish a remedy for the Voting Rights Act violation, the Court will favorably consider a [m]otion to extend the time to allow the Legislature to complete its work." *Robinson v. Ardoin*, No. 22-00211, ECF No. 182 (M.D. La. June 9, 2022).

The preliminary injunction was appealed to this court, which administratively stayed the injunction, then vacated that stay and denied a stay pending appeal, while expediting No. 22-30333. *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022).[1] On the eve of the district court's remedial

[1] Briefing now is complete and our court will hear argument next week.

plan hearing, however, the Supreme Court stayed the injunction and held the case in abeyance pending resolution of (the then-styled) *Merrill v. Milligan* (No. 21-1086 and No. 21-1087). *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022).

When *Milligan* issued one year later, the Supreme Court instructed in the instant matter as follows: The "[s]tay heretofore entered by the Court on June 28, 2022 [is] vacated. This will allow the matter to proceed before the Court of Appeals for the Fifth Circuit for review in the ordinary course and in advance of the 2024 congressional elections in Louisiana." *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023).

Correspondingly, this court in No. 22-30333, promptly ordered briefing "addressing [*Milligan*] and any other developments or caselaw that would have been appropriate for Rule 28(j) letters over the past year had the case not been in abeyance." Mem. to Counsel at 1, *Robinson v. Ardoin*, No. 22-30333, ECF No. 242 (5th Cir. June 28, 2023). In response, the State urged this court to vacate the injunction, remand, and "direct the district court to conduct a trial on the merits and reach a final judgment in advance of the 2024 congressional elections in Louisiana." Letter at 2, *Robinson v. Ardoin*, No. 22-30333, ECF No. 246 (5th Cir. July 6, 2023). On July 17, 2023, the district court rescheduled the remedial plan hearing that was supposed to have taken place the previous year—and for which the State had presumably fully prepared for given the original hearing was only cancelled the day before it was supposed to occur—for approximately eleven weeks later on October 3-5, 2023, consistent with the Supreme Court's vacatur of its stay of the district court's injunction. *Robinson v. Ardoin*, Nos. 22-cv-211 and 22-cv-214, ECF No. 250 (M.D. La. July 17, 2023).

The State then, on July 21, submitted more letter argument, *still in No. 22-30333*, reiterating its arguments as to both the hearing and also the unscheduled trial, to "request[] the remedies outlined in [its] July 6, 2023 Letter Brief." Letter at 1, *Robinson v. Ardoin*, No. 22-30333 (5th Cir. July 21,

2023). The State argued on August 19, in its reply brief to this court in No. 22-30333, that the hearing and lack of trial date "make[] little sense when the district court could bring the case to final judgment in time for the 2024 election cycle," Reply Br. at 2-3 n.2, and sought dismissal of the appeal and vacatur of the preliminary injunction, *id.* at 2.

Next, the State moved *in the district court* to cancel the remedial plan hearing. Mot., *Robinson v. Ardoin*, Nos. 22-cv-211 and 22-cv-214, ECF No. 260 (M.D. La. Aug. 25, 2023). That motion was denied, Order, *Robinson v. Ardoin*, Nos. 22-cv-211 and 22-cv-214, ECF No. 267 (M.D. La. Aug. 29, 2023), and the State neither appealed the denial nor moved to expedite its appeal of the preliminary injunction in pursuance of which the hearing is scheduled.

Despite this procedural history, the State instead separately filed a mandamus petition seeking to vacate the scheduled district court hearing and to set a district court trial date. Pet. at 4, *In re Landry*, No. 23-30642 (5th Cir. Sept. 15, 2023). On receipt of the petition, I would have consolidated with No. 22-30333 and reassigned for consideration by that panel, respectful of the long-pending appeal as well as that panel's explicit invitation to the parties to submit argument—which, months before this petition, they did, presenting the same issues and requesting the same relief. *In re Landry*, No. 23-30642 (5th Cir. Sept. 17, 2023) (Higginson, J. dissenting from order requesting responsive briefing).

II. Analysis

Until today, mandamus has been ordered only when a petitioner has "no other adequate means to attain the relief [it] desires"—thus, specifically, mandamus "is not a substitute for appeal." *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017) (citations and internal

quotation marks omitted) (alteration in original).[2] While the majority acknowledges this principle, it factually errs in describing this matter as "wholly different from the merits appeal." There could be no more conclusive proof of the availability of appellate relief than this circumstance, where the petitioner is already an appellant pressing the same issues and seeking the same relief, challenging the *same injunction in pursuance of which this hearing was scheduled*. There is no support for the assertion that the hearing, lasting for three days at the beginning of October, is mutually exclusive with progression to a full merits trial. The State can also, of course, appeal any remedial plan that the hearing produces. The panel asserts a prerogative to ignore this as only a "paper right" based on its prediction that this litigation will "turn into legal chaos" and eventually reach the Supreme Court. Needless to say, our court has yet to adopt a rule that mandamus lies where a matter may reach the Supreme Court.

Furthermore, "we limit mandamus to only 'clear abuses of discretion that produce patently erroneous results.'" *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015) (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 (5th Cir. 2008)). Oddly, the majority points to this court's order *denying* the State's motion for a stay pending appeal as evidence that the State has made the higher showing that it is entitled to mandamus. No patent error exists here. Quite the opposite. Until today, we have explicitly assured district judges that they enjoy "broad discretion and inherent authority to manage [their] docket." *June Med. Servs., L.L.C. v. Phillips*, 2022 WL 4360593 at *2 (5th Cir. 2022) (quoting *In re Deepwater Horizon*, 988

[2] Contrary to the assertion that "[d]enying mandamus effectively means a two-track set of appeals," it is the majority that now invites parties to slice and dice in the hopes of eleventh-hour success in front of a mandamus panel when an earlier-in-time merits panel has so far declined to act on the same issues, presumably intending to question counsel about those issues in oral argument.

F.3d 192, 197 (5th Cir. 2021) (per curiam)). The district court exercised that discretion when the Supreme Court lifted its stay after a year. The district court could, with approximately eleven weeks of notice to parties, reschedule the hearing that had originally been scheduled for well over a year earlier, a hearing that parties had prepared for because it was not cancelled until the day before it was supposed to begin. It is this yearlong process that the majority inexplicably calls a "game of ambush."

For these reasons, I dissent and would deny the petition.

No. 23-30642

In the United States Court of Appeals

for the Fifth Circuit

IN RE JEFF LANDRY, *IN HIS OFFICIAL CAPACITY AS THE LOUISIANA ATTORNEY GENERAL;* ET AL.

ON PETITION FOR WRIT OF MANDAMUS FROM UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA CIV. NO. 22-0211 & CIV. NO. 22-0214 (C.J. SHELLY D. DICK)

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Petitioners: State of Louisiana, by and through Attorney General Jeff Landry, represented by Louisiana's Office of the Attorney General attorneys Elizabeth Baker Murrill, Angelique Duhon Freel, Carey T. Jones, Jeffrey Michael Wale, Morgan Brungard, and Shae McPhee; and by Holtzman Vogel Baran Torchinsky & Josefiak PLLC attorneys Jason B. Torchinsky, Edward M. Wenger, and Phillip Michael Gordon. R. Kyle Ardoin, in his official capacity as Secretary of State for Louisiana, represented by Shows, Cali & Walsh, LLP attorney John Carroll Walsh; and by Nelson Mullins Riley & Scarborough LLP attorneys Alyssa Riggins, Phillip Strach, and Thomas A. Farr.

Respondents: Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, National for the Advancement of

Colored People Louisiana State Conference (NAACP), Power Coalition for Equity and Justice, represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP attorneys Adam Savitt, Amitav Chakraborty, Jonathan Hurwitz, Robert A. Atkins, Yahonnes Cleary, Arielle McTootle, and Robert Klein; and by the NAACP Legal Defense Fund attorneys Jared Evans, Leah C. Aden, I. Sara Rohani, Stuart C. Naifeh, and Victoria Wenger; and by ACLU of Louisiana attorneys Nora Ahmed, and Stephanie Willis; and by the ACLU attorneys Sarah E Brannon, Sophia Lin Lakin, and Megan C. Keenan; and by Harvard Law School Election Law Clinic attorney Tiffany Alora Thomas-Lundborg; and by attorneys Tracie L. Washington; and John Nelson Adcock.

Respondents: Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard, represented by Elias Law Group LLP attorneys Abha Khanna, Jacob D. Shelly, Jonathan Patrick Hawley, and Qizhou Ge; and by Walters Thomas Cullens, LLC attorneys J. E. Cullens, Jr., Andrée Matherne Cullens, and S. Layne Lee.

SEPTEMBER 20, 2023

/S/ *Adam Savitt*
ADAM SAVITT

Attorney For Appellees

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STATEMENT REGARDING ORAL ARGUMENT

This mandamus petition is about whether ordinary docket management decisions of a district court—such as whether and when to set a case for trial and whether and when to hold a hearing on the appropriate remedy on a preliminary injunction—should be overridden by this Court on mandamus.

As set forth herein, the petition, in which Petitioners ask this Court to vacate the district court's scheduled remedial hearing before it occurs and to instruct the district court to set a trial date, satisfies none of the well-settled principles for the issuance of a mandamus. In these circumstances, Respondents submit that oral argument is unlikely to assist the Court in resolving the petition. Respondents further submit that the legal arguments on which Petitioners rest the petition—principally that the preliminary injunction is allegedly moot—have already been fully briefed on Petitioners' merits appeal and should be addressed by the merits panel, which is scheduled to hear oral argument on October 6, 2023, little more than two weeks from now.

INTRODUCTION

Petitioners' mandamus petition should be denied because none of the settled requirements for issuance of such an extraordinary writ is satisfied. *First*, Petitioners have not established a "clear and indisputable right" to relief. On the contrary, the relief Petitioners seek—to vacate the remedial hearing scheduled by the district court for October 3–5, 2023, and to direct the district court to schedule a trial on the merits—is that this Court override the district court's management of its own docket. This Court, however, has consistently adhered to the principle that management of the district court's docket is a matter left to the discretion of that court, and has accordingly denied mandamus petitions seeking such relief.

