No. 23A_____

IN THE SUPREME COURT OF THE UNITED STATES

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

On Application for Stay Pending Appeal from the United States Court of Appeals for the Fifth Circuit

APPENDIX TO EMERGENCY APPLICATION FOR STAY OF WRIT OF MANDAMUS

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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

JOINT MOTION FOR STATUS CONFERENCE

NOW INTO COURT, come Plaintiffs 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 (the "Robinson Plaintiffs"), and Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard (the "Galmon Plaintiffs") to request that this Court set a status conference as soon as is practicable to discuss the resumption of this action following the June 26, 2023 Order of the Supreme Court. *See* Summary Dispositions, *Ardoin* v. *Robinson*, No. 21-1596 (June 26, 2023). Under FRCP Rule 16(a), a court may order attorneys to appear for a conference for the purpose of, among other things, "expediting disposition of the action" and "establishing early and continuing control so that the case will not be protracted."

On June 6, 2022, and following a five-day hearing in early May 2022, this Court granted the Plaintiffs' Motion for Preliminary Injunction. *Robinson* v. *Ardoin*, 605 F. Supp. 3d 759 (M.D. La.). The 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 any congressional elections using that map. *Id.* at 766-67. The Court established a deadline of June 20, 2022 for the Louisiana Legislature to enact a map compliant with the Court's decision and stated that it would enact a remedial plan if the Legislature failed to do so. *Id.*

Defendants moved in the Fifth Circuit on June 9, 2022 for a stay pending appeal. The Fifth Circuit initially entered an administrative stay of this Court's injunction and, on June 12, 2022, issued a 33-page opinion denying Defendants' motion for a stay and

vacating the administrative stay, while also ordering expedited briefing for a merits panel. *See Robinson* v. *Ardoin*, 37 F.4th 208 (5th Cir. 2022).

Although the Governor proclaimed an Extraordinary Legislative Session on June 7, 2022 to allow for the passage of a new congressional map, the Louisiana Legislature failed to timely enact a redistricting plan compliant with this Court's directive. On June 17, 2022, the Court required that the parties submit briefing and proposed remedial maps and scheduled an evidentiary hearing to be held on June 29, 2022 in order to evaluate the proposed maps and facilitate the adoption of a remedial map. ECF No. 206. The same day, Defendants filed an emergency application for a stay and petition for writ pending certiorari with the United States Supreme Court, which was granted on June 28 pending decision by the Supreme Court in *Allen* v. *Milligan*, 599 U.S. __ (2023). The grant of certiorari by the Supreme Court paused proceedings in the Fifth Circuit and in this Court. ECF No. 227.

On June 8, 2023, the Supreme Court issued its decision in *Allen* v. *Milligan*. 599 U.S. __ (2023). The Supreme Court upheld the judgment of the three-judge panel in that case that the Alabama congressional redistricting plan at issue likely violated Section 2 of the Voting Rights Act and reaffirmed the standards that it first adopted in *Thornburg* v. *Gingles* and that this Court applied to the present case. *Id.*

The Supreme Court subsequently issued an Order on June 26, 2023 dismissing the writ of certiorari before judgment as improvidently granted, vacating the stay, and allowing the matter to proceed "in the ordinary course and in advance of the 2024 congressional elections in Louisiana." Summary Dispositions, *Ardoin* v. *Robinson*, No. 21-1596 (June

26, 2023). The dismissal of certiorari and lifting of the Supreme Court's stay allows this Court to resume its proceedings regarding the remedial maps.

Accordingly, the Robinson and Galmon Plaintiffs respectfully request that the Court schedule a status conference at its earliest convenience in order to establish a timeline for resuming the process for establishing the remedial maps, including but not limited to (i) entering a schedule for supplemental briefing and remedial maps; and (ii) setting forth a date for an evidentiary hearing to resume consideration of the maps.

Date: June 27, 2023

Respectfully submitted,

By: */s/John Adcock*

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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

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 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

PLAINTIFFS' JOINT NOTICE REGARDING STATUS CONFERENCE

NOW INTO COURT, come Plaintiffs Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard (the "Galmon Plaintiffs") and 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 (the "Robinson Plaintiffs"), to state their position regarding further proceedings, in advance of the status conference scheduled for today at 3 p.m.

Plaintiffs request that the Court recommence the remedial process that was underway when the Supreme Court stayed this case last summer.[1] When the Supreme Court's now-lifted stay was issued, this Court had "grant[ed] Plaintiffs Motions for Preliminary Injunction[,] preliminary enjoin[ed] Secretary Ardoin from conducting any congressional elections under the map enacted by the Louisiana Legislature in H.B. 1," and ordered a remedy map to be adopted. *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 766 (M.D. La. 2022). The Court reached this decision in a thorough, well-reasoned order that followed a five-day evidentiary hearing in which the parties—two sets of plaintiffs and three sets of defendants—presented testimony from 21 witnesses, introduced into evidence hundreds of exhibits, and filed hundreds of pages of pre- and post-trial briefing and proposed findings of fact and law. Both this Court and the Fifth Circuit declined to stay Defendants' appeal of that order while remedial proceedings continued.

The Supreme Court has now vacated its stay of this Court's preliminary injunction, and accordingly the preliminary injunction remains in effect. *See Ardoin v. Robinson*, No.

[1] The history of this case over the past year is detailed in Plaintiffs' Joint Motion for Status Conference filed June 27, 2023. *See Robinson v. Ardoin*, Case No. 3:22-cv-00211-SDD-SDJ, ECF No. 240 (June 27, 2023).

21A814, 2023 WL 4163160, at *1 (U.S. June 26, 2023) (dismissing certiorari as "improvidently granted" and vacating stay of preliminary injunction). The Court should now effectuate that preliminary injunction by resuming the process for establishing a remedial map. *Robinson*, 605 F. Supp. 3d at 766 ("The appropriate remedy in this context is a remedial congressional redistricting plan . . ."). Plaintiffs request that the Court commence remedial proceedings in a timely manner over the coming weeks, such that the Court may consider any supplemental remedial briefing and maps, conduct an evidentiary hearing, and adopt a map that remedies the likely Section 2 violation to preserve the parties' positions and prevent Plaintiffs' vote dilution injury until final resolution of the merits.

Defendants have asked the Fifth Circuit to vacate the preliminary injunction and order this Court to "conduct a trial on the merits and reach a final judgment before the end of 2023." Defs.' Letter to Fifth Circuit at 4, *Robinson v. Ardoin*, Case No. 22-30333 (5th Cir. July 6, 2023), Doc. 246. But Defendants can assert no basis to dissolve the injunction currently in place or bypass remedial proceedings to effectuate that injunction. To the extent Defendants urge the same arguments here, they should be rejected.

