No. 22-30333

In the United States Court of Appeals for the Fifth Circuit

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

v.

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

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

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

v.

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

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

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

OPENING BRIEF FOR APPELLANTS

(Counsel listed on next page)

RICHARD B. RAILE
KATHERINE L. MCKNIGHT
E. MARK BRADEN
RENEE M. KNUDSEN
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Phone: (202) 861-1711
Email: rraile@bakerlaw.com

MICHAEL W. MENGIS
BAKER & HOSTETLER LLP
811 Main Street, Suite 1100
Houston, TX 77002

PATRICK T. LEWIS
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114

ERIKA DACKIN PROUTY
BAKER & HOSTETLER LLP
200 Civic Center Dr., Suite 1200
Columbus, OH 43215

Attorneys for Clay Schexnayder and Patrick Page Cortez

JEFF LANDRY
Louisiana Attorney General
ELIZABETH B. MURRILL
Solicitor General
SHAE MCPHEE
Deputy Solicitor General
MORGAN BRUNGARD
Assistant Solicitor General
ANGELIQUE DUHON FREEL
CAREY TOM JONES
JEFFREY M. WALE
Assistant Attorneys General
LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, LA 70804
murrille@ag.louisiana.gov

JASON B. TORCHINSKY
PHILLIP M. GORDON
EDWARD M. WENGER
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Highway
Haymarket, VA 20169

Attorneys for the State of Louisiana

PHILLIP J. STRACH
THOMAS A. FARR
ALYSSA M. RIGGINS
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
phil.strach@nelsonmullins.com

JOHN C. WALSH
SHOWS, CALI & WALSH, LLP
P.O. Box 4046
Baton Rouge, LA 70821

Attorneys for the Secretary of State

CERTIFICATE OF INTERESTED PERSONS

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

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

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

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

Defendant-Appellant: R. Kyle Ardoin, in his official capacity as Secretary of State for Louisiana, represented by Shows, Cali & Walsh,

LLP attorney John Carroll Walsh; and by Nelson Mullins Riley & Scarborough LLP attorneys Alyssa Riggins, Cassie Holt, John E. Branch, III, Phillip Strach, and Thomas A. Farr.

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

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

Intervenor Plaintiffs-Appellees: Vincent Pierre (Chairman of LLBC), represented by Arthur Ray Thomas of Arthur Thomas & Associates and Ernest L. Johnson, I. Louisiana Legislative Black Caucus (LLBC), represented by Stephen M. Irving of Steve Irving LLC and Ernest L. Johnson, I.

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

Dated: June 21, 2022

/s/ Elizabeth B. Murrill
ELIZABETH B. MURRILL

Attorney of Record for the State of Louisiana

STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for July 8, 2022, and classified this appeal for Class IV treatment.

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INTRODUCTION

This Court rarely will encounter a redistricting case as consequential as this or district-court order as imprudent. For three decades, Louisiana conducted congressional elections under redistricting plans with one majority-Black district because a federal court invalidated plans containing two as racial gerrymanders. After the State Legislature adopted a new plan in March 2022 maintaining that status quo, two sets of challengers (Plaintiffs) sued and demanded a new plan with two majority-Black districts as temporary relief for the 2022 elections. The district court conducted a rushed hearing, then took no action for 24 days. During that time, the 2022 Regular Session of the Louisiana Legislature concluded, and the State continued to implement its enacted plan. On June 6, the court provisionally enjoined that plan, stayed and extended the candidate nominating-petition deadline, and gave the Legislature 14 days—10 days less than the court spent cogitating on the motions—to enact a new plan with two majority-Black districts. The district court stated that it would look "favorably" on a motion for additional time, but then treated that same motion with disdain. Indeed, giving the Legislature time to act appears to have been merely a formality, quickly jettisoned when the district court began the remedial phase before the Legislature's remedial effort concluded, contrary to its June 6 order.

This Court should reverse the injunction and, pending consideration, issue an administrative stay and a stay pending appeal. When a

three-judge court in Alabama issued a materially identical injunction (commanding two majority-Black districts rather than one) on a materially identical time frame (four months before an election), the Supreme Court stayed that order. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). This case presents an even weaker case on the merits for Plaintiffs than for the challengers in *Merrill*. To obtain a second majority-Black district, Plaintiffs were required to establish three elements called the "*Gingles*" preconditions, which they cannot do. Three judges of this Court have already concluded the district court founded its analysis of the first precondition on error, and that is sufficient to immediately stay and reverse the injunction.

Further, Plaintiffs' experts conceded below that there is no legally significant white bloc voting, which is the essential predicate of the third *Gingles* precondition. This second fatal defect in Plaintiffs' case also justifies a stay and reversal. In *three* cases last decade, the U.S. Supreme Court made clear that white bloc voting does not arise to legal significance under §2 of the Voting Rights Act (VRA) where there is sufficient white crossover voting to obviate the need for majority-minority districts. Plaintiffs' experts looked at their own estimates of racial voting patterns and admitted this is so in Louisiana. Thus, not only are Plaintiffs unlikely to succeed, but Appellants are likely entitled to summary judgment.

Time is of the essence. The Secretary of State must administer an election this year in a manner that ensures full enfranchisement, minimizes voter error, and maximizes voter education as to where and when they will cast their votes and who is running in their districts. The injunction thwarts all these compelling state interests. Indeed, it maximizes both disenfranchisement and likelihood of error, raising serious risks of disaster this fall. Making matters worse, injecting such chaos and instability into a mid-term congressional election at the eleventh hour undermines public confidence in the election as a whole, will breed additional litigation, and may result in a lack of congressional representation for an indeterminate time. The equities alone compel reversal, and the Court should act immediately.

A panel of this court expedited the appeal and signaled a stay may be appropriate. This Court should promptly issue a stay and reverse the decision below. Absent an administrative stay, the Secretary of State will be obligated to begin implementing any remedial plan the district court adopts, starting by re-coding millions of Louisiana voters to new congressional districts. Without a prompt stay, a favorable ruling may issue too late to afford meaningful relief and place the State in the untenable position of using a court-ordered plan despite prevailing in this appeal.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Plaintiffs' federal-law VRA claim under 28 U.S.C. § 1331. This Court has jurisdiction over this appeal

under 28 U.S.C. § 1292(a) from the district court's preliminary injunction entered on June 6, 2022. ROA.6635. Attorney General Jeff Landry; Secretary of State R. Kyle Ardoin; and Patrick Page Cortez, the President of the Louisiana State Senate, and Clay Schexnayder, the Speaker of the Louisiana House of Representatives (collectively, "Appellants") timely filed notices of appeal that same day, June 6. *See* ROA.6787-88 (Legislative Appellants); ROA.6790-91 (Appellant Secretary of State); ROA.6792-93 (Appellant Attorney General).

STATEMENT OF THE ISSUES

1. Have Plaintiffs clearly established a likelihood of proving that Louisiana's congressional districts violate VRA §2, when their alternative plans combine disparate regions of the State for predominantly racial reasons and their expert witnesses admit majority-minority districts are unnecessary in Louisiana to ensure equal-electoral opportunity?

2. Is there a private right of action under VRA §2?

3. Do the equities warrant a mandatory injunction, which upends the status quo and overrides a complex statutory deadline scheme, threatens widespread constitutional violations, and was issued so close to an election that it assures widespread error, causes administrative chaos, and ultimately undermines public trust in the State's election process?

STATEMENT OF THE CASE

A. The Legal and Historical Framework.

1. Legal Background: A State Balancing Act.

After each decennial census, "[s]tates must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). At the same time, the Supreme Court acknowledges "redistricting is never easy." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). "The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (*Shaw I*)). Purposefully creating a new majority-minority district is presumptively unconstitutional. *Cooper v. Harris*, 137 S. Ct. 1455, 1468-69 (2017).

On the other hand, a state violates VRA §2 "if its districting plan provides 'less opportunity' for racial minorities 'to elect representatives of their choice.'" *Abbott*, 138 S. Ct. at 2315 (quoting *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 425 (2006) (*LULAC*)). The Supreme Court has "interpreted this standard to mean that, under certain circumstances, States must draw 'opportunity' districts in which minority groups form 'effective majorit[ies].'" *Id.* (citation omitted). Getting there isn't easy: A plaintiff seeking to compel a state to create a majority-minority district must, as a threshold matter, satisfy three "*Gingles*" preconditions: that (1) the relevant minority group is "'sufficiently large and

geographically compact to constitute a majority' in some reasonably configured legislative district"; (2) the relevant minority group is "politically cohesive," and (3) the "district's white majority…'vote[s] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S. Ct. at 1470 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)). Additionally, "race-based districting is narrowly tailored" and allowable *only* "if a State had 'good reasons' for thinking that the Act *demanded* such steps." *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249 (2022).

In the face of these "'competing hazards of liability,'" the Supreme Court has "assumed"—but never squarely held—that "compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)); *but see Miller v. Johnson*, 515 U.S. 900, 927 (1995) (observing this assumption raises "troubling and difficult constitutional questions"). A state's burden to satisfy "strictest scrutiny" is demanding. *Miller*, 515 U.S. at 915. The state must at a minimum adduce evidence—at the time of redistricting—establishing the three *Gingles* preconditions. *Cooper*, 137 S. Ct. at 1470. It is insufficient that citizens or advocacy groups "want[] a State to create" a majority-minority district. *Abbott*, 138 S. Ct. at 2334. It is also insufficient that a government actor demands a majority-minority district. *See Miller*, 515 U.S. at 922 (striking down a majority-minority district, even though the federal government made it

a condition of §5 preclearance); *Shaw v. Hunt*, 517 U.S. 899, 911-12 (1996) (*Shaw II*) (same). The Supreme Court has forbidden states from seeking to maximize the number of majority-minority districts. *Shaw II*, 517 U.S. at 913; *Wis. Legis.*, 142 S. Ct. at 1249; *see also Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("Failure to maximize cannot be the measure of §2"). "Nor is proportional representation the benchmark." *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008).

2. The 1990s: Louisiana Tries Drawing Two Majority-Minority Districts.

No defendant has ever successfully invoked §2 in the Supreme Court as a racial-gerrymandering defense. Louisiana tried. After the 1990 census, the Louisiana Legislature *twice* enacted congressional plans with two majority-minority districts. Both were invalidated. The 1992 plan included one majority-minority district (CD2) that "covers essentially the same geographic area as did old District 2 in the previous plan" in Orleans Parish. *Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993) (three-judge court) (*Hays I*). That *status quo* district posed no equal-protection problem.[1] *Id.*

[1] CD2 resulted from §2 litigation in the early 1980s, *Major v. Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983), and has been maintained since then as a majority-minority district for non-racial purposes, such as "preservation of existing district boundaries" and maintaining "relationships among constituents and their…representatives," *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 592 (N.D.

But the plan added a new majority-minority district (CD4) because the U.S. Department of Justice "had let it be known that preclearance [under VRA §5] would not be forthcoming" without one. *Id.* at 1196 n.1. In the subsequent equal-protection challenge, a three-judge court held that racial considerations predominated because "the Plan was drawn with the *specific intent* of ensuring the creation of a second, safe, black majority congressional district." *Id.* at 1204. The plan was not narrowly tailored under §2 because "it adversely affects more interests, if it generally wreaks more havoc, than it reasonably must to accomplish the articulated compelling state interest." *Id.* at 1208. The State appealed, but the Legislature enacted another plan, also with two majority-minority districts, mooting that appeal. *See Louisiana v. Hays*, 512 U.S. 1230 (1994) (mem.).

A second challenge ensued. Again, the three-judge court concluded race predominated, finding "[t]he Legislature was justifiably convinced that the United States Department of Justice would preclear no redistricting plan for Louisiana that failed to include a second majority-minority district" and therefore passed the plan "for the very reason that it was effective in separating black voters from white." *Hays v. Louisiana*, 936

Ill. 2011). Plaintiffs stipulated below that they do not challenge CD2 as an unconstitutional racial gerrymander. ROA.56.

F. Supp. 360, 368 (W.D. La. 1996) (*Hays IV*).[2] CD4 failed strict scrutiny because it "meanders for roughly 250 miles from the northwestern corner of the state to the southeast, dividing parishes and municipalities while surgically agglomerating pockets of minority populations along the way." *Id.* at 370. The three-judge court imposed a remedial plan with one majority-minority district (CD2). *Id.* at 372.

3. Subsequent Plans.

The Black population has not materially grown as a percentage of Louisiana's overall population. Just as in 1994, it has been "approximately 30%" of the voting-age population, *Hays IV*, 862 F. Supp. at 124 n.4; ROA.6707. Consequently, in the 2000 and 2010 decades, the Legislature maintained CD2 anchored in Orleans Parish as a majority-minority district, and did not enact a second majority-minority district. The U.S. Department of Justice precleared these plans. Meanwhile, Louisiana lost a congressional district after the 2010 census, going from seven to six.

[2] The three-judge court reached the same conclusion in a prior ruling, *Hays v. Louisiana*, 862 F. Supp. 119 (W.D. La. 1994) (*Hays II*), but the Supreme Court vacated that ruling because no plaintiff had standing to challenge CD4, *United States v. Hays*, 515 U.S. 737 (1995) (*Hays III*).

B. 2020 Redistricting: Goals, A Plan, Veto, and Veto Override.

1. Goals.

In the 2020 apportionment, Louisiana retained six districts. But population shifts necessitated redistricting to "achieve population equality 'as nearly as is practicable.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (citation omitted). The Legislature began in June 2021 by adopting criteria mandating that proposed plans comply with all legal requirements (including "the Equal Protection Clause"), "contain whole election precincts," "maintain[]…communities of interest," and "respect the established boundaries of parishes, municipalities, and other political subdivisions and natural geography of this state to the extent practicable." ROA.2657; ROA.6637. From October 2021 to January 2022, the Legislature held public "roadshows" statewide to present information and solicit public feedback. ROA.6638.

The Legislature convened an Extraordinary Session on February 1, 2022. The congressional plan ultimately enacted, House Bill 1 and Senate Bill 5, satisfies the adopted criteria. ROA.6486; ROA.6638. The plan maintains the "core districts as they [were] configured" to "ensure continuity of representation." ROA.6486. Although population shifts rendered some changes necessary, the plan preserves "the traditional boundaries as best as possible" and "keeps the status quo." ROA.6486. On average, the plan maintains more than 96% of constituents per district as the 2011 plan. ROA.2634. The plan respects political-subdivision boundaries and

natural geography and splits just one precinct. ROA.6486. It accounts for long-settled communities of interest identified in committee hearings, including by grouping major military installations and military communities in CD4,[3] preserving the Acadiana region in CD3, and joining major cities and their suburbs as much as possible. ROA.6486-87; ROA.14256-57. Of particular relevance here are CD5, CD6, and CD2:

- CD5 is a rural district accounting for nearly half Louisiana's agricultural sales. It borders a long stretch of the Mississippi River. The drive from Monroe to Baton Rouge typically takes one through Mississippi. Louisiana's only female representative in Congress, its incumbent, serves on the House Agriculture Committee. The plan maintains rural communities as the "backbone" of CD5 by preserving the Delta region and adding Point Coupee and rural parts of the Florida Parishes, all rural/agricultural dominated areas. ROA.6487.

- CD6, which was overpopulated by about 40,000 residents, is anchored in the Greater Metropolitan Baton Rouge area. It joins contiguous suburbs, including West Baton Rouge, Ascension, and Livingston. The enacted plan improves CD6 by curing precinct splits from the prior plan. ROA.6487.

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[3] The district court found there was no "probative evidence" that the Legislature designed CD4 to preserve these military communities-of-interest, ROA.6736, but the record reflects otherwise, *see,* ROA.12998; ROA.12925-26 (remarks of Sen. Hewitt), ROA.14290 (remarks of Sen. Reese).

- CD2 was the closest of any district to the ideal population, being under the ideal by 1,000 residents. The district joins the State's two largest urban areas, New Orleans and portions of Baton Rouge, which share interests in the tourism industry, affordable housing, safe neighborhoods, and accessible healthcare. CD2 brings together ports along the Mississippi River, which is the "gateway to commerce." ROA.6488. The "general makeup of this district remains the same" from the 2010 plan, though some precincts shifted between District 2 and others to equalize population. ROA.6488. The enacted version retains nearly 99% of the constituents of the 2011 version of CD2. ROA.2634. CD2 remains a majority-Black district, with a Black Voting Age Population (BVAP) of over 58%. ROA.6488.

2. Demands for Racial Segregation.

The Legislature faced "demands" to engage in race-based redistricting. *See Abbott*, 138 S. Ct. at 2334. Some commenters contended that, "[b]ecause over 1/3 of Louisiana's population is minority…at least 2 of the 6 districts should have a fair chance of electing a member of a minority." ROA.81. Many legislators argued for proportionality, "repeating, 'One-third of six is two.'" ROA.15165. Legislators and members of the public proposed alternative plans containing two majority-Black districts drawn with the specific intent to capture at least 50% BVAP. ROA.6488. Senator Fields, for example, asserted that, "if you wish to create a majority-mi-

nority district, you can." ROA.6489. The proposals transferred Black residents from CD2 to CD5, reducing CD2's BVAP, and some contained z-shaped districts zigging and zagging across the state. ROA.6489. The Governor announced he would veto any congressional plan that "does not include a second majority African American district." ROA.15167; *cf. Hays I*, 839 F. Supp. at 1196 n.1; *Miller*, 515 U.S. at 917-18; *see also Shaw II*, 517 U.S. at 902-03.

No one advocating a second majority-minority district presented "a strong basis in evidence to conclude that § 2 demands such race-based steps." *Cooper*, 137 S. Ct. at 1471. Plaintiffs Louisiana NAACP and Power Coalition for Equity and Justice claimed to have conducted statistical analyses. ROA.6489. But they submitted no such an analysis or underlying data, so their claim is unsubstantiated. Plaintiffs (and their counsel) refused to provide any analyses and did not answer questions about the elections purportedly analyzed. ROA.6490. The only meaningful information gleaned from their submissions was a summary of an analysis of a single election, and it suggested that alternative configurations of CD5, rendering it a bare-majority-Black district, would not meaningfully improve the Black community's opportunity to elect its preferred candidates. ROA.6490. Meanwhile, legislators expressed concerns that two majority-minority districts with slim BVAP majorities compromised Black opportunity in both. ROA.6491. Legislators had the same concerns about state legislative and judicial redistricting plans. ROA.6491.

3. The Enacted Plan.

The Legislature resisted calls "to segregate the races for purposes of voting." *Shaw I*, 509 U.S. at 642. House Bill 1 and Senate Bill 5 (amended to incorporate the identical congressional plans), ROA.6491, passed February 18, 2022. As promised, the Governor vetoed both bills. ROA.6639. The Legislature overrode the veto of House Bill 1 on March 30, 2022. ROA.6639. Accordingly, as with previous precleared apportionments, the Legislature enacted a map retaining CD2 as a majority-minority district but that did not create another majority-minority district.

C. Litigation Ensues.

1. The Allegations.

Two sets of Plaintiffs filed consolidated §2 actions based on what they call "critical facts," including that "Louisiana has six congressional districts and a Black population of over 33%," "[a]ctivists, community leaders, and ordinary Louisianans petition[ed] lawmakers" to create a second majority-minority district," the Governor "pledged to veto any new map that failed to" create such a race-based district, and a district could be drawn including "the Baton Rouge area and the delta parishes" to achieve a 50% racial quota. ROA.1039. They waited 16 days to file preliminary-injunction motions.

Plaintiffs sued the Secretary of State alone. The Attorney General, on behalf of the State, and the President of the Senate and Speaker of the

House of Representatives intervened ("Legislative Appellants") (collectively, "Appellants"). ROA.6639.

2. Rushed Preliminary Proceedings.

The district court, over the State's objection, conducted an expedited preliminary-injunction hearing. The court afforded Appellants only two weeks to prepare expert reports. The State objected, advising it had insufficient time for an adequate defense, ROA.3197, but the district court barreled forward, ROA.3230.

In support of their motions, Plaintiffs presented alternative plans with two majority-Black districts. Their experts achieved this feat because there were "specifically asked to draw two by the plaintiffs," ROA.4947, and "consciously drew the district[s] right around 50 percent [BVAP]" to "satisf[y] that first [*Gingles*] pre-condition," ROA.5041. To further achieve this, they joined territory on the northern border of Louisiana with territory in and around Baton Rouge and split Lafayette along racial lines, ROA.6541-6544, in contravention of the Legislature's stated goals and public requests, ROA.12931-32; ROA.11607-10; ROA.11624-25. Plaintiffs' experts admitted they did not analyze whether Black voters in these disparate regions share anything in common but race. ROA.4967. It was also necessary to reduce BVAP in CD2, dropping it from about 58% BVAP to just slightly above 50% BVAP, to increase it in CD5. *Cf.* ROA.6659, *with* ROA.6657.

Plaintiffs also presented expert testimony regarding voting patterns. Two experts testified that "black voters and white voters voted differently." ROA.6185; *see also* ROA.6129; ROA.5133-34. They admitted, however, their data reveals sufficient white crossover voting support for Black-preferred candidates to ensure equal electoral opportunity without 50% BVAP districts. *See also* ROA.5163-64.

The parties presented evidence on whether the State could implement a new redistricting plan for November 2022 elections. The State's chief elections officer testified she is "very concerned" with the prospect of implementing a new map with minimal time and potentially harmful effects. ROA.5971-74. Plaintiffs, in contrast, offered testimony from the Governor's attorney, who admitted he has *no* elections administration experience. ROA.5471-72. He testified administering a new plan at this stage would be a "huge challenge," ROA.5466, but opined it's possible because the State handled disrupted elections after Hurricane Ida, which occurred after the election date was delayed by act of the State Legislature, ROA.5464-65.

3. The Preliminary Injunction.

The district court took no action for 24 days. The Legislature ended the 2022 Regular Session, and the State continued implementing the challenged plan.

Then, on June 6, the last day of the Regular Session, the district court issued an injunction and memorandum opinion. The court concluded that the first and third *Gingles* preconditions are satisfied.

As to the first precondition, the court found Plaintiffs' experts utilized race "to determine if two majority-minority districts could be drawn," ROA.6670, but found race did not predominate because "some *consideration* of race is permissible," ROA.6745. The court also determined that the predominance inquiry governing legislative redistricting *does not apply* to the *Gingles* inquiry because the illustrative plans "are not state action." ROA.6748. The court analyzed Plaintiffs' plans according to statewide geometric averages and concluded the plans satisfy *Gingles'* compactness test, but failed to explain why rural voters in the Delta parishes form an identity of interest with urban and suburban voters in and around Baton Rouge.

As to the third precondition, the court found Plaintiffs established divergent racial voting preferences, showing that "White voters consistently bloc vote to defeat the candidates of choice of Black voters." ROA.6758. The court found high white crossover voting and admitted "that high levels of crossover voting undermine a finding of legally significant polarized voting," ROA.6758-59, but found it sufficient that "crossover voting was inherently included in the analysis performed by" Plaintiffs' experts," ROA.6760. It did not matter, the court said, that Plaintiffs'

experts *agreed* that majority-minority districts *are not necessary* to create equal electoral opportunity. ROA.6760.

The court concluded the enacted plan contravenes §2 under the totality of the circumstances. It also concluded it is not too late to configure and implement a new plan for the 2022 elections. The court discredited the State's chief election official, concluding it has not been proven infeasible to implement a new plan, and credited instead testimony of the Governor's counsel who has no election administration experience.

The court issued an injunction that (1) "ORDERS the Louisiana Legislature to enact a remedial plan" "that includes an additional majority-Black district" (regardless of where that is); (2) gave the Legislature until June 20 (14 days, 7 of which fell inside a state constitutional notice requirement) to do so; and (3) representing that the court would "issue additional orders to enact a remedial plan" if that did not occur. ROA.6636. The next day, the Governor issued a call for an Extraordinary Session to begin as soon as was legally permitted under the State Constitution (June 15), and ending on the order's deadline of June 20.

4. The Stay-Stage Ruling.

Appellants filed same-day notices of appeal, moved the district court for a stay, and promptly renewed that request with this Court when it was denied. A motions panel issued an administrative stay, but on June 12 denied the emergency motion and instead ordered expedited review before a merits panel. The panel conceded "this appeal's exigency has left

us little time to review the record," and the district court's analysis is "not without weaknesses." ROA.6859.

First, the panel found that the district court's findings regarding the first precondition are "not airtight" and that the district court likely erred in relying on statewide compactness averages, but nevertheless found sufficient evidence on a cursory review. ROA.6864-65.

Second, the panel agreed "[r]ace was undoubtedly a factor in the drawing of the illustrative maps," ROA.6872, but found this irrelevant—at least on cursory review of the record—because, if the predominance test applied to §2 claims, "it is difficult to see how any *Gingles* showing could be successful," ROA.6875. The panel "d[id] not rule out that a *Gingles* showing transparently dependent on racial gerrymandering might fail" if, for example, it was "inevitable" that a legislature carrying it out would engage in "racial gerrymandering." ROA.6875.

Third, the panel found it irrelevant that majority-minority districts are unnecessary in light of strong white crossover voting. ROA.6876-81. The panel agreed "the question…is whether, without a VRA remedy, the minority voters' preferred candidates will usually lose," ROA.6878, but found this "loses the plot," because the Legislature did not draw crossover districts, ROA.6878-79.

As to the first precondition, the court found Plaintiffs' experts utilized race "to determine if two majority-minority districts could be drawn," ROA.6670, but found race did not predominate because "some

consideration of race is permissible," ROA.6745. The court also determined that the predominance inquiry governing legislative redistricting *does not apply* to the *Gingles* inquiry because the illustrative plans "are not state action." ROA.6748. The court analyzed Plaintiffs' plans according to statewide geometric averages and concluded the plans satisfy *Gingles'* compactness test, but failed to explain why rural voters in the Delta parishes form an identity of interest with urban and suburban voters in and around Baton Rouge.

As to the third precondition, the court found Plaintiffs established divergent racial voting preferences, showing that "White voters consistently bloc vote to defeat the candidates of choice of Black voters." ROA.6758. The court found high white crossover voting and admitted "that high levels of crossover voting undermine a finding of legally significant polarized voting," ROA.6758-59, but found it sufficient that "crossover voting was inherently included in the analysis performed by" Plaintiffs' experts," ROA.6760. It did not matter, the court said, that Plaintiffs' experts *agreed* that majority-minority districts *are not necessary* to create equal electoral opportunity. ROA.6760.

The court concluded the enacted plan contravenes §2 under the totality of the circumstances. It also concluded it is not too late to configure and implement a new plan for the 2022 elections. The court discredited

the State's chief election official, concluding it has not been proven infeasible to implement a new plan, and credited instead testimony of the Governor's counsel who has no election administration experience.

The panel therefore denied the stay motions, but *sua sponte* expedited the appeal and reiterated that "neither the plaintiffs' arguments nor the district court's analysis is entirely watertight." ROA.6890. "And it is feasible that the merits panel, conducting a less-rushed examination of the record…, may well side with the defendants." ROA.6890.

5. Subsequent Events.

The motions panel found it significant that "the district court stressed in refusing to stay its order pending appeal, '[i]f Defendants need more time' to draw a new map, the district court would 'favorably consider a Motion to extend the time to allow the Legislature to complete its work.'" ROA.6889 (quoting ROA.6850). Legislative Appellants moved the following day for a short extension of that deadline, explaining the legislative process. The district court ordered the Speaker and Senate President to "appear **IN PERSON** to offer testimony in support of the" motion. Dist.Ct.Dkt.189. The court conducted the hearing on the morning of the second legislative day of six allotted to the Legislature to redistrict and thus deprived the Legislature of its leadership in an already exceedingly short special session.

The district court "sometimes express[ed] disdain for a process that [the Supreme Court] ha[s] cautioned courts to respect." *Easley v.*

Cromartie, 532 U.S. 234, 250 (2001). At the outset, the district court speculated that it had the authority to suspend the seven-day notice for an Extraordinary Session required by the Louisiana Constitution or unilaterally amend the Governor's call and extend the existing session by federal fiat. Dist.Ct.Dkt.208, at 10:5-25. It threatened Speaker Schexnayder with contempt for filing a procedural placeholder bill lacking two majority-minority districts.[4] *Id.* at 77:15-78:14. The court purported to direct Legislative Appellants in how the Legislature should conduct its work, demanding that it suspend its rules and dispense with public input into the legislative process and opined that the Legislature could rely on "prior testimony and evidence from prior sessions."[5] *Id.* at 87:22-88:23. The court deemed the testimony "disingenuous and insincere," *id.* at 90:13, denied the motion, *id.* at 90, and then announced its intent to "hammer out a remedial process" immediately, *id.* at 91:3-4, after refusing to allow the State and Secretary of the State to participate at the hearing, *id.* at 6:19-7:4.

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[4] No federal authority has power to compel the Louisiana Legislature to enact state legislation, *see, e.g.*, *New York v. United States*, 505 U.S. 144, 178 (1992), and the legal significance of the redistricting deadline is that it afford the "*opportunity*" to cure the putative violation, *Upham v. Seamon*, 456 U.S. 37, 41 (1982) (emphasis added; citation omitted).

[5] The district court assumed that "all of those maps have been debated," but that is wrong. Dist.Ct.Dkt.208, at 89:10-11. Moreover, President Cortez made clear that amendments in this process had not been debated before and merited public input. *Id.* at 59:23-60:23.

The next day, the district court issued another order requiring the parties to submit maps and memoranda supporting their maps by Wednesday, June 23, one day after the court had previously indicated *discussion* would *begin* about a remedial phase. No pretrial order has been issued, and no dates for dispositive motions have been set. In other words, after attempting to micromanage the special session, the district court dismissed it as an irrelevant detail while the session was ongoing, effectively amended its order, and barreled full-steam ahead to impose a new plan on Louisiana.

SUMMARY OF ARGUMENT

The decision below, at the eleventh hour before a pivotal national election, forces upon Louisiana a flawed view of §2 that conflicts with the Fourteenth Amendment. It is legally and factual erroneous and it should be promptly reversed. The Court should issue a stay pending appeal or administrative stay immediately to cure the irreparable harm of the injunction below, limit further election chaos, and permit orderly administration of the mid-term election.

I. Plaintiffs are unlikely to succeed on the merits. They have little prospect of proving the three *Gingles* preconditions at trial or even of establishing a right to bring this action.

A. Two distinct but related defects plague Plaintiffs' case on the first precondition, which requires them to prove that the relevant minority group is "'sufficiently large and geographically compact to constitute

a majority' in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (citation omitted). First, Plaintiffs' alternative district configurations are but slight variations on a common scheme joining disparate regions of Louisiana with no commonalities but race. Each plan joins territory in and around Baton Rouge with the Delta Parishes on Louisiana's northeastern border, 180 miles away. This contravenes the §2 principle that "farflung segments of a racial group" are not appropriately combined in a remedial district, *LULAC*, 548 U.S. at 433, and the district court's approval of this configuration was infected with legal error—as the motions panel recognized but improperly excused.

Second, Plaintiffs' illustrative plans are not appropriate comparators to the State's plan when they are the product of racial predominance. Plaintiffs' experts admitted to building the plans around the racial goal of two majority-minority districts, and this goal "had a direct and significant impact" on lines. *Cooper*, 137 S. Ct. at 1468-69. The district court's conclusion that race did not predominate clearly contravened recent Supreme Court decisions defining predominance. And its conclusion that predominance is irrelevant because no state action exists turns a blind eye to its own order demanding that one government actor (the legislature) adopt a plan with two majority-minority districts or else another (the federal court) will. Meanwhile, the motions panel agreed §2 liability may be foreclosed where racial predominance is "inevitable" in a remedy, ROA.6875, but failed to see this is precisely such a case.

B. The third precondition demands proof of "legally significant" white bloc voting, *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*en banc*), but Plaintiffs' evidence disproves this element. Supreme Court precedent holds "that in areas with substantial crossover voting, § 2 plaintiffs would not be able to establish the third *Gingles* precondition and so majority-minority districts would not be required." *Cooper*, 137 S. Ct. at 1472 (quotation and edit marks omitted). It also confirms that white bloc voting is not legally significant if remedial districts of 50% minority VAP are unnecessary to create equal electoral opportunity. *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion). Plaintiffs' experts admitted their own data shows 50% BVAP districts are unnecessary to create equal electoral opportunity. As a result, the district court's demand for majority-minority districts contravenes not only §2, but also the Constitution.

C. Plaintiffs are unlikely to establish even a right to bring this case. VRA §2 contains no express private right of action. There is no basis to infer an implied action where the VRA authorizes the United States Attorney General to bring suits (including for injunctive relief) under VRA §2 but contains no mention of private suits. *See* 52 U.S.C. § 10308(c). Nor does the reference to "aggrieved person" in §3 fill this hole, because that provision refers to suits "to enforce the voting guarantees of the fourteenth or fifteenth amendment" and concerns appointing election observers. *Id.* § 10302(a). Two Supreme Court Justices have recognized that its

prior cases referencing §2 suits by private litigants "have assumed—without deciding" the question, so it remains open for this Court's adjudication. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, joined by Thomas, JJ., concurring).

II. The equities independently foreclose injunctive relief, for three independent reasons.

First, the injunction does *nothing* to "preserve the relative positions of the parties until trial on the merits," *Univ. of Texas v. Camenisch*, 451 U.S. 390, 396 (1981), and *everything* to force upon Louisiana the functional equivalent of permanent relief. The district court cited no case where a new redistricting plan of any kind, let alone a statewide congressional plan, has been imposed by a court at the *provisional* stage, except the stayed *Merrill* decision. And its reading of this Court's non-binding openness to status-quo-altering relief ignores that its injunction was not tailored "to preserve the court's ability to render a meaningful decision on the merits," as the authority it cited requires. *See Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974). Nor does any authority support the stunning demand for a sovereign legislature to convene and attempt to pass new legislation as *temporary* relief.

Second, the balance of equities cannot colorably favor a plan with two majority-minority districts that are likely to be unconstitutional (or at least presumptively so) to address an alleged *statutory* injury this

Court has concluded does not "automatically" implicate "irreparable injury." *Chisom v. Roemer*, 853 F.2d 1186, 1188-89 (5th Cir. 1988). Where competing risks pit a potentially massive equal-protection violation against a questionable statutory violation, the balance of equities can only be resolved one way. The district court provided no reason for its convoluted, contrary view.

Third, the *Purcell* principle "establish[es] (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election," *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J. concurring), and this case fits the bill. Preparing for an election begins well in advance of election day. The Secretary of State began implementing the plan after the Legislature adopted its final plan and overrode a gubernatorial veto. The enacted congressional plan has already been implemented, and starting over puts election officials at severe risk of failing to implement a new plan in time for federal deadlines—one of which demands the State *re-code* assignment of millions of voters, some by hand, to their appropriate precincts so ballots can be printed by September 24. The timelines here do not materially differ from those in *Merrill*, and the record is brimming with evidence that the injunction's demands do more than impose additional administrative burdens. It threatens widespread error, voter disenfranchisement, and lengthy disruption in Louisiana's representation in Congress. The district court and motions panel imposed too high

a burden on the State, lacked precedential support, and refused to discern the true nature of risk. Rarely has a federal court been so callous to the potential calamity its injunction may cause the electoral process and violence it necessarily does to principles of federalism.

STANDARD OF REVIEW

"Although the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed de novo." *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006) (footnote omitted). "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.*, 451 U.S. at 395. Preliminary injunctions "favor the status quo and seek to maintain things in their initial condition so far as possible until after a full hearing permits final relief to be fashioned." *Wenner v. Tex. Lottery Comm'n*, 123 F.3d 321, 326 (5th Cir. 1997).

To obtain a preliminary injunction, the movant bears the burden of establishing four elements: "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Jiao v. Xu*, 28 F.4th 591, 597-98 (5th Cir. 2022). A "mandatory injunction," or an injunction that forces a party to *take* action rather than an injunction

that *prohibits* a party from taking action, is an "extraordinary remedial process." *Morrison v. Work*, 266 U.S. 481, 490 (1925). Accordingly, mandatory injunctive relief "is particularly disfavored" and awarded only when "the facts and the law clearly favor the moving party." *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976).

Additionally, the Supreme Court has signaled that enjoining the use of a redistricting map during an election year further elevates the burden. Specifically, plaintiffs must show four things: (1) "the underlying merits are entirely clearcut in [their] favor"; (2) they "would suffer irreparable harm absent the injunction"; (3) they did not "unduly delay[] bringing the complaint to court"; and (4) "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). In other words, even if *Purcell* stops short of barring an injunction outright, it nonetheless ratchets up the showing necessary for "a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially-imposed changes to its election laws and procedures." *Id.*

ARGUMENT

I. PLAINTIFFS HAVE NOT DEMONSTRATED A CLEAR RIGHT TO RELIEF.

Any party seeking a preliminary injunction must "clearly carr[y] the burden of persuasion" in showing a likelihood of success. *PCI Transp., Inc. v. Fort Worth & W. R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005). A party

seeking a mandatory injunction must show that "the facts and the law clearly favor the moving party." *Martinez*, 544 F.2d at 1243. Here, because Plaintiffs sought an injunction thwarting the administration of an upcoming election, they were obligated to meet a higher burden and prove that "the underlying merits are *entirely clearcut* [their] favor." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (emphasis added). Plaintiffs failed to meet any applicable standard below, and the decisions issuing and declining to stay injunctive relief exhibit multiple errors of law.

A. Plaintiffs' Failed to Establish the First Precondition.

The first *Gingles* precondition requires a challenger to establish that the relevant minority group is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper*, 137 S. Ct. at 1470 (quoting *Gingles*, 478 U.S. at 50). This precondition "specifically contemplates the creation of hypothetical districts." *Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1151 (5th Cir. 1993). Although Plaintiffs presented hypothetical districts, they failed to establish the legal prerequisites in at least two independent respects.

1. The Illustrative Maps combine far-flung communities with little in common but race.

Plaintiffs' illustrative plans fail the first precondition because they fail to "take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *Abrams v.*

Johnson, 521 U.S. 74, 92 (1997) (citation omitted). "[T]here is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *LULAC*, 548 U.S. at 433. That's because §2 rights are individual and do not exist at the statewide level. *Shaw II*, 517 U.S. at 917. A district is not a §2 remedy when "the only common index" between the combined territories "is race." *Id.* at 435.

a. That is the case here. "[P]laintiffs have staked their all on a proposal that [Black voters] are entitled at least to proportional representation via two [Black]-effective districts no matter what the consequences of race-blind districting would be." *Gonzalez*, 535 F.3d at 600. From that starting point, Plaintiffs concluded that two majority-Black districts are desirable and worked backwards to find territory to achieve this mechanical quota. ROA.4961-62 (Cooper); ROA.5058 (Fairfax).

They arrived at a new majority-minority district that pulls predominantly Black areas out of CD2 (already a majority-Black district), combines them with adjacent territory in and around Baton Rouge, and joins these regions together with the Delta Parishes on the northeastern border of Louisiana, 180 miles away. ROA.6644. The district court found Plaintiffs' plans "all take roughly th[at] same shape." ROA.6659; *see also* ROA.6665. The only historical precedent for a district of that basic design was one of the invalidated *Hays* districts, which "meander[ed] down the west bank of the Mississippi River" before "swallow[ing] predominantly

black portions of several more parishes" around Baton Rouge. *Hays I*, 839 F. Supp. at 1199.

The *Gingles* "compactness" inquiry demands, however, that communities stitched together in an illustrative district have similar "needs and interests" *beyond* race. *LULAC*, 548 U.S. at 435. Communities are not defined solely by race, and consideration of "nonracial communities of interest reflects the principle that a State may not 'assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Id.* at 433 (quoting *Miller*, 515 U.S. at 920). In the absence of that "prohibited assumption, there is no basis to believe that a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates." *Id.*; *see also Miller*, 515 U.S. at 908 (striking down a Georgia congressional district as a racial gerrymander because it "connect[ed] the black neighborhoods of metropolitan Atlanta and the poor black populace of Chatham County, though 260 miles apart in distance and worlds apart in culture"); *Sensley v. Albritton*, 385 F.3d 591, 597 (5th Cir. 2004) (finding a district joining discrete communities "roughly 15 miles apart from one another" failed the first precondition).

LULAC illustrates this point. There, Texas created a majority-Latino district that combined "the Latino community near the Mexican border" with "the one in and around Austin," with a "300-mile gap" between

them. 548 U.S. at 432, 434. Despite the two Latino communities having different backgrounds and interests, however, the district court concluded the district was reasonably compact because of the "relative smoothness of the district lines," *id.* at 432-33. This was problematic because "the practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals." *Id.* at 434. The Court recognized that the sprawling size and diversity of the new district "could make it more difficult for the constituents in the Rio Grande Valley to control election outcomes." *Id.* (quotation omitted). Compactness, then, is not about "style points" but is instead "critical to advancing the ultimate purposes of § 2," *i.e.*, ensuring true equal electoral opportunity. *Id.*

But Plaintiffs did not analyze the non-racial similarities and differences between the rural Delta region and Baton Rouge. *See* ROA.4967-70. And they conceded these regions are in fact different (*e.g.*, that "East Baton Rouge, West Baton Rouge are not part of the Louisiana Delta region"). ROA.5043. Their analyses, as the district court acknowledged, ROA.6663-64, ROA.6671, showed marked differences in household income, educational attainment, and poverty levels of Black residents in East Baton Rouge Parish compared to Black residents of the Delta parishes. *See* ROA.4975-78; ROA.5056; ROA.5058.

Furthermore, the legislative record—admitted with the preliminary-injunction record—demonstrated that the Legislature viewed CD5

as appropriately connecting the rural Delta Parishes with rural parts of the Florida Parishes but *not* with urban Baton Rouge. ROA.12928-31. It also shows that citizens in the footprint of CD5 urged the Legislature, at its roadshow meeting in Monroe (Ouachita Parish), not to combine the Delta Parishes with an urban region. *E.g.,* ROA.11421 ("[W]e don't need to go from Baton Rouge to Monroe to Ruston to Grambling to call it a district that has anything in common other than race"); ROA.11410 ("I hope that district 5 stays in Northeast and North Central Louisiana with our rural area" and "we're good folks together"); ROA.11414-15 ("[I]n North Louisiana, particularly Northeast Louisiana, we're not getting the resources the South gets," and recognizing that "rural concerns are not the same as urban or suburban concerns").

In short, Plaintiffs' approach was flawed from the start. Their theory is one of abstract *proportionality*, just like the theory Judges Easterbrook and Wood rejected in *Gonzalez*. Plaintiffs' concluded two majority-Black districts in Louisiana somewhere—*anywhere*—should be created and then sought the location as an afterthought. By contrast, §2 asks whether a discrete minority community suffers vote dilution. *See Gonzalez*, 535 F.3d at 599-600; *Shaw II*, 517 U.S. at 917. Not so here. Plaintiffs' pleadings failed to identify any discrete voter or group of voters suffering dilution; they give only the slimmest mentions to the Delta Parishes or the discrete concerns of Black voters on a regional basis.

b. The district court erred in examining this question, as the motions panel recognized. The §2 compactness question "refers to the compactness of the minority population, not to the compactness of the contested district." *LULAC*, 548 U.S. at 433 (citation omitted). Further, the "relevant basis" of the inquiry is "each district" proposed, not the plan as a whole. *Wis. Legislature*, 142 S. Ct. at 1250.

Compounding its error of law, the district court erred further in relying heavily on legally irrelevant evidence, focusing on "mathematical measures provided by the plaintiffs' map-drawing experts," ROA.6866, and other analytics analyzed "on a plan-wide basis," ROA.6867. The motions panel called out these errors, but then erred itself in choosing to examine "the shape of proposed districts," which it felt entitled to do under the Supreme Court's decision in *Bush*. 517 U.S. at 980-81. ROA.6865. But *Bush* was an equal-protection case, where "compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines." *LULAC*, 548 U.S. at 433. *LULAC* clarified that this is "*not*…the compactness" inquiry in a §2 case. *Id.* (emphasis added; citation omitted). Yet the motions panel relied on this test as a substitute for the relevant question—whether the "minority population" is compact. *Id.*; *see* ROA.6865-67. The indisputable answer to that question is no.

c. Ultimately, on an admittedly cursory review, the motions panel agreed "the plaintiffs' evidence has weaknesses," but believed

Plaintiffs' "evidence is stronger than the evidence produced by the defendants." ROA.6868. This should have ended the inquiry, as it implicitly recognizes Plaintiffs' failure to demonstrate the merits are "entirely clearcut," but there are several more reasons for this Court to disagree.[6]

First, as explained, the motions panel itself analyzed the question principally on the view that compactness "to the naked eye" is the right approach, despite *LULAC*. ROA.6865. That means its finding of "weakness" in the district court's analysis was compounded by weakness in its own analysis.

Second, the motions panel did not pay sufficient heed to the heavy burden Plaintiffs bore. *PCI Transp., Inc.*, 418 F.3d at 545. Plaintiffs clearly did not satisfy it. Once noisy datapoints unrelated to the correct legal question are excluded, the compactness analysis turned almost exclusively on "lay testimony" Plaintiffs submitted attesting that "CD5 preserves communities of interest." ROA.6867. The motions panel called this "extensive," but it actually consisted of the testimony of *two* lay witnesses. ROA.6872-73. And their testimony did not agree. One repeatedly

[6] The motions panel's critique of Appellants' supposed inability to mount a defense amounts to a criticism of the district court's breakneck-speed for briefing the preliminary-injunction motion. Appellants had only two weeks to prepare responsive filings, including expert reports, and were prejudiced by a cram-down schedule. As discussed *infra* at §II.C, *Purcell* cautions against upending elections at the eleventh hour should not trigger a race to the finish in litigation. That alone causes collateral damage to all the citizens of a state and principles of federalism.

attested that Baton Rouge is part of "south Louisiana." ROA.5064-65; *see also* ROA.5064-71 (five additional references to "south Louisiana"). But the Delta Parishes are obviously not part of "south Louisiana"; they form its northeastern border. The second witness attested that there are similarities between the Delta Parishes and Baton Rouge, but did not refer to Baton Rouge as "south Louisiana" (presumably because he believes it forms a community with northeast Louisiana). Meanwhile, as noted, neither of Plaintiffs' demography experts could identify meaningful shared interests among these regions and admitted to significant differences. ROA.4967-71; ROA.5043; ROA.4975-78; ROA.5056; ROA.5058.

In sum, even taking as a given that the district court rightly (and actually) credited the second witness over the first, that leaves a *single* Louisiana citizen as supplying the basis for Plaintiffs to establish that the Delta Parishes and Baton Rouge are appropriate "communities of interest." *Abrams*, 521 U.S. at 92. The proposition before this Court, then, is that redistricting challengers can foist an unprecedented (and previously invalidated) district configuration on more than 4.5 million Louisiana residents because *one* believes it is a good idea. The Court should have little trouble concluding that Plaintiffs have not "clearly carried the burden of persuasion" on this question. *PCI Transp., Inc.*, 418 F.3d at 545.

Third, the panel mistakenly believed no contrary evidence exists because (in its view) Appellants "put all their eggs in the basket of racial

gerrymandering." ROA.6864. That's wrong, and likely the product of "little time to review the record." ROA.6859. Appellants made robust arguments below regarding the first *Gingles* precondition that were distinct from (though complementary to) their racial-gerrymandering argument. ROA.6557-84; ROA.2614-18 (Legislative Br.); ROA.2122-27 (Secretary Br.). The entire *legislative* record, *see* ROA.7010-16 (index of legislative record), demonstrated *the Legislature* viewed CD5 as appropriately connecting rural communities, which properly placed the Delta Parishes with rural parts of the Florida Parishes, *see* ROA.12928-31; ROA.11410; ROA.11414-15; ROA.11421. It also shows that citizens in the footprint of CD5 urged the Legislature, at its roadshow meetings in Monroe (Ouachita Parish) and Alexandria (Rapides Parish), not to combine the Delta Parishes with disconnected urban regions. *E.g.*, ROA.11421 ("[W]e don't need to go from Baton Rouge to Monroe to Ruston to Grambling to call it a district that has anything in common other than race"); ROA.11410 ("I hope that district 5 stays in Northeast and North Central Louisiana with our rural area"); ROA.11414-15 ("[I]n North Louisiana, particularly Northeast Louisiana, we're not getting the resources the South gets," and recognizing that "rural concerns are not the same as urban or suburban concerns"); ROA.11723-25 (requesting preservation of CD5 as a "rural" and "agricultural" district).

The motions panel also believed it was not asked whether *Gingles* "can be satisfied where a substantial portion of the minority voters included in the *Gingles* coalition will already be able to elect their candidate of choice under the enacted plan because they live in a majority-minority district." ROA.6880. But that question is at the core of Appellants' contentions regarding the first precondition. Plaintiffs' claim views Black voters as fungible, such that §2 compels the "donation" of Black voters from CD2 to CD5 in the way a pharmacist may divvy up fungible pills into bottles to achieve numerical quotas. *See Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 165 (E.D. Va. 2018).

Fourth, the motions panel was mistaken in believing the evidence it did consider "is outweighed" by Plaintiffs' evidence. ROA.6870. The testimony of *one* person is not much. Compared to that, the opinion of the State's expert that rural regions of northeast Louisiana do not belong culturally with urban population in Baton Rouge," ROA.6870, stands strong, as does expert opinion that surgical splits in Baton Rouge carve up the city on the basis of race with no meaningful communities-of-interest component, ROA.6868. And the testimony before the Legislature also counts—indeed, it should count *the most*, as this body is charged by the federal Constitution with drawing districts in the first instance and their action is what is on review.

d. That aside, the significant legal errors undermining the district court's decision compel this Court, at a minimum, to reverse its ruling and remand. The motions panel believed the district court's errors were, at best, comingled with the right standard, and thus the "error is not fatal" to the "overall finding" of likelihood of success. ROA.6871. But that is not how appellate review works (regardless of how stay-stage review works). Because "[a]ppellate judges are not finders of fact," *Chavez v. Plan Benefit Servs., Inc.*, 957 F.3d 542, 547 (5th Cir. 2020), the district court's use of "the wrong legal standard" requires that this Court "reverse and remand," *Dzana v. Foti*, 829 F.2d 558, 560 (5th Cir. 1987); *see also Canal Auth.*, 489 F.2d at 570; *Thomas v. Shaw*, 497 F.2d 123, 124 (5th Cir. 1974). It is speculative, at best, whether the district court would have deemed the first precondition unmet, or unlikely to be unmet, had it not relied on statewide averages, geometric figures, or visual inspection of lines. Reversal is mandated on this ground alone.

2. Race-based comparators cannot form an appropriate baseline with a race-neutral plan.

A second failing in Plaintiffs' first-precondition showing is that their illustrative districts cannot be deemed "reasonably configured," *Wis. Legislature,* 142 S. Ct. at 1248, when they "segregate the races for purposes of voting," *Shaw I*, 509 U.S. at 642. Districting maps that "sort

voters on the basis of race 'are by their very nature odious.'" *Wis. Legislature,* 142 S. Ct. at 1248. On this question, the district court and motions panel both erred.

a. The Predominance Test applies in §2 litigation.

The district court (and the motions panel) erred first in viewing the predominance test as *irrelevant* to Plaintiffs' showing. ROA.6874-75; ROA.6745-53. That is both wrong and counter-intuitive. The district court expressed concern that the racial-predominance test would hinder satisfaction of VRA prerequisites, ROA.6875; ROA.6746, but that is the challenge legislatures have faced since 1993, *see, e.g.*, *Shaw I*, 509 U.S. at 680-81 (Souter, J., dissenting) ("One need look no further than the Voting Rights Act to understand that [racial predominance] may be required"). The motions panel ignored "friction" between the predominance test and §2 that bedevils state legislatures, wrongly concluding that "it is not for us to resolve." ROA.6875. But, in the next sentence, it defended *private experts*, complaining that prohibiting them from "racial gerrymandering" may prevent showing VRA violations. ROA.6875. But why should it be easier for *litigants* to prove VRA violations than for *legislatures* to wrestle and comply with the VRA? "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 578 U.S. 266, 272 (2016).

A predominance test would not preclude first-precondition showings. As Judge Easterbrook has explained, a plaintiff could use computer-

generated plans to show that non-racial criteria consistently yield a certain number of majority-minority districts. *Gonzalez*, 535 F.3d at 599-600. Likewise, an expert could draw a race-blind map trained on a state's traditional districting principles and check racial data at the back end to see if a certain number of majority-minority districts were created (or so nearly created as to require only modest adjustments). Here, however, Plaintiffs' experts *began* with a racial goal, because "you can't draw a plan in an area where Black population doesn't exist." ROA.5033.

i. The legal error here is plain. There is no legal basis for striking down duly enacted redistricting legislation by reference to alternative plans that are presumptively unconstitutional. The Supreme Court established the alternative-map requirement because without presenting a viable alternative scheme a minority group "cannot claim to have been injured by [the challenged] structure or practice." *Gingles*, 478 U.S. at 51. Thus, when a §2 plaintiff presents a "hypothetical" alternative, the plaintiff purports to show "what the right to vote *ought to be*." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000). But the key word is *viable*. The right to vote certainly ought *not* to be something constitutionally "odious." *Wis. Legislature*, 142 S. Ct. at 1248 (quotation marks omitted). The alternative plans purport to show what a statute, §2, demands of a state under the circumstances, but, of course, a statute cannot compel violation of the Constitution.

Should there be any doubt regarding interpretation, the Supreme Court commands that statutes be interpreted to minimize constitutional doubts, *Bartlett*, 556 U.S. at 21, but here the district court did the *opposite*, reading §2 to compel presumptively unconstitutional redistricting. VRA §2 enforces the Civil War Amendments. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 542 n.1 (2013). Just as "Congress does not enforce a constitutional right by changing what the right is," *City of Boerne v. Flores*, 521 U.S. 507, 508 (1997), it would be an absurd result to read that statute as enforcing these Amendments *by compelling states to violate them*. "Racial classifications are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States." *Shaw II*, 517 U.S. at 907 (quotation marks omitted). Congress cannot enforce that bedrock principle through a statute forcing state legislatures to engage in those precise racial classifications.[7]

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[7] *Gingles* itself relied on commentators who argued "the relevant question should be whether the minority population is so concentrated that, if districts were drawn pursuant to accepted *nonracial* criteria, there is a reasonable possibility that at least one district would give the racial minority a voting majority." James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?* 34 Hastings L.J. 1, 64 n.330 (1982) (emphasis added) (cited repeatedly at *Gingles*, 478 U.S. at 47-51); *see also* Richard L. Engstrom & John K. Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 Legis. Stud. Q. 465, 465 (1977) (cited in *Gingles*, 478 U.S. at 46 n.11).

ii. No cogent explanation for this gross anomaly has emerged. Although the motions panel purported to endorse the district court's incorrect conclusion that no predominance inquiry is even required in a §2 case, ROA.6874, their divergence in approaches exposes the problem raised here.

To begin, the district court contrived a resolution to the predominance problem through the "state action" doctrine, opining that the Fourteenth Amendment does not reach private expert witnesses. ROA.6748. But first precondition aims to establish what the *State should* have done with its power and what a court *will compel* if it continues not to. The court eventually acknowledged that "a *Court-imposed or legislatively-enacted map* would be squarely subject to Equal Protection review." ROA.6748 (emphasis added). Precisely. Where challengers seek to harness the power of government to invalidate state action by reference to an alternative the state "*ought*" to have chosen, *Bossier Par.*, 528 U.S. at 334, and foist it on the public through state action, litigants have little to complain of in being compelled to submit to constitutional constraints.[8]

[8] This principle is manifest, for example, in the principle that First Amendment scrutiny applies to contracts reached between labor unions—which are private, expressive associations—and governments, since the First Amendment limits the terms governments can accept, even if it does not limit the terms a union may propose. *See, e.g.*, *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

After all, no one is seeking to enjoin Plaintiffs' experts from drawing racially predominant plans for *private* use. But those plans cannot invalidate and then compel state action impacting millions of Louisiana voters free from constitutional constraints.

To its credit, the motions panel recognized this problem and did "not rule out that a *Gingles* showing transparently dependent on racial gerrymandering might fail under *Gingles*'s totality-of-the-circumstances assessment." ROA.6875. The panel indicated this could occur if racial gerrymandering is "inevitable" from a district-court order compelling a VRA remedy. *Id.* Stated differently, the panel acknowledged racial predominance in legislative *or* court-ordered plans is constitutionally problematic *and* that this problem undermines liability itself, which cannot arise in the first place if no lawful remedy is permissible or possible. *Cf. E. Jefferson Coal. for Leadership & Dev. v. Par. of Jefferson*, 926 F.2d 487, 492 (5th Cir. 1991) (recognizing that liability and remedy "merge" in §2 cases). But the motions panel employed circular reasoning in declining to apply "that doctrine" here. ROA.6875. It looked back to "the district court's findings…that racial gerrymandering is far from inevitable" to conclude that no equal-protection problem arises here. ROA.6875. But that predominance analysis is precisely what the motions panel deemed superfluous on the prior page. *See* ROA.6874.

This reference back to the district court's findings was premised upon the erroneous application of the predominance test. Correctly applying that test compels the conclusion that racial predominance *is* "inevitable" in a remedy in *this* case. Indeed, the panel on the next page acknowledged that there is no "more than one way" to implement the district court's demand for a new majority-minority district—*i.e.*, combining East Baton Rouge Parish with the Delta Parishes. ROA.6875. As shown below, that configuration was identified for predominantly racial reasons, the Legislature could only adopt it for predominantly racial reasons, and the district court could only impose it for predominantly racial reasons. So the motions panel's inevitability test is satisfied here (or at least the issue is substantial enough to defeat provisional relief). Plaintiffs fail, again, to show the merits are "entirely clearcut" in their favor.

iii. Both the motions panel and district court relied on *Clark v. Calhoun Cnty.*, 88 F.3d 1393 (5th Cir. 1996), but that reliance fails for the reasons the panel intimated. *Clark* held that the predominance inquiry *does* apply at the remedial phase (where state action is harnessed). 88 F.3d at 1406-08. And, like the court below, *Clark* deemed remedy irrelevant to liability, such that the predominance test does not apply with respect to the first precondition. *See id.* at 1406-07.

But divorcing liability and remedy is not an option. The Supreme Court and this Court have both clarified that the liability and remedial inquiries are *one and the same*. *Abbott*, 138 S. Ct. at 2333; *Harding v.*

Cnty. of Dallas, 948 F.3d 302, 309-10 (5th Cir. 2020). The motions panel took a narrow view of these decisions, reading them to hold only that §2 "plaintiffs must demonstrate that their proposed districts will perform." ROA.6874. But it is equally clear from these cases that the remedy shown at the liability phase *must be truly viable*. In *Abbott* and *Harding*, this doomed the challengers' claims because they did not show their alternatives would actually improve electoral opportunity. *Abbott,* 138 S. Ct. at 2333; *Harding*, 948 F.3d at 309-10. Here, *Plaintiffs failed to show their alternatives are even constitutional.*

Furthermore, this Court has previously held race should not be the predominant motive for a §2 remedy. *Washington v. Tensas Par. Sch. Bd.*, 819 F.2d 609, 612 (5th Cir. 1987); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1161 (5th Cir. 1981). Under the rule of orderliness, "the earlier precedent controls." *United States v. Walker*, 302 F.3d 322, 325 (5th Cir. 2002). Likewise, precedent post-dating *Clark* rejected race-based §2 remedies. *See Sensley*, 385 F.3d at 597.

If this Court has questions on what the rules are, there's hope to resolve them, but the State gets the benefit of the doubt in the meantime. The Supreme Court will rule next Term in *Merrill, et al. v. Milligan, et al.*, No. 21-1086 (U.S. 2022); *Merrill, et al. v. Caster, et al.*, No. 21-1087 (U.S. 2022). In *Merrill*, the Supreme Court stayed a strikingly similar preliminary injunction that compelled Alabama to hold 2022 elections under a congressional plan with two-majority minority districts, rather

than one majority-minority district. *See Singleton v. Merrill*, 2022 WL 265001 (N.D. Ala. Jan. 24, 2022). The Supreme Court also took the extraordinary step of treating the stay motions, respectively, as a petition for certiorari. Argument is October 4, 2022, the second day of the Court's next Term. Plaintiffs have the burden of showing a likelihood of success, and the meaningful prospect that the Supreme Court will intervene and abrogate *Clark* defeats their position here. Even if the panel disagrees and views itself as bound by *Clark*, it has the prerogative to recommend this case for *en banc* review and to stay the case in the meantime. A question worthy of Supreme Court review is worthy of this Court's review *en banc*.

b. Race predominated.

The district court's (and panel's) second error was concluding Plaintiffs' alternative plans are not the product of racial predominance. ROA.6872-73. This is legally incorrect. The district court found (based on Plaintiffs' experts' concessions) that they purposefully drew plans with a second majority-minority district and moved large numbers of voters on that basis. That is *paradigmatic* racial predominance under governing law.

i. The racial-predominance test is a legal test that has generated no shortage of Supreme Court treatment. The question its precedents pose is whether "race was the predominant factor motivating" the

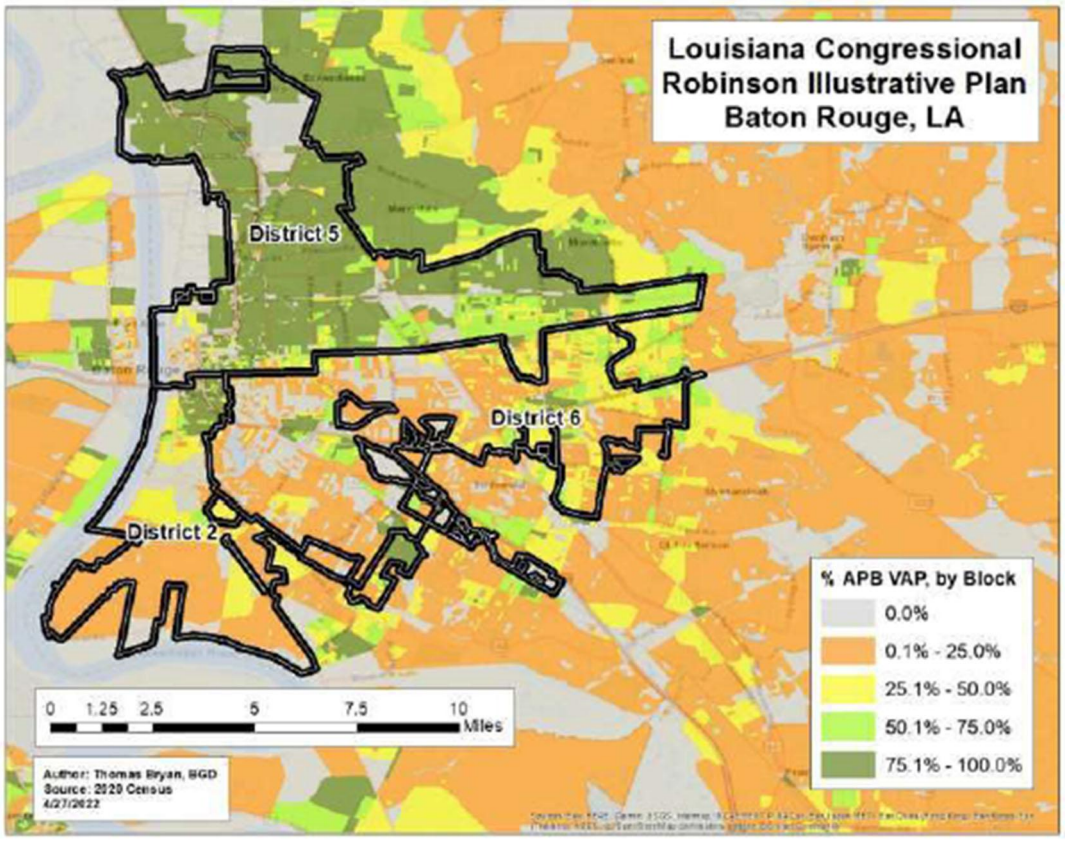
"decision to place a significant number of voters within or without a particular district." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller*, 515 U.S. at 916). This standard is satisfied if "race was the criterion that…could not be compromised," *id.* at 798 (quoting *Shaw II*, 517 U.S. at 907) (alterations accepted), which occurs when (1) a mapmaker "purposefully established a racial target," such as that "African-Americans should make up no less than a majority of the voting-age population," and (2) the racial target "had a direct and significant impact" on the district's "configuration." *Cooper*, 137 S. Ct. at 1468-69. Predominance can be shown through circumstantial or direct evidence. *Bethune-Hill*, 137 S. Ct. at 797.

ii. Plaintiffs' remedies cleanly satisfy that test. The Supreme Court held in *Cooper* that the purposeful choice of a 50% BVAP target, and the movement of a large number of voters to achieve that target, compels a finding of predominance. *Id.* The same occurred here. As the motions panel held, "a key expert relied on by plaintiffs…freely admitted that the plaintiffs had 'specifically asked' him to draw maps with two majority-minority districts," which "is unsurprising because determining whether another majority-minority district can be drawn consistent with traditional districting principles is the purpose of a *Gingles* claim." ROA.6872-73. The district court, likewise, found as fact that Plaintiffs' experts used racial data "to conclude that the majority-minority districts…topped the 50% BVAP mark," ROA.6665, and "considered race to

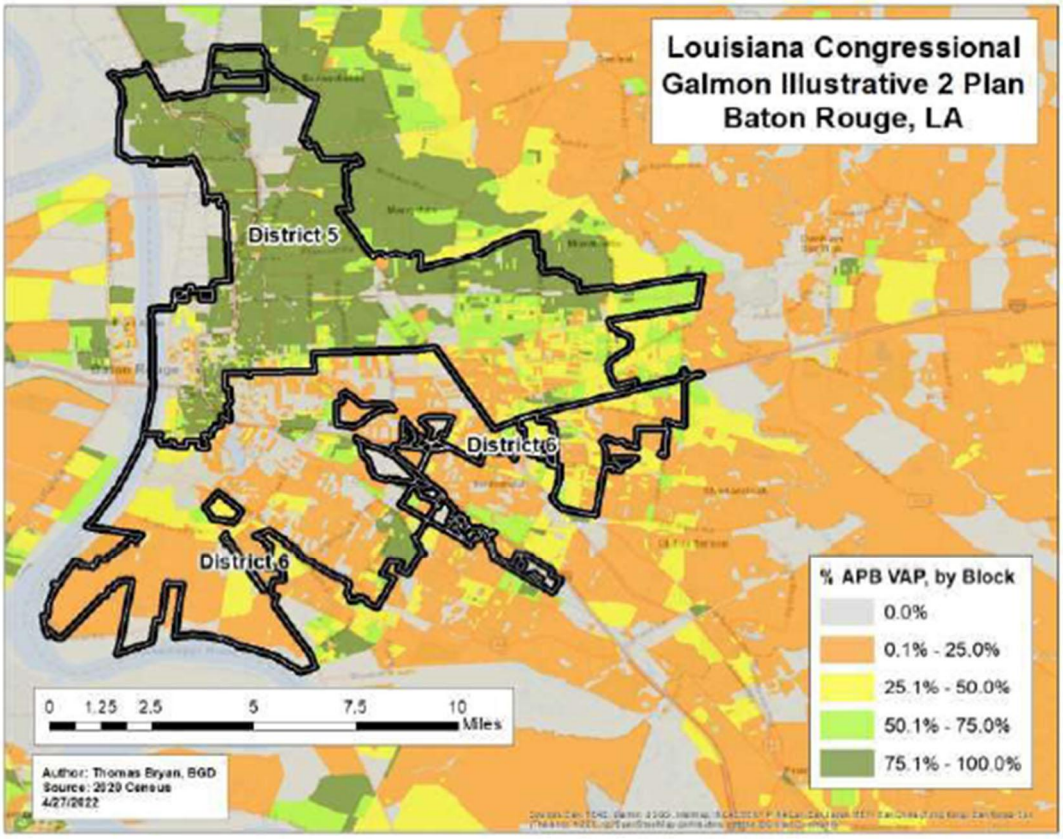
the extent necessary to test for numerosity and compactness as required by *Gingles I*," ROA.6733. That is, to a tee, what the Supreme Court held *compels* a predominance finding in *Cooper*. 137 S. Ct. at 1468-69.

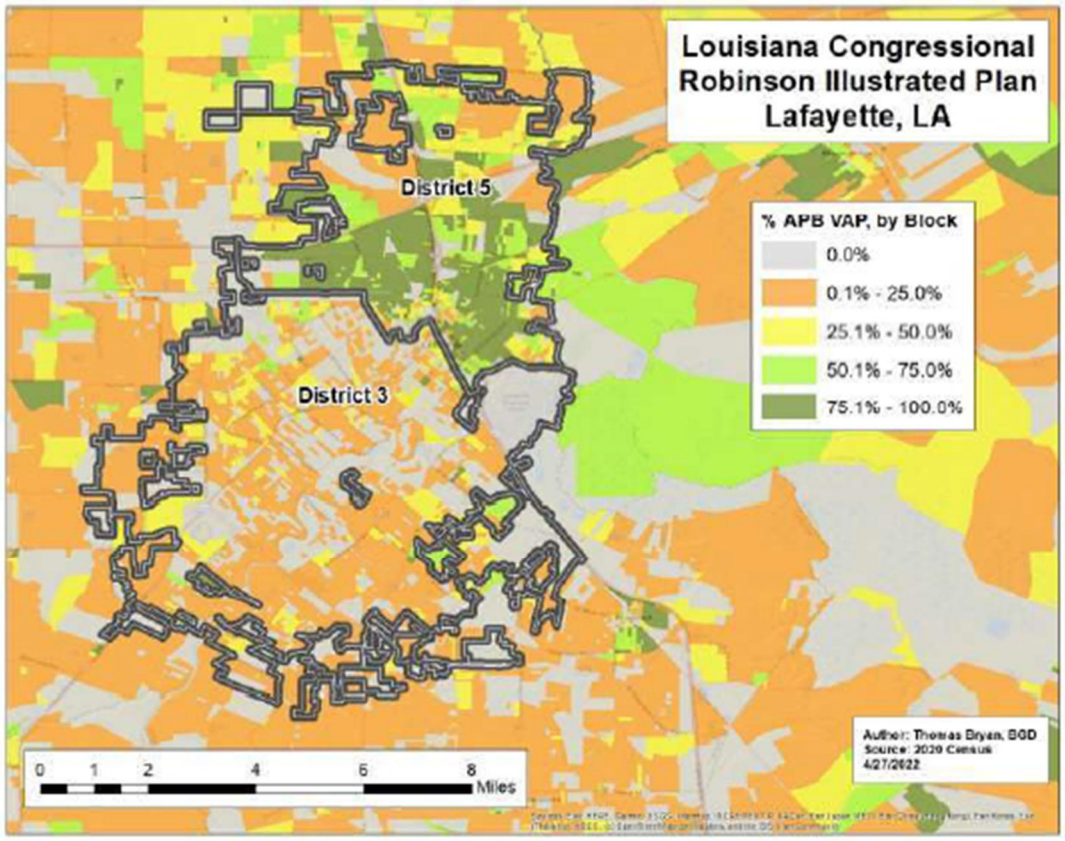
No other conclusion is possible. First, the direct evidence: Plaintiffs' experts testified to using a 50% threshold for the purpose of "pulling in Black population for these [majority-minority] districts," ROA.5031-32; consulted racial data at the outset of map-drawing "to get an idea where the Black population is inside the state," ROA.5032, because "you can't draw a plan in an area where Black population doesn't exist," ROA.5033; continued assigning voters on the basis of race, to "pull the BVAP percentages back up to check [his] work," ROA.5034; *see also* ROA.5035-36 (similar); and ultimately arrived at one basic configuration for all their plans—combining East Baton Rouge Parish with "majority Black" territory in the Delta—they knew would achieve two majority-minority districts, ROA.4954-55; ROA.4955-56; *see also* ROA.4948-49 (conceding he "stopped" adding BVAP to CD-5 after reaching 50.04% because, when the district achieved the ideal population, "it was still above 50 percent BVAP"); ROA.4979 (acknowledging achievement of *Bartlett*'s "50 percent plus 1" rule). This is textbook predominance. *See Covington*, 316 F.R.D. at 134-35 (finding that purposefully meeting the *Bartlett* standard qualifies as predominance).

The circumstantial evidence confirms predominance. Here, the State presented exemplar maps demonstrating that Plaintiffs' experts' illustrative plans consistently and precisely "segregate the races." *Shaw I*, 509 U.S. at 642.



Probative circumstantial evidence includes "evidence of a district's shape and demographics," "such as stark splits in the racial composition" of districts. *Bethune-Hill*, 137 S. Ct. at 797, 800 (citation omitted). As shown, the line dividing proposed majority-minority district CD5 and majority-white districts CD2 and CD6 precisely tracks racial lines. CD5 goes only so far into Baton Rouge to pick up the majority BVAP census blocks (shaded in green). The only other district in this map to get any significant black population is District 2. The other plans are not materially different as far as segregation is concerned:





Additional evidence of predominance in the illustrative maps abounds. For one, Plaintiffs' majority-minority districts skate just a smidgen above the 50% mark using the most expansive definition of BVAP ("Any Part Black"), ranging from 50.16% to 52.05%.[9] *See*

[9] Appellants argued below that the proper measure for the majority-minority rule of §2 is a less liberal definition of "Black," used by the United States Department of Justice to evaluate redistricting plans. The district court and motions panel concluded the Supreme Court rejected this view in *Ashcroft*, 539 U.S. at 474 n.1, a case addressing VRA §5. *See* ROA.6862-63; ROA.6720. Whether or not that is right, if the Department of Justice's metric was chosen, only one plan before the district court would meet the majority-minority test. *See* ROA.7114, 9619.

ROA.7175. The achievement of these targets is implausible as the result of anything but careful attention to race. For another, the configurations achieved majority-minority status in CD5 by transferring black voters from the benchmark version of CD2, so the mapmakers utilized CD2 as a "donor" district of BVAP to CD2—which is another form of racial predominance, *Bethune-Hill*, 326 F. Supp. 3d at 174 (three-judge court). For yet another, Appellants presented a simulation analysis running a total of twenty thousand alternative configurations (utilizing two sets of criteria) of Louisiana's congressional district, without regard to racial data, and not *one* of those simulations resulted in even *one* majority-minority congressional district. ROA.7328.

iii. The district court's conclusion that "[t]here is *no factual evidence* that race predominated," ROA.6750, in the illustrative maps is baffling. Controlling authority holds that "direct evidence going to…purpose" is probative, if not dispositive, on predominance, *Bethune-Hill*, 137 S. Ct. at 797, and the district court's leeway in fact-finding does not permit it to apply the wrong legal standard and then, to boot, pretend probative evidence simply is not there. In *Cooper*, direct evidence of the purposeful creation of a majority-minority district, standing alone, led the Supreme Court to hold that "the [district] court could hardly have concluded anything but" predominance. 137 S. Ct. at 1468-69. So too here.

Likewise, the district court discredited Appellants' expert, who created the maps shown above, because it found other portions of his work

(*e.g.,* a "misallocation" exercise) flawed, ROA.6726-28, but the district court did not find, nor was it argued, that the above-shown maps are inaccurate in showing racial demographics or Plaintiffs' illustrative district lines. This Court can see for itself the stark racial sorting and the district court clearly erred in closing its eyes to this evidence, which other courts have found "telling" evidence of predominance. *Bethune-Hill*, 326 F. Supp. 3d at 146. That evidence *supports* the Legislative choice not to draw a race-based second majority-minority district, as it was previously told it could not do by federal courts.

Similarly, the district court declined to consider the *20,000* alternative simulated plans, even though it considered the expert who created them "well-qualified by education and experience in the tendered field of expertise." ROA.6728. The district court reasoned that the computer algorithm that created them was "performed without regard to minimizing precinct splits, respecting communities of interest, incumbency protection, or even…core retention." ROA.6729. But the Fourth Circuit reversed as clearly erroneous a materially identical district-court rejection of simulations—which utilized the same considerations employed here. *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 344 (4th Cir. 2016). The ruling here is more illogical than the reasoning rejected in that case: Plaintiffs' experts also did not prioritize "incumbency protection" and conceded they could maintain district cores, a point both the district court and the motions panel found legitimate.

ROA.6738; ROA.6869. Further, the alleged failure to honor "communities of interest" misses the point that the expert ran *20,000* simulations, which in turn would include an array of potential communities of interest (except those selected with racial intent). Numerous other courts have credited similar simulations and rejected the argument that they are not probative because they are not programmed to achieve specific communities-of-interest goals. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 775, 790-91, 818-21 (Pa. 2018) (reversing lower court ruling based in part on simulations method, over the argument that it "failed to take into account the communities of interest" of challenged plans); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1074-75 (S.D. Ohio 2019) (relying on materially identical simulations method).

Besides, at the risk of repetition: it is *Plaintiffs* who "clearly carr[y] the burden of persuasion." *PCI Transp., Inc.*, 418 F.3d at 545. Plaintiffs did not run their own simulations demonstrating that race neutral principles would likely yield two majority-minority districts, even though they employed a leading expert in the field of computer-simulated redistricting plans. Plaintiffs' expert, Dr. Palmer testified that Appellants' expert Blunt used a "standard redistricting package that's widely available and one that [he's] used a lot in [his] own academic work," ROA.5153-54, but that Dr. Palmer did not run simulations even though he had the time and ability, ROA.5170-71. The Seventh Circuit found, in a case where no

simulations were presented, that the failure to make that presentation doomed the challengers. *See Gonzalez*, 535 F.3d at 600.

iv. The district court (and panel's) decision "might have been reconcilable with [the Supreme] Court's case law at an earlier time," but the Supreme Court has since rejected the analysis it employed, *Bethune-Hill*, 137 S. Ct. at 798.

The panel conceded there are "high bars to challenging supposed racial gerrymanders." ROA.6872. But this map is not the State's preferred map and, high or not, the bar is met where a mapmaker purposefully hits a 50% BVAP target by moving a meaningful number of persons. *Cooper*, 137 S. Ct. at 1468-69. The panel admitted this occurred with the illustrative maps. ROA.6872-73. The "high bars" the Supreme Court has imposed in predominance cases flow from the important principles of federalism in play, and they reach only "claims that a *State* has drawn district lines on the basis of race," because of "the sensitive nature of redistricting and the presumption of good faith that must be accorded to legislative enactments." *Miller*, 515 U.S. at 915 (emphasis added). The district court here owed the litigant-hired experts, and the evidentiary record before it, no such deference or respect. So there is no basis to apply "high bars" here.

Next, the panel incorrectly reasoned on its admittedly cursory review that, "while [the experts] considered race, they did not subordinate

race to other redistricting criteria," and "that the boundaries of the illustrative maps have at least some basis in traditional districting principles such as communities of interest." ROA.6873-74. But that argument "rests on a legal proposition that was foreclosed almost as soon as it was raised"—in fact *years* before. *Cooper*, 137 S. Ct. at 1469 n.3. In *Bethune-Hill*, the Court rejected the argument that a litigant seeking to show predominance must show "an actual conflict between the enacted plan and traditional redistricting principles." 137 S. Ct. at 797-98. The constitutional affront "in racial gerrymandering cases stems from the "racial purpose of *state action*, not its stark manifestation." *Id.* at 798 (quotation marks omitted; emphasis added).

What matters is that "race was the criterion that…could not be compromised," *id.* (quotation marks omitted; alterations accepted), which the panel admitted is so here, ROA.6872-73. *Bethune-Hill* held that "direct evidence," including of "an express racial target," qualifies as predominance, 137 S. Ct. at 797, 800, and explained that predominance occurs simply where "race for its own sake is the overriding reason for choosing one map over others," *id.* at 799. *Cooper* confirmed race *per se* predominates where, as here, a map-drawer sets a 50% BVAP threshold, renders it non-negotiable, and makes districting decisions on that basis. 137 S. Ct. at 1468-69 & n.3. The motions panel's observation that "plaintiffs' proposed maps" are not "so bizarrely shaped as to be 'unexplainable on grounds other than race,'" ROA.6873 (quoting *Shaw I*, 509 U.S. at

643), applies a rejected legal standard, *see Bethune-Hill*, 137 S. Ct. at 798 (holding that the "unexplainable on grounds other than race" standard is a rule of "an earlier time" (citation omitted)). The district court waived off the proper standard and the motions panel did not even cite the governing law, *Cooper* and *Bethune-Hill*.

Finally, neither the district court nor the motions panel expressed any confidence in their findings. Both expressed concerns that, "[i]f the plaintiffs' *Gingles* showing is invalid because of racial gerrymandering, it is difficult to see how any *Gingles* showing could be successful." ROA.6875; *see also* ROA.6746. That observation only makes sense if, as shown, the purposeful creation of majority-minority districts—as the Supreme Court held in *Cooper*—amounts to predominance. And the concern that predominance simply cannot be the law where the purpose is VRA compliance ignores that *in every single racial-predominance case*, the cause of racial predominance was the good-faith intent to achieve VRA compliance. *See, e.g.*, *Cooper*, 137 S. Ct. at 1468-69; *Bethune-Hill*, 137 S. Ct. at 796-97; *Miller*, 515 U.S. at 917-18; *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 262-63 (2015). The obvious motive in achieving majority-minority districts, ROA.6873, is *evidence* of predominance, not an argument *against* it.

B. Plaintiffs Failed to Establish the Third Precondition.

On top of this constellation of errors, the district court also erred in analyzing the third precondition, which requires proof of the "amount of

white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 56 (citations omitted). The question is not merely "whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *Clements*, 999 F.2d at 850 (citation omitted). White bloc voting does not arise to legal significance here because there is sufficient white crossover voting to obviate the need for majority-minority districts in the relevant regions of Louisiana. The Supreme Court has in these circumstances held the third precondition is *not* met, and therefore a state is not required to (and may be *prohibited* from) creating majority-minority districts.

1. The Supreme Court recognized in *Gingles* that "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters," 478 U.S. at 49 n.15, a point it has since reiterated, *see Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). It has also since recognized the other side of that coin: that "[i]n areas with substantial crossover voting"—*i.e.*, white voting for minority-preferred candidates—"it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition." *Bartlett*, 556 U.S. at 24. The question for determining what level of crossover voting (and bloc voting) is *legally* significant is "whether majority bloc voting exist[s]at such a level that the candidate of choice of African-American voters would usually be defeated *without a VRA remedy*." *Covington*, 316 F.R.D. at 168 (emphasis added).

The Supreme Court explained this doctrine in *Bartlett*, holding "that § 2 does not require crossover districts," which are districts "in which minority voters make up less than a majority of the voting-age population" but are a "large enough" group "to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." 556 U.S. at 13, 23. The Supreme Court rejected a crossover-district requirement and ordered "majority-minority rule," *id.* at 15, in part because "[a]llowing crossover-district claims would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence," *id.* at 16. *Bartlett* observed that, in areas where "white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate" without a majority, "[i]t is difficult to see how the majority-bloc-voting requirement could be met." *Id.* The Court, in fact, criticized the respondents there for "conced[ing] the third *Gingles* requirement in state court." *Id.* The very assertion that a crossover district below 50% BVAP could perform was tantamount to a concession that white bloc voting is not legally significant. *Id.* at 24 (repeating that, "[i]n those areas" where districts below 50% minority VAP can perform, "majority-minority districts would not be required in the first place").

The Supreme Court subsequently turned that subtle prick into a hammer, affirming the invalidation of at least 29 majority-minority districts on this basis over the subsequent decade. One was a majority-Black

congressional district in North Carolina, which was drawn to achieve a 50% BVAP target and therefore had to "survive the strict scrutiny applied to racial gerrymanders." *Cooper*, 137 S. Ct. at 1469. The Supreme Court unanimously held that §2 could not justify the district because "the electoral history" showed that Black voters in the region could elect their preferred candidates at "less than a majority" of the voting-age population on the strength of white crossover voting. *Id.* at 1470. *Cooper* condemned North Carolina's choice to draw a majority-minority district and relied on *Bartlett*, which "explained that '[i]n areas with substantial crossover voting,' § 2 plaintiffs would not 'be able to establish the third *Gingles* precondition' and so "majority-minority districts would not be required." *Id.* at 1472 (quoting *Bartlett*, 556 U.S. at 24).

By 2018, the point was so obvious as to not require comment. In *Covington*, the North Carolina legislature created 28 majority-minority districts in its state legislative plans, based on advice of statistical experts who found "statistically significant racially polarized voting in 50 of the 51 counties studied." 316 F.R.D. at 169 (quotation marks omitted). A three-judge district court held that North Carolina's experts missed "crucial difference between <u>legally</u> significant and <u>statistically</u> significant racially polarized voting." *Id.* (underlining in original). Whereas polarized voting can be said to occur "when 51% of a minority group's voters prefer a candidate and 49% of the majority group's voters prefer that same candidate," *id.*, "the third *Gingles* inquiry is concerned only with

'legally significant racially polarized voting,'" *id.* (quoting *Gingles*, 478 U.S. at 51, 55-56), which exists only when "racial bloc voting is operating at such a level that it would actually minimize or cancel minority voters' ability to elect representatives of their choice, *if no remedial district were drawn*." *Id.* at 168 (quotation and edit marks omitted; emphasis added). The legislature did not assess whether the Black-preferred candidate would likely lose "absent some remedy," and this "failure" was "fatal to their Section 2 defense." *Id.*

Covington was not close. The three-judge court—led by Fourth Circuit Judge James Wynn—subsequently called the invalidated North Carolina plan "the most extensive unconstitutional racial gerrymander ever encountered by a federal court," *Covington v. North Carolina*, 270 F. Supp. 3d 881, 892 (M.D.N.C. 2017), and the Supreme Court summarily affirmed, which fell within its appellate jurisdiction, in a one-sentence unanimous order. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017); *see also Covington*, 270 F. Supp. 3d at 892

2. This case is materially identical to those in *Cooper* and *Covington*, but the roles are reversed. Louisiana did not adopt a second majority-minority district (as unlawfully occurred in *Cooper*), and the district court ordered that it do so (*i.e.*, which was held unlawful in *Cooper*). So instead of the State having to prove a §2 claim against itself to satisfy strict scrutiny, Plaintiffs "use section 2 as a sword to challenge districting legislation" and therefore shoulder the §2 burdens. *Harris v. McCrory*,

159 F. Supp. 3d 600, 623 (M.D.N.C. 2016), *aff'd sub nom. Cooper*, 137 S. Ct. at 1455. But the burden of the third precondition remains the same. Plaintiffs must show that "bloc voting exist[s] at such a level that the candidate of choice of African-American voters would usually be defeated *without a VRA remedy*," *Covington*, 316 F.R.D. at 168, or else "majority-minority districts [are] not be required in the first place," *Bartlett*, 556 U.S. at 24.

Plaintiffs cannot meet this burden, and they did not even try. The correct analysis, as *Covington* observed, is a "district effectiveness analysis" which is "used to determine the minority voting-age population level at which a district becomes effective in providing a realistic opportunity for voters of that minority group to elect candidates of their choice." 316 F.R.D. at 169 & n.46 (alteration and quotation marks omitted). Plaintiffs could have conducted this analysis because one of their experts, Dr. Handley, pioneered this method, *see, e.g.*, Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1384 (2001), yet she did not perform it here, ROA.6235. Instead, as in *Covington*, Plaintiffs' experts (including Dr. Handley) defined polarized voting as existing where "black voters and white voters voted differently," ROA.6185; *see also* ROA.5133-34, or, stated differently, where "black voters and white voters would have elected different candidates if they had voted separately." ROA.6193. That would occur any time bare majorities of

Black voters and white voters vote for different candidates. From that starting point, "the experts opined (to no one's great surprise) that in [Louisiana], as in most States, there are discernible, non-random relationships between race and voting." *Cooper*, 137 S. Ct. at 1471 n.5.

When probed, Plaintiffs' experts admitted their own studies show a VRA remedy is unnecessary. Dr. Palmer testified that there is meaningful white crossover voting, ROA.5161, and that CD2 and CD5 could be drawn below 50% and enable the Black community to elect its preferred candidates, ROA.5170. Dr. Lichtman—who was also the plaintiffs' expert in *Covington*—agreed that a district around 40% BVAP could perform and compared this case to *Covington* without prompting. ROA.6370-72. Dr. Handley testified that it is possible districts below 50% BVAP may perform. ROA.6247-48. The *amicus* brief of mathematics and computer-science professors at LSU and Tulane University presents an analysis of nineteen elections asserting that districts of about 42% BVAP afford an equal minority electoral opportunity. ROA.1854; ROA.1858; ROA.1865-66. There is no contrary record evidence. No expert testified that observed patterns of white crossover voting, Black cohesion, and comparative turnout signal "that the African-American voters' candidate of choice would usually be defeated unless [a given district] was drawn to be majority-black." *Covington*, 316 F.R.D. at 171.

3. Despite all that, the district court *commanded* the Legislature prepare "a remedial congressional redistricting plan that includes an additional majority-Black congressional district." ROA.6636. Because that was *forbidden* in *Cooper* and *Covington* under materially similar electoral conditions, it cannot be *required* here.

The district court legally erred when it treated *Gingles'* third precondition as a matter of expert credibility. ROA.6757-61. It found Plaintiffs' experts "examined this issue, amassed detailed data, and arrived at the same conclusion: that White voters consistently bloc vote to defeat the candidates of choice of Black voters" and that these analyses "inherently included" an assessment of "[w]hite crossover voting." ROA.6760. That is true but unhelpful to Plaintiffs. Plaintiffs' experts were able to conclude that 50% BVAP districts are unnecessary *precisely because* their analyses incorporated white crossover voting. *See* ROA.5170 (Dr. Palmer testifying that his conclusion that a district "below 50 percent BVAP" may perform is "[b]ased on [his own] table" of data). The fact that their analysis of white crossover voting demonstrates it to fall short of legal significance dooms Plaintiffs' claim to relief and should have short-circuited the path to any injunctive relief at all, much less effectively permanent injunctive relief arising out of rushed preliminary procedures.

The stay-stage ruling also erred, but in a different way. The motions panel agreed that "the question under *Covington* is whether, without a VRA remedy, the minority voters' preferred candidate will usually lose."

ROA.6878. But the panel proceeded to impliedly redefine a VRA remedy as something less than a 50% BVAP district. It deemed it irrelevant that Louisiana "could have…give[n] minority voters an opportunity to elect candidates of their choice without creating a majority-minority district," because it "did not" actually create such a crossover district. ROA.6879. But Louisiana was not required to create a crossover district, because "§ 2 does not require crossover districts." *Bartlett*, 556 U.S. at 23. A "VRA remedy" is a district that meets the "majority-minority rule." *Id.* at 18. Having agreed the question is whether Black-preferred candidates will usually lose "without a VRA remedy," ROA.6878, the panel should have seen why it is highly relevant "that a hypothetical district could elect black-preferred candidates with as little as 40% BVAP," ROA.6879. That electoral fact means that a VRA remedy is unnecessary, which in turn means white bloc voting lacks legal significance.

The motions panel misread *Cooper*'s discussion of white crossover voting to apply only where "a minority group can already elect its preferred candidates," ROA.6880, by which the panel appeared to reference *Cooper*'s discussion of the "electoral history" in the prior decade's version of the district challenged, *see* 137 S. Ct. 1470. But the Court acknowledged that the contours of "the *future* District" were unknown (absent the state's purposefully creating a majority-minority district) and hence that there was no particular reason to believe it would continue to be a "cross-

over district" had the Legislature not drawn it as a majority-minority district. *Id.* at 1471. The point was that there was a "pattern of white crossover voting in the *area*," which fell short of legal significance. *Id.* (emphasis added). The same conclusion follows here, where Plaintiffs' experts admitted to a pattern of crossover voting.

The motions panel also found this interplay of legal principles "bizarre," ROA.6879, but failed to appreciate how much more bizarre its own rule is. It would render either crossover districts mandatory or redistricting impossible. If the Legislature *had* done what the district court ordered, it would have drawn a district unnecessary under §2 and forbidden by the Constitution. If the Legislature *had* enacted a second majority-minority district, race *would* have predominated, *Cooper*, 137 S. Ct. at 1468-69, challengers would have sued, easily presented a "district effectiveness analysis" showing that 50% BVAP districts are unnecessary, *Covington*, 316 F.R.D. at 168, highlighted that the Legislature did not have (and could never have had) evidence that the district needed "to be majority-black," *id.* at 171, and acquired an injunction striking that district down under "the strict scrutiny applied to racial gerrymanders," *Cooper*, 137 S. Ct. at 1469. The only options available to a legislature are (1) draw the crossover district *Bartlett* held cannot be compelled, or (2) pick one of the two equally bad options, get sued, and lose.

If redistricting is truly to be, as the Supreme Court has held, "primarily a matter for legislative consideration and determination," *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), then courts cannot deny states §2 shields where they give challengers racial-gerrymandering swords. If a racial-gerrymandering plaintiff can pierce a §2 defense by showing that majority-minority districts are unnecessary given white crossover voting levels—or that a state simply did not know one way or the other—then a state must equally be able to defend a §2 claim with the same showing. That is the scenario here, the third precondition cannot be met, and—under the *Bartlett*, *Cooper*, and *Covington* standards—the State is likely entitled to judgment as a matter of law.

C. Section 2 Creates No Private Cause of Action.

Plaintiffs' claim is unlikely to succeed for the additional reason that they are unlikely to establish a private cause of action under §2. "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.*

There is no express cause of action under §2, and the Supreme Court "has made quite clear that judicially implied private rights of action are now extremely disfavored." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 2022 WL 496908, at *10 (E.D. Ark. Feb. 17, 2022).

Nothing compels departing from that principle here: "Section 2 is completely silent as to the remedies available for a violation of that statutory provision." *Id.* at *11. Meanwhile, VRA §12 authorizes "the Attorney General [to] institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction" to enforce VRA §2 (among other provisions). 52 U.S.C. § 10308(d). Congress's expressly providing a government-enforcement mechanism is overriding evidence against a private cause of action for the same relief. *See Alexander*, 532 U.S. at 289-90. And, while some courts and litigants have seized on the term "aggrieved person" in VRA §3, this provision addresses a suit "to enforce the voting guarantees of the fourteenth or fifteenth amendment" and concerns "the appointment of Federal observers of elections." 52 U.S.C. § 10302(a).

Morse v. Republican Party of Virginia, 517 U.S. 186 (1996), does not compel a contrary result. It held that VRA §10 contains a private right of action, but that holding does not control here. *See id.* at 230-35 (plurality opinion). And, although the Court assumed VRA §2 contains a private right of action, *id.* at 232, it undertook no analysis of the question beyond that mere assumption, which cannot even arise to the level of dicta. Supreme Court decisions do not stand for propositions they do not reach. *See, e.g.*, *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1282-83 (11th Cir. 2020). The Supreme Court has consistently "remind[ed] counsel" and lower courts "that words of our opinions are to be read in the

light of the facts of the case under discussion." *Armour & Co. v. Wantock*, 323 U.S. 126, 132-33 (1944); *accord Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012). Accordingly, two Justices of the Supreme Court have recognized that its "cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2." *Brnovich*, 141 S. Ct. at 2350 (Gorsuch, joined by Thomas, JJ., concurring). To the extent this Court views itself as bound by *Morse*, however, Appellants respectfully preserve this question for Supreme Court review.

II. THE EQUITABLE FACTORS, STANDING ALONE, FORBID THE INJUNCTION.

The district court, implementing a constellation of legal errors, abused its discretion in analyzing "whether the balance of equities tips in [Plaintiffs'] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). A district court abuses its discretion where it "significantly understate[s] the burden the preliminary injunction would impose" on government offices and "the injunction's consequent adverse impact on the public interest." *Id.* at 24. The equities in this case, as in *Winter*, do not present "a close question," *id.* at 25, and the district court's contrary conclusion is "grounded in erroneous legal principles," *Speaks*, 445 F.3d at 399.

A. Proper Scope of Provisional Relief.

At the outset, the district court gave minimal consideration to the fundamental problem that Plaintiffs have demanded a *new redistricting plan* governing millions of voters as *temporary* relief pending trial on the merits. This is exceptional, if not unprecedented. Louisiana has never conducted its congressional elections with a plan employing two majority-Black congressional districts, except for the brief periods before federal courts invalidated such plans in the 1990s. And a court-ordered switch to that completely different, court-forbidden approach is an inappropriate *provisional* remedy. A temporary injunction serves "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex.*, 451 U.S. at 395. There is no serious argument that the district court's injunction, commanding an interim plan with two majority-minority districts, preserves the relative state of anything pending trial on the merits.

The district court addressed this problem only at the end of its opinion, where it found authority for this form of temporary relief in a 1974 decision of this Court stating generally that there is no "particular magic in the phrase 'status quo.'" ROA.6783 (quoting *Canal Auth.*, 489 F.2d at 576). But *Canal Authority* confirmed that a preliminary injunction must still "preserve the court's ability to render a meaningful decision on the merits," 489 F.2d at 576, which the district court can deliver here without

the exceptional step it took. Moreover, the statement was dictum because, in the case before it, the district court had determined it necessary *to preserve* the status quo *without* a finding of irreparable harm, *see id.* at 573-74, and the Court found it appropriate to speak on "the general requirements for a preliminary injunction" to guide the remand, *id.* at 576. Further, this Court issued the decision before *University of Texas*, which reoriented the standard around the "relative state of the parties." 451 U.S. at 395.

Besides, the district court cited nothing like the earth-shattering injunction it issued here, identifying only one case where a district court has ever demanded a new redistricting plan governing an entire state as temporary relief—the *Merrill* decision now *stayed* by the Supreme Court. ROA.6784. Dozens of courts have declined to take that step, even as to much smaller jurisdictions. *See, e.g.*, *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 596 (E.D. Pa. 2012); *Diaz v. Silver*, 932 F. Supp. 462, 468-69 (E.D.N.Y. 1996); *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992); *Kostick v. Nago*, 878 F. Supp. 2d 1124, 1147 (D. Haw. 2012); *NAACP-Greensboro Branch v. Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516, 530 (M.D.N.C. 2012); *Perez v. Texas*, 2015 WL 6829596, at *4 (W.D. Tex. Nov. 6, 2015); *Valenti v. Dempsey*, 211 F. Supp. 911, 912 (D. Conn. 1962); *Shapiro v. Berger*, 328 F. Supp. 2d 496, 501 (S.D.N.Y. 2004). The district court's discussion takes no account of the serious equitable implications of its heavy-handed order, which ordered

a legislature to attempt new legislation, previously held unconstitutional, for only a temporary purpose. Neither *Canal Authority* nor any other decision of which undersigned counsel are aware endorses that severe and unacceptable federal-court invasion of state sovereignty.

B. The Injunction Risks Mass Equal-Protection Violations.

Neither the district court nor the motions panel said anything of the public interest in the constitutional rights of the hundreds of thousands (maybe millions) of persons affected by this temporary order. The mere risk that a remedy to be used in this election may be unconstitutional, on the order of "the most extensive unconstitutional racial gerrymander ever encountered by a federal court," *Covington*, 270 F. Supp. 3d at 892, condemns the district court's injunction as inequitable. Unless this Court intervenes, the injunction will create the unacceptable risk—if not the certainty—of violating the equal-protection rights of hundreds of thousands of Louisiana citizens, of all races, colors, and ethnicities. *See Hays III*, 515 U.S. at 745 (holding that every resident of a racially gerrymandered district suffers injury in fact).

Because it "is always in the public interest to prevent the violation of a party's constitutional rights," *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014), the risk that the demanded injunction would inflict a gross and widespread equal-protection violation cannot be justified by the possibility of a statutory violation. The district

court was obligated to err in favor of the Constitution. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest."). It was also required "to balance the harm that would be suffered by the public if the preliminary injunction were denied against the possible harm that would result" if the injunction were granted. *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 626 (5th Cir. 1985).

Here, there was a risk that, on the one hand, a statute may be violated (under a plan like those used for generations) and, on the other, a risk of a constitutional violation caused by a new court-ordered plan. This Court has resolved that balance, *rejecting* the position that, "if an electoral standard, practice, or procedure abridges section 2 of the Voting Rights Act it automatically does irreparable injury to all or a portion of the body politic." *Chisom*, 853 F.2d at 1188-89. It was impermissible for the district court to weigh the balance of harms as it did, privileging statute over the Constitution, especially when it failed even to mention the issue.

C. The *Purcell* Principle Prohibits the Injunction.

1. The equities analysis in an election case is governed by the *Purcell* principle, "which establish[es] (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Merrill*, 142 S.

Ct. at 879 (Kavanaugh, J. concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). This principle antecedes *Purcell* by two generations, having its genesis in *Reynolds*, 377 U.S. at 545. "*Sims* has been the guidon to a number of courts that have refrained from enjoining impending elections," *Chisom*, 853 F.2d at 1190, "even in the face of an undisputed constitutional violation," *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).

In cases where a lower court has chosen differently, the Supreme Court has consistently "stayed [that] district court's hand." *Chisom*, 853 F.2d at 1190; *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers) *Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (issuing stay); *North Carolina v. Covington*, 138 S. Ct. 974 (2018) (same); *Abbott v. Perez*, 138 S. Ct. 49 (2017) (same); *North Carolina v. Covington*, 137 S. Ct. 808 (2017) (same); *Perry v. Perez*, 565 U.S. 1090 (2011) (same); *Miller v. Johnson*, 512 U.S. 1283 (1994) (same); *Chabot v. Ohio A. Philip Randolph Inst.*, 139 S. Ct. 2635 (2019) (same); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (same).

Merrill is the Supreme Court's latest correction of this all-too-familiar error. There, the Supreme Court intervened both to stay a three-judge panel's redistricting injunction and to take jurisdiction of the matter for itself. 142 S. Ct. at 879. According to the two Justices whose votes were decisive, the strength of the *Purcell* principle, standing alone, compelled

that result. *Id.* at 879-82 (Kavanaugh, J., concurring). The principle, at a minimum, "heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Id.* at 881.

2. This case falls comfortably within this line of decisions. In *Merrill*, the district court entered an injunction in late January 2022, four months before the next in-person voting date and two months before mail-in voting was to begin. *See Singleton v. Merrill*, 2022 WL 265001, at *51 (N.D. Ala. Jan. 24, 2022). The *Merrill* concurrence looked solely to election dates to conclude *Purcell* applied. 142 S. Ct. at 880 (Kavanaugh, J., concurring). Here, the district court issued an injunction five months before in-person voting on November 8, two-and-a-half months before the federally mandated date of September 24 for ballots to be issued to overseas voters, and only weeks before qualifying by petition (which necessitated the first court-imposed bumping of statutory deadlines, with a promise of more to come). La. Rev. Stat. §18:1308.2; 52 U.S.C. § 20301 *et seq*. The district court did not explain how only slightly longer timeframes are materially different from those in *Merrill*. The motions panel oddly dismissed *Merrill* as an "outlier," ROA.6884, though it is the Supreme Court's most recent action on point and the Court granted certiorari and set argument for October 4. An outlier it clearly is not. *See, e.g.*, *Chisom*, 853 F.2d at 1189-92 (vacating district-court injunction issued July 7, 1988); *Karcher*, 455 U.S. at 1306 (Brennan, J., in chambers) (issuing stay

in March); *Kilgarlin v. Martin*, 252 F. Supp. 404, 444 (S.D. Tex. 1966), *aff'd in relevant part sub nom. Kilgarlin v. Hill*, 386 U.S. 120 (1967) (February 2 was too late to implement remedy for that year's elections); *Cardona*, 785 F. Supp. at 843 (February 25 was too late to interfere with that year's elections); *Favors v. Cuomo*, 881 F. Supp. 2d 356, 370 (E.D.N.Y. 2012) (May 16 was too late to interfere with that year's elections).

3. The unrebutted evidence here establishes beyond dispute that the injunction will require officials to navigate "significant logistical challenges" that require "enormous advance preparations." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). The September 24 overseas-voting deadline is the *culmination* of election administration by which time ballots must be *printed*, not the start date Louisiana election officials must comply with state and federal laws regarding candidacy, ballot preparation, and voter assignment, all of which require significant advance preparation. This includes ensuring voters are assigned correctly into the state's election database system called ERIN. ROA.5967-69. Only once voters are assigned and proofed in ERIN can ballot drafting begin. ROA.5967-69. Before that occurs, the Secretary of State must have all redistricting plans impacting the November 2022 election so that each voter can be assigned to all districts for the upcoming election. There are hundreds of statewide and local elections running in November 2022. To hold a successful November 2022 election, the following major steps must be completed:

First, on June 22, 2022 (the day after this brief is due), all municipal and school board redistricting plans are due to the Secretary of State for verification and coding. La. Rev. Stat. §18:465(E)(1)(a). This deadline presupposes that statewide districting plans have already been entered in the system and only municipal and school board plans remain. The Legislature's Congressional plan had already been implemented in ERIN, so this work must be undone and a new plan must be coded at the same time elections staff needs to be focused on assigning voters to their assigned municipal and school board plans. ROA.5966-69.

Assigning voters to districts is complicated work. For example, when the Legislature's Congressional plan moved only 250,000 voters, it took weeks to implement. ROA.5962. In fact, elections administrators worked for a week studying the plan before any coding actually began to make sure it did not make mistakes. ROA.5962. Now, elections administrators face coding a Congressional plan that is very different from the previous plan, while simultaneously coding municipal and school board plans. And this painstaking and critically important work must be complete by **July 13, 2022**, less than a week after oral argument. La. Rev. Stat. §18:58(B)(2). Adding a Congressional plan to the ongoing coding work increases the likelihood of mistakes, which impacts ballot assignment and increases the likelihood of subsequent election outcome challenges. ROA.5967-69.

Second, election administrators must handle filing by nominating petition, qualifying, and objections to candidacy. The deadline for candidates to file by nominating petition is *now* **July 8, 2022** pursuant to the lower court's order, but the candidate qualifying period of **July 20 through July 22, 2022** remains the same. La. Rev. Stat. §18:462; 18:467; 18:468(A). This means that under the current schedule, there is only *one week* for elections administrators to proof assignments or make any adjustments due to inadvertent mistakes in ERIN. This makes moving the coding deadline impossible. Citizens have just one week to object to the candidacy of any person running for election and must do so by **July 29, 2022**. La. Rev. Stat. §18:493; 18:1405(A).

Third, election administrators must program and prepare ballots. Ballot programing must begin no later than **August 1, 2022**, to ensure all ballots can be created, proofed, and printed ahead of the September 23, 2022, deadline for local registrars to receive ballots to be mailed the next day pursuant to the federal UOCAVA deadlines. And the ballots being prepared, proofed, and printed, must account for the hundreds of state and local elections running in the November 2022 election cycle. This August 1 date comes just days after the deadlines for qualifying and objections to candidacy. The elections administration calendar is already spread thin, and moving these deadlines back further will likely result in

an insufficient time to prepare the ballots for the November election cycle.[10]

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

Just based on an analysis of these major deadlines, it is clear the timeframe to conduct the November 2022 election cycle is already extremely tight, including merely three weeks to code millions of Louisianans to dozens, if not hundreds, of redistricting plans. Adding a new

[10] These dates are calculated based on the current qualifying period running from July 20-22, 2022, and the court-ordered nominating petition deadline of July 8, 2022. Because many of the statutory deadlines run from one of these two dates, pushing *either* of these dates has a domino effect, impacting numerous deadlines that in-turn decrease the time needed for ballot coding and printing, ahead of federal deadlines that cannot be moved.

statewide congressional plan to these coding efforts will indisputably result in rushed coding efforts riddled with mistakes, especially if the new plan has split precincts which require the local registrar of voters to move voters in split precincts by *hand*. ROA.5967-69.

This is not conjecture. The Louisiana's Commissioner of Elections, Sherri Hadskey, testified that this scenario has already occurred due to a compressed timeframe this cycle. For example, in Calcasieu Parish, late census information caused a rushed entry of voter information and led to entry of incorrect voter information, ultimately resulting in the issuance of incorrect ballots. ROA.5969. As a result, a judge required state and local officials to hold a special municipal election in Calcasieu Parish to remedy the issue. ROA.5969. Thus, the undisputed evidence in this matter shows that rushing voter assignments in ERIN not only *may* but *does* lead to election error, even catastrophe. ROA.5968-69. If that can occur in a single parish judicial election, it is virtually certain to occur for the entire state.

Ms. Hadskey testified about her fears that this may actually occur. ROA.5969-70.

> I'm extremely concerned. I'm very concerned because when you push – when you push people to try and get something done quickly and especially people that have not done this process before, the worst thing you can hear from a voter is I'm – I'm looking at my ballot and I don't think it's right, I

> think I'm in the wrong district or I don't feel like I have the right races.
>
> The other thing is notifying the voters. I think we all can relate to we know who our person is that we voted for Congress or for a school board or any race; and when you get there and you realize it's not the person you are looking for, you're thinking that's who you are going to vote for and then you find out, wait, I'm in a different district. If we don't notify them in enough time and have that corrected, it causes confusion across the board, not just confusion for the voters, but also confusion for the elections administrators trying to go back and check and double check that what they have is correct.

ROA.5971-72. This is not testimony of mere "bureaucratic strain." ROA.6886; ROA.6779. It is of the state's chief elections officer, an esteemed professional with over 30 years in elections administration, issuing a stark warning. This is an administrative catastrophe of the lower courts making that will result in rampant voter confusion, and potentially have grave consequences impacting voter confidence in election integrity. ROA.5968-69.

Argument in this case will mark 78 days until the start of *voting*. In those 78 days, dozens of redistricting plans, not just the Congressional plan must be completed, coded, and have all voters assigned to proper districts in the ERIN system. Then, ballots for the hundreds of races running in the November 2022 election must be created, proofed, and printed amid a national election paper shortage. ROA.5970-72. The "risk" of

"voter confusion," low turnout, and election error that inform the *Purcell* doctrine is severe. 549 U.S. at 4-5.

4. The motions panel's ruling shortchanged both the *Purcell* doctrine and the evidentiary record. As noted, it improperly criticized *Merrill* as an outlier, which is inconsistent with the grounds upon which the Supreme Court grants certiorari. ROA.6882. After waiving off *Merrill*, the panel selectively picked apart various pieces of evidence without considering its cumulative impact. It arbitrarily disconnected the work necessary to implement the congressional plan from all the contemporaneous work election administrators must accomplish with all *other* plans. ROA.6884-85. It admitted notices have already been mailed to voters and this "could confuse some voters," but sailed past this important fact by *ipse dixit* assuring itself that "time remains" to cure the confusion. ROA.6884. It did not consider the effort necessary to do so, (or consider this fact in light of the status quo, which would avoid the problem entirely) and its suggestion that using the internet would suffice fails to appreciate the special burden on elderly and minority voters. ROA.6884-85.

The motions panel also failed to account for the fact that a new plan needed to be *created* before it could be *administered.* The panel, again, bifurcated that discussion, treating it as a separate challenge by Legislative Appellants to the time the district court afforded the Legislature to

redistrict. ROA.6886-87. But giving the Legislature time to cure any alleged defect is built into the process, as required by principles of federalism and comity. The district court (and the panel) used election timelines as an excuse to *deny* the Legislature the "reasonable opportunity" to redistrict to which it is entitled. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added). And the panel's decision of the narrow question turned largely on the expectation that the district court would look "favorably" on a motion to extend the time to redistrict, ROA.6889 (quoting ROA.6850), but the district court didn't. To the contrary, it expressed disdain for the entire process and elected representatives involved. Dist.Ct.Dkt.208, at 9:15-10:17 (querying that "for all I know" the Legislature's procedural rules were "passed back in the day when there was horse and buggy"). In any event, the rushed schedule issued by the district court, which already set a truncated trial on the remedial plan and "evidentiary hearing" for June 29, shows the court plans to force a new plan on the general public after only the most minimal, rushed, and haphazard remedial process—which this Court's precedent condemns, *see Jones v. City of Lubbock*, 727 F.2d 364, 386-87 (5th Cir. 1984).

Ultimately, the motions panel's reasoning hinged on the proposition that federal courts have authority to move state-law election deadlines. ROA.6885. But that misses the point and this fallback only underscores the *Purcell* problem. *Purcell* does not hold that a federal court can match some electoral intrusion with even *more* electoral intrusion. The motions

panel and district court wrongly implied that it is Appellants' burden to prove that electoral failures are certain or close to it, but the question the Supreme Court has posed is whether a late change "*can* lead to disruption." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). In *Merrill*, there was no cited evidence at the granular level like the unrebutted evidence Appellants provided here.

5. The court below and the motions panel also believed it was legitimate to credit an attorney with no elections administration experience whatsoever over the State's chief elections officer. But, at some point, credibility determinations are incredible. At a minimum, the choice should be between two equally qualified witnesses, but here they concededly are not. Besides, that attorney's testimony *confirms Purcell* applies. He agreed that implementing the election under a new plan was now a "huge challenge," ROA.5466, akin to what Hurricane Ida imposed. It is baffling that the district court credited an inexperienced lawyer's testimony over the actual official whose job it is to make the changes happen, and even after finding analogy to hurricanes "shallow." ROA.6779. *Plaintiffs'* witness drew that analogy.[11]

Further, the premise of this witness's testimony that an election *may* be administered without disaster is flat wrong. Reflecting his lack of actual experience, he believed this is possible if the ultimate election

[11] Moreover, Ida imposed no challenge pertaining to re-coding voters into electoral districts and is an inapt analogy.

date, November 8, 2022, is pushed back, as occurred with *state* legislative elections after Hurricane Ida. ROA.5464. But Louisiana may *not* move the *federal* election date because Congress codified it, *see* 2 U.S.C. §§ 1 and 7, under its Elections Clause authority, *see Foster v. Love*, 522 U.S. 67, 69 (1997). A federal court lacks the same authority because it shares none of the Elections Clause's delegated power. *See Rucho*, 139 S. Ct. at 2495-96.

The implications for the State and the nation are severe. Setting aside the likelihood of additional litigation over an unconstitutionally racially gerrymandered remedial map, mistakes in the election may spur challenges to the results. This in turn could lead to a delay in seating members of Congress representing Louisiana to participate in Congress's actions as a whole. Upending congressional elections at the eleventh hour further erodes confidence in the integrity of national elections, which only increases instability in our constitutionally-established system of governance. Neither the trial court nor the panel were correct to minimize these consequences.

CONCLUSION

The Court should reverse the injunction. It should immediately issue a stay pending argument and final decision.

Dated: June 21, 2022

*/s/ Richard B. Raile**

RICHARD B. RAILE
KATHERINE L. MCKNIGHT
E. MARK BRADEN
RENEE M. KNUDSEN
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Phone: (202) 861-1711
Email: rraile@bakerlaw.com

MICHAEL W. MENGIS
BAKER & HOSTETLER LLP
811 Main Street, Suite 1100
Houston, TX 77002

PATRICK T. LEWIS
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114

ERIKA DACKIN PROUTY
BAKER & HOSTETLER LLP
200 Civic Center Dr., Suite 1200
Columbus, OH 43215
Attorneys for Clay Schexnayder and Patrick Page Cortez

/s/ Elizabeth B. Murrill

JEFF LANDRY
Louisiana Attorney General
ELIZABETH B. MURRILL
Solicitor General
SHAE MCPHEE
Deputy Solicitor General
MORGAN BRUNGARD
Assistant Solicitor General
ANGELIQUE DUHON FREEL
CAREY TOM JONES
JEFFREY M. WALE
Assistant Attorneys General
LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, LA 70804
murrille@ag.louisiana.gov

JASON B. TORCHINSKY
PHILLIP M. GORDON
EDWARD M. WENGER
HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Highway
Haymarket, VA 20169
Attorneys for the State of Louisiana

*/s/ Phillip J. Strach**

PHILLIP J. STRACH
THOMAS A. FARR
ALYSSA M. RIGGINS
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
phil.strach@nelsonmullins.com

JOHN C. WALSH
SHOWS, CALI & WALSH, LLP
P.O. Box 4046
Baton Rouge, LA 70821
Attorneys for the Secretary of State

**Signed with permission*

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2022, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Dated: June 21, 2022

/s/ Elizabeth B. Murrill
ELIZABETH B. MURRILL

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. ("Rule") 32(a)(7)(B) because it is 19,997 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: June 21, 2022

/s/ Elizabeth B. Murrill
ELIZABETH B. MURRILL

ADDENDUM

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52 U.S.C. § 10301

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10302

(a) Authorization by court for appointment of Federal Observers

Whenever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court shall authorize the appointment of Federal observers by the Director of the Office of Personnel Management in accordance with section 1973d1 of Title 42 to serve for such period of time and for such political subdivisions as the court shall determine is appropriate to enforce the voting guarantees of the fourteenth or fifteenth amendment (1) as part of any interlocutory order if the court determines that the appointment of such observers is necessary to enforce such voting guarantees or (2) as part of any final judgment if the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred in such State or subdivision: *Provided*, That the court need not authorize the appointment of observers if any incidents of denial or abridgement of the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 10303(f)(2) of this title (1) have been few in number and have been promptly and effectively corrected by State or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future.

52 U.S.C. § 10308

(a) Depriving or attempting to deprive persons of secured rights

Whoever shall deprive or attempt to deprive any person of any right secured by section 10301, 10302, 10303, 10304, or 10306 of this title or shall violate section 10307(a) of this title, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(b) Destroying, defacing, mutilating, or altering ballots or official voting records

Whoever, within a year following an election in a political subdivision in which an observer has been assigned (1) destroys, defaces, mutilates, or otherwise alters the marking of a paper ballot which has been cast in such election, or (2) alters any official record of voting in such election tabulated from a voting machine or otherwise, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(c) Conspiring to violate or interfere with secured rights

Whoever conspires to violate the provisions of subsection (a) or (b) of this section, or interferes with any right secured by section 10301, 10302, 10303, 10304, 10306, or 10307(a) of this title shall be fined not more than $5,000, or imprisoned not more than five years, or both.

(d) Civil action by Attorney General for preventive relief; injunctive and other relief

Whenever 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 10301, 10302, 10303, 10304, 10306, or 10307 of this title, section 1973e of Title 42,1 or subsection (b) of this section, the Attorney General may institute for the United States, or in the name of the United States, an action for preventive relief, including an application for a temporary or permanent injunction, restraining order, or other order, and including an order directed to the State and State or local election officials to require them (1) to permit persons listed under chapters 103 to 107 of this title to vote and (2) to count such votes.

(e) Proceeding by Attorney General to enforce the counting of ballots of registered and eligible persons who are prevented from voting

Whenever in any political subdivision in which there are observers appointed pursuant to chapters 103 to 107 of this title any persons allege to such an observer within forty-eight hours after the closing of the polls that notwithstanding (1) their listing under chapters 103 to 107 of this title or registration by an appropriate election official and (2) their eligibility to vote, they have not been permitted to vote in such election, the observer shall forthwith notify the Attorney General if such allegations in his opinion appear to be well founded. Upon receipt of such notification, the Attorney General may forthwith file with the district court an application for an order providing for the marking, casting, and counting of the ballots of such persons and requiring the inclusion of their votes in the total vote before the results of such election shall be deemed final and any force or effect given thereto. The district court shall hear and determine such matters immediately after the filing of such application. The remedy provided in this subsection shall not preclude any remedy available under State or Federal law.

(f) Jurisdiction of district courts; exhaustion of administrative or other remedies unnecessary

The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of chapters 103 to 107 of this title shall have exhausted any administrative or other remedies that may be provided by law.