Petitioners' principal argument in support of their petition is that the preliminary injunction is moot in view of the fact that, as a result of the Supreme Court's stay, the 2022 congressional elections were held pursuant to the likely unlawful enacted plan. That argument, however, ignores the scope of the district court's preliminary injunction, which is not limited to the 2022 election but instead enjoins the Secretary of State from "conducting any congressional elections" under the enacted plan.

Robinson v. *Ardoin*, 605 F. Supp. 3d 759, 766 (M.D. La. 2022). The sweep of that ruling is consistent with the district court's finding that vote dilution and the consequent abridgement of the fundamental right to vote constitutes irreparable injury, and that the injury will persist after the 2022 election "unless the map is changed for 2024." *Id*. at 851–52.

Petitioners' argument that the injunction is moot is squarely inconsistent with the Supreme Court's recent ruling in *Allen* v. *Milligan*, 143 S. Ct. 1487 (2023), and Petitioners' statements to the Supreme Court in this case. The Court in *Allen*, in substantially similar circumstances, affirmed a comparably worded injunction approximately six months after the 2022 election, with no suggestion that the Court lacked subject matter jurisdiction because the injunction was moot. *Id.* Had the 2022 elections rendered the injunction at issue moot, the Court undoubtedly would have raised the issue sua sponte. Likewise, in their letters to the Supreme Court following *Allen* urging the Court to set their appeal from the district court's preliminary injunction in this case for briefing and argument, Petitioners nowhere suggested that the injunction was moot or that the Court lacked jurisdiction.

Petitioners' other arguments likewise do not warrant mandamus. Courts routinely enter remedial orders pursuant to preliminary injunctions pending final resolution on the merits, and there is no basis for Petitioners' suggestion that doing so somehow violates due process. Likewise, Petitioners' argument that *Allen* and *Students for Fair Admissions* v. *President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023) ("*SFFA*"), reflect a "changing legal landscape" has no merit. Petition for Writ of Mandamus at 23, *In re Jeff Landry*, No. 23-30642, (Sep. 15, 2023) (Doc. 2-1). In *Allen*, the Supreme Court squarely reaffirmed the standards that the Court adopted nearly forty years ago in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986)—the same standards that the district court applied in issuing a preliminary injunction here—and expressly declined the defendants' invitation "to recast our § 2 case law as Alabama requests." *Allen*, 143 S. Ct. at 1507. Petitioners themselves acknowledged in a submission to the Supreme Court that, following *Allen*, "the law in the section 2 context has not substantially changed." Petitioners' Supplemental Letter Requesting Establishment of Briefing and Argument Schedule, *Ardoin* v. *Robinson*, No. 21A814 (June 14, 2023). As for *SFFA*, that case involved efforts by universities to achieve

diversity through affirmative action programs; it has nothing to do with the Voting Rights Act or the proper use of race in remedying violations of the Act.

Second, Petitioners cannot demonstrate that they have no adequate means other than mandamus to obtain relief. Their arguments regarding alleged mootness and the implications of *Allen* and *SFFA* can be and have been fully briefed on their merits appeal, and that appeal is scheduled to be argued on October 6, 2023, in little more than two weeks. *See* Appellants' Reply Brief at 5–8 , *Robinson*, 37 F.4th 208 (5th Cir. 2022) (Doc.248); Appellants' Supplemental Brief at 3 n.1, *Robinson*, 37 F.4th 208 (5th Cir. 2022) (Doc. 260-1). Any objections Petitioners may have to additional rulings by the district court following the forthcoming remedial hearing can likewise be presented to this Court on appeal in the ordinary course.

Third, Petitioners cannot show that mandamus is appropriate under the circumstances. No doubt this case is of enormous importance to Louisiana voters; it is particularly important to Plaintiffs and other Black Louisiana voters whose votes the district court has held have likely been (and likely continue to be) unlawfully diluted. But the relevant

standard is not whether the case in which a mandamus is sought is important. It is, rather, whether the importance of the issue presented extends "beyond the immediate case." *In re Depuy Orthopaedics, Inc.*, 870 F.3d at 352. The unusual procedural circumstances here—including, in particular, the stay issued by the Supreme Court after the issuance of a preliminary injunction but before a scheduled remedial hearing, the subsequent dismissal of certiorari as improvidently granted, and the vacatur of that stay—are unlikely to recur, and the issues Petitioners raise principally pertain to how the district court should manage its docket. And, as noted, Petitioners have ample opportunity to urge their position on appeal in the ordinary course.

Mandamus is not appropriate here, and the petition should be denied.

STATEMENT OF THE CASE

For nearly 40 years, and with the exception of a brief period in the early 1990s, only one of Louisiana's now six congressional districts has had a Black majority population. That single majority-Black district was only established after a federal court found that the State's prior

congressional district plan violated §2. *Major* v. *Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983).

The 2020 census revealed that Louisiana's population had grown and that its growth since 2010 had been driven entirely by growth in its minority populations. *Robinson*, 605 F. Supp. 3d at 778–79. As of 2020, Black citizens represented approximately 31.2% of the state's voting age population. In accordance with its constitutional obligations, *see* U.S. Const. art. I § 2, the State was required to redraw its congressional district boundaries to ensure compliance with the one-person, one-vote principle. It was also required to do so in compliance with the requirements of the Voting Rights Act of 1965 ("VRA").

Despite its obligations, and ignoring both the state's minority population growth, extreme levels of racially polarized voting, and the existence of alternative maps that would have satisfied traditional redistricting principles and allowed Black voters with shared interests to be combined in a second majority-Black district, on March 30, 2022, the Louisiana Legislature overrode a gubernatorial veto and adopted a congressional redistricting plan (H.B. 1) that provided for only one majority-Black district. *Robinson*, 605 F. Supp. 3d at 768.

Plaintiffs commenced this action the same day, and on April 15, 2022, little more than two weeks later, moved to enjoin the use of the enacted map on the ground that it violated Section 2 of the VRA. Over a five-day preliminary injunction hearing held in May 2022, the district court reviewed 244 exhibits and heard testimony from 22 witnesses, including 15 expert witnesses and seven fact witnesses. Petitioners called a total of 9 witnesses and extensively cross-examined the witnesses called by Respondents.

On June 6, 2022, the Court issued a 152-page ruling granting the motion for a preliminary injunction. The district court found that (i) Plaintiffs are substantially likely to prevail on each of the preconditions for establishing Section 2 liability under *Thornburg* v. *Gingles*, 478 U.S. 30, 46 (1986), and, as *Gingles* also requires, with regard to the totality of circumstances; and (ii) that H.B. 1 therefore likely dilutes the votes of Black Louisianans in violation of § 2 of the VRA. 52 U.S.C. § 10301. The district court preliminarily enjoined Petitioner Ardoin, the Louisiana Secretary of State, from "conducting any congressional elections under the map enacted by the Louisiana Legislature in H.B. 1." *Robinson*, 605 F. Supp. 3d at 766.

While recognizing the need for the expeditious adoption of a VRA-compliant map in light of the forthcoming 2022 elections, the district court nevertheless provided the Legislature with the first opportunity to adopt a remedial map by June 20, 2022. The court stated further that if the Legislature failed to pass a remedial map by that date, the Court would take necessary steps to enact a lawful remedial plan. *Id.* at 766–67. In providing the Legislature with the opportunity to enact a remedial map, the Court emphasized 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 856. Indeed, multiple maps compliant with the VRA had already been introduced in the Legislature's Regular Session and introduced into the preliminary injunction hearing record. Despite the five-day Special Session called from June 15 to June 20, 2022, by the Governor, the Legislature was unable to enact a compliant remedial map.

Petitioners immediately appealed to the Fifth Circuit and concurrently sought a stay of the preliminary injunction and remedial hearing process. On June 12, 2022, a unanimous motions panel denied

the stay request, largely deferring to the careful factual findings of the district court, and concluding that Petitioners had not "met their burden of making a 'strong showing' of likely success on the merits." *See Robinson* v. *Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022). Petitioners appealed to the Supreme Court and sought a writ of certiorari before judgment, arguing that "this case presents the same question" as that of the then-pending case of *Allen* v. *Milligan* (known then as *Merrill v. Milligan*). *See* Petitioners' Emergency Application for Administrative Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment, *Ardoin* v. *Robinson*, No. 21A814 (June 17, 2022). Meanwhile, the Legislature failed to enact a compliant remedial map and the district court set a June 29, 2022 start date for a remedial hearing. Order at 2, *Robinson* v. *Ardoin*, 605 F. Supp. 759 (M.D. La. 2022) (ECF No. 206).

Just before the remedial hearing was scheduled to commence however, the Supreme Court granted Petitioners' request for certiorari before judgment and directed that the case be "held in abeyance" pending the Court's ruling in *Allen*. *Ardoin* v. *Robinson*, 142 S. Ct. 2892 (2022).

After the Supreme Court issued its ruling in *Allen*, Petitioners asked the Supreme Court to set this case "for oral argument and briefing

on the merits in the normal course." Petitioners' Letter Requesting Establishment of Briefing and Argument Schedule, *Ardoin* v. *Robinson*, No. 21A814 (June 8, 2023). Petitioners acknowledged in a subsequent letter in support of that application that, following *Allen*, "the law in the section 2 context has not substantially changed." *See* Petitioners' Supplemental Letter Requesting Establishment of Briefing and Argument Schedule, *Ardoin* v. *Robinson*, No. 21A814 (June 14, 2023). On June 26, 2023, however, the Supreme Court dismissed the writ of certiorari as improvidently granted, vacated the stay it had previously entered, and noted that the vacatur of the stay "will allow the matter to proceed before the Court of Appeals for the Fifth Circuit for review in the ordinary course and in advance of the 2024 congressional elections in Louisiana." *Ardoin* v. *Robinson*, 143 S. Ct. 2654 (2023)

By order issued June 28, 2023, this Court requested that the parties file letters by July 6, 2023, "addressing whether this court should remand the appeal to allow the district court to consider the new authority." Court Directive at 1, *Robinson*, 37 F.4th 208 (5th Cir. 2022) (Doc. 242). The Court also requested that the parties file supplemental briefs addressing the Supreme Court's *Allen* decision and any other

developments or case law that would have been appropriate for Rule 28(j) letters while the case was held in abeyance. *Id.*

In their letter to the Court dated July 6, 2023, Petitioners urged the Court to "vacate and remand the matter in light of" *Allen* and *SFFA*. July 6, 2023 Appellants' Letter at 1, *Robinson* v. *Ardoin*, 37 F.4th 208 (5th Cir. 2022) (Doc. 246). Petitioners further asked the Court to "direct the district court to conduct a trial on the merits and reach a final judgment in advance of the 2024 congressional elections in Louisiana." *Id.* at 2. Petitioners argued that plaintiffs' request for a preliminary injunction "is now moot" in light of the 2022 elections, and that "[v]acatur and remand is the optimal case-management approach under the circumstances." *Id.* at 3, 4.

