No. 22-30333

In the United States Court of Appeals
for the Fifth Circuit

PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE, EDWIN RENE SOULE, ALICE WASHINGTON, CLEE EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS, AMBROSE SIMS, NAACP LOUISIANA STATE CONFERENCE, AND POWER COALITION FOR EQUITY AND JUSTICE,
PLAINTIFFS-APPELLEES

v.

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

EDWARD GALMON, SR., CIARA HART, NORRIS HENDERSON, AND TRAMELLE HOWARD,
PLAINTIFFS-APPELLEES

v.

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA
CIV. NO. 22-0211 & CIV. NO. 22-0214
(THE HONORABLE SHELLY D. DICK, C.J.)

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STATEMENT REGARDING ORAL ARGUMENT

This case already has been set for oral argument on October 6, 2023.

PRELIMINARY STATEMENT

Over a year ago, the District Court granted the motion of Plaintiffs-Appellees ("Plaintiffs") for a preliminary injunction upon a finding that Louisiana's congressional redistricting plan ("H.B. 1") likely dilutes the votes of Black Louisianans in violation of § 2 of the Voting Rights Act of 1965 ("VRA"). 52 U.S.C. § 10301. The District Court enjoined Appellant-Defendant Secretary of State Ardoin from "conducting any congressional elections under the map enacted by the Louisiana Legislature in H.B. 1." ROA.6636. The Secretary and Appellant-Intervenors the State of Louisiana and Legislative Leaders (together "Defendants") immediately requested a stay from this Court, and in June 2022, a unanimous motions panel denied that request and rejected Defendants' attempts to remake § 2 precedent. *See Robinson v. Ardoin*, 37 F.4th 208 (5th Cir. 2022).

Defendants then sought a stay in the U.S. Supreme Court, arguing that "this case presents the same question" as the pending case of *Allen v. Milligan* (then known as *Merrill v. Milligan*). *See* Petitioners' Emergency Application for Administrative Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment, *Ardoin v. Robinson*, No. 21A814 (June 17, 2022). The Supreme Court granted the stay until

June 2023, when it issued its decision in *Milligan*. 143 S. Ct. 1487 (2023); *see Ardoin v. Robinson*, 143 S. Ct. 2654 (2023) (dismissing writ of certiorari dismissed as improvidently granted and vacating stay to "allow the matter to proceed before the Court of Appeals for the Fifth Circuit for review in the ordinary course and in advance of the 2024 congressional elections in Louisiana").

In *Milligan*, the Supreme Court reaffirmed its jurisprudence under § 2, as first articulated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), which federal courts, including the District Court and motions panel here, have faithfully applied for nearly forty years. *See Robinson*, 37 F.4th at 216-227. Finding "Alabama's new approach to § 2 compelling neither in theory nor in practice," the Supreme Court declined to "remake our § 2 jurisprudence anew." *Milligan*, 143 S. Ct. at 1506.

Milligan confirms the correctness of the District Court's decision, which concluded that H.B. 1 likely violated Plaintiffs' § 2 rights. Indeed, Defendants themselves admitted that *Milligan* raised the same issues that this case does in their stay application to the Supreme Court. The District Court properly applied the correct legal standard laid out in *Gingles* and affirmed in *Milligan*, and Defendants have offered no basis

for finding clear error in any the District Court's extensive findings of fact in support of its conclusion that Plaintiffs satisfied that standard. This Court should affirm the District Court's preliminary injunction.

SUMMARY OF ARGUMENT

Under *Gingles*, the plaintiff bears the burden of proving a § 2 violation by satisfying three "preconditions." "First, the minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district." *Milligan*, 143 S. Ct. at 1503 (cleaned up). A district is "reasonably configured" where "it comports with traditional districting criteria, such as being contiguous and reasonably compact." *Id*. "Second, the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51. "And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate." *Milligan*, 143 S. Ct. at 1503 (cleaned up). Where the three *Gingles* preconditions have been satisfied, the plaintiff must also show, "under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters." *Id*. Here, the District Court correctly

applied this standard, and its factual findings are well supported by the record.