First, Defendants have argued in the Fifth Circuit that this Court should be directed to reevaluate its preliminary injunction in light of "[t]wo Supreme Court decisions that bear on this case." Defs.' Letter to Fifth Circuit at 2 (citing *Allen v. Milligan*, 143 S. Ct. 1487 (2023), and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2023 WL 4239254 (June 29, 2023)). But as Defendants have acknowledged, following *Milligan*, "the law in the section 2 context has not substantially changed." Letter from La. Att'y Gen. Jeff Landry to Hon. Scott S. Harris at 3, *Ardoin v. Robinson*, No. 21A814 (Sup. Ct. June 14, 2023). In fact, 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*, 143 S. Ct. at 1510. *Milligan* thus reaffirmed the applicability of the *Gingles* standard that this Court applied in its preliminary injunction order. *Robinson*, 605 F. Supp. 3d at 818 ("apply[ing] *Gingles* and its progeny" to conclude that Louisiana's congressional redistricting plan likely violated Section 2); *Robinson v. Ardoin*, 37 F.4th 208, 215, 224 (5th Cir. 2022) (Smith, Higginson, and Willett, JJ.) (denying motion for stay pending appeal and finding "*Gingles* remains good law, and so the defendants have not shown that they are likely to succeed on that basis."). Defendants cannot escape the plain implications of *Milligan*—a Section 2 case that Defendants previously argued "present[ed] the same question as" this case, Defs.' Emergency Appl. for Admin. Stay, Stay Pending Appeal, & Pet. for Writ of Cert. Before Judgment at 4, *Ardoin v. Robinson*, No. 21A814 (Sup. Ct. June 17, 2022)—by pointing to an entirely different case deciding an entirely different claim.[2]

Second, Defendants have asserted that Plaintiffs' "request for a preliminary injunction" is "moot" in light of the 2022 elections. Defs.' Letter to Fifth Circuit at 3. Not so. This Court enjoined Defendants from "conducting *any* congressional elections," not just one election, under the enacted map. *Robinson*, 605 F. Supp. 3d at 766 (emphasis added); *see also id.* (noting "Plaintiffs' injury will persist" past 2022 "unless the map is

[2] As of this filing, the Fifth Circuit has not issued any orders remanding the case. But even if it were to vacate and remand "to allow [this Court] to consider" the Supreme Court's decision in *Milligan*, Mem. to Counsel, *Robinson v. Ardoin*, Case No. 22-30333 (5th Cir. June 28, 2023), Doc. 242, the appropriate action for this Court would be to order supplemental briefing on legal issues affected by *Milligan* and consider whether to reissue its preliminary injunction order, not disregard its preliminary injunction altogether.

changed for 2024"). The Court's conclusion that Plaintiffs would face irreparable harm absent an injunction was based not on the proximity of the next election, *cf. id.* at 854 (finding "the credibility of Defendants' assertions regarding the imminence of deadlines lacks credence"), but on its finding that the enacted map "has been shown to dilute Plaintiffs' votes," *id.* at 852. Neither the map's likely "violat[ion] [of] federal law," *id.* at 851, nor the resulting injury to Plaintiffs has evaporated with the passage of time.

Third, Defendants have contended that proceeding straight to trial and final judgment is the "optimal case-management approach under the circumstances." Defs.' Letter to Fifth Circuit at 4. According to Defendants, because "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," the Court should simply disregard the preliminary injunction order already in place and start from scratch. *Id*. But Defendants can assert no basis to undo the preliminary injunction pending a final judgment. "The focus [of a preliminary injunction] always must be on prevention of injury by a proper order[.]" *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). Because the enacted map is enjoined, a remedial map is necessary to serve the "paramount" interest of "prevention of injury" through vote dilution. *Robinson*, 605 F. Supp. 3d at 857. A remedial map effectuating the preliminary injunction will "preserve the relative positions of the parties until a trial on the merits can be held." *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (quoting *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)); *see also Caster v. Milligan*, Case No. 2:21-cv-01536-AMM (N.D. Ala. June 20, 2023), ECF No. 156 (setting schedule for remedial process following preliminary injunction enjoining use of state's congressional plan). Thus, while the Court

can also move towards a final judgment in this case, there is no basis to reverse the relative positions of the parties achieved through the preliminary injunction or skip over the remedial process necessary to effectuate that injunction.

Defendants have repeatedly tried and failed to undo the effects of the preliminary injunction. *See e.g.,* Defs.' Joint Mot. to Stay, *Robinson*, No. 3:22-cv-00211-SDD-SDJ (M.D. La. June 6, 2022), ECF No. 177 (denied); Defs.' Emergency Mot. Seeking Stay Pending Appeal, *Robinson*, No. 22-30333, (5th Cir. June 9, 2022), Doc. 27 (denied); Letter from La. Att'y Gen. Jeff Landry to Hon. Scott S. Harris, *Ardoin v. Robinson*, No. 21A814 (Sup. Ct. June 14, 2023) (seeking further stay of preliminary injunction; denied). Their position has not improved in the 14 months since that injunction was issued. While Defendants may wish to pretend that the preliminary injunction proceedings never happened, this Court's injunction remains in place and must be given meaningful effect until the case is resolved on the merits.

Accordingly, the Galmon and Robinson Plaintiffs respectfully request that the Court resume the remedial process and establish a timeline for, among other things, (1) supplemental remedial briefing and maps, (2) an evidentiary hearing on proposed remedial maps, and (3) adoption of a remedial map to preserve the parties' positions in light of the Court's preliminary injunction order and prevent Plaintiffs' vote dilution injury until final resolution on the merits.

Date: July 12, 2023

Respectfully submitted,

By: */s/Abha Khanna*

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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 RESPONSE TO PLAINTIFFS' JOINT MOTION FOR STATUS CONFERENCE AND JOINT NOTICE REGARDING STATUS CONFERENCE

Plaintiffs' Joint Motion for Status Conference, Doc. 240, asked the Court to hold a status conference "to establish a timeline for resuming the process for establishing the remedial maps, including but not limited to (i) entering a schedule for supplemental briefing and remedial maps; and (ii) setting forth a date for an evidentiary hearing to resume consideration of the maps." Doc. 240. This morning, Plaintiffs filed a joint notice regarding status conference asking the Court to restart preliminary injunction proceedings. Doc. 242 at 3 (asking the Court to accept "weeks" of new briefing, new maps, and a new evidentiary hearing). Defendants and Intervenors (collectively, "Defendants") oppose such a "remedial phase" and oppose restarting the preliminary

injunction proceedings because it would only inject unnecessary delay into this matter. Defendants further oppose the imposition of a new congressional districting plan on the basis of a preliminary injunction when there is time for a trial on the merits before the 2024 elections. The Court should set this matter for trial on the merits as soon as possible.

While counsel for the defense side of this case will be prepared to more fully explain Defendants' position during the July 12, 2023, telephone status conference, Doc. 241, this memorandum is intended to provide background they believe will be helpful to the Court.

1. As Defendants recently detailed to the Fifth Circuit, this Court should conduct a trial on the merits and reach a final judgment promptly to allow this case to be resolved before the November 2024 elections. *See* Appellants' July 6, 2023 Ltr., *Robinson v. Ardoin*, No. 22-30333, Doc. 246. This Court's June 6, 2022, preliminary injunction and remedial schedule, *see* Docs. 173, 206, sought to impose a remedy in advance of the November 2022 congressional elections. Those elections have passed, and Plaintiffs no longer need a preliminary injunction and temporary remedy based on a limited record when the next elections to be conducted under the enjoined congressional plan are nearly 16 months away (rather than four months away, as they were when this case was stayed in 2022).

There is sufficient time for a trial on the merits before the end of 2023,[1] with a reasonable pre-trial schedule for fact discovery and additional expert discovery, if the Court acts now to schedule that trial. Plaintiffs cannot argue otherwise. In the related case of *Nairne v. Ardoin* involving Louisiana's legislative plans, the plaintiffs and their counsel—including many of the

[1] Indeed, it is possible that a trial as late as January or February 2024 will provide sufficient time for resolution prior to congressional elections in November 2024, but Defendants appreciate the Court's point in *Nairne v. Ardoin* that it wants to work to avoid potential timing issues and try these matters as soon as possible.

same counsel here—urged this Court to set an expedited trial schedule "to allow for potential relief of a special election in November 2024." Case No. 22-cv-00178, Doc. 89 at 3. Setting aside whether a special election is available to Plaintiffs in the *Nairne* matter (it is not), there *is* a scheduled election for Louisiana's congressional districts on November 5, 2024. The *Nairne* plaintiffs initially advocated for a trial in January 2024, showing they believed it is feasible to hold a trial on the merits 10 months in advance of the November 2024 elections.