In their reply brief filed July 2019, 2023, Petitioners likewise argued that this case was moot in light of the fact that the 2022 congressional elections were held under H.B. 1. Appellants' Reply Brief at 5–8, *Robinson*, 37 F.4th 208 (5th Cir. 2022) (Doc. 248). Petitioners argued in their supplemental brief to this Court, as they do here, that the district court's preliminary injunction should be vacated in light of *Allen* and *SFFA*. Appellants' Supplemental Brief at 1–3, *Robinson*, 37 F.4th

208 (5th Cir. 2022) (Doc. 260-1). The Court has taken no action in response to Petitioners' request, and oral argument is now scheduled for October 6, 2023. Scheduling Order, *Robinson*, 37 F.4th 208 (5th Cir. 2022) (Doc. 280).

In light of the Supreme Court's vacatur of its order holding the case in abeyance, the district court has resumed the proceedings it had begun in June 2022. The hearing on the remedial map has been set to begin October 3, 2023. *See* Order Setting Prehearing Deadlines at 2, 605 F. Supp. 759 (M.D. La. 2022) (ECF No. 275).

On August 25, 2023, Petitioners moved in the district court to cancel the scheduled remedial hearing and to enter a scheduling order for trial. Emergency Motion to Cancel Remedial Hearing, *Robinson*, 605 F. Supp. 759 (M.D. La. 2022) (ECF No. 260). On August 29, 2023, the district court denied Petitioners' motion. Order at 1–2, *Robinson*, 605 F. Supp. 759 (M.D. La. 2022) (ECF No. 267). The court noted that the case had already been "extensively litigated," including through evidence and testimony presented at the five-day preliminary injunction hearing and in hundreds of pages of pre-and post-hearing briefing, all culminating in the Court's preliminary injunction ruling. *Id.* The court further noted

that "[t]he preparation necessary for the remedial hearing was essentially complete, in that plaintiffs had proposed a remedial map (and defendants elected not to propose such a map); witnesses and exhibits for the remedial hearing were disclosed; expert reports were exchanged; and defendants deposed plaintiffs' experts." *Id.* at 2. Accordingly, the court found, "based on the remaining issues before it, there is adequate time to update the discovery needed" for a remedial hearing on October 3–5. *Id.* While the court has not yet scheduled a trial on the merits, nowhere has it stated that a trial on the merits will not be held or cannot be held well in advance of the 2024 elections.

Petitioners now seek by this mandamus petition to make an end run around the district court's broad authority to manage its own caseload and around the Fifth Circuit panel set to consider their preliminary injunction appeal and mootness argument.

REASONS WHY THE WRIT SHOULD NOT ISSSUE

An appellate court's mandamus authority should be "reserved for really extraordinary causes," *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947). Mandamus is only appropriate where (i) there is a "clear and indisputable right to a writ"; (ii) there are "no other adequate means" to

obtain relief; and (iii) relief is "appropriate under the circumstances." *See In re Depuy Orthopaedics, Inc.*, 870 F.3d at 350–51. If the Petitioners fail to satisfy even one of these requirements, that would be dispositive against issuing this extraordinary relief. *Id.* at 353. Here, where Petitioners seek to impose a trial schedule on the district court, and seek to lift a preliminary injunction that is already on appeal (and fully briefed) before this Court, and, in any event, has no bearing on the resolution of a merits trial, Petitioners can satisfy none of these prongs.

I. Petitioners have not established a "clear and indisputable right" to encroach upon the district court's management of its own docket.

Petitioners fail to demonstrate a clear and indisputable right to mandamus relief. That "require[s] more than showing that the court misinterpreted the law, misapplied it to the facts, or otherwise engaged in an abuse of discretion." *Id.* at 350–51. Where a matter is committed to a district court's discretion, "we review only for clear abuses of discretion that produce patently erroneous results." *Id.* at 351.

Few matters are as firmly committed to a district court's discretion as the management of its own docket. It is black letter law that there is "power inherent in every court to control the disposition of the causes on

its docket with economy of time and effort for itself, for counsel, and for litigants." *See Landis* v. *N. Am. Co.*, 299 U.S. 248, 254 (1936). A district court's exercise of that power requires an "exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254–55; *Topalian* v. *Ehrman*, 954 F.2d 1125, 1139 (5th Cir. 1992) ("District courts generally are afforded great discretion regarding trial procedure applications (including control of the docket and parties).").

Consistent with this principle, therefore, this Court and other reviewing courts have regularly denied mandamus petitions seeking to alter a district court's judgment on how to manage its own docket. *See, e.g.*, *June Med. Servs., L.L.C.* v. *Phillips*, 2022 WL 4360593, at *2 (5th Cir. Sept. 28, 2022) (denying mandamus petition concerning the district court's denial of a motion to "vacate forthwith or within two days" an injunction, and the denial of a motion that the district court reconsider its denial by the following day); *In re Depuy Orthopaedics, Inc.*, 870 F.3d at 350–51 (denying a writ of mandamus to prohibit a district court from moving forward with a bellwether trial in an MDL case); *In re Itron, Inc.*, 31 F. App'x 664, 665 (Fed. Cir. 2002) (denying a mandamus petition where a district court "ordered a short stay and stated that the trial will

be set" later in the year, holding that "[b]oth decisions are well within the discretion of the district court to manage its own docket and promote judicial efficiency.").

Petitioners appear to argue that they are entitled to relief because it is "clear" and "indisputable" that the district court does not have jurisdiction to hold the preliminary injunction remedial hearing. Petitioners argue—as they have already before this Court—that the preliminary injunction has either expired or is moot. *See* July 6, 2023 Appellants' Letter at 3, *Robinson* v. *Ardoin*, 37 F.4th 208 (5th Cir. 2022) (Doc. 246) (again arguing that Respondents have "no live claim of irreparable harm" because Louisiana has already conducted elections under unlawful maps and urging that vacatur of the preliminary injunction and remand is the "optimal case-management approach"); July 19, 2023 Appellants' Reply Brief at 7, *Robinson*, 37 F.4th 208 (5th Cir. 2022) (Doc. 248) (where Petitioners again argue that Respondents "have no live claim of irreparable harm"); Appellants' Supplemental Brief at 3 n.1, *Robinson*, 37 F.4th 208 (5th Cir. 2022) (Doc. 260-1) (reiterating the argument that the "appeal is moot"). The issue whether the preliminary injunction is moot has been briefed before the merits panel

of this Court and will be before the Court during the oral argument on the preliminary injunction scheduled for October 6, 2023.

While this Court need not resolve the merits of the issue on a petition for mandamus, the district court's preliminary injunction is decidedly *not moot*. The district court's injunction is not limited to the 2022 elections. On the contrary, the court enjoined the Louisiana Secretary of State from "conducting *any* congressional elections under the map enacted by the Louisiana Legislature in H.B. 1." *Robinson*, 605 F. Supp. at 766 (emphasis added). Petitioners point to nothing in the preliminary injunction that limits its scope to the 2022 Congressional elections.

Petitioners' argument is contrary to the actions of the Supreme Court in *Milligan*. In that case, the Court affirmed a similarly worded injunction approximately six months after the 2022 election. *See Singleton*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022) (enjoining Alabama Secretary of State Merrill "from conducting *any* congressional elections according" to the enacted map) (emphasis added).[1] Mootness would have

[1] The *Milligan* district court has since rejected a similar argument made by the defendants in that case and reiterated that the case is not moot: "Black Alabamians

deprived the Court of subject matter jurisdiction over the injunction under review, and the Court could properly have addressed that issue sua sponte if it had any concerns that the case was moot. *St. Paul Fire & Marine Ins. Co.* v. *Bary*, 438 U.S. 531, 537 (1978) ("Although not raised by the parties, this issue [i.e., mootness] implicates our jurisdiction."); *Rocky* v. *King*, 900 F.2d 864, 866 (5th Cir. 1990) (recognizing that mootness bears on jurisdiction and "quite clearly can be raised sua sponte"). The Court plainly did not conclude that the occurrence of the 2022 election rendered the case before it moot.

Petitioners themselves have recognized that this case is not moot. Following the decision in *Milligan*, Petitioners asked the Supreme Court to set the case for merits briefing and oral argument. *See* Petitioners' Letter Requesting Establishment of Briefing and Argument Schedule, *Ardoin* v. *Robinson*, No. 21A814 (June 8, 2023). Nowhere in their letter did they suggest that the appeal was moot or should be dismissed for lack of jurisdiction. Had they believed that the 2022 election mooted the

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will be forced, if we do not address the matter, to continue to vote under a map that we have found likely violates Section Two." *Milligan* v. *Allen,* No. 2:21-CV-1291-AMM, 2023 WL 5691156, at *46 n.20 (N.D. Ala. Sept. 5, 2023). That, the court held, "constitutes a live and ongoing injury." *Id.*

injunction, Petitioners could not have properly asked the Court to review their appeal from the injunction on the merits.

Petitioners also appear to argue that they have a clear right to mandamus because (i) they "were prevented from fulsomely defending [their] case by virtue of the expedited preliminary-injunction proceedings," and (ii) "the resulting preliminary-injunction opinion from the Court did not fully resolve—and as a matter of law, could not have fully resolved—the merits of the Plaintiffs Section 2 claims." Petition for Writ of Mandamus at 23, *In re Jeff Landry*, No. 23-30642, Doc. 2-1 (Sep. 15, 2023), Doc. 2-1. But Petitioners do not explain why those reasons, even if true, support mandamus as opposed to any other form of relief, including on their pending merits appeal. In any event, the expedited nature of the preliminary injunction proceedings in the district court were entirely appropriate in light of the rapidly approaching election (indeed, Petitioners argued in the district court that it was *too late* for the injunction to be issued because doing so would interfere with the election, *Robinson*, 605 F. Supp. 3d at 852-56). And, as the motion panel noted, the limited scope of the record Petitioners developed at the hearing was a result of their own "tactical choice . . . to put all their eggs in the basket

of racial gerrymandering"—a choice that, as the panel noted, "has consequences." *Robinson*, 37 F.4th at 217-18. Finally, Petitioners' complaints about the purported lack of time to develop a full factual record, if anything, counsel *in favor* of district court deference to determine when in its schedule a trial of this magnitude and complexity is most appropriate.