First, *Milligan* confirms that the District Court properly analyzed the first *Gingles* precondition ("*Gingles* 1") and did not clearly err in finding that Plaintiffs' illustrative maps satisfied the traditional redistricting criteria of compactness, contiguity, and respect for political subdivisions, and preserved a distinct community of interest in East Baton Rouge and the Delta parishes. ROA.6737-40; ROA.6734-35. Although it "did not have to conduct a 'beauty contest[]' between plaintiffs' maps and the State's," *Milligan*, 143 S. Ct. at 1505, the District Court also found that Plaintiffs' illustrative maps "outperformed the enacted plan on every relevant criteria." ROA.6752. In sum, just as in *Milligan*, the District Court's factual findings make clear that the illustrative maps satisfy *Gingles* I because they contain reasonably configured districts that comport with traditional redistricting principles. *See* 143 S. Ct. at 1504-05.

Second, *Milligan* rejects Defendants argument that any use of race in drawing illustrative maps under *Gingles* I—including any effort to meet the numerical threshold mandated by the Supreme Court in § 2

cases—is unconstitutional, a rule they wrongly claim is compelled by both *Milligan* and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (*SFFA*). *SFFA* was a case about efforts by public universities to achieve diversity through voluntary affirmative action programs, and it bears no connection to the VRA or to the proper use of race in such remedial statutes. By contrast, in *Milligan*, the Supreme Court rejected the argument that the consideration of race to draw illustrative maps to satisfy *Gingles* I is unconstitutional and expressly declined the defendants' invitation "to recast our § 2 case law as Alabama requests." *Milligan*, 143 S. Ct. at 1507. As the Supreme Court explained, race-consciousness is required by the nature of the *Gingles* inquiry: "The very reason a plaintiff adduces a map at the first step of Gingles is precisely *because of* its racial composition—that is, because it creates an additional majority-minority district that does not then exist." *Milligan*, 143 S. Ct. at 1506 n.7. *Milligan* confirmed that race does not illegally predominate in the map drawing process where a mapmaker considers race while satisfying traditional districting principles. *Id.* at 1508-10, 1511-12, 1517-19. Under

Milligan, the District Court's finding that race did not predominate in Plaintiffs' illustrative plans is amply supported by the record.

Third, *Milligan* applied the longstanding framework for analyzing the third *Gingles* precondition to establish racially polarized voting. 143 S. Ct. at 1505. Despite Defendants' straw-man arguments about crossover voting, nothing in *Milligan* casts doubt upon the District Court's factual findings that there is stark racially polarized voting in Louisiana or that bloc voting by the majority usually results in the defeat of Black voters' candidates of choice in H.B. 1. ROA.6753-6761. Plaintiffs satisfied *Gingles* III.

Fourth, the District Court properly weighed the question of proportionality in its assessment of the totality of circumstances. ROA.6774. Nothing in *Milligan* calls that analysis into question. In *Milligan*, the Supreme Court held that "the *Gingles* framework itself imposes meaningful constraints on proportionality," 143 S. Ct. at 1508, and it declined to overturn its § 2 precedent, including its holding in *Johnson v. De Grandy* that the lack of proportionality, while not dispositive, is a relevant consideration under the totality of

circumstances analysis, 143 S. Ct. at 1504 (citing *Johnson v. De Grandy* 512 U.S. 997, 1016-17 (1994) among the precedents the Court affirmed).

Fifth, this Court must reject Defendants' argument that the preliminary injunction is now moot. Defendants' claims run contrary to plain text of the District Court's order, which prohibited Defendants from "conducting *any* congressional elections" under H.B. 1. ROA.6636 (emphasis added). *Milligan* affirmed a nearly identical preliminary injunction six months after the 2022 election. *See Singleton v. Merrill*, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022), *aff'd sub nom. Allen v. Milligan*, 143 S. Ct. 1487 (2023). The preliminary injunction's ongoing purpose of protecting Black Louisianans from the irreparable harm that would result from holding elections under H.B. 1 remains vital. The case is not moot. ROA.6775-6776.

Because the District Court properly applied existing law, as recently reaffirmed in *Milligan*, and because it did not err in its fact finding, this Court should affirm the preliminary injunction.

ARGUMENT

The District Court's conclusion that H.B. 1 dilutes the votes of Black Louisianans is a factual finding subject only to review for clear

error. *See Milligan*, 143 S. Ct. at 1506; *Gingles*, 478 U.S. at 78 ("We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution."); Fed. R. Civ. P. 52(a)(6). Under this standard, this appellate court must affirm a district court's findings so long as they are "'plausible' in light of the full record—even if another [finding] is equally or more [plausible]." *Cooper v. Harris*, 581 U.S. 285, 293 (2017) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)). This Court must "give singular deference to a trial court's judgments about the credibility of witnesses." *Id.* (citing Fed. R. Civ. Proc. 52(a)(6)). This is because the "various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record." *Id.* (quoting *Anderson*, 470 U.S. at 575).

I. Plaintiffs' Illustrative Plans Satisfy the First Precondition.

A. The District Court Applied the Correct Legal Standard in Finding *Gingles* I Satisfied.

For nearly 40 years, courts have evaluated vote dilution claims arising under § 2 of the VRA under the now familiar and well-developed standard first articulated in *Thornburg v. Gingles*. *See Milligan*, 143 S. Ct. at 1502-03 (citing *Gingles* and its progeny in the Supreme Court);

Fusilier v. Landry, 963 F.3d 447, 455 (5th Cir. 2020); *Fairley v. Hattiesburg Mississippi*, 662 F. App'x.291, 295-96 (5th Cir. 2016); *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 365-67 (5th Cir. 2001); *Houston v. Lafayette County, Miss.*, 56 F.3d 606, 609-10 (5th Cir. 1995); *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109, 1116 (5th Cir. 1991). The first *Gingles* precondition is "focused on geographical compactness and numerosity, [and] is 'needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.'" *Milligan*, 143 S. Ct. at 1503. (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)). In determining that Plaintiffs satisfied the first *Gingles* precondition, the District Court declined Louisiana's invitation to "toss *Gingles* onto the trash heap," ROA.6717-18, just as the Supreme Court ultimately did in *Milligan* when it rejected arguments from Alabama that are nearly identical to Defendants' arguments here. 143 S. Ct. at 1506-07. Instead, the District Court faithfully applied the standards articulated in *Gingles* and its progeny and now reaffirmed in *Milligan*.

To satisfy the first precondition, as *Milligan* explains, a plaintiff must show that "the minority group [is] sufficiently large and

geographically compact to constitute a majority in a reasonably configured district." *Milligan*, 143 S. Ct. at 1503 (cleaned up). "A district will be reasonably configured … if it comports with traditional districting criteria, such as being contiguous and reasonably compact" and "respect[ing] existing political subdivisions, such as counties, cities, and towns." *Id.* at 1503-04 (citing *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015)); *accord* ROA.6652 (quoting *League of United Latin Am. Citizens v. Perry* ("*LULAC*"), 517 U.S. 399, 433 (2006)) (*Gingles* I "should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries").

As the District Court correctly stated, the focus of the *Gingles* I inquiry is on "the compactness of the minority population, not [] the compactness of the contested district." ROA.6730 (quoting *LULAC*, 548 U.S. at 433). Plaintiffs establish that the minority population is compact for purposes of *Gingles* I by showing that it can be placed in "a district that is '*reasonably* compact and regular.'" ROA.6653 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (cleaned up)); *accord Milligan*, 143 S. Ct. at 1503. *Milligan* confirms that the District Court faithfully applied the correct legal principles, and this Court should affirm.

B. The District Court's *Gingles* I Findings Were Supported by the Record and Were Not Clearly Erroneous.

In applying these well-established principles to find that Black Louisianans are geographically compact enough to form a voting age majority in a second reasonably configured district, the District Court was faced with facts and evidence remarkably similar to those in *Milligan*. The District Court's entirely plausible findings were based on a thorough analysis of the evidence that Plaintiffs' illustrative plans comported with traditional redistricting principles such as compactness, contiguity, and respect for political subdivisions. Those findings are not clearly erroneous and must be affirmed.

First, the District Court found that the illustrative plans contained reasonably compact districts. The court credited expert testimony explaining that Louisiana's "Black population tends to be concentrated in very compact, easily definable areas, partly as a result of historical housing segregation which still prevails in the current day." ROA.6662. This "well-known and easily demonstrable fact"—undisputed on appeal—made it an easy task to develop an illustrative plan with two majority-Black districts that are geographically compact as measured using widely accepted mathematical measures. ROA.6662-63. In the

District Court, "Defendants did not meaningfully refute or challenge Plaintiffs' evidence on compactness." ROA.6726.

Although a comparison between the illustrative plans and H.B. 1 was unnecessary, *see Milligan*, 143 S. Ct. at 1505, the District Court cited evidence that that, as in *Milligan*, the districts in the illustrative plans offered by both sets of plaintiffs were on average more compact than the enacted plan using accepted mathematical measures. ROA.6724-26; *see Milligan*, 143 S. Ct. at 1504 (*Gingles* I satisfied where, *inter alia*, "the maps submitted by one of plaintiffs' experts … performed generally better on average than did [the enacted map]" with respect to compactness).[1] On a visual inspection, the District Court found that, as in *Milligan*, the districts in the illustrative plans were "visually more compact" than the enacted plan, "without 'tentacles, appendages, bizarre shapes, or any other obvious irregularities.'" ROA.6733 (quoting *Caster v. Merrill*, No. 2:21-CV-1536-AMM, 2022 WL 264819, at *64 (N.D. Ala. Jan. 24, 2022), *aff'd sub nom. Allen v. Milligan*, 143 S. Ct. 1487 (2023)); *Milligan*, 143 S. Ct. at 1504 (citing district court's finding with approval);

[1] The Supreme Court did not demand a district-level assessment of compactness in *Milligan*.

see also, *e.g.*, ROA.6666 (Mr. Fairfax used several widely accepted mathematical "measures to assess compactness and demonstrated that his illustrative districts were more compact than the enacted map").[2]

Defendants argue that Plaintiffs and the District Court focused on "the wrong kind of compactness," because the *Gingles* I compactness inquiry focuses on "the compactness of the minority population, not the compactness of the contested district." Def. Supp. Br. 18. (quoting *LULAC*, 548 U.S. at 433). But, again, the District Court understood this distinction. ROA.6730. The court focused on the compactness of Black communities in the illustrative districts as well as the mathematical compactness of the districts as a whole. ROA.6663 ("This compactness in the Black population made it easy … to draw a majority-Black district."). And, while the ultimate touchstone is the compactness of the minority community, *Milligan* and numerous prior decisions make clear that the minority population is generally reasonably compact if it is compact enough to be drawn into a district that complies with traditional redistricting principles. As evidence that *Gingles* I had been satisfied, the

[2] For ease of reference, images of a selection of these maps, excerpted from ROA.10711 (H.B. 1); ROA.10724 (CD 2 and CD6 in H.B. 1); ROA.3076 (Fairfax Illustrative Plan 2), are included in the appendix.

Milligan court specifically cited expert evidence assessing the illustrative districts' compactness under the same mathematical measures applied by Plaintiffs' experts in this case. *Compare Milligan*, 143 S. Ct. at 1504 *with* ROA.6725-26.

Aside from misguidedly challenging the relevance of compactness, Defendants do not dispute that Plaintiffs' illustrative districts are reasonably compact as measured using the same metrics approved in *Milligan*. ROA.6733 ("[N]ot a single defense expert disputed that Plaintiffs' illustrative plans are generally more compact than the enacted plan based on statistical measures.").

Defendants likewise do not dispute that the District Court did not err in concluding that Plaintiffs' illustrative maps "respect existing political subdivisions, such as parishes, cities, and towns." ROA.6733-34; *accord Milligan*, 143 S. Ct. at 1504 (affirming that illustrative maps that "respected existing political subdivisions, such as counties, cities, and towns" satisfied *Gingles* I). The court found that the illustrative maps split as few as 10 parishes and no more than 14. ROA.6733-34. Several of the illustrative plans, including both of the maps offered by *Robinson* Plaintiffs, split no precincts. ROA.6734. The District Court credited the

testimony of Plaintiffs' experts that the parish splits were necessary to comply with the Equal Protection Clause's "one person, one vote" requirement. ROA.6659. And, without conducting a "beauty contest," the District Court also found that the *Robinson* Plaintiffs' maps split fewer parishes than H.B. 1 and the same number of precincts. ROA.6734; *accord Milligan*, 143 S. Ct. at 1504 (*Gingles* I satisfied where, *inter alia*, "some of plaintiffs' proposed maps split the same number of county lines as (or even fewer county lines than) the State's map").[3] Defendants do not challenge the District Court's conclusion that this redistricting principle supported its holding that Plaintiffs' illustrative maps were reasonably configured.

As in *Milligan*, the District Court gave "essentially no weight" to Defendants' insistence that the illustrative plans' have lower "core retention" than the enacted plan—"a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another." *Milligan*, 143 S. Ct. at 1505; ROA.6738-6739. *Milligan* explained:

[3] Like compactness, *Milligan* affirmed the Alabama district court's findings regarding political subdivision splits without engaging in a district-by-district analysis.

> [T]his Court has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim. If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan. That is not the law: § 2 does not permit a State to provide some voters "less opportunity ... to participate in the political process" just because the State has done it before.

143 S. Ct. at 1505 (quoting 52 U.S.C. § 10301(b)). Echoing this sentiment, the District Court here held that "[c]ore retention is not and cannot be central to *Gingles I*, because making it so would upend the entire intent of Section 2, allowing states to forever enshrine the status quo regardless of shifting demographics." ROA.6739. The court then concluded that "core retention does not trump the Voting Rights Act." *Id.*[4]

C. The District Court Committed No Clear Error in Finding that Plaintiffs' Plans Respect Communities of Interest.

Consistent with *Milligan*, the District Court made extensive findings concerning the illustrative maps' preservation of communities of

[4] The District Court did "not extensively analyze the traditional criteria of equal population and contiguity, because the evidence makes clear that Plaintiffs' plans are contiguous and equalize population across districts, and these issues are not disputed." ROA.6733. Defendants do not dispute those findings on appeal.

interest. As in *Milligan*, the District Court considered a combination of lay and expert evidence concerning where and how communities of interest were preserved. *See Singleton*, 582 F. Supp. 3d at 966, 980 (crediting lay testimony regarding connections between Mobile and the Black Belt); *id.* at 1012-15 (discussing expert testimony concerning communities of interest). Based on that evidence, the District Court found that "Plaintiffs made a strong showing that their maps respect" communities of interest, and, as in *Milligan*, "even unite communities of interest that are not drawn together in the enacted map." ROA.6737; 143 S. Ct. at 1505.

Specifically, in finding that Plaintiffs' illustrative plans protected communities of interest, the District Court relied on testimony of Plaintiffs' demographic experts that they avoided splitting Core Based Statistical Areas, which cover larger populated areas than municipalities or governmental units, and Census Designated Places, which includes populated areas that are recognized by local people and are "more indicative of a community of interest than actual cities." ROA.6734-6735.

The District Court additionally rested its conclusion that Baton Rouge and the Delta were appropriately grouped together on the

testimony of Plaintiffs' experts explaining the configuration of their districts. Mr. Cooper and Mr. Fairfax both explained that they relied on evidence from multiple sources to identify communities of interest. ROA.6664; ROA.6667-70. Both experts testified that they used socioeconomic data to identify areas of the state with shared characteristics, such as low levels of household income and education, greater reliance on public benefits, and higher exposure to environmental and climate hazards, as a means of identifying communities of interest. *E.g.*, ROA.6663 (describing Mr. Cooper's testimony that "[s]ocioeconomic factors … made the combination of East Baton Rouge and East Carroll Parish a natural one."). Mr. Fairfax additionally stated that relied on public testimony from community members at the legislature's redistricting roadshow. *E.g.*, ROA.6668 ("Fairfax explains that he considered the testimony of Louisiana residents from the roadshows … to validate his impressions of communities of interest."). The court credited Plaintiffs' experts' testimony and recognized that they "gave careful thought" and selected "objectively verifiable indicators" to identify communities of interest. ROA.6737.

The District Court also relied on lay witnesses who testified on the modern and historical social, family, educational, and economic links between St. Landry Parish, Lafayette, and East Baton Rouge, ROA.6672-6674 (describing testimony of Charles Cravins), and between the Delta Parishes and East Baton Rouge, ROA.6671-6672 (describing Testimony of Christopher Tyson); ROA.6735 ("The citizen viewpoint testimony of Christopher Tyson and Charles Cravins … contributed meaningfully to an understanding of communities of interest.").

In stark contrast to Plaintiffs' extensive evidentiary showing, Defendants put on no witness testimony concerning communities of interest. This "str[uck] the [District] Court as a glaring omission." ROA.6735. Although they disclosed an expert witness on the topic discovery, Defendants did not call him to testify at the preliminary injunction hearing. And despite intervening purportedly to "defend[] [the legislature's] policy choices," ROA.173, and asserting that "it is the Legislature's role to identify communities of interest, not the Court's or Plaintiffs'," ROA.2759, the Legislative Intervenors likewise offered no testimony concerning those choices.

Despite failing to put on any meaningful evidence concerning communities of interest—which the district court called a "glaring omission," ROA.6735—Defendants' Supplemental Brief consists largely of an unfounded attack on the District Court's factual findings on this issue. Def. Supp. Br. at 6-20. Those factual findings are entitled to deference and may only be reversed if clearly erroneous. *See Milligan*, 143 S. Ct. at 1506; *Gingles*, 478 U.S. at 78 ("We reaffirm our view that the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution."); Fed. R. Civ. P. 52(a)(6). The record below overwhelmingly supports the District Court's findings, and as such those findings are not clearly erroneous and must be affirmed.

First, Defendants argue that using Core Based Statistical Areas to identify communities of interest is invalid, Def. Supp. Br. 13-14, but during the preliminary injunction hearing they offered no expert evidence to support that assertion. The District Court properly relied on the unrebutted evidence before it, and no amount of legal argument can at this stage give rise to clear error. ROA.6735.

Next, Defendants wrongly fault the District Court for "completely ignor[ing]" what they describe as a "fulsome legislative record" concerning the communities of interest favored by the legislature. Def. Supp. Br. 1-2, 19-20. They cherry-pick a handful of general statements from Senator Hewitt, the adopted plan's proponent in the Senate, about the plan's configuration, *id.* at 19 (citing ROA.14257; ROA.14570; ROA.12929-30; ROA.12934-36), and testimony of three members of the public—which Defendants call a "public outpouring", *id.* at 9—at a single roadshow hearing, *id.* at 19 (citing ROA.11410; ROA.11415; ROA.11421). But Defendants ignore the testimony of dozens of witnesses at every roadshow hearing around the state calling for more responsive representation for Black people and highlighting the interests shared by Black communities that are united in Plaintiffs' illustrative plans. For example, voters at hearings in Monroe, Lafayette, Alexandria, and Baton Route, spoke to legislators about their concerns on issues such access to health care, food-deserts, education and under-resourced schools, racialized policing and mass incarceration, and infrastructure. *E.g.*, ROA.11428-30; ROA.11432-34; ROA.11434-35; ROA.11442-45; ROA.11445-47; ROA.11451-53; ROA.11456; ROA.11628-34; ROA.11635-

37; ROA.11646-47; ROA.11787-89; ROA.11792-94; ROA.11802-05; ROA.11824-26; ROA.11826-29; ROA.11829-30; ROA.11830-33; ROA.11845-46; ROA.11846-49; ROA.11854-56. They also ignore the testimony of other legislators who favored maps that grouped East Baton Rouge and Monroe with the Delta, including legislators who represent communities in these regions. *E.g.*, ROA. 11737-41; ROA. 14032-36; ROA.13949-53; ROA.14002-08; ROA.14010-13; ROA.14016-21; ROA.14573-83; ROA.14264-65; ROA.14597-606; ROA.14772-75. Looking for support in *Milligan* for a reprise of their evidentiary arguments, Defendants next engage in a witness counting exercise. Def. Supp. Br. 6. According to Defendants, because the *Milligan* Court found *Gingles* I satisfied notwithstanding two witnesses' testimony that the plaintiffs plans split Alabama's preferred community of interest, it is *per se* clear error for the District Court here to find *Gingles* I satisfied when just one witness testified to a community of interest between Baton Rouge and the Delta. *Id.*

The *Milligan* Court, of course, announced no such rule. And Defendants are simply wrong in asserting that the only evidence supporting the existence of a community of interest between Baton Rouge

and the Delta was the testimony of one witness. As explained above, in addition to Mr. Tyson's lay testimony, Plaintiffs' two demographic experts explained why they configured CD5 to include Baton Rouge and the Delta based on socioeconomic data and roadshow testimony. ROA.6663; ROA.6668. Taken together, this evidence is more than sufficient to support the District Court's conclusion that joining Baton Rouge and the Delta in the illustrative maps protects a community of interest.

Even if only one witness had testified to the community of interest between Baton Rouge and the Delta, that would not be grounds for reversal. It is a fundamental principle of appellate review that it is the District Court's province to assess the credibility of witnesses and weigh their testimony accordingly. *See First State Ins. Co. v. Mini Togs, Inc.*, 841 F.2d 131, 133 (5th Cir. 1988). In *Milligan*, the district court gave little weight to the testimony of two witnesses whom it found not credible or whose testimony it found not helpful or relevant. 143 S. Ct. at 1505. In contrast, the District Court in this case credited a witness it found highly credible and whose detailed and cogent testimony it found highly probative. ROA.6735.

Moreover, Defendants' claimed "fulsome record" evaporates under even cursory scrutiny. For example, Defendants assert that the enacted map protects the "greater Baton Rouge" community of interest consisting of "the suburban parishes that are closest to the City of Baton Rouge, like West Baton Rouge, Ascension, Livingston," which, they claim, "was accomplished in CD6." Def. Supp. Br. 8 (quoting ROA. 12934-12935). But the enacted map itself belies that claim. The legislature's map splits West Baton Rouge and Ascension Parishes, two of the three suburban parishes Defendants identify, as well as the city of Baton Rouge that purportedly anchors this community. And a chorus of voices at the roadshow and legislative hearings contradicts Defendants' insistence that Baton Rouge and New Orleans form a community of interest simply because both are urban. Community members from both Baton Rouge and New Orleans protested that the interests of Baton Rouge voters are different from those of voters in New Orleans and pleaded for Baton Rouge to be placed in a separate district where its voters' concerns will be heard. *E.g.*, ROA.11737-41; ROA.11803; ROA.11813; ROA.11819-21; ROA.11850; ROA.11857. It is also undermined by Mr. Tyson's testimony explaining the two cities' very particular economies and cultures. ROA.6672.

Defendants are also wrong to claim that drawing the Delta and Baton Rouge together ignores the legislative preference for protecting rural interests in CD5. Def. Supp. Br. 8. According to Senator Hewitt, CD4, in Northwest Louisiana, is also predominantly rural, and its residents share many of the same interests as rural residents in CD5. ROA.12926-27 ("one of the things … in terms of communities of interest that we were working to ensure in [CD4] is uniting rural and agricultural interest"). And as the District Court explained, Mr. Fairfax shifted many of the rural parishes west of the Delta that are in enacted CD5 into his illustrative CