UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON., *et al.* Plaintiffs, v. KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS LOUISIANA SECRETARY OF STATE, *et al* Defendant and Intervenor-Defendants,	Case No.: 3:22-cv-00211-SDD-SDJ
AND	(c/w)
EDWARD GALMON, SR., *et al.* Plaintiffs, v. KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS LOUISIANA SECRETARY OF STATE, *et al.* Defendant and Intervenor-Defendants,	Case No.: 3:22-cv-00214-SDD-SDJ

INTERVENOR-DEFENDANT THE STATE OF LOUISIANA'S COMBINED OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Intervenor-Defendant the State of Louisiana, by and through Jeff Landry, the Attorney general of Louisiana (the "State"), files this Combined Response in Opposition to Plaintiffs' Motions for Preliminary Injunction.[1]

[1] The State will refer to Plaintiffs in the following ways: if one set of Plaintiffs only, then "*Galmon*" or "*Robinson*" Plaintiffs; together it will be "Plaintiffs." Any reference to the pre-consolidation dockets will reference the specific case name with the corresponding ECF number.

INTRODUCTION

The legislative process is a machine with many moving parts. The passage of a law is not something that happens in a few weeks. Needless to say, there is give and take from both sides of the aisle as a bill passes through various committees, both legislative chambers, and the executive branch. This elaborate political process is how the Louisiana State Legislature passed HB1, the bill that determined the boundaries for Louisiana's six congressional districts. However, despite new elections being just around the corner, Plaintiffs ask this Court to override the months-long deliberative legislative process and require that new congressional boundaries be drawn. Instead of months of bicameral hearings and careful deliberation by the elected representatives of the people, Plaintiffs want this matter to be decided by a single judge in a matter of weeks.

A rushed preliminary injunction process should not replace the deliberative legislative process. That is especially true here where the facts will show just how tenuous Plaintiffs' factual and legal arguments are. This case should play out in the same deliberative and careful process as the passage of a bill—both sides should have adequate time to prepare and be heard, and witnesses and experts should be questioned after both sides have had adequate time to prepare. If the Court rushes through a new congressional map via a preliminary injunction the primary losers will be the people of Louisiana. After all, laws are established by the will of the people. This Court should deny Plaintiffs' Motions for Preliminary Injunction and allow the legal process to play out in due course.

ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show: (1) a substantial likelihood of success on the merits, (2) a substantial threat that Plaintiffs will suffer irreparable injury in the absence of an injunction, (3) that Plaintiffs' threatened injury outweighs the threatened harm to the defendant, and (4) that granting the preliminary injunction is not against the public interest. *PCI Transp. Inc. v. Fort Worth & W.R.R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). The Fifth Circuit and the Supreme Court have "cautioned repeatedly that a preliminary injunction is an extraordinary remedy which should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' on all four requirements." *Id*. (quoting *Lake Charles Diesel, Inc. v. General Motors Corp.,* 328 F.3d 192, 195 (5th Cir. 2003)); *Nken v. Holder*, 556 U.S. 418, 428 (2009) (calling an injunction an "extraordinary remedy." (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). Plaintiffs have failed to carry their burden of meeting "all four requirements" for a preliminary injunction here. *Id*.

Further, it must be noted that "the purpose of [a preliminary injunction] is *not* to conclusively determine the rights of the parties." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). What's more, "mandatory injunctive relief, which goes well beyond simply maintaining the status quo *pendente lite*, is particularly disfavored, and should not be issued unless the facts and the law *clearly* favor the moving party." *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976); *see also Miami Beach Fed. Sav. & Loan Assoc. v. Callander*, 256 F.2d 410, 415 (5th

Cir. 1958) ("A mandatory injunction, especially at the preliminary stage of proceedings, should not be granted except in rare instances in which the facts and law are clearly in favor of the moving party."); *Justin Industries, Inc. v. Choctaw Secur., L.P.,* 920 F.2d 262, 268 (5th Cir. 1990) (per curiam) (The party "seeking a mandatory injunction . . . bears the burden of showing *clear entitlement* to the relief under the facts and the law." (emphasis added)).