II. Petitioners fail to demonstrate that they have "no other adequate means" to obtain relief.

Plaintiffs obligated to show that they have no means to obtain relief other than mandamus confront "a high bar: The appeals process provides an adequate remedy in almost all cases, even where defendants face the prospect of an expensive trial." *In re Depuy Orthopaedics, Inc.*, 870 F.3d at 352.

Petitioners do not clear this high bar. There is no irreparable injury to Petitioners if the district court proceeds as planned with the remedial hearing and adopts a remedial map. Petitioners can appeal in the ordinary course (as they already have), challenge on such an appeal any remedial map the district court may adopt, and attempt again to stay the injunction pending appeal. But there is nothing inconsistent with adopting a remedial map and at the same time moving forward with a

trial on the merits, and the district court has never suggested that it plans to forgo trial.

Petitioner implies that the fully briefed merits appeal of the preliminary injunction is inadequate because the record on appeal is incomplete and fails to include intervening events. This Court, however, has the benefit of substantial, up-to-date, briefing from both parties on the merits. Indeed, due to the Supreme Court's intervening stay, Petitioners had until July 17, 2023 to file their reply brief on appeal. And, as noted, that brief makes the same mootness argument Petitioners urge here. The merits panel also expressly requested supplemental briefing (which was completed Sept. 6, 2023) addressing the impact of the Supreme Court's decision in *Milligan* "and any other developments or caselaw that would have been appropriate for Rule 28(j) letters over the past year." Court Directive at 1, *Robinson*, 37 F.4th 208 (5th Cir. 2022) (Doc. 242). That briefing encompassed the impact on the law—if any—of the Supreme Court's *Milligan* and *SFFA* decisions. There is no prejudice or irreparable harm if Petitioners are required to follow the ordinary

course and contest the preliminary injunction and any remedial orders the district court may issue on appeal.[2]

III. Mandamus Is Not "Appropriate under the Circumstances"

Petitioners must independently establish that a writ of mandamus is "appropriate under the circumstances." *In re Depuy Orthopaedics, Inc.*, 870 F.3d at 352. This they cannot do. To guide the inquiry, this Court has looked to whether an issue's importance extends "beyond the immediate case." *Id.* Thus, it is not sufficient to argue that the case before the Court is important. For example, in *In re JPMorgan Chase & Co.*, 916 F.3d 494, 500 (5th Cir. 2019), the court found mandamus was appropriate where "[f]ederal district courts, in at least 210 decisions, have wrestled with the applicability of arbitration agreements at the conditional-certification stage of FLSA suits." *See id.* (specifying that 99 such cases "were in the past three years."). That is far afield from the circumstances here. Here, the parties and court were prepared to move

[2] The Petitioners also argue that there are more recent "irreparable harms" that will not be included in the record. But both parties have extensively briefed the irreparable harm prong of the preliminary injunction standard. Petitioners are free to draw any additional harms to the attention of the district court, and supplementing the appellate factual record may also be proper. *See, e.g., Gibson* v. *Blackburn*, 744 F.2d 403, 405 n.3 (5th Cir. 1984); Rules 10(e)(2)(C) and 28(j) of the Federal Rules of Appellate Procedure; Rule 201 of the Federal Rules of Evidence.

forward on the remedial hearing 12 months ago, after which Petitioners appealed, and, at Petitioners' insistence, the Supreme Court subsequently held the proceedings in abeyance. Petitioners do not attempt to show that this situation is likely to recur or that the issues presented extend beyond the immediate case.

CONCLUSION

This Court should deny the petition for writ of mandamus.

Respectfully submitted,

/s/ Adam P. Savitt

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September 20, 2023

CERTIFICATE OF SERVICE

I, Adam P. Savitt, a member of the Bar of this Court and counsel for appellees certify that, on September 20, 2023, a copy of the Respondents' Response Brief in Opposition to Petition for Writ of Mandamus was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/S/ *Adam P. Savitt*
ADAM P. SAVITT

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Adam P. Savitt, a member of the Bar of this Court and counsel for appellees certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.3, that the Respondents' Response Brief in Opposition to Petition for Writ of Mandamus is proportionately spaced, has a typeface of 14 points or more, except for footnotes, which are 12 points, and contains 4,794 words.

/s/ Adam P. Savitt
ADAM P. SAVITT

September 20, 2023

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, et al., *Plaintiffs,* v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, *Defendant.*	Civil Action No. 3:22-cv-00211-SDD-SDJ Chief Judge Shelly D. Dick Magistrate Judge Scott D. Johnson
EDWARD GALMON, SR., et al., *Plaintiffs,* v. R. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, *Defendant.*	Consolidated with Civil Action No. 3:22-cv-00214-SDD-SDJ

DEFENDANTS' MEMORANDUM IN SUPPORT OF
JOINT MOTION FOR STAY PENDING APPEAL

Defendants respectfully move the Court to stay its injunction of June 6, 2022, pending their appeals to the U.S. Court of Appeals for the Fifth Circuit. Defendants have a right of appeal under 28 U.S.C. § 1292(a)(1), and each set of Defendants has filed a notice of appeal. Defendants respect the Court's ruling but respectfully submit that it is vulnerable to reversal on appeal. This is not merely a remote possibility. As the Court is aware, a three-judge district court in Alabama issued an injunction similar to this Court's, and the Supreme Court stayed that injunction pending appeal. *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022). Defendants are well within their rights to seek the same relief here.

This motion provides this Court an opportunity to correct the irreparable harm to Defendants and all Louisiana citizens that will result from the injunction. Federal Rule of Appellate Procedure 8(a)(1)(A) commands an appellant to provide a district court this opportunity before seeking relief in a court of appeals. In this Rule, it is "fairly contemplated" that "tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844–45 (D.C. Cir. 1977).

Alternatively, the Court should issue a temporary stay, often called an "administrative" stay, to permit Defendants the opportunity to file and brief an emergency stay motion in the Fifth Circuit. "The purpose of [an] administrative stay is to give the court sufficient opportunity to consider the emergency motion for stay." *Garza v. Hargan*, No. 17-5236, 2017 WL 4707112, at *1 (D.C. Cir. Oct. 19, 2017). It is a "routine practice" in the Fifth Circuit that "falls within the 'power inherent in *every* court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *In re Abbott*, 800 F. App'x 296, 298 (5th Cir. 2020) (*Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)) (emphasis added). Such a stay would, if granted, apply temporarily and terminate upon an order of the Fifth Circuit resolving Defendants' forthcoming appellate stay motions.

However, if the Court is inclined to disagree with these requests, Defendants respectfully request that the Court issue a prompt order denying this motion to permit Defendants to move the Fifth Circuit for a stay pending appeal. In all events, the exigencies of this case require immediate relief, and Defendants respectfully request a ruling by close of business June 9 to permit them to file a motion for a stay in the Fifth Circuit. *See* FRAP 8(a)(2)(A)(1).

ARGUMENT

Under the "traditional" standard for a stay pending appeal, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted); *see also NFIB v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665–66 (2022). These factors are not to be applied "in a rigid or mechanical fashion." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (alterations accepted). A movant "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (citation omitted).

As the Supreme Court "has often indicated, however, that traditional test for a stay does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state's election law in the period close to an election." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). The Supreme Court "has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election, and [the Supreme] Court in turn has often stayed lower federal court injunctions that contravened that principle." *Id.* That standard is appropriately read to provide "a district court may *never* enjoin a State's election laws in the period close to an election." *Id.* at 881 (Kavanaugh, J., concurring). There is also an arguable "relaxed" interpretation of the rule, requiring "a *plaintiff* [to] establish[] at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly

delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Id.* (emphasis added). A stay is warranted under all of these standards.

A. Defendants are likely to succeed on the merits, and the merits are certainly not clear-cut in Plaintiffs' favor. At a minimum, the Court should have "little difficulty concluding that the legal questions presented by this case are serious, both to the litigants involved and the public at large, and that a substantial question is presented for [the Fifth Circuit] to resolve." *Campaign for S. Equal.*, 773 F.3d at 57. Defendants' arguments are more thoroughly set forth in their consolidated post-hearing brief, Doc. 158, and their consolidated post-hearing proposed conclusions of law, Doc. 159. Defendants have preserved all these arguments for appeal and incorporate them by reference. They summarize several critical points here for the sake of completeness.

1. Plaintiffs cannot satisfy the first *Gingles* precondition with illustrative plans that qualify as racial gerrymanders. A plan that links "distinct locations" on the basis of race does not satisfy the first *Gingles* precondition. *Sensley v. Albritton*, 385 F.3d 591, 597 (5th Cir. 2004). As Defendants have shown, *see, e.g.*, Doc. 158 at 3–13, that is the case here. Plaintiffs' post-hearing brief raised no quarrel with the proposition that racially predominant redistricting schemes cannot satisfy the first *Gingles* precondition. *See* Doc. 161 at 11. Instead, they mischaracterize Defendants' argument as a claim that "*any* consideration of race" amounts to predominance. *Id.* That is a straw man. The evidence clearly establishes more than consideration of race. It establishes that Plaintiffs' experts (1) "purposefully established a racial target" that "African-Americans should make up no less than a majority of the voting-age population," and (2) the racial target "had

a direct and significant impact" on the "configuration" of districts. *Cooper v. Harris*, 137 S. Ct. 1455, 1468–69 (2017). As a matter of law, that is predominance.

This Court's order found that Defendants' arguments regarding predominance are "hypercritical," Doc. 173 at 117, but the Supreme Court has found the same evidentiary indicators of predominance to support a finding of racial predominance. *Cooper*, 137 S. Ct. at 1469 (affirming district court finding of a "textbook example" of "race-based districting"); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (reversing finding of a lack of racial predominance); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 273 (2015) (calling materially identical evidence "strong, perhaps overwhelming, evidence that race did predominate"). The Court also concluded that *Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393 (5th Cir. 1996), deems racial predominance irrelevant to Section 2 claims, Doc. 173 at 112–13, but the Court's recognition "that the liability and remedial phases are highly interrelated," *id.* at 115, underscores the extent to which *Clark*'s discussion of racial predominance is unlikely to withstand scrutiny in the appellate courts empowered to interpret, modify, or overrule it. *Clark* recognized that the predominance inquiry *does* apply at the remedial phase. Given the Court's acknowledgment of record interrelatedness between the liability and remedial phases, predominance cannot be deemed irrelevant when a court decides to order a remedial phase.

Defendants submit that the distinction this Court would draw between "state action" in drawing a Section 2 remedial plan, and Section 2 illustrative remedies drawn by "demographers," *e.g.*, *id.* at 114, is unlikely to withstand appellate scrutiny. This Court has ordered the Louisiana Legislature to enact a new plan containing "an additional majority-Black congressional district," *id.* at 2, after Plaintiffs have provided that district's basic design in the form of illustrative plans replete with Plaintiffs' demographers' predominantly racial goals. Having a state actor essentially

follow those blueprints does not eliminate the taint. Indeed, the Court seemingly recognizes this problem: it relies on the dissent in the Supreme Court's recent decision in *Merrill v. Milligan*, 142 S. Ct. 879 (2022), and on the district-court decision it stayed, *see* Doc. 173 at 118.

2. Plaintiffs' illustrative plans are also unlikely to withstand appellate scrutiny under the first precondition for the additional reason that they combine "farflung segments of a racial group with disparate interests." *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (plurality opinion). Plaintiffs' experts scanned Louisiana for pockets of Black population, reasoning that "[y]ou can't draw a plan in an area where black population doesn't exist." 5/9 Tr. 209:22–23. Only after discerning that a 50 percent target requires that specific territory be joined—namely, East Baton Rouge Parish, Ouachita Parish (Monroe), and other portions of the delta region—did Plaintiffs seek communities-of-interest and traditional-principles justifications for the choice. *Id.* 137:13–138:10 (Cooper); *id.* 234:21–235:5. (Fairfax). As Defendants have explained, *see, e.g.*, Doc. 158 at 13, this does not qualify as a Section 2 district. Indeed, the only time anything like this configuration (combining East Baton Rouge with East and West Carroll and Morehouse Parishes) has ever been utilized was in a district invalidated as a racial gerrymander in the 1990s *Hays* litigation. *See Hays v. Louisiana*, 936 F. Supp. 360, 376 (W.D. La. 1996).

The Court's order bypasses this problem, focusing instead on mathematically derived compactness scores and other mathematical metrics. *See* Doc. 173 at 90–106. The Court did not justify combining portions of Louisiana Plaintiffs' lay witness repeatedly referred to as "south Louisiana" with the Delta Parishes in the northeast corner of the state. Rather, the Court criticized Defendants for failing to present evidence demonstrating that the illustrative plans did not combine coherent communities of interest. *See, e.g.*, Doc. 173 at 100–01. This "twisted the burden of proof beyond recognition." *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018). It was *Plaintiffs'* burden to

identify the communities allegedly subject to vote dilution, and not to rely on statewide concepts of proportionality. *Washington v. Tensas Par. Sch. Bd.*, 819 F.2d 609, 612 (5th Cir. 1987); *Gonzalez v. City of Aurora, Illinois*, 535 F.3d 594 (7th Cir. 2008). Moreover, it was Plaintiffs' burden to show that the farflung communities it stitched together in their illustrative plans' second majority-Black district (i.e., District 5) shared "similar interests" and characteristics beyond race. *LULAC*, 548 U.S. at 434–35. They failed to do so.

3. The third *Gingles* precondition was not satisfied at the preliminary injunction phase and cannot be established in this case. The parties agree that white crossover voting is sufficient to enable Black communities in the relevant areas to elect their preferred candidates without majority-minority districts. *See, e.g.*, 5/9 Tr. 339:18–343:10; *id.* 346:18–21. The third *Gingles* precondition cannot be shown "[i]n areas with substantial crossover voting." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (principal opinion). Where there is sufficient crossover voting to enable the construction of performing crossover districts "majority-minority districts would not be required in the first place." *Id.* That is the case here.

The Court's contrary view overlooks "crucial difference between legally significant and statistically significant racially polarized voting." *Covington v. North Carolina*, 316 F.R.D. 117, 169–70 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017). The order does not even cite *Bartlett*'s discussion of legally significant white bloc voting, and its discussion of *Covington* does not address the relevant question whether "a VRA remedy" is necessary. *Covington*, 316 F.R.D. at 168. To establish "legally significant white bloc voting," a challenger must show that "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes." *Thornburg v. Gingles*, 478 U.S. 30, 31 (1986). Here, that standard was not met, and cannot be met, because all experts agreed that the alleged white voting bloc is not sufficiently large to defeat the

combined strength of minority voters plus white crossover votes "without a VRA remedy." *Covington*, 316 F.R.D. at 168. A VRA remedy is therefore neither necessary nor legally supportable. The Court's contrary position yet again shifted the onus to Defendants to prove that a crossover district could perform, *see* Doc. 173 at 126. And any doubt on this point would be a matter of legislative discretion. The Court called this proposition "attenuated." Doc. 173 at 127.[1] Actually, the Supreme Court's precedent establishes this proposition in unmistakable terms. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018); *LULAC*, 548 U.S. at 429; *Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996).

"It is not [this Court's] task today to resolve the merits of this conflict in deciding the instant motion." *Campaign for S. Equal.*, 773 F.3d at 58. It is sufficient that Defendants' raise at least one "serious legal issue" warranting preservation of the *status quo* pending appeal. *Id.* (citation omitted).

B. "The equities do not justify withholding interim relief." *NFIB*, 142 S. Ct. at 666. They *command* interim relief. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). The injunction imposes irreparable harm *per se* by enjoining a duly enacted State law. *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). "If the district court judgment is ultimately reversed, the State cannot run the election over again, this time applying" the enacted redistricting plan. *Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014) (issuing stay pending appeal). This is *per se* a harm to the public interest. *See, e.g.*, *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 605 (E.D. La. 2016*), aff'd sub nom. Monumental Task Comm., Inc. v. Chao*, 678 F. App'x 250 (5th Cir. 2017).

[1] The Court also observed that "neither side" had "presented" any "evidence of a successful crossover district" in Louisiana, Doc. 173 at 127, but the Court overlooked the LSU/Tulane Professors' amicus plan which drew two such districts.

The injunction imposes further irreparable harm by compromising the State's election administration during an election year. And it compounds that irreparable harm by ordering the Legislature to enact a racial gerrymander and requiring the State to conduct elections under a racial gerrymander in November in all events. Defendants' arguments are more thoroughly recounted in their consolidated post-hearing brief, Doc. 158, and their consolidated post-hearing proposed conclusions of law, Doc. 159. Defendants have preserved all these arguments for appeal and incorporate them by reference. They summarize several critical points here for the sake of completeness.

1. There can be no serious question that the *Purcell* principle applies in this case. Defendants sponsored the testimony of the State Commissioner of Elections. *See, e.g.*, Doc. 158 at 22–25 and materials cited therein. Based on an extensive discussion of election-administration problems that will likely result if the injunction is not stayed, the Commissioner testified that she is "very concerned" with implementing a new map with minimal time and potentially harmful effects. 5/13 Tr. 40:12–43:9. There is no contrary record evidence. Plaintiffs relied on the testimony of the Governor's attorney, who has no meaningful experience administering elections, and even he testified that an injunction would pose a "huge challenge." 5/11 Tr. 23:1–2. He reached that conclusion assuming that the ultimate election date, November 8, 2022, is subject to alteration. 5/11 Tr. 21:17–22:21. He is wrong. *Foster v. Love*, 522 U.S. 67, 69 (1997). The Court nevertheless relied heavily on his testimony. Doc. 173 at 147.

The Court's order concedes that it is "Placing a bureaucratic strain on a state agency." Doc. 173 at 145. It will ultimately be the Fifth Circuit's (or the Supreme Court's) responsibility to determine whether the Court's order despite that constitutes a *Purcell* violation. For the time being, it is sufficient to note that the Court's ruling required it to move the candidate-qualification

deadline, which is hardly a compelling basis for an appellate tribunal to conclude that *Purcell* is totally irrelevant. The change of that deadline will have the domino effect of reducing the amount of time registrars have to program the map, error check, and notify voters of their new districts. Meanwhile, the Court's reliance on statements by Legislative Defendants in an impasse case ignores the timing of those statements (March 2022) and the fact that, in an impasse case, there is no need to adjudicate liability, meaning the judicial map-drawing can occur immediately.

2. The balance of equities favors a stay for the additional reason that the injunction risks a widespread and severe infringement of constitutional rights in order to vindicate this Court's interpretation of a *statute*. It "is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014). A stay would vindicate constitutional rights. The Court failed to address this problem at all in its order, and its suggestion that state action is not involved here is difficult to square with the fact that—without a stay—a presumptively unconstitutional plan is about to be imposed on hundreds of thousands of Louisiana voters.

All of these harms signal that "the public interest weighs strongly in favor of issuing the stay." *Veasey*, 769 F.3d at 896.

3. Any harm Plaintiffs may incur through a stay "does not outweigh the other three factors." *Veasey*, 769 F.3d at 896. "In consideration of this factor, the maintenance of the status quo is important." *Louisiana by & through Landry v. Biden*, No. 22-30087, 2022 WL 866282, at *3 (5th Cir. Mar. 16, 2022). Louisiana has, since the *Hays* litigation, run its congressional elections under plans with one majority-Black district, not two. A stay would preserve that status quo to permit the Fifth Circuit to address the difficult legal question whether another majority-Black

district is required. In these circumstances, the alleged harm of an election under a plan with one majority-Black district cannot outweigh the numerous harms of an injunction.

C. The Court's order is unlikely to withstand appellate scrutiny for the additional reason that it provides a remedial redistricting schedule that is unworkable. A court that invalidates redistricting legislation must "afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). The Court's order requires the Louisiana Legislature to enact redistricting legislation by June 20, as provisional relief, but the Legislature has no ability to meet that deadline. Because the Louisiana Legislature concluded its Regular Session on June 6, 2022,[2] the day the Court issued its injunction, the Legislature must now convene a new Extraordinary Session to consider redistricting legislation. La. Const. art. 3, § 2(B). The Louisiana Constitution sets a seven-day notice period "prior to convening the legislature in extraordinary session." *Id.* The Louisiana Constitution also requires that "each bill shall be read at least by title on three separate days in each house." La. Const. art. 3, § 15(D). The three-readings rule is mandatory, not discretionary, and legislation that does not go through three readings in each house is unconstitutional. *Doll v. City of New Orleans*, 85 So.2d 514, 515 (La. 1956); *Casey v. Southern Baptist Hosp.*, 526 So.2d 1332, 1336 (La. App. 4th Dist. 1988). Further, the Constitution provides that "[n]o bill shall be considered for final passage unless a committee has held a public hearing and reported on the bill." La. Const. art. 3, sec. 15(D).

This timeline assumes one proposed bill and no amendments, which is unlikely to occur. *See* LEG_4, LEG_5, and LEG_31 to 48 (showing 19 congressional bills and multiple amendments introduced during the 2022 First Extraordinary Session). Amendments, multiple bills or

[2] *See* 2022 Regular Session Information Bulletin, Louisiana Legislature, at 1 (Sept. 1, 2021), at https://legis.la.gov/legisdocs/22rs/22RS_House_Bulletin.pdf (visited June 6, 2022).

negotiation—in other words, the act of legislating—would add time to this schedule. Finally, to become law, a bill also must be signed by the Governor. The Court—after waiting more than three weeks from the preliminary injunction hearing before issuing its ruling—gave the Legislature only 14 days to enact a remedial plan. But it is not possible for the Legislature to comply with the seven-day notice period, the days of bill readings, the committee-hearing requirement, negotiating multiple bills and amendments into one bill, and the requirement of presentment to the Governor in 14 days. That would be so even without the complexities inherent in redistricting, and it is all more plain in light of those inherent complexities. The point of providing a legislature a meaningful opportunity to create a remedy is to allow the body to legislate; the Court's timeline precludes this work.

D. Alternatively, the Court should stay its injunction pending Defendants' forthcoming motions to stay in the Fifth Circuit. An administrative stay freezes the *status quo* to allow time for orderly adjudication of a stay motion in an appellate tribunal. A court need not find the stay factors met to issue such a stay. *See Garza*, 2017 WL 4707112, at *1. The Court should order that its injunction does not take effect until after the Fifth Circuit rules on Defendants' forthcoming emergency motions for a stay pending appeal.

CONCLUSION

The Court should stay its injunction pending appeal. Alternatively, the Court should issue an administrative stay of its injunction to permit Defendants to adjudicate a renewed stay motion in the Fifth Circuit. If the Court declines to deny either form of relief, it should promptly issue an order denying this motion to permit Defendants to seek expedited relief in appropriate appellate tribunals.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE, EDWIN RENE SOULE, ALICE WASHINGTON, CLEE EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS, AMBROSE SIMS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ("NAACP") LOUISIANA STATE CONFERENCE, AND POWER COALITION FOR EQUITY AND JUSTICE, *Plaintiffs*, v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana. *Defendant*.	Civil Action No. 3:22-cv-00211-SDD-RLB
EDWARD GALMON, SR., CIARA HART, NORRIS HENDERSON, TRAMELLE HOWARD, *Plaintiffs*, v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana. *Defendant*.	Civil Action No. 3:22-cv-00214-SDD-RLB

***ROBINSON* PLAINTIFFS' OPPOSITION TO**
DEFENDANT'S JOINT MOTION FOR STAY PENDING APPEAL

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Plaintiffs in the *Robinson* matter submit this memorandum in opposition to defendants' joint motion to stay the Court's injunction of June 6, 2022, pending appeal. ECF No. 177.

PRELIMINARY STATEMENT

After hearing the testimony of 22 witnesses and reviewing 244 exhibits offered during a five-day evidentiary hearing, and having considered hundreds of pages of briefs, expert reports, and post-hearing proposed findings of fact and conclusions of law, the Court concluded that plaintiffs are substantially likely to establish that Louisiana's congressional redistricting map violates Section 2 of the Voting Rights Act and that a preliminary injunction is warranted. Defendants' motion barely grapples with the reasoning set forth in the Court's thorough and detailed 152-page preliminary injunction opinion. Instead—based upon arguments that the Court has already considered and rejected—they assert that the Court's rulings are "unlikely to withstand appellate scrutiny." ECF No. 177-1, at 11 ("Mot."). But, as the Court has already held, defendants' arguments are unsupported by existing law. Defendants also disregard the Court's careful findings of fact and credibility determinations, which will be subject to a "clear error" standard of review on appeal. In granting the injunction, the Court properly "appl[ied] the law as it is" and declined defendants' invitation "to speculate or venture into advisory opinions." ECF No. 173 at 84 ("Op."). It should do the same here and deny defendants' motion.

As the Court has also already held, the equities—including considerations related to the *Purcell* principle—do not justify staying the Court's injunction. On the contrary, they powerfully support keeping the injunction in place. As the Court held, "protecting voting rights is quite clearly in the public interest, while allowing elections to proceed under a map that violates federal law most certainly is not." Op. at 142. Defendants' reliance on the Supreme Court's stay in *Merrill* v. *Milligan*, 142 S. Ct. 879 (2022), is misplaced because, as the Court has

noted, Op. at 148, the primary elections in that case were scheduled to begin just a few weeks after the Court's ruling; here, Election Day is five months away. In contrast, defendants wholly ignore the Supreme Court's on-point ruling from less than three months ago in *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 142 S.Ct. 1245, No. 21A471 (2022) (per curiam). There, the Court required the State of Wisconsin to redraw its state legislative maps 139 days before the state's primary—less time than the 150 days until Louisiana's election at issue here—and concluded that its order gave the state "sufficient time" to adopt new maps consistent with the Court's ruling that the state's election calendar. *Id*. at 1248. Defendants' argument also disregards the Court's finding of fact that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." ECF No. 173 at 148. This finding and *Wisconsin Legislature* are fatal to defendants' *Purcell* argument.

The relief defendants seek would effectively permit the State of Louisiana to conduct the 2022 congressional elections using a map that the Court has found to illegally dilute the votes of Louisiana's Black citizens. As plaintiffs' witnesses compellingly testified at the hearing, Louisiana has a centuries' long history of marginalizing and disenfranchising its Black citizens. Defendants seek by this motion to delay justice again and allow that sad history to continue unchanged for yet another election. The Court should say enough—indeed, it has already said so. Defendants' motion should be denied.

ARGUMENT

In evaluating an application to stay its ruling, the Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 425–26. The balance of equities and public interest

"merge when the Government is the opposing party." *Id*. at 435. Under each of these criteria, defendants' application fails.

I. Defendants cannot make a strong showing that they are likely to succeed on the merits.

Far from making a "strong showing" that they are likely to succeed on the merits, defendants' motion rests on arguments that the Court has already considered and rejected as inconsistent with governing law or the evidence at the hearing. Nothing in defendants' motion calls into questions the Court's determination that plaintiffs are likely to establish the first and third *Gingles* factors. *Thornburg* v. *Gingles*, 478 U.S. 30, 50–51 (1986). Defendants' motion makes no effort to challenge the Court's conclusions on the second *Gingles* factors or its analysis of the totality of circumstances.

***Gingles* I**. The Court correctly found that the six illustrative maps presented by plaintiffs' experts established that, consistent with traditional redistricting principles, the Black population of Louisiana is sufficiently large and geographically compact to constitute a majority in two reasonably compact congressional districts. Op. at 4–7. Defendants barely contested the testimony of plaintiffs' experts on this issue. None of defendants' experts testified that plaintiffs' illustrative maps were not majority-Black under the "any part Black" standard expressly approved in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), or that the maps were not reasonably compact both visually and using standard and well-accepted compactness measures.

Defendants' argument that plaintiffs' illustrative maps "qualify as racial gerrymanders," because they link "distinct locations" on the basis of race, Mot. at 4, ignores the Court's factual findings and mischaracterizes settled law. *First*, the Court found, based on the testimony and written reports of the plaintiffs' experts and lay witnesses and its assessment of their credibility, that "Plaintiffs 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." Op. at 103. For example, the Court credited Mr. Fairfax's testimony "that he used census places and landmark areas to gauge how often his maps split communities of interest, as well as socioeconomic data and roadshow testimony from community members for insight into local ideas about communities of interest." Op. at 101. In contrast, defendants offered no testimony at the hearing about communities of interest. As the Court noted, this is "a glaring omission, given that Joint Rule 21 requires communities of interest to be prioritized over and above preservation of political subdivisions. Op. at 101. The Court further found that plaintiffs' *Gingles* I experts "both offered persuasive testimony regarding how they balanced all of the relevant principles, including the Legislature's Joint Rule 21, without letting any one of the criteria dominate their drawing process." *Id*. at 106. The Court concomitantly found that race was not the predominant factor in creating plaintiffs' illustrative maps. On the contrary, the Court found that "[t]here is *no factual evidence* that race predominated in the creation of the illustrative maps in this case." Op. at 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.

Second, the Court correctly held, under the Fifth Circuit's decision in *Clark* and other binding precedent, that the mapmaker's motivation in preparing an illustrative map is irrelevant to whether *Gingles* I is satisfied. Op. at 112 (citing *Clark v. Calhoun Cty.*, 88 F.3d 1393, 1406–07 (5th Cir. 1996)). As the court held in *Clark*, the Supreme Court's Fourteenth Amendment racial gerrymandering decisions in *Bush* v. *Vera*, 517 U.S. 952 (1996), and *Shaw* v. *Hunt*, 517 U.S. 899 (1996)

> support our conclusion that *Miller*'s emphasis on purpose does not apply to the first *Gingles* precondition. In neither case did the Court suggest that a district drawn for predominantly racial reasons would necessarily fail the *Gingles* test. To the contrary, the first *Gingles* factor is an inquiry into causation that necessarily classifies voters by their race.

Clark, 88 F. 3d at 1406–07. Unlike the cases on which defendants principally rely, plaintiffs assert no claim here based upon racial gerrymandering. Defendants' argument also improperly conflates the requirements applicable to illustrative and remedial maps under Section 2, as explained in plaintiffs' post-hearing brief. *See* ECF No. 161 at 8–9.

Finally, as the Court also explained, defendants' reliance on the *Hays* decisions, Mot. at 6, is equally inapposite. As the Court held, the illustrative maps in this case are demonstrably more compact and consistent with traditional redistricting principles than the maps at issue in that case. Op. at 110. As the Court also concluded, "*Hays*, decided on census data and demographics 30 years ago," does not justify "freez[ing] Louisiana's congressional maps in perpetuity." *Id*.

***Gingles* III**. The Court was also correct in ruling that plaintiffs satisfied their burden to establish the third *Gingles* factor—namely, 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.

Contrary to defendants' assertions, Mot. at 7, the Court expressly considered whether there was "legally significant" white bloc voting sufficient to satisfy *Gingles* III, and recognized that "high levels" of white crossover voting could undermine a finding of legally significant polarized voting. Op. at 123–24. The Court correctly found, however, that no evidence was presented in this case of sufficiently "high levels" of white crossover voting to defeat plaintiffs' showing that white bloc voting usually results in the defeat of Black-preferred candidates. *Id.* at 126. On the contrary, the Court found that plaintiffs' experts, Drs. Palmer and

Handley, "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 124. The Court further credited the testimony by Drs. Palmer and Handley that white crossover voting was "insufficient to swing the election for the Black-preferred candidate in any of the contests they examined." *Id*. at 126.

The Court properly rejected defendants' arguments about crossover voting as unsupported by the evidence. As the Court noted, "[i]f there is evidence of a successful crossover district in Louisiana, neither side has presented it." *Id.* at 127. Thus, the Court concluded, "[t]he fact that Plaintiffs' experts agreed, hypothetically, that a sub-50% BVAP district *could* perform under unspecified circumstances, is not sufficient to overcome the conclusions reached by their robust statistical analysis." *Id.* at 126. In contrast, the Court found the testimony of defendants' experts on crossover voting "unreliable" and "unsupported by sufficient data." *Id.* at 125–26. The Court found that Dr. Solanky's testimony was "unreliable because it was based on his analysis of one exogenous election and limited to one parish." *Id*. at 125. Similarly, it found that Dr. Lewis's "hypothetical based on limited data [involving a single presidential election was] not helpful." *Id.* at 125–26. These findings are strongly supported by the evidentiary record, and defendants offer no basis to conclude that they were clear error.

Defendants' apparent contention that the mere existence of white crossover voting precludes satisfying *Gingles* III, Mot. at 7–8, fundamentally misconstrues the significance of crossover voting under settled law and was rejected by the Court. *Id.* at 124-25. As set forth in plaintiffs' post-hearing brief, the extent of white crossover voting "has no bearing on the *Gingles* inquiry." ECF No. 161 at 9. To determine whether *Gingles* III has been established, the Court must instead assess whether "white voters engage in bloc voting at levels sufficient to

regularly defeat Black-preferred candidates in the area where the new illustrative district would be drawn." *Id.* at 9 (citing *Thornburg* v. *Gingles*, 478 U.S. 30, 51 (1986)). Defendants' reliance on *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), to attempt to undermine the significance of the Court's findings is misplaced. Contrary to Defendants' assertion, the Court in *Bartlett* nowhere states that plaintiffs "*cannot*" establish *Gingles* III "[i]n areas with substantial crossover voting." Mot. at 7 (quoting *Bartlett* v. *Strickland*, 556 U.S. 1, 24 (2009) (emphasis added)). To the contrary, the question posed by *Bartlett* is whether crossover voting in the districts that actually exist is sufficient to overcome *Gingles* III. 556 U.S. at 24. *Bartlett* does not stand for the proposition that Section 2 liability does not lie when a hypothetical district could be (but has not been) drawn in which crossover voting was sufficient to overcome *Gingles* III. Defendants' contention that the existence of any white crossover voting invariably defeats a finding that *Gingles* III is satisfied is contrary to the plain language of *Gingles* itself and would effectively preclude relief under Section 2 in virtually all cases. As the Court concluded, that is not the law. Op. at 123–24.

II. The balance of equities and other *Nken* factors weigh against a stay.

This Court correctly held that plaintiffs "will suffer an irreparable harm if voting takes place in the 2022 Louisiana congressional elections based on a redistricting plan that violates federal law." Op. at 141. As the Court explained,

> [v]oting is a fundamental political right, because it is preservative of all rights. Once the election occurs, there can be no do-overs and no redress for voters whose rights were violated, and votes diluted by the challenged plan.

Id. (internal quotations and citations omitted). The Court's ruling follows the consistent holdings of federal courts throughout the country that restrictions on voting rights constitute irreparable harm. *See, e.g., League of Women Voters of N. Carolina* v. *North Carolina*, 769 F.3d 224, 247–48 (4th Cir. 2014) (collecting cases). In particular, vote dilution in violation of Section 2 of the

VRA "irreparably injures the plaintiffs' right to vote and to have an equal opportunity to participate in the political process." *Patino* v. *City of Pasadena*, 229 F. Supp. 3d 582, 590 (S.D. Tex. 2017); *Casarez* v. *Val Verde Cty.*, 957 F. Supp. 847, 865 (W.D. Tex. 1997) (holding that violation of local election laws and the Voting Rights Act was "a harm monetary damages cannot address").

The irreparable harm to plaintiffs and to Black voters across Louisiana from conducting an election using a districting map that illegally dilutes their votes far outweighs any administrative burden on the defendants from having to adopt and implement a legal map. Defendants' assertion that "'[p]lacing a bureaucratic strain on a state agency'" justifies allowing the State to dilute the votes of its Black citizens, Mot. at 9 (quoting Op. at 145), is not the law, nor should it be. On the contrary, as the courts have repeatedly held, "mere administrative inconvenience . . . in redistricting simply cannot justify denial of Plaintiffs' fundamental rights." *Johnson* v. *Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996); *see also Bethune-Hill* v. *Virginia State Board of Elections*, No. 3:14-CV-852, 2018 WL 11393922, at *1 (E.D. Va. Aug. 30, 2018) ("[T]he risk that a stay wholly would deprive the plaintiffs of a remedy significantly outweighs the inconvenience and any other detriments that the intervenors may experience in re-drawing the districts."). In any event, defendants' argument ignores the Court's express finding that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." Op. at 148.

Defendants argue that the injunction should be stayed because, they contend, the Court "order[ed] the Legislature to enact a racial gerrymander" and "requir[ed] the State to conduct elections under a racial gerrymander in November in all events." Mot. at 9. The Court's injunction does nothing of the kind. To begin with, as discussed above, the Court properly

concluded that none of the plaintiffs' illustrative maps is a racial gerrymander. And, in any event, the Court did not order the Legislature to adopt any of those maps. On the contrary, it properly respects the role of the Legislature in redistricting by giving it an opportunity in the first instance to adopt a map that complies with Section 2. And, if the Legislature determines not to adopt a new map, the Court order provides for further proceedings to consider an appropriate remedial map. The proposition implicit in defendants' argument—that *any* congressional map with two districts that afford Black voters the opportunity to elect their candidates of choice, is a racial gerrymander—is unsupported by anything in the record and is contrary to settled law.

Defendants' reliance on the principle in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election," *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (citing 549 U.S. 1 (2006)) (quoted in Mot. at 3), is misplaced. Louisiana is not "close to an election." Election Day will not for another five months. As the Court found, there is ample time for the State to adopt and implement a congressional map that complies with the Voting Rights Act. Op. at 148.

The Supreme Court's recent decision in *Wisconsin Legislature* is on point. The Court there, in a decision rendered less than five months before the relevant primary election, overturned a redistricting map adopted by the State Supreme Court and remanded to that Court to adopt a new map. The Court expressly concluded that in so doing it gave the State Supreme Court "sufficient time to adopt maps consistent with the timetable" for the primary. *Wis. Legislature* v. *Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam). As this Court noted, the amount of time before the Louisiana election is *more* than the amount of time between the Supreme Court's ruling in *Wisconsin Legislature* and the relevant primary in that case. Op. at 148. For similar reasons, defendants' reliance on *Milligan* is misplaced. Mot. at 1 (citing

Merrill v. *Milligan*, 142 S. Ct. 879, 881 (2022)). As Justice Kavanaugh indicated in his concurring opinion, the primary elections in Alabama at issue there were scheduled to begin only seven weeks from the Court's ruling, *id*. at 879, far less than the five months available here. *See* Op. at 148.

As the Court also noted, defendants' contention that there is insufficient time to adopt and implement a new map before Election Day is squarely contrary to the representations the Legislative Intervenors and the Attorney General made to the state court in the prior impasse case that "there remains several months on Louisiana's election calendar to complete the [redistricting] process." Op. at 145–46 (quoting GX 32, at 8). Defendants try to harmonize that and similar statements they made to the state court with their current position by asserting that the statements were made in March 2022 and that "in an impasse case, there is no need to adjudicate liability, meaning that judicial map-drawing can occur immediately." Mot. at 10. But no "judicial map-drawing" was underway when defendants made those representations to the state court. To the contrary, plaintiffs made those representations in support of their argument that the plaintiffs' claims in those cases were *too early* (in their words, "unripe" and "nonjusticiable") and that the state court need not take up any challenge to 2022 redistricting until some unspecified time after the legislative session that ended on June 6 was complete. GX 32 at 5–8. Now, in this case—commenced the same day after the Legislature's veto override vote—defendants argue that plaintiffs' challenge is *too late*. The Court properly concluded that these squarely inconsistent positions cast doubt on the "credibility" of defendants' position. Op. at 145.

The factors Justice Kavanaugh identified in his concurrence in *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (cited in Mot. at 3–4), likewise do not justify a stay. As the

Court's opinion exhaustively demonstrates, the underlying merits overwhelmingly favor plaintiffs, and plaintiffs will suffer irreparable harm absent an injunction. Nor have plaintiffs "unduly delayed bringing the complaint to court." *Merrill*, 142 S. Ct. at 881; on the contrary, they plaintiffs filed their complaints *the same day* that the challenged maps were enacted. By contrast, it was defendants who repeatedly sought to delay this litigation, successfully urging the Court to adjourn the hearing date it originally set; then unsuccessfully moving three weeks later for a stay of the proceedings; and now seeking a stay of the Court's order. And they did so although, as the Court noted in its Opinion, they had been on notice for at least six months that a congressional map with only one majority-Black district would become the subject of litigation. Op. at 126 n. 350. Finally, as noted, the Court found that redrawing the State's congressional map is feasible without significant cost, confusion, or hardship. Op. at 144-145.

Finally, defendants' argument that the Court's injunction should be stayed because the fourteen days it allows the Legislature to adopt new maps is insufficient, Mot. 11–12, is a non sequitur. If the schedule the Court adopted gives the Legislature too little time, the appropriate remedy would be for defendants to seek additional time to develop a new redistricting plan. It would not be to stay the injunction altogether. That defendants have not asked for more time, or any other relief that would address their accusation that the timeline the Court imposed is "unworkable," Mot. at 11, illustrates that this is a red herring. In any event, as the Court concluded, the fourteen-day period it adopted is consistent with precedent, *see* Op. at 149 n. 443 (citing cases), and is ample time in light of the numerous maps already made available—from the redistricting process through this litigation—for the Legislature to consider.

In any event, defendants' contention that it cannot act before the Court's June 20 deadline in light of the notice period required for an Extraordinary Session and the bill-reading

requirement before a law may be enacted is unpersuasive. Mot. at 11–12. The governor has already called an Extraordinary Session, and thus, the process under way. Moreover, the Legislature has been on notice that the Court's decision would issue during or shortly after the ordinary session. The Legislature could have scheduled a special session to convene immediately after the ordinary session in anticipation of the Court's ruling. At the very least, members of the Legislature could have set out a plan for preparatory work that could be completed before the start of any special session. In any event, the Legislature will not be operating on a blank slate. It has considered proposed bills in the prior sessions, including two districts that would afford Black voters the opportunity to elect their candidates of choice.

Defendants' reliance on the three-readings rule is similarly unavailing. Article 3 of the Louisiana Constitution specifies that, on each reading, a "bill shall be read at least by title" (emphasis added) meaning that a bill can evolve and change over a three-day period so long as its titles do not. La. Const. art. 3, § 15(D). In any event, the requirements for seven days' notice of an Extraordinary Session and three bill reading require a total of only ten days, less than the fourteen days allowed by the Court's injunction.

CONCLUSION

Plaintiffs commenced this action the very same day that the State's map became law, and plaintiffs and the Court acted with extraordinary diligence and expedition on plaintiffs' motions for a preliminary injunction. Defendants' contention that it is still too late for the Court to afford plaintiffs relief amounts to saying that, as a matter of law, the State gets a free pass to violate the Voting Rights Act for at least one election cycle. That is not the law. For that and the other reasons set forth above, defendants' motion for a stay pending appeal—which would, in effect, allow the State to conduct the 2022 congressional elections using a map that illegally dilutes the votes of its Black citizens—should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system which provides electronic notice of filing to all counsel of record, on this 8th Day of June, 2022.

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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, *et al*

versus

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana

CIVIL ACTION

22-211-SDD-SDJ

consolidated with

EDWARD GALMON, SR., *et al*

versus

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana

CIVIL ACTION

22-214-SDD-SDJ

RULING

This matter is before the Court on the *Joint Motion to Stay Pending Appeal*[1] filed by Defendant, Louisiana Secretary of State Kyle Ardoin, and the Intervenor Defendants, Senate President Page Cortez, Speaker Clay Schexnayder, and Attorney General Jeff Landry. The *Galmon* and *Robinson* Plaintiffs filed separate *Oppositions*.[2] For the reasons that follow, the *Motion* is DENIED.

On a motion to stay, the Court "considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies."[3]

[1] Rec. Doc. No. 177.
[2] Rec. Doc. Nos. 180, 181.
[3] *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Defendants have not shown that the Court erred in its application of the prevailing law to the facts adduced at the hearing.

Defendants' argument that they will be irreparably harmed absent a stay is disingenuous. Defendants contend that a stay is necessary to avoid "compromising the State's election administration during an election year."[4] But, in March 2022, Senate President Cortez and House Speaker Schexnayder represented to another court that Louisiana's "election calendar is one of the latest in the nation";[5] that "the election deadlines that actually impact voters do not occur until October 2022";[6] and that "there remains several months. . .to complete the process."[7]

The Court finds that Plaintiffs will suffer substantial harm if a stay is granted. Given that there has been no showing of error in the Court's application of the prevailing law, and considering that the Legislators' representations indicate that there is ample time to consider and enact remedial maps, a halt to the remedy process "will substantially injure the other parties."[8] A stay increases the risk that Plaintiffs do not have an opportunity to vote under a non-dilutive congressional map until 2024, almost halfway through this census cycle.

Finally, the Court finds that the public interest lies in conducting elections under a legal map.

Defendants argue for a "'relaxed' interpretation"[9] of the stay standard, citing Justice Kavanaugh's concurrence in *Merrill v. Milligan*, wherein he discussed the propriety of a stay "in the period close to an election."[10] The Court finds the concurrence inapplicable. Where, as here,

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[4] Rec. Doc. No. 177-1, p. 9.
[5] Rec. Doc. No. 173, p. 11 (citing GX-32, p. 8).
[6] *Id*. (citing GX-32, p. 5).
[7] *Id*.
[8] Note 3, *supra.*
[9] Rec. Doc. No. 177-1, p. 4.
[10] *Merrill v. Milligan*, 142 S. Ct. 879 (2022).

"election deadlines that actually impact voters do not occur until October 2022,"[11] we are not in "a period close to an election."[12]

Nor is the Court persuaded that the rules of the legislature requiring seven days' notice of an extraordinary session, three days for bill readings and committee hearings, among other things, indicate the necessity of a stay. If Defendants need more time to accomplish a remedy for the Voting Rights Act violation, the Court will favorably consider a *Motion* to extend the time to allow the Legislature to complete its work. As Plaintiffs point out, allowing for seven days' notice of the start of the session and three days for bill reading would require ten days total, and this Court gave the Legislature fourteen. So, seven days are available to comply with this Court's order. Defendants' argument about the "unworkable" deadline is insincere and not persuasive.

The Court also declines to enter an administrative stay. This decision "falls within the 'power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'"[13]

ACCORDINGLY,

IT IS HEREBY ORDERED that Defendants' *Joint Motion to Stay*[14] is DENIED.

Signed in Baton Rouge, Louisiana this 9th day of June, 2022.

CHIEF JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[11] Note 5, *supra*.
[12] Note 10, *supra*.
[13] *In re Abbott*, 800 F. App'x 296, 298 (5th Cir. 2020)(quoting *Landis v. N. Am. Co.,* 299 U.S. 248, 254 (1936)).
[14] Rec. Doc. No. 177.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

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CONSOLIDATED WITH

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KYLE ARDOIN, ET AL	

ORDER

The Court held a telephone status conference on July 12, 2023.

The parties filed Notices of their respective positions regarding the continuation of these proceedings following the stay lifted by the United States Supreme Court.

The Court ORDERS that the preliminary injunction hearing stayed by the United States Supreme Court, and which stay has been lifted, be and is hereby reset to October 3-5, 2023, at 9:00 a.m. in Courtroom Three.

The parties shall meet and confer and jointly submit a proposed pre-hearing scheduling order on or before Friday July 21, 2023.

Signed in Baton Rouge, Louisiana, on July 17, 2023.

Shelly D. Dick

CHIEF JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

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EDWARD GALMON, SR., *et al*

versus

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana

CIVIL ACTION

22-214-SDD-SDJ

RULING

This matter is before the Court on a *Motion to Cancel Hearing on Remedy and to Enter a Scheduling Order for Trial*[1] filed by Defendant, Louisiana Secretary of State Kyle Ardoin, and the Intervenor Defendants, Senate President Page Cortez, Speaker Clay Schexnayder, and Attorney General Jeff Landry. The *Galmon* and *Robinson* Plaintiffs filed a joint *Opposition*,[2] and the Louisiana Legislative Black Caucus separately opposed[3] the *Motion*. For the reasons that follow, the *Motion* is DENIED.

This case has been extensively litigated. The parties have conducted expansive discovery, presented testimony from twenty-one witnesses, introduced hundreds of exhibits into evidence throughout a five-day preliminary injunction hearing, and filed hundreds of pages of

[1] Rec. Doc. No. 260.
[2] Rec. Doc. No. 264.
[3] Rec. Doc. No. 263.

pre- and post-hearing briefing—all of which culminated in this Court's 152-page *Ruling* on liability.[4] On the eve of the remedial hearing, this matter was stayed by the United States Supreme Court.[5] The preparation necessary for the remedial hearing was essentially complete. The parties were ordered to submit proposed remedial maps. The Defendants elected not to prepare any remedial maps. The Plaintiffs disclosed proposed remedial maps; witnesses and exhibits were disclosed; expert reports were disclosed; and Defendants deposed Plaintiffs' identified experts.[6] The only remaining issue is the selection of a congressional district map—a limited inquiry—which has been the subject of disclosure and discovery in the run up to the June 29, 2022 remedy hearing that was stayed on the eve of trial.

The Court finds that based on the remaining issue before it, there is adequate time to update the discovery needed in advance of the hearing to take place October 3–5, 2023. The parties were previously ordered[7] to confer and jointly submit a proposed pre-hearing scheduling order in advance of the October 3, 2023 hearing date but have failed to reach an agreement. Accordingly, the Court will refer this matter to the Magistrate Judge on an expedited basis for the entry of a scheduling order.

ACCORDINGLY, **IT IS HEREBY ORDERED** that Defendants' *Motion to Cancel Hearing on Remedy and to Enter a Scheduling Order for Trial*[8] is DENIED. The matter is hereby referred to the Magistrate Judge for an expedited entry of a Scheduling Order.

Signed in Baton Rouge, Louisiana this 29th day of August, 2023.

CHIEF JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[4] Rec. Doc. No. 173.
[5] Rec. Doc. No. 227.
[6] *See* Rec. Doc. No. 206.
[7] Rec. Doc. No. 250.
[8] Rec. Doc. No. 260.

52 U.S. Code § 10301 - Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Pub. L. 89–110, title I, § 2, Aug. 6, 1965, 79 Stat. 437; renumbered title I, Pub. L. 91–285, § 2, June 22, 1970, 84 Stat. 314; amended Pub. L. 94–73, title II, § 206, Aug. 6, 1975, 89 Stat. 402; Pub. L. 97–205, § 3, June 29, 1982, 96 Stat. 134.)