The imposition of a preliminary remedial plan now, rather than trying this case before the end of 2023, would be problematic and counterproductive for multiple reasons. First, the Court would impose dramatic mandatory injunctive relief on a preliminary basis (imposing a judicially created congressional district plan on the state) despite a significant change in circumstances since the Court entered its order in June 2022: we now have 16 months before the next election rather than the four months between when this case was stayed and the November 2022 congressional elections.

Second, if the Court were to implement a preliminary remedial plan based on the preliminary injunction and accede to Plaintiffs' wishes to restart the preliminary injunction phase and not try this case before the end of 2023, there likely will not be sufficient time to reach a final judgment and conduct *another* remedial phase in advance of the November 2024 congressional elections. That approach would mark a significant duplication of effort and ensuing waste of resources by both counsel and the Court let alone a sharp departure from this Court's recently expressed wishes in *Nairne* to proceed promptly in order to avoid potential *Purcell* issues. *Purcell v. Gonzalez*, 549 U.S. 1 (2006).

Third, Plaintiffs' proposal risks exposing voters to as many as three different congressional plans in three elections (the 2022 elections under the enacted plan, the 2024 elections under a

preliminary remedial plan, and the 2026 elections under potentially yet a third plan), which would work a "needlessly chaotic and disruptive effect upon the electoral process." *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018) (citing *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976)).

Fourth, the status quo here is the challenged plan which was used in the November 2022 election and which governs congressional representation in Louisiana today. "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). The Supreme Court "has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Here, adequate legal remedies exist for Plaintiffs: they can try the case to conclusion and establish their claim that this status quo should be altered prior to the November 2024 election.

Plaintiffs' reliance on *Canal Auth. of State of Fla. v. Callaway* for the position that a preliminary injunction remedial plan is necessary in this case, some 16 months prior to the next election, ignores that case's rule. Pls' J. Notice at 5; 489 F.2d 567 (5th Cir. 1974). In *Canal Authority of Florida*, the Fifth Circuit applied a rule of necessity that cannot be satisfied here where there is no need for a status quo-altering remedial injunction pending trial because there is sufficient time to try this case before the next election. *Id.* at 576.

Finally, such an approach would be inconsistent with the Supreme Court's directive that "the matter 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." Summary Dispositions, *Ardoin v. Robinson*, No. 21-1596 (June 26, 2023). The ordinary course in this scenario—nearly 16 months prior to the next election—is to try the case, not to languish in a preliminary-injunction

phase that is simultaneously moot (the November 2022 elections are past) and unripe (the November 2024 election is not yet an imminent emergency).

2. This Court need not wait to schedule a trial on the merits while the Fifth Circuit considers Defendants' appeal of the preliminary injunction order. While this Court does not have jurisdiction over matters on appeal, it does have jurisdiction over the merits of this action. *Farmhand, Inc. v. Anel Eng'g Indus., Inc.*, 693 F.2d 1140, 1145–46 (5th Cir. 1982) ("Generally, when an appeal is noticed the district court is divested of jurisdiction; the matter is transferred immediately to the appellate court. The rule, however, is not absolute. The district court maintains jurisdiction as to matters not involved in the appeal, *such as the merits of an action when appeal from a preliminary injunction is taken*, or in aid of the appeal, as by making clerical corrections.") (emphasis added).

3. In order to try this case on the merits before the end of 2023 while also allowing sufficient time for additional expert and fact discovery, Defendants request that the Court schedule this matter for trial on November 27, 2023.[2] This date is currently reserved for the *Nairne* trial, *see Nairne* Doc. 97, but trying this case should take priority over trying *Nairne* for a number of reasons.

First, the next elections to be conducted under the congressional plan challenged in this action will occur in November 2024, well before any elections that could be impacted by the *Nairne* litigation. The *Nairne* plaintiffs were unsuccessful in their attempt to seek relief for the

[2] Defendants maintain their previous arguments that trying any case in November 2023 will be exceedingly difficult for elected officials in light of the upcoming Gubernatorial Primary and General Elections. *See* Doc. 92 at 2–5. Defendants' proposal is based on the Court's prior direction in *Nairne* regarding its availability for trial in the fall of 2023. But to be clear, Defendants would oppose trying both *Nairne* and *Robinson* in November 2023—preparing for and participating in two trials during the election period would be untenable for the Secretary of State, Attorney General, and their staff who have statutory obligations to administer the election and advise election officials throughout every stage of the election process.

2023 elections, *see Nairne* Doc. 96, and the plaintiffs' insistence on an expedited trial date in that case is based on the legally erroneous contention that they could seek special elections in November 2024. *See Nairne* Doc. 92 (explaining that Supreme Court precedent "effectively foreclose[s]" such a remedy). This Court should prioritize trying this action for elections that must occur in November 2024 over an action where the next elections that could be impacted will not occur for four years.

Second, this action is more amenable to an expedited discovery schedule and trial in November than *Nairne*. The congressional plan challenged here contains just six districts, and Plaintiffs seek the creation of just one additional majority-Black district. The *Nairne* plaintiffs, in contrast, challenge two different redistricting plans containing 144 districts, and seek numerous additional majority-Black districts across the state.

Third, and importantly, elections will occur under the districts challenged in *Nairne* in October and November 2023, offering this Court the most probative election data for its analysis. It is imperative that the parties have an opportunity to obtain and analyze the final election results in those districts before trial. *See Nairne* Doc. 92 at 5.[3] As the United States Supreme Court has intimated, a trial should be held after there is evidence of how the challenged law operates in an actual election as opposed to hypothetical, expert witness driven speculation that could later turn out to be incorrect. *Purcell*, 549 U.S. at 5 ("Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality [and] the Court wisely takes action that will enhance the likelihood that [the legal

[3] Moving the *Nairne* trial to January 2024 or later is also necessary in light of the *Nairne* plaintiffs' position that 2023 election results could not be admitted at a November 27, 2023, trial because there would be insufficient time for those results to be finalized and analyzed. *See* Jun. 29, 2023 Email from Plaintiffs' Counsel at 6, attached as Exhibit A.

issues] will be resolved correctly on the basis of historical facts rather than speculation.") (Stevens, J., concurring). While the record in this action needs to be more fully developed, that can occur more quickly than in a case where dozens of districts are at issue and where the most probative elections for a Section 2 analysis—endogenous elections—will be held in the weeks prior to trial.

Defendants respectfully ask the Court to reject Plaintiffs' request to proceed with a remedial process and to instead schedule this matter for trial on the merits for November 27, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 12, 2023, 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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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
JULY 12, 2023
CHIEF DISTRICT JUDGE SHELLY D. DICK

PRESS ROBINSON, ET AL — CIVIL ACTION

VERSUS

NO. 22-211-SDD-SDJ

KYLE ARDOIN, ET AL

CONSOLIDATED WITH

EDWARD GALMON, SR., ET AL — CIVIL ACTION

VERSUS

NO. 22-214-SDD-SDJ

KYLE ARDOIN, ET AL

This matter came on this day for a *Telephone Status Conference*.

PRESENT: Sarah E. Brannon, Esq.
Counsel for Robinson Plaintiffs

Lalitha D. Madduri, Esq.
Counsel for Galmon Plaintiffs

Katherine L. McKnight, Esq.
Counsel for Defendants

The parties discussed potential deadlines for proceedings for either the remedy phase of the preliminary injunction or trial on the merits.

The Court takes this matter under advisement and will issue a scheduling order next week.

* * * * *

C: CV 36; T: 30 mins

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, ET AL	CIVIL ACTION
VERSUS	NO. 22-211-SDD-SDJ
KYLE ARDOIN, ET AL	

CONSOLIDATED WITH

EDWARD GALMON, SR., ET AL	CIVIL ACTION
VERSUS	NO. 22-214-SDD-SDJ
KYLE ARDOIN, ET AL	

O R D E R

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
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' JOINT NOTICE OF PROPOSED PRE-HEARING SCHEDULE

This notice is filed in response to the Court's Order of July 17, 2023, Doc. 250, which "reset" the remedial preliminary injunction hearing in this case for October 3-5, 2023, and sets forth Defendants' proposed "pre-hearing scheduling order."[1] Defendants appreciate that the Court's Order contemplated this schedule being submitted "jointly" with Plaintiffs. Regrettably, this filing is not joint as the parties could not agree on basic principles about the upcoming hearing.

[1] Defendants opposed Plaintiffs' request to resume the remedial phase of the preliminary injunction proceedings, *see* Docs. 240 & 242, and instead urged the Court to schedule a trial on the merits before the end of 2023. *See* Doc. 243. This submission of a proposed schedule is made subject to, and without waiver of, Defendants' opposition to the resumption of remedial preliminary injunction proceedings.

Put more bluntly, Plaintiffs are attempting a bait-and-switch. During the July 12, 2023, status conference concerning the remedial phase of the preliminary injunction proceedings, Defendants expressed considerable concern about the length of time it would take to prepare for a completely restarted remedial proceeding with new proposed remedial plans. Defendants argued that the Court should instead proceed to a trial on the merits. During the conference, Plaintiffs represented to the Court that they would stand on the proposed remedial plan they jointly submitted on June 22, 2022, and that this case could proceed quickly to a preliminary remedial hearing. By making that representation, Plaintiffs set the bait. The Court granted Plaintiffs' request to resume the remedial proceedings rather than proceed to a trial, over Defendants' objections, and scheduled the hearing for October 3, 2023.

Then came the switch. Plaintiffs have now walked back their representations and seek a schedule that allows them nearly two months to develop and submit *new* remedial plans and that further deprives Defendants of an adequate opportunity to analyze and respond to those plans. For the reasons set forth in this Notice, the Court should hold Plaintiffs to their word, prohibit Plaintiffs from offering new remedial plans, and adopt Defendants' July 21, 2023, modified proposed schedule.

1. On July 12, 2023, this Court held a telephone status conference, *see* Doc. 250, in response to Plaintiffs' motion requesting the Court resume the process of establishing a remedial plan that had been stayed by the Supreme Court of the United States in June 2022. *See* Doc. 227. After that conference, this Court 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." *See* Doc. 250. The court also ordered the parties to "meet and confer and jointly submit a proposed pre-hearing scheduling order on or before Friday July 21, 2023." *Id.*

The parties met and conferred on Thursday, July 20, 2023. In advance of that meeting, counsel for Defendants sent a proposed schedule to counsel for Plaintiffs on July 19, 2023. *See* Exhibit A at 5, 07/21/2023 Email Correspondence from Counsel for Legislative Intervenors. Defendants designed their proposal around their understanding of the Court's direction to the parties, and on Plaintiffs' representations to the Court, that the remedial phase would proceed based on the proposed remedial plan that Plaintiffs jointly submitted on June 22, 2022, *see* Joint Notice of Proposed Remedial Plan and Memorandum in Support, Doc. 225, pursuant to the Court's June 17, 2022, order. *See* Doc 206.

Defendants' proposal was designed to allow both Plaintiffs and Defendants to obtain and submit additional evidence (expert and factual) concerning the proposed plan, as well as a supplemental prehearing brief. *See* Ex. A at 5. The timing of Defendants' proposal is also reasonable—it contemplates Plaintiffs' supplemental reports to be provided over five weeks after their request to the Court to resume the remedial proceedings, *see* Doc. 240, and provides Defendants' experts with five weeks to respond. The subsequent deadlines for completing depositions, submitting supplemental briefing, and exchanging exhibits and witness lists were proposed based on the understanding that the parties would "pick up where they left off" in June 2022 and would *supplement* the existing record on the existing proposed plan, not wipe the slate clean and restart the remedial phase from scratch. Counsel for Defendants made this clear to Plaintiffs' counsel, stating that under Defendants' proposal, "Plaintiffs' supplemental reports will not be permitted to include any new remedial plans, per Plaintiffs' counsel's representations to the Court during last week's status conference." *See* Ex. A at 5.

2. But Plaintiffs have refused to honor their representations to the Court of continuing with their existing joint proposed remedial plan, and have instead proposed a schedule that allows

them to submit new proposed plan(s). *See* Ex. A at 2–4. During the parties' July 20, 2023, conference, counsel for Plaintiffs asserted the right to submit new plans and claimed their prior contrary representations were expressly conditioned on this Court scheduling a hearing sooner than October, though defense counsel recalls no such caveat being made. The parties further discussed other aspects of each other's proposed schedules, including but not limited to the timing of disclosure of fact and expert lists and the amount of time Defendants would have to respond to Plaintiffs' expert submissions. (Plaintiffs had proposed giving Defendants just two weeks to respond to Plaintiffs' expert reports, which Plaintiffs had at least seven weeks—measuring from the date Plaintiffs filed their motion on June 27, 2023—to prepare, *see* Ex. A at 3–4).

In an attempt to reach a compromise, Defendants sent Plaintiffs the following modified proposed schedule on the morning of July 21, 2023:

Defendants' July 21, 2023 Modified Proposed Schedule	
Date	**Deadline**
Friday, August 4, 2023	Plaintiffs' Supplemental Expert Reports Due
Friday, ~~August 11, 2023~~ August 18, 2023	Exchange Fact ~~& Expert~~ Witness Lists
Friday, September 8, 2023	Defendants' Supplemental Expert Reports Due
Tuesday, September 12, 2023	Exchange Supplemental Fact Witness Lists
~~Friday, September 15, 2023~~ Tuesday, September 19, 2023	Deadline for Fact and Expert Depositions
~~Friday, September 22, 2023~~ Monday, September 25, 2023	Supplemental Memorandum in Support and Memorandum in Opposition of Proposed Remedial Plan Due
Friday, September 29, 2023	Exchange Final Witness Lists and Copies of Exhibits
Tuesday, October 3 to Thursday, October 5, 2023	Preliminary Injunction Hearing on Remedy

See Exhibit B at 2, 07/21/2023 Email Correspondence from Counsel for Legislative Intervenors.

While Plaintiffs also sent a modified proposed schedule, their proposal still allows Plaintiffs to submit new remedial plans. Importantly, however, Plaintiffs' counsel's clarified[2] that

[2] Plaintiffs also noted that they removed initial briefing in support of or in opposition to plans. *See* Ex. A at 2.

Plaintiffs "intend to submit no more than a single joint remedial plan." Plaintiffs' proposed modified schedule is as follows:

Plaintiffs' July 21, 2023 Modified Proposed Schedule	
Event	**Plaintiffs' Amended Dates**
Deadline for the submission of any proposed plans and supporting expert reports	August 11, 2023
Deadline for parties to exchange fact and expert witness lists	August 11, 2023
Deadline for expert reports in response to any proposed plans	September 5, 2023
Deadline for supplemental witness disclosures	September 8, 2023
Deadline for fact and expert depositions	September 19, 2023
Deadline for prehearing briefs	September 26, 2023
Deadline to exchange copies of exhibits and final witness list	September 29, 2023
Remedial hearing	October 3 to October 5, 2023

See Ex. A at 2–3.[3]

Because the parties were unable to resolve their fundamental disagreement on Plaintiffs' ability to submit a new remedial plan(s), they could not reach an agreement on a joint proposed pre-hearing schedule to file with the Court. *See* Ex. A at 2.

3. The Court should adopt Defendants' July 21, 2023, modified proposed schedule and reject Plaintiffs' attempt to start the remedial phase over from scratch. There is no reason to allow Plaintiffs to submit a new proposed remedial plan[4] when they urged the Court—over

[3] For clarity, this chart omits two columns from the one presented in Plaintiffs' email. The first removed column was the original schedule, and the second was a column Plaintiffs added for "Defendants' Proposed Deadline," because Defendants' modified proposed schedule did not contemplate the same events as Plaintiffs' proposal—among other differences, Defendants' proposal did not include deadlines "for the submission of any proposed plans and supporting expert reports" and required only the exchange of fact witness lists on August 18, 2023, and September 12, 2023.

[4] During the parties' meet and confer, the most Plaintiffs could offer as the reason for new plans was that "a lot has occurred" since they submitted their joint proposed remedial plan in June 2022.

Defendants' objections—to resume this process and to proceed rapidly based on their existing proposed remedial plan. Plaintiffs submitted that plan over a year ago, supported it with expert reports and briefing, and were ready to proceed to a hearing less than 24 hours before the Supreme Court stayed this action. *See* Doc. 225. Defendants responded (in the extremely compressed five calendar days the Court permitted) with their own evidentiary submission and briefing opposing Plaintiffs' proposed plan.

If Plaintiffs are held to their joint proposed remedial plan, as they represented they would stick to on July 12, 2023, and which is most consistent with the Court's July 17, 2023, Order "resetting" the previous preliminary injunction hearing, then both parties and their experts can be working now to supplement the record on that plan. In fact, Defendants have been preparing based on Plaintiffs' representations and the Court's direction that this case would be proceeding on Plaintiffs' existing joint proposed plan. But, as counsel for Defendants made clear during the July 12, 2023, status conference, if Plaintiffs submit new plan(s), Defendants and their experts would be required to re-do their analyses, which is a significant and time-consuming undertaking. What is more, even under Plaintiffs' modified proposal, Defendants would lose valuable time over the next three weeks while they wait for Plaintiffs' new submission on August 11, 2023, which is still over six weeks after Plaintiffs asked this Court to resume the remedial phase proceedings and time they could have—and likely have been—working on new submissions. Plaintiffs have offered no explanation for their need for this length of time to submit a new plan.

But Plaintiffs did not specify what had "occurred" that required them to scrap the remedial plan they asked the Court to impose on Louisiana just last year. To the extent Plaintiffs seek to offer analyses of 2022 election results, those analyses can be conducted of Plaintiffs' prior joint proposed plan, and cannot serve as the basis for a new plan.

While Plaintiffs' modified proposal allowed Defendants more time to respond than the two weeks in their initial proposal, Plaintiffs would still only provide Defendants and their experts just 25 calendar days (including Labor Day weekend)[5] to re-do those analyses and responses at the same time that Defendants, and potentially several of the same experts, will be working to meet the Court's deadlines in *Nairne, et al. v. Ardoin*. *See* Case No. 3:22-cv-00178, Doc. 100 (setting August 21, 2023 as the deadline for "Defendant/Intervenors' Sur-Rebuttal Expert Reports," September 1, 2023 as the deadline for "Completing Fact Discovery and Related Motions," September 29, 2023 as the deadline for "Completing Expert Discovery," etc.). There is simply no need to allow Plaintiffs to start over, or to deprive Defendants of a meaningful opportunity to respond and fully develop the record on a proposed plan, as Plaintiffs' proposed schedule demands.

4. Defendants' proposal is designed to allow the parties to focus their time and resources on supplementing the record on Plaintiffs' joint proposed plan. To be clear, Defendants' supplementation may include new fact and expert witnesses who were not offered during the very expedited remedial phase proceedings that had been scheduled in 2022 before the Supreme Court stay, which only afforded Defendants five days to analyze and respond to Plaintiffs' proposed remedial plan and prevented Defendants from submitting an appropriate expert and factual record. But Defendants' proposal grants Plaintiffs that same latitude. This type of supplementation would focus on Plaintiffs' joint proposed plan, and will allow the Court to evaluate a proposed preliminary remedy in this case based on an appropriately robust record given the enormity of the relief Plaintiffs seek.

[5] Defendants strongly object to the introduction of any new remedial plans by Plaintiffs at this stay. Without waiving that objection, if the Court is inclined to allow any new plans, then Defendants request a schedule that allows Defendants and their experts at least 28 days to analyze and respond to those plans.

Defendants respectfully ask the Court to reject Plaintiffs' proposed schedule and to adopt the July 21, 2023, modified proposed schedule set forth by Defendants above. A proposed order is enclosed herewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 21, 2023, 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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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

EMERGENCY MOTION TO CANCEL HEARING ON REMEDY AND TO ENTER A SCHEDULING ORDER FOR TRIAL

Attorney General Jeff Landry, on behalf of the State of Louisiana, Secretary of State Kyle Ardoin, Clay Schexnayder, Speaker of the Louisiana House of Representatives, and Patrick Page Cortez, President of the Louisiana Senate, each in their respective official capacities (collectively "Defendants") seek an Emergency Motion to Reset Deadlines and Request that this Matter be Set for Trial (hereinafter, "Emergency Motion").

1.

The Court should immediately cancel the currently scheduled remedial proceeding set for October 3rd and set this matter for a trial on the merits with sufficient time for any appeals to be resolved prior to the 2024 congressional elections.

2.

The following are all causing extreme prejudice to Defendants: (1) the delay of over a month and counting for a schedule prior to the remedial hearing on Plaintiffs' motion for preliminary injunction to be set (as well as Plaintiffs' inaction absent a schedule); (2) the failure to set a date or scheduling order for a prompt trial on the merits; and (3) the lack of jurisdiction to commence a remedial proceeding. Defendants require a prompt decision given the impending remedial proceeding.

3.

Defendants sought consent from Plaintiffs for the relief sought herein. Plaintiffs oppose such relief.

4.

Defendants also contemporaneously filed a motion to expedite the decision on this motion, seeking a ruling by September 8, 2023.

5.

Therefore, for the reasons more fully explained in Defendants' memorandum in support, Defendants respectfully request the Court cancel the remedial proceeding currently scheduled for October 3-5 and set this matter for trial on the merits to be conducted with sufficient time for any appeals prior to the 2024 congressional elections.

Dated: August 25, 2023

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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of August 2023, the foregoing has been filed with the Clerk via the CM/ECF system that has sent a Notice of Electronic filing to all counsel of record.

/s/ Jeffrey M. Wale
Jeffrey M. Wale

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 THEIR EMERGENCY MOTION TO CANCEL HEARING ON REMEDY AND TO ENTER A SCHEDULING ORDER FOR TRIAL

Attorney General Jeff Landry, on behalf of the State of Louisiana, Secretary of State Kyle Ardoin, Clay Schexnayder, Speaker of the Louisiana House of Representatives, and Patrick Page Cortez, President of the Louisiana Senate, each in their respective official capacities (collectively "Defendants") present this Memorandum in Support of their Motion to Cancel Hearing on Remedy and to Enter a Scheduling Order for a Trial on the Merits. Due to the fast-approaching hearing, a response by Plaintiffs is respectfully requested by Wednesday, August 30th, and a decision is

respectfully requested by Friday, September 8th. A companion motion for expedited review will be filed shortly after the instant motion.

RELEVANT BACKGROUND

On July 17, 2023, the Court 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, at 9:00 a.m." (ECF No. 250). The Court further directed that "[t]he parties shall meet and confer and jointly submit a proposed pre-hearing scheduling order on or before Friday July 21, 2023." *Id*. The parties met and conferred in good faith and were unable to reach complete agreement with respect to a schedule to govern the remedial proceeding. Therefore, the Plaintiffs and the Defendants each filed their own proposed scheduling orders. *See* (ECF Nos. 255 & 256). Meanwhile, on August 22, 2023, the United States Court of Appeals for the Fifth Circuit set Defendants' appeal of the underlying preliminary injunction order for oral argument on October 6, 2023, *Robinson v. Ardoin*, No. 22-30333 (5th Cir.), the day after the conclusion of the scheduled remedial proceeding.

As of the time of this filing, the Court has yet to issue a scheduling order in this matter despite the proposed schedules being submitted over 35 days ago. Many of the proposed deadlines in Plaintiffs' and Defendants' schedules have now passed.[1] Plaintiffs, for their part, have not sought to press their proposed schedule on the remedy phase and have not yet produced any expert reports or disclosures, or any proposed remedial plans, even though their own proffered deadlines have passed. (ECF No. 255 at 5). Given the significant delay on an already expected schedule,

[1] Plaintiffs' proposed schedule had August 11th as the date the parties would submit "any proposed plans" and as the deadline to exchange witness lists. (ECF No. 255 at 5). Defendants, jointly, proposed August 4th as the deadline for Plaintiffs' supplemental expert reports and disclosures and August 18th as the date to exchange fact and witness lists. (ECF No. 255-2 at 1).

there is simply no longer sufficient time to conduct a remedial hearing on a timeframe sufficient to sure the quality of presentations of counsel and the Court's decision.

The 2022 November Elections have come and gone, which means the premise for the Plaintiffs' twin preliminary injunction motions no longer exists. More to the point, any urgency that there be a remedy *now*, before a trial on the merits, is also gone. The 2024 General Election, however, is on the horizon, which, at roughly fourteen months away, means that the Court has enough time to try this case to a final judgment—if it acts *now* to set a date for trial. This window will close very soon if the Court declines to do so. And declining to do so would transgress the Supreme Court's mandate that this case is to proceed "for review in the ordinary course and in advance of the 2024 congressional elections in Louisiana." *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023). For the reasons that follow, the Court should cancel the upcoming October remedial proceeding and schedule a trial on the merits so that the litigants, and more importantly the people of Louisiana, can have a final resolution of this continuing litigation.

ARGUMENT

While the Defendants appreciate the Court's efforts to move this case to a speedy resolution, the Defendants' rights to a fair and full hearing no longer permit the proceedings to move along the present path. The prejudice that the impending October 3rd remedial proceeding has to the Defendants' rights cannot be gainsaid. For more than forty years, the Supreme Court has recognized that "where a federal district court has granted a preliminary injunction, the parties generally will have had the benefit neither of a full opportunity to present their cases nor of a final judicial decision based on the actual merits of the controversy." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 396 (1981). This is true by virtue of the preliminary injunction mechanism (which necessitates expedited, yet *temporary*, resolution, given the specter of a rapidly impending

irreparable injury), and it is aggravated by the nature of Voting Rights Act litigation (which cannot be resolved without tremendously detailed, and time-consuming, preparation and presentation of expert testimony). Defendants have *never* been given the opportunity to make their case in defense of the enacted maps fully, and denying them the opportunity to do so now, given the ability for them to do so before the 2024 November Elections, would imperil the Defendants' rights and call into question the fundamental fairness of this litigation.

The Defendants are aware that much needs to be accomplished between now and the 2024 November Elections to avoid another round of, among other things, *Purcell* fights and expedited motions practice before this Court. Circumventing a repeat of the chaos leading up to the 2022 November Elections has motivated the Defendants to submit this request on an emergency basis. The gravity of this litigation, the implications of the challenged congressional maps for the 2024 election and Defendants' rights, as well as simple procedural fairness and federalism concerns, should compel the Court to swiftly decide this motion in Defendants' favor.

I. There is now insufficient time to conduct a remedial proceeding by October 3rd, and allowing it to proceed would result in a waste of judicial resources.

The Court's remedial proceeding cannot practically occur as scheduled because none of the lead-up events can occur as *any* of the parties envisioned. With fewer than 6 weeks before a three-day hearing, there still is not a scheduling order, and no order embracing all necessary events can be practically achieved.

The parties each submitted their proposed schedules on July 21st, over a month ago, and no scheduling order has been issued by the Court. In the meantime, many of the parties proposed deadlines have already come and gone without a scheduling order. Moreover, Plaintiffs have not

adhered to the case deadlines they themselves proposed.[2] Thus, nothing has happened in this remedial matter since the Supreme Court's order vacated its stay. Defendants have yet to see any disclosures or revised plan(s) from Plaintiffs. Defendants can hardly to begin to mount a cogent defense when they are, at present, completely in the dark as to what plans Plaintiffs will even be proffering and what expert opinions they intend to support them. There is now not enough time for the necessary disclosures and expert reports in advance of the hearing, and if the Court were to conduct it anyway, it would sacrifice the quality of presentations and, by consequence, the quality of any future ruling..

Conversely, the 2024 General Election is roughly fourteen months away. This is *just* enough time to hold a trial on the merits and to allow the appellate process to run its course in advance of those elections. In the expedited, chaotic world of redistricting litigation, the amount of time that the Court has to allow *both* sides to fully and fairly litigate their positions is a luxury that does not often arise, and it should not be squandered.

The Plaintiffs themselves recognize that more robust litigation, certainly beyond the proceedings that occurred during the 2022 preliminary injunction proceedings, is needed. That is why they asked the Court for leeway to engage in "a more robust remedial process by allowing [them] to incorporate new election data[3] and accommodate concerns raised by Defendants in opposition to the initial remedial map Plaintiffs proposed in 2022." (ECF No. 256, at 2-3.) In other words, the Plaintiffs recognize that more work needs to be done to account for the truncated preliminary-injunction proceedings. For its part, the Supreme Court has long recognized that

[2] One would assume that, given their desire for a swift remedy, Plaintiffs would be acting of their own volition absent an order from this Court to ensure, for their part, that any remedial proceeding occurs along their preferred timeline. They are not.

[3] The existence of new election data that Plaintiffs themselves wish to rely upon simply underscores the incomplete factual record exists in this case without a trial on the merits.

redistricting litigation is an especially fact-intensive endeavor. *See Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023) All of these issues point to the inescapable conclusion that a remedial hearing should be cancelled and a trial set. Yet another rushed proceeding is simply not in the interest of the parties or of substantial justice.

The Defendants would be remiss if they also did not point out that the Plaintiffs' proposed scheduling order, if entered near the time it was filed, would exacerbate tremendously all of the issues the Defendants have identified in this motion. The Plaintiffs have insisted on (1) barreling past a decision on the merits of their claims to the remedial phase, (2) submitting brand-new remedial maps and expert reports, but (3) not providing those materials in time for the Defendants to properly assess and respond to them. These concerns are now further exacerbated by the fact that the parties generally, and the Defendants specifically, have lost *a month* of time to prepare for the remedial hearing that is scheduled less than 6 weeks from now because no scheduling order has been entered and Plaintiffs have sat on their hands instead of voluntarily complying with their proposed deadlines. Any scenario short of cancelling the hearing and setting this matter for trial will result in the abridgement of Defendants' rights and a violation of basic principles of federalism. In no uncertain terms, the Court should prevent this outcome.

The United States Court of Appeals for the Fifth Circuit has set Defendants' appeal of the underlying preliminary injunction order for oral argument on October 6, 2023, *Robinson v. Ardoin*, No. 22-30333 (5th Cir.). That is the day after the conclusion of the scheduled remedial proceeding, which is currently set for October 3-5, 2023. The Fifth Circuit's scheduling of oral argument on October 6 is yet another reason for this Court to cancel the remedial proceedings. The timing of oral argument—just nine days after the conclusion of supplemental briefing the Fifth Circuit requested—suggests the Fifth Circuit is prepared to rule quickly on the merits of the preliminary

injunction. That forthcoming ruling could have any number of different impacts on this matter, including a reversal which would negate the need for any remedial phase on the preliminary injunction. This Court should instead focus resources on the ultimate merits questions in this case and set this matter for a trial sufficiently in advance of next year's elections. By proceeding forward with a remedy phase on a preliminary injunction order that is currently on appeal, and with a decision from the Fifth Circuit seemingly forthcoming, this Court risks a complete waste of judicial resources at both levels.

II. Forgoing resolution of the merits via a final trial is fundamentally unfair to Defendants and is disrespectful to basic principles of federalism.

Declining to resolve the merits of the Plaintiffs' Section 2 claims by way of a full trial would inflict further constitutional injury on the Defendants. Defendants have not yet had the opportunity to fully and fairly litigate the merits of its enacted maps, given the remarkably expedited preliminary injunction proceedings that occurred back in late Spring 2022. This alone raises basic fairness concerns if the Court moves past the merits and onto considerations of a remedy.

To be certain, it is error to "improperly equate[] 'likelihood of success' with 'success,'" and it is an even more erroneous error to "ignore[] 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.* Indeed, "[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*.

In other words, the merits of this case have not yet been fully and fairly resolved. By treating them as if they had been (i.e., by skipping past a final trial on the merits and moving on to considerations of a remedy), the Court is at risk of prejudicing a State with nearly 3.5 million voters[4] preparing to cast ballots during a 2024 General Election cycle that is likely to see record-level voter turnout. And this is no idle concern. For more than a century, the Supreme Court has held that every defendant must be afforded "an opportunity to present" its defense *and then* to have a "question" *actually* "decided" against it. *Fayerweather v. Ritch*, 195 U.S. 276, 299 (1904).

Neither has occurred here. The Defendants were prevented from fulsomely defending their 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. Given the limited purpose of a preliminary injunction ("merely to preserve the relative position of the parties until a trial on the merits can be held") they are often considered "on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Camenisch*, 451 U.S. at 395. "[A]t the 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 the pace at which the preliminary proceedings were decided. *Sole v. Wyner*, 551 U.S. 74, 84-85 (2007) (emphasis added). Simply put, deciding that a claim is "likely to succeed" is not the same as "actually litigat[ing] and resolv[ing]" a claim.

[4] Louisiana has a voting age population estimate of 3,564,038. Federal Register, Estimates of the Voting Age Population for 2020, https://www.federalregister.gov/documents/2021/05/06/2021-09422/estimates-of-the-voting-age-population-for-2020 (last accessed August 24, 2023).

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" amounts to a violation of the basic rights of litigants. *Id*.

There is, moreover, the changing legal landscape in the wake of *Allen v. Milligan* and *Students for Fair Admission v. University of North Carolina*, both of which the Supreme Court issued while this case was held 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).

Simply put, the merits of this case (particularly given the changing legal landscape) remain live. So long as they do, there can be no remedy imposed.

III. The Court has no jurisdiction to proceed with a remedial hearing stemming from a preliminary injunction that is now moot.

Mootness typically arises if an Article III-required injury-in-fact ceases. But it also arises if time has rendered a court unable to *remedy* a purported injury. Injunctive relief, moreover, is necessarily and solely prospective. What matters is that the Plaintiffs are no longer "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008). It follows inexorably that the Court has no power to hold a hearing about a remedial injunction if the event purporting requiring the injunction has come and gone. The Plaintiffs filed motions seeking injunctive relief based on their argument that conducting the *2022* November Elections under the auspices of Louisiana's enacted congressional map would inflict an irreparable injury upon them unless the Court granted their requested relief *before* the 2022 November Elections. The 2022 congressional elections, however, were held nine months ago. Because the Court can no longer provide a remedy related to the 2022 November Elections, it has no power to "reset" a previously stayed *remedial* hearing. (ECF No. 250.) Instead, the only option available to the Court is to set a trial date to fully and fairly resolve the merits of their claims.

CONCLUSION

There is no legally defensible reason to allow the now-moot preliminary-injunction order to control final resolution of the Plaintiffs' claims on the merits. The Court no longer has jurisdiction to issue the relief sought by the Plaintiffs in their preliminary-injunction motions. The truncated timeline under which those motions were adjudicated prejudiced the Defendants' rights, and it would prejudice them further if the Court were to transmogrify its preliminary-injunction "likelihood of success on the merits" conclusion into a final resolution of the Plaintiffs' Section 2

claims. Finally, the over month long delay (and counting) in setting a schedule and inaction by the Plaintiffs has further prejudiced Defendants such that it is simply not possible to have a remedial hearing.

For all these reasons, the Court should vacate its preliminary-injunction hearing and set a date for a final trial in this matter.

Respectfully submitted this the 25th day of August, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 25th day of August 2023, the foregoing has been filed with the Clerk via the CM/ECF system that has sent a Notice of Electronic filing to all counsel of record.

/s/ Jeffrey M. Wale
Jeffrey M. Wale

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 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.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, et al., Plaintiffs, v. R. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, Defendant. *consolidated with* EDWARD GALMON, SR., et al., Plaintiffs, v. R. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, Defendant.	CIVIL ACTION NO. 3:22-CV-00211-SDD-SDJ *consolidated with* NO. 3:22-CV-00214-SDD-SDJ

NOTICE OF DEFENDANTS' PROPOSED SCHEDULE

NOW INTO COURT, through the undersigned counsel, comes Defendant R. Kyle Ardoin, in his official capacity as Secretary of State for the State of Louisiana, the State of Louisiana, and Legislative Intervenors Clay Schexnayder and Patrick Page Cortez (collectively "Defendants") pursuant to Fed. R. Civ. P. 16(b) and this Court's September 1, 2023, order [D.E. 272] and notify the Court as follows:

1. Following the Status Conference on September 1, 2023, and the entry of D.E. 272, counsel for Defendants emailed counsel for Plaintiffs on Friday September 1, 2023, seeking their position on whether Plaintiffs wanted a new map and a new hearing date. Counsel for Plaintiffs indicated

that a response was forthcoming on Monday. Hearing nothing, Counsel for Defendants' followed up again on Tuesday, September 5, 2023. Finally, at 11:31 PM counsel for Plaintiffs notified the counsel for Defendants' that the plaintiffs would stick to the October 3-5 hearing date and schedule discussed on Friday's call. This was confirmed again on the morning of September 6, 2023. A true and accurate copy of this email correspondence is attached as Exhibit 1.

2. Throughout the day on September 6, 2023, counsel for Defendants drafted a consent motion with the scheduling order they believed was agreed to via email. Unfortunately, no agreement on that motion could be reached.

3. As such, Defendants' hereby provide notice to the Court pursuant to D.E. 272 of their proposed schedule. This schedule listed below contemplates the October 3-5, 2023 hearing date elected by Plaintiffs and Defendants' understanding that Plaintiffs will not submit a new map.

1.	All Parties Serve Fact Witness Disclosures	**September 14, 2023**
2.	Defendants Serve Expert Reports (Supplemental and New)	**September 15, 2023**
3.	Plaintiffs Disclose Rebuttal Expert Witnesses	**September 18, 2023**
4.	Plaintiffs Serve Rebuttal Expert Reports	**September 28, 2023**
5.	All Parties File Witness and Exhibit Lists	**September 29, 2023**
6.	All Parties File Pre-Hearing Briefs (limit 30 pages per side)	**September 29, 2023**

Respectfully submitted, this the 6th day of September, 2023.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, ET AL.	**CIVIL ACTION**
VERSUS	**No. 22-211-SDD-SDJ**
KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana	
and	
EDWARD GALMON, SR., ET AL.	**CIVIL ACTION**
VERSUS	**No. 22-214-SDD-SDJ**
KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana	

ORDER

On August 29, 2023, Chief Judge Dick issued an Order denying Defendant's Motion to Cancel Hearing on Remedy and referring the matter of a pre-hearing scheduling order to Magistrate Judge Johnson. (R. Doc. 267). After hearing from the parties at two status conferences (R. Docs. 271, 272), the Court ordered that the parties submit proposed pre-hearing plans addressing (1) timing of the hearing, (2) whether Plaintiffs would submit a revised remedial map, (3) whether the parties would introduce new expert witnesses, and (4) discovery and briefing schedules. (R. Doc. 272). The Parties submitted separate proposals on September 6, 2023. (R. Doc. 273, Defendant; R. Doc. 274, Plaintiffs).

The parties' proposals both contemplate the remedial hearing's remaining on its scheduled date beginning October 3, 2023. Plaintiffs have decided to forego the opportunity to submit a new remedial plan. And the parties' proposed discovery and briefing dates are the same; however, the

content of the discovery is not agreed. Namely, Defendant's proposal contemplates *only* Defendant submitting expert reports—both supplemental and new;[1] Plaintiffs' proposal allows for both supplemental and new expert reports from *all* parties. The Court has not contemplated and sees no reason for allowing only one party to submit supplemental and new expert witnesses. Indeed, both parties should have equal opportunity to present updated discovery before the hearing. Accordingly,

IT IS ORDERED that the following pre-hearing deadlines are set:

Parties Serve Fact Witness Disclosures	September 14, 2023
Parties Serve Expert Reports (Supplemental and New)	September 15, 2023
Parties Disclose Rebuttal Expert Witnesses	September 18, 2023
Parties Serve Rebuttal Expert Reports	September 28, 2023
Parties File Witnesses and Exhibit Lists	September 29, 2023
Parties File Pre-Hearing Briefs (limit 30 pages per side)	September 29, 2023
Remedial Hearing	October 3-5, 2023[2]

Signed in Baton Rouge, Louisiana, on September 7, 2023.

SCOTT D. JOHNSON
UNITED STATES MAGISTRATE JUDGE

[1] As briefly discussed in the minute entry R. Doc. 271, whether the parties are entitled to new expert witnesses or restricted to supplementing the experts put forth for the original hearing in June 2022 has been a contested issue. At the status conference on September 1, 2023, the Court expressed its inclination to issue a schedule allowing for new experts. (R. Doc. 272).
[2] Date and details set in R. Doc. 250.

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)

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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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TABLE OF AUTHORITIES

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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 */s/ Jason B. Torchinsky*
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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
777 Florida Street,
Suite 301
Baton Rouge, LA 70801

Dated: September 15, 2023

/s/ Jason B. Torchinsky
JASON B. TORCHINSKY

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*; KYLE R. ARDOIN, *in his official capacity as Louisiana Secretary of State,*,

Petitioners.

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

UNPUBLISHED ORDER

Before JONES, HIGGINSON, and HO, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Respondents respond to the mandamus petition by close of business, 5:00 p.m. CST, on Wednesday, September 20, 2023. Judge Dick is also invited to file a response.

STEPHEN A. HIGGINSON, *Circuit Judge*, *dissenting*:

Rather than order responsive briefing to the State's petition for writ of mandamus, I would reassign the petition to the merits panel that is set to hear oral argument on October 6, 2023, in this appeal arising from district court litigation over Louisiana's congressional-district boundaries. Indeed, that panel has already explicitly invited argument as to "any other developments or case law that would have been appropriate for Rule 28(j) letters over the past year had the case not been in abeyance" and "whether this court should remand the appeal to allow the district court to consider" the same. *Robinson v. Ardoin*, 22-30333 (5th Cir. June 28, 2023). And, the State responded to that panel by making the same arguments it now re-submits in this petition, *Robinson v. Ardoin*, 22-30333 (5th Cir. Jul 6, 2023), arguments it already re-raised to that same panel, *Robinson v. Ardoin*, 22-30333 (5th Cir. July 21, 2023). I do not, however, understand the instant request for responsive briefing on the State's petition to foreclose re-assignment to the panel that has been entertaining briefing in this longstanding and complex matter.

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

[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.

A True Copy
Certified order issued Sep 28, 2023

Jyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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600 S. MAESTRI PLACE,
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NEW ORLEANS, LA 70130

September 29, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 23-30642 In re: Jeff Landry
USDC No. 3:22-CV-211
USDC No. 3:22-CV-214

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Allison G. Lopez, Deputy Clerk
504-310-7702

Mr. John Nelson Adcock
Ms. Renee Chabert Crasto
Mrs. Andree Matherne Cullens
Mr. Joseph Elton Cullens Jr.
Mr. Jared Evans
Mrs. Angelique Duhon Freel
Mr. Phillip Michael Gordon
Mr. Carey Thompson Jones
Ms. Abha Khanna
Mr. Michael L. McConnell
Ms. Elizabeth Baker Murrill
Mr. Stuart Naifeh
Ms. Isabel Sara Rohani
Mr. Adam Savitt
Mr. Jacob D. Shelly
Mr. Phillip Strach
Ms. Tiffany Alora Thomas
Mr. Jason Brett Torchinsky
Mr. Jeffrey M. Wale
Mr. John Carroll Walsh
Mr. Edward Mark Wenger

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*; KYLE R. ARDOIN, *in his official capacity as Louisiana Secretary of State*,

Petitioners.

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

UNPUBLISHED ORDER

Before JONES, HIGGINSON, and HO, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Respondents' motion for emergency stay is denied. Judge Higginson would grant the stay.