I. Plaintiffs Are Unlikely Succeed on the Merits of their Voting Rights Act Claims.

Louisiana is vested with the authority, under the Elections Clause, to determine the "Times, Places and Manner of holding Elections for . . . Representatives." U.S. Const. art. I, § 4, cl. 1. To that end, "reapportionment is primarily a matter for legislative consideration and determination." *White v. Weiser*, 412 U.S. 783, 794 (1973). In order to be successful on the merits of their Voting Rights Act claims, Plaintiffs must establish that the "political process leading to the nomination or election in" Louisiana is "not equally open to participation by members" of a minority group "on account of race." 52 U.S.C. § 10301(a) and (b). To that end, under the current understanding of claims under Section 2, Plaintiffs must meet the standard announced by *Thornburg v. Gingles* and its progeny.[2] 478 U.S. 30 (1986). The U.S. Supreme Court has signaled, however, that it will be reviewing vote dilution claims under Section 2 and the *Gingles* standard in the coming term in. *See*

[2] In the next term, the Supreme Court will hear a case on vote dilution claims under the Voting Rights Act. *Merrill, et al. v. Milligan, et al.*, No. 21-1086 (Mar. 21, 2022) (granting motion to amend the question presented to "Whether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated section 2 of the Voting Rights Act, 52 U. S. C. §10301.").

Merrill v. Milligan, 142 S. Ct. 879 (Feb. 7, 2022) (granting stay of a find of vote dilution under Section 2 and treating stay motion as a jurisdictional statement); *Merrill, et al. v. Milligan, et al.*, No. 21-1086 (2022) (consolidated with *Merrill, et al. v. Caster*, *et al.*, No. 21-1087 (2022)).

Assuming for now that *Gingles* controls, it requires that each of the following three preconditions to be met for any claim of vote dilution in districting to succeed: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group must be able to show that it is politically cohesive"; and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51. Failure to establish all three of the *Gingles* preconditions dooms a claim under Section 2. *Clark v. Calhoun County*, 21 F.3d 92, 94 (5th Cir. 1994). Once each of the three preconditions are met, Plaintiffs must then show, "under the totality of the circumstances," they do not possess the same opportunities to participate in the political process and elect representatives of their choice" as set forth in the so-called senate factors that accompanied the passage of Section 2. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (hereinafter *LULAC, Council*); *see also id*. at 849 n.22 (listing the senate factors).

Plaintiffs here cannot meet at least two of the three preconditions, or, at the very least, they are not "substantially likely" to succeed on the merits of their claims

as to the first and third *Gingles* preconditions. As such, the Court should not grant a preliminary injunction.

A. No sufficiently numerous and geographically compact second majority-minority district can be drawn in Louisiana.

In order to prevail on their argument that a second majority-Black congressional district is required under Section 2 of the VRA, under the first *Gingles* precondition, Plaintiffs must show that it is possible to "creat[e] more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *LULAC v. Perry*, 548 U.S. 399, 430 (2006) (plurality opinion). Under *Bartlett v. Strickland*, the districts must contain a majority of minority citizens of voting age population. 556 U.S. 1, 19-20 (2009). Here, despite Plaintiffs' emphatic statements to the contrary, Plaintiffs do not meet the required burden under a reasonable understanding of census race categories.

Through statistical manipulation, Plaintiffs' experts claim their illustrative plans showing two majority-minority congressional districts with Black voting age populations over ("BVAP") 50%, appear to have met the + 50% BVAP burden. In these illustrative plans, their proposed districts are over 50% BVAP by a razor's edge. *Robinson* Plaintiffs' expert BVAP percentages are as follows: 50.16%, 50.04%, 50.65%, 50.04%, 50.16%, and 51.63%. ECF No. 43 at 24-48. *Galmon* Plaintiffs' expert BVAP percentages are 50.96% and 52.05%. ECF No. 41-2 at 23. Plaintiffs' experts

state that they used "Any Part Black" to define the term "Black". ECF No. 43 at 6; and ECF No. 41-2 at 11.[3]

Why would Plaintiffs' experts use "Any Part Black" when forming their illustrative maps as opposed to "DOJ Black"? The answer is simple: if they used the "DOJ Black" then the BVAP numbers do not rise above 50%, which is required to justify the creation of two majority-minority congressional districts. For example, when looking at the three Cooper illustrative maps and using "DOJ Black" as the racial metric, the BVAP percentages are as follows: 48.41%, 49.22%, 48.92%, 49.25%, 48.41%, and 50.81%. Expert Report of Thomas Bryan (attached hereto as "Exhibit A") at 19-21. The only "DOJ Black" BVAP number above 50% was in CD5 in "Illustrative 3" at 50.81% where the "DOJ Black" BVAP in CD2 was at 48.41%—well below any required metric and proving that drawing two legally sufficient "DOJ Black" BVAP districts is not possible. *Id.* The *Galmon's* illustrative map possesses the same insufficiencies as *Robinson's* "Illustrative 3" map with "DOJ Black" percentages at 49.39% and 51.25%—again, showing that you cannot create two legally sufficient BVAP congressional districts. *Id.* at 19.[4]

[3] "Any Part Black" is a broader census category that includes anyone that is "Black", as well as "Black" combined with any other race. "DOJ Black" is a narrower the category that includes those who are "Black" and those who are "Black and White". *See Pope v. Cty. of Albany*, No., 2014 U.S. Dist. LEXIS 10023, at *7-8 n.3 (N.D.N.Y. 2014). As Tom Bryan notes in his report, "any part" Black may include a person who had one Black grandparent. Or this may include a citizen who is Black and Hispanic and whose family might have immigrated from Haiti, and whose family may speak French at home. *See* Ex. A at ¶¶ 21-26.

[4] While using "Any Part Black" to define "Black", Plaintiffs fail to use the analogous racially expansive category to define "White". Therefore, if someone were to identify as Black and Hispanic, they would be included in Plaintiffs' "Black" number, but if someone were to identify as White and Hispanic, they would not be included in Plaintiffs' "White" number. *See* ECF No. 41-2 at 29.

To get to even those bare minimum totals, Plaintiffs had to ignore any conception of communities of interest. "All four plans are based on the presumption that African American Louisiana residents all share the same interest because of their race, regardless of where they geographically reside." Expert Report of Michael Hefner at 14 (attached hereto as "Exhibit C"). While the enacted HB1 plan generally keeps communities of interest intact, "the Plaintiffs' plans do not." Ex. C at 22. "The fact that so many communities of interest were either divided among the Congressional districts or paired with unlikely and dissimilar larger cities begs the question of whether the distribution of African Americans are truly compact enough to create a second majority-minority Congressional district." *Id.*

Though not lawyers, Plaintiffs' experts cite to a dicta footnote in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), as justification for their use of "Any Part Black" as opposed to "DOJ Black". *See* ECF No. 41-2 at 11; ECF No. 43 at 6. However, a proper understanding of context surrounding *Georgia v. Ashcroft* will show that Plaintiffs' non-lawyer experts' opinions are misguided. In 2003, when *Georgia v. Ashcroft* was decided, the Secretary of State for Georgia did not have a race category that corresponded with "DOJ Black" when classifying race for the purposes of map drawing. *See Georgia*, 539 U.S. at 473 n.1. As such, when drawing proposed maps, Georgia was permitted to use "Any Part Black" because it corresponded better with the racial definitions in Georgia's voter data. *Id.* The fact the United States Supreme Court felt it needed to add a footnote to explain why it was allowing the use of "Any Part Black" as opposed to "DOJ Black" only shows how big of an exception this was.

With Louisiana, the *Georgia v. Ashcroft* exception is not applicable because Louisiana, when voluntarily providing race information, only allows voters to register as White, Black, Asian, Hispanic, American Indian, or Other.[5] *See* La. R.S. 18:104(B) (providing race information is optional). Long story short: because Georgia used racial categories that were similar to "Any Part Black" when drawing the maps at issue in *Georgia v. Ashcroft*, it made sense to use a similar racial metric when comparing proposed maps—however, this distinction does not create a reason to stray from "DOJ Black" in Louisiana. The dicta footnote in *Georgia v. Ashcroft* does not call for a *one size fits all* approach, but allows for the use of racial classifications that correspond most directly with the racial data linked to voter files in a particular state.

Often, courts have examined the question of whether a map drawer should use "DOJ Black" or "Any Part Black" contain +50% BVAP under either measure, meaning it was unnecessary for the court to make a legal determination to that regard. *See Pope v. Cty. of Albany*, 687 F.3d 565, 577 n.11 (2d Cir. 2012) ("Because plaintiffs satisfy the first *Gingles* factor for DOJ Non-Hispanic Blacks, we need not here consider whether the relevant minority group might more appropriately be identified as "Any Part Black," for which the minority VAP percentages are even higher."). However, here, the specific mix of census responses used to meet the *Bartlett* numerosity test matters because Plaintiffs are struggling to draw a second district that meets the numerosity requirements under either measure, and certainly under

[5] *See* Application to Register to Vote, *available at* https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ApplicationToRegisterToVote.pdf (last visited April 29, 2022).

"DOJ Black" numbers. As a result, this Court must resolve the difficult question of "who counts as black" for the purposes of Section 2 analysis. Where this court draws the demographic lines or definitions is a crucial step in determining whether Plaintiffs have any case at all—let alone one that would allow them to prevail at the preliminary injunction stage.

Additionally, as we are currently at the preliminary injunction stage, Plaintiffs must show that there is a "substantial likelihood of success on the merits" of their claims. *Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006). The fact that Plaintiffs' only arguable path to victory in this matter comes from the statistical manipulation of racial data shows the absurdity of this exercise. This Court should not permit a rushed analysis and map drawing process to trump the detailed legislative process that that led to the enactment of the challenged maps. After all, legislative enactments are presumed to be in good faith. *Abbott v. Perez*, 138 S. Ct. 2305, 2325 (2018).

Finally, while Plaintiffs do not directly make the claim that they are entitled to a proportional number of Black candidates elected in numbers equal to their population, both Plaintiffs, in their complaints and in their preliminary injunction motions, highlight the discrepancy in the number of elected Black candidates in proportion to the Black population in Louisiana. *See, e.g, Robinson*, ECF No. 1 at ¶ 1; *see Galmon,* ECF No. 1, at ¶ 2; *see* ECF No. 41-1 at 4; *see* ECF No. 42-1 at 2-3. However, it is well established that when a plaintiff brings a claim under Section 2, there is "nothing in [Section 2 that] establishes a right to have members of a protected

class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b); *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) ("[I]n evaluating an alleged violation, § 2(b) cautions that 'nothing in [§ 2] establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.'"). As such, Plaintiffs' excessive reliance on these facts is misguided.

B. The minority population in Louisiana is not compact.

In their motions for preliminary injunction, both sets of Plaintiffs only bring claims under Section 2 of the VRA. ECF No. 41 at 2; ECF No. 42 at 2. In addition to showing that the allegedly injured racial group is "sufficiently large," Plaintiffs must also show that the minority group is "geographically compact." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). A compactness analysis under Section 2 is different than that of an equal protection claim. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (hereinafter *LULAC v. Perry*). "In the equal protection context, compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines." *Id.* (citing *Miller v. Johnson*, 515 U.S. 900, 916-917 (1995)). However, "[u]nder § 2, by contrast, the injury is vote dilution, so the compactness inquiry embraces different considerations. 'The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district.'" *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 997 (1996) (Kennedy, J., concurring); *Abrams v. Johnson*, 521 U.S. 74, 111 (1997) (Breyer, J., dissenting)).

"While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining

communities of interest and traditional boundaries." *Id.* (cleaned up). For example, a district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact. *Id.* (quoting *Vera*, 517 U.S. at 979). "[T]here is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *Id.* Plaintiffs' plans do just that. Ex. C at 14, 22-23.

Here, Plaintiffs districts are not compact as they do exactly what the Supreme Court prohibited in *LULAC v. Perry*—combining "far-flung segments of a racial group" in hopes to create a second majority minority district. 548 U.S. at 433. Louisiana's spatial analytics expert, Dr. Murray, specifically shows just how non-compact Blacks are in Plaintiffs' illustrative maps. Below is the milage chart created by Dr. Murray that shows the distance between the center of the Black populations in communities across Louisiana:

	Alexandria	Baton Rouge	New Orleans	Lafayette	Monroe	Shreveport
Alexandria	0	98	169	77	86	112
Baton Rouge	98	0	72	56	152	209
New Orleans	169	72	0	119	211	279
Lafayette	77	56	119	0	157	186
Monroe	86	152	211	157	0	99
Shreveport	112	209	279	186	99	0

Every map proposed by Plaintiffs combines Monroe's Black population with the Black population of Baton Rouge and Lafayette—despite the populations being 152 and 157 miles apart, respectively. Expert Report of Dr. Alan Murray (attached hereto as "Exhibit B") at 24. To combine Black communities from far-flung parts of Louisiana in the same district is to discount the different experiences and make-up of those communities—such as countries of origin and primary languages spoken. *See*

Ex. C at 7-23. And, in so doing, "do a disservice" to these diverse minority populations "by failing to account for the differences between people of the same race." *LULAC v. Perry*, 548 U.S. at 434. For this reason, along with many others, Plaintiffs' arguments must fail.

C. Plaintiffs' proposed exemplar maps show that no constitutional second majority-minority congressional district is possible in Louisiana.

"A federal judge cannot command what the Constitution condemns." *Thomas v. Bryant*, 938 F. 3d 134, 184 (5th Cir. 2019) (Willet, J. dissenting). The Equal Protection Clause of the Fourteenth Amendment's "central mandate is racial neutrality in governmental decisionmaking," including "a State's drawing of congressional districts." *Miller v. Johnson*, 515 U.S. 900, 904-05 (1995). This is true even when the purported purpose of the racial gerrymander is in seeking to comply with the dictates of the Voting Rights Act. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (cleaned up). To put it even more simply, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *C.f. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). Because Plaintiffs' exemplar maps are racial gerrymanders of the type that would make the authors of the infamous *Gomillion v. Lightfoot* plan blush, their motion for preliminary injunction should be denied.

Compare Gomillion v. Lightfoot, 364 U.S. 339, 348 app. 1 (1960) *with E.g.,* Ex. A at 82-101 (showing how Plaintiffs' maps carefully included as much urban Black voting age population in their districts as possible while avoiding urban majority white populations).

Initially, it is acknowledged that the Supreme Court has long "assumed" that the Voting Rights Act is "a compelling interest" sufficient to satisfy strict scrutiny. *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017). That "assumption" cannot give Plaintiffs and the courts license to seek out every Black majority census block it can find in order to cobble together a *bare* majority for *Gingles* purposes. The relevant test for a racial gerrymander is that there first must be proof "that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district[6] [and then] *[s]econd*, if racial considerations predominated over others, the design of the district must withstand strict scrutiny."[7] *Cooper*, 137 S. Ct. at 1463-64.

Here, Plaintiffs' illustrative maps go block by block through towns and cities as diverse as Monroe, Lafayette, and Baton Rouge, attempting to pick out only those census blocks over 50% population and excluding to the extent possible blocks of less than 50% Black population. *E.g.*, Ex. A at ¶¶ 40-44 (analyzing the splits of Lafayette in the illustrative plans and showing how race was distributed unequally among the

[6] Proof of predominance is found by demonstrating that traditional districting factors were subordinated to "racial considerations." *Cooper*, 137 S. Ct. at 1463-64.

[7] The test for racial gerrymandering claims in *Cooper* presumes that plaintiffs are seeking to prove the government acted with racial motivations. However, the test is just as valuable in determining *plaintiffs'* motives for drawing a racial gerrymander for illustrative purposes.

splits). This is the exact type of evidence of racial intent that dooms legislative action. *Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 799 (2017) (noting that a finding of racial predominance is usually accompanied by a showing the traditional redistricting criteria were subordinated to race based considerations). This Court cannot condone this overt use of race simply because it is under the guise of a mere "illustrative map." More to the point, if it is impossible for Plaintiffs to demonstrate that a second majority-minority district can be drawn without impermissibly resorting to mere race as a factor, as Plaintiffs did here, then Plaintiffs have not carried their burden "of showing *clear entitlement* to the relief under the facts and the law." *Justin Industries, Inc. v. Choctaw Secur., L.P.*, 920 F.2d 262, 268 (5th Cir. 1990) (per curiam) (emphasis added).

The Fifth Circuit's holding in *Clark v. Calhoun County* does not necessitate a different result. In *Clark* the Fifth Circuit found after a trial on the merits that the Supreme Court's holding in *Miller v. Johnson* does not limit the scope of the first *Gingles* precondition. *Clark v. Calhoun County*, 88 F.3d 1393, 1406 (5th Cir. 1996). The posture of this case is demonstrably different as this case is in the preliminary injunction stage of the proceedings. The issue with Plaintiffs' proposed illustrative maps is that they cannot demonstrate to the Court that a remedy is even possible, let alone make the required showing of a clear entitlement to relief. Put another way, if the only relief that can be afforded Plaintiffs is itself unconstitutional, there can be no relief at all. Therefore, Plaintiffs' request for a preliminary injunction should be denied.

D. Politics, not race, is responsible for Louisiana's voting patterns.

When "partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens" in the relevant jurisdiction then there is no "legally significant" racially polarized voting under the third *Gingles* precondition. *LULAC, Council*, 999 F.2d at 850. "'The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.' Rather, § 2 is implicated only where Democrats lose *because they are black*, not where blacks lose because they are Democrats." *Id*. at 854 (emphasis added) (quoting *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992). This tracks closely to the text of the Voting Rights Act, as amended, that requires that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). Therefore "evidence that divergent voting patterns are attributable to partisan affiliation or perceived interests rather than race [is] quite probative" to the question of racial bloc voting.[8] *LULAC, Council*, 999 F.2d at 858 n.26.

[8] There is significant disagreement within this Circuit on the burdens imposed by this evidentiary question. *Compare LULAC, Council*, 999 F.2d at 859-861 (noting that there is "a powerful argument supporting a rule that plaintiffs, to establish legally significant racial bloc voting, must prove that their failure to elect representatives of their choice cannot be characterized as a 'mere euphemism for political defeat at the polls,' or the 'result' of 'partisan politics.'") (citations omitted) *with Teague v. Attala County*, 92 F.3d 283, 290 (5th Cir. 1996) (holding that defendants may rebut evidence of racial bloc voting) *and Lopez v. Abbott*, 339 F. Supp. 3d 589, 604 (S.D. Tex. 2018) (holding that "Plaintiffs have the duty, in the first instance, to demonstrate some evidence of racial bias through the factors used in the preconditions and the totality of the circumstances test. Upon doing so, the burden shifts

Here it is clear that it is *politics and not race* which is the determining factor in the electoral chances of Black Louisianans. Or, at the very least, the facts with respect to racial bloc voting do not "clearly favor" Plaintiffs. *See Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976). Dr. Alford, professor of political science from Rice University, conducted an analysis of the reports submitted by Plaintiffs' experts Drs. Handley and Palmer. Dr. Alford found that while "voting may be correlated with race . . . the differential response of voters of different races to the race of the candidate is not the cause." Expert Report of Dr. Alford at 9 (attached hereto as Exhibit D). Instead, he found that the polarization seen in the data is a result of Democratic party allegiance and not race. *Id.* at 6, 8.

To come to this conclusion, Dr. Alford replicated the Ecological Inference ("EI") analysis done by Drs. Handley and Palmer to assess any quantitative differences in the data. *Id*. at 2. Dr. Alford observed that there were only slight variations that are expected when conducting these sorts of analysis. *Id*. at 2. As the numbers he achieved were similar, and thus do not impact his expert opinions, he relied on the EI estimates that Drs. Hanley and Palmer produced. *Id*. at 3.

First, Dr. Alford analyzed the Presidential election results and found that political polarization and not politics is the likely cause of Black and white voting trends. *Id*. at 3-5. Unlike the conclusions of Drs. Hanley and Palmer, the three presidential elections analyzed show that support amongst Black voters does not track with the race of the candidate, but rather the *party* of the candidate. *Id*. at Table

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to the State to demonstrate some evidence of partisan politics (or some other issue) influencing voting patterns.").

1 p. 3. Dr. Alford analyzed the 2012, 2016, and 2020 presidential elections. These three elections are interesting because the 2012 election had a Black Democrat (President Obama) against a white republican (Mitt Romney) who both had white Vice-Presidential running mates (then-Vice-President Biden and Paul Ryan). *Id.* at 5. The 2016 election had two all-white tickets—Hillary Clinton and Tim Kaine (D) and President Trump and Vice President Pence (R). *Id.* The 2018 election pitted two white presidential candidates—President Biden (D) and President Trump (R)—against each other but the Vice-Presidential candidates were a Black candidate in Vice President Harris against white candidate Vice President Pence. *Id*. If race were the driving factor, one would expect that voters would vote in a pattern with President Obama securing the highest Black support and the lowest white support with Clinton earning the lowest Black support and highest white support, with President Biden joined by Vice President Harris in the middle. *Id*. What actually happened is that the all-white Clinton/Kaine campaign received the most support amongst Black voters and the least support amongst white voters. *Id*.

Turning now to contests in which there were no Democratic candidates, the data shows that any "pattern of racial differences in voting largely disappears." *Id*. at 6. There are three recent Louisiana elections in which two Republican candidates went head-to-head: (1) Attorney General in 2015; (2) State Treasurer in 2015; and (3) Commissioner of Insurance in 2019. *Id*. In these contests, Black and white support for the candidates is nearly identical in the 2015 and 2019 Treasurer and Commissioner of Insurance elections. *Id*. The one minor outlier is the election for

Attorney General in 2015. However, this election only serves to reinforce the point that politics, not race, is the primary motivator of racial differences in voting. In 2015, Republican General Landry ran against General Caldwell. What distinguishes the modest differences in this race is the fact that Caldwell was first elected to office as a Democrat, only changing his party affiliation in 2011. *Id*. Other statewide elections reinforce the broader point that:

> Black voters' [tendency] to vote at high levels for Democratic candidates is not dependent on those Democratic candidates themselves being Black or white, only that they are Democrats. Similarly, the tendency of white voters to vote at low levels for Democratic candidates is not dependent on those Democratic candidates themselves being Black or white, only that they are Democrats.

Id. at 8. Therefore, it is clear that while "voting may be correlated with race . . . the differential response of voters of different races to the race of the candidate is not the cause." *Id*. at 9. As such, Plaintiffs have not shown there is "legally significant" bloc voting, *see LULAC, Council*, 999 F.2d at 850, and, consequently, they are not entitled to the "extraordinary remedy" of a preliminary injunction. *See PCI Transp. Inc.*, 418 F.3d at 545.

E. There is no private right of action under Section 2 of the Voting Rights Act.

This Court should dismiss Plaintiffs claims because there is no private right of action under Section 2 of the Voting Rights Act. Never has the Supreme Court held that a private cause of action exists under Section 2 of the Voting Rights Act, and recently two members of the Court "flag[ged]" the issue for future litigation. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring)

("Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under §2. . . . this Court need not and does not address that issue today."). The Fifth Circuit has even recently acknowledged that it is an open question as to whether a private right of action exists under Section 2 of the Voting Rights Act. *Thomas v. Reeves*, 961 F.3d 800, 808 (2020) (Costa, J. concurring); *see also id.* at 818 (Willett, J. concurring). That said, the Eastern District of Arkansas has recently held that "[i]t is undisputed that Congress did not include in the text of the Voting Rights Act a private right of action to enforce Section 2." *Arkansas State Conference of the NAACP v. Arkansas Board of Apportionment*, 2022 U.S. Dist. LEXIS 29037, *21 (E.D. Ark Feb. 17, 2022).

To determine if an implied right of action exists, a court must first assess whether the statute demonstrates "a congressional intent to create new rights;" and, if so, the court must then determine whether the statute "manifest[s] an intent to create a private remedy[.]" *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001). Like many things involving a statute, courts must look at "the text and structure of" the statute when making its determination. *Id.* Any alternative sources of congressional intent are irrelevant. *Id.* It is apparent when looking at the face of Section 2, both in isolation and in the context of the Voting Rights Act as a whole, that it fails the test articulated in *Sandoval*.

Section 12 of the Voting Rights Act is the only section of the statute that provides a remedy for Section 2. However, that provision only identifies the Attorney General of the United States as the party who can enforce the statute. 52 U.S.C. §

10308(d). Section 12(d) provides that *the Attorney General* may institute proceedings on behalf of the United States "[w]henever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by" Section 2 of the VRA. 52 U.S.C. § 10308(d). As *only* the Attorney General is identified as the individual who may enforce Section 2, Plaintiffs here have no right to step into his shoes. As such, Plaintiffs lack a private cause of action under Section 2.

II. The threatened injury to the State as well as the Public Interest Weigh in Favor of *Not* Granting Plaintiffs' Requested Relief.

The Fifth Circuit's analysis with respect to whether an injunction is in the public interest "begins with the staunch admonition that a federal court should jealously guard and sparingly use its awesome powers to ignore or brush aside long-standing state constitutional provisions, statutes, and practices." *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988). When analyzing the public interest, the courts should also consider the proximity of forthcoming elections. *See id.*

A. The Supreme Court's holding in *Purcell* dictates that preliminary relief be denied.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quoting *Eu v. San Francisco County Democratic Central Comm.,* 489 U.S. 214, 231 (1989)). "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. These concerns are heightened "in the apportionment context" where "'a court is entitled to

and *should* consider the proximity of a forthcoming election and the mechanics and complexities of state election laws'" when determining whether to "'award or withhold immediate relief.'" *Veasey v. Perry*, 769 F.3d 890, 893 (5th Cir. 2014) (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)). Injunctions close in time to elections are thus disfavored in federal court. *Purcell*, 549 U.S. at 4-6.

Here there are looming candidate deadlines that must be met.[9] As Justice Kavanaugh recently explained concurring in a stay of a similar case out of Alabama "state and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges." *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring). A similar issue is present here. The State through its executive officers, such as the Secretary of State, are currently in the process of implementing the existing districts. Any hinderance or reversal of that work will result, at minimum, in the requisite risk of confusion sufficient to trigger *Purcell*. This is because "[c]hanges that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement." *Id.* Implementation of new redistricting maps are among the most disruptive changes a court can order, not just because of the complexities involved, but also the downstream effects that it can have on numerous aspects of state election administration and the electoral system

[9] *See* Louisiana Secretary of State, "2022 Elections," available at https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2022.pdf (last visited April 6, 2022).

overall. Indeed, "[s]hifting district and precinct lines can leave candidates wondering, voters confused, and election officials with a tremendous burden to implement maps in a timely manner with very limited resources." *Perez v. Texas*, 970 F. Supp. 2d 593, 606 (W.D. Tex. 2013).

Therefore, under Purcell immediate injunctive relief should be denied irrespective of the underlying merits of Plaintiffs' claims. *Veasey v. Perry*, 769 F.3d 890, 893 (5th Cir. 2014) (holding that relief can be denied under *Purcell* even if an "'apportionment scheme was found to be invalid'") (quoting *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

B. The accelerated scheduling order denies the people of Louisiana an adequate defense.[10]

The State of Louisiana respectfully objects—in the most strenuous terms—to this Court's preliminary injunction schedule in theses consolidated matters. While the State's motions to intervene were pending in the now consolidated matters, the Court implemented a schedule that works a material injustice on the State and, thereby, the people of Louisiana.[11] The actions of this Court are prejudicial to the defense and, as such, are prejudicial to both Defendants and the public interest.

While the extent of the prejudice, and the attendant evidence of that prejudice, must wait for the State's forthcoming motion, it is sufficient to note here that it cannot

[10] Thus, the State of Louisiana will be filing an emergency motion to stay these proceedings and a motion to reset deadlines so that a proper and robust defense to Plaintiffs' claims can be mounted.

[11] This objection is notwithstanding the fact that the current schedule is less catastrophic than the previous one. On April 13th the Court implemented a schedule that gave Defendants (which did not yet include either of the Intervenors) a mere four days—*over the Easter weekend*—to respond. *See Robinson* (ECF No. 33). The mere fact that the Court granted Defendants two weeks to respond to briefing and expert reports, *see Robinson* (ECF No. 35), that Plaintiffs had *months* to draft and prepare is no better than a band-aid on a broken leg.

be in the public interest to disallow a robust defense of a law where "the good faith of the legislature is presumed." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). A motion prior to the State filing its response was impossible as both the counsel and the experts necessarily had to devote all their attention to responding to the preliminary injunction motions. As will be fully detailed in the future motion, the following are just some of the issues that are prejudicial to the Defendants because of the current schedule: (1) Defendants' experts had insufficient time to fully analyze and respond to Plaintiffs' experts; (2) there was insufficient time to retrieve and review documents and other factual information residing within the State's agencies; and (3) certain fact witnesses have had limited availability. The State looks forward to providing evidence as to why a new schedule should issue,[12] but for now it ought to be sufficient to say that a rushed proceeding does nothing but harm the public.

CONCLUSION

For the aforementioned reasons, the Court should deny Plaintiffs' motion for preliminary injunction.

Dated: April 29, 2022,

Respectfully Submitted,

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[12] "[A] party arguing that time limits are unfair must show prejudice." *Laster v. District of Columbia*, 499 F. Supp. 2d 93, 100-01 (D.D.C. 2006).

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CERTIFICATE OF SERVICE

I CERTIFY I have served the foregoing was served on counsel for the parties via electronic means on April 29, 2022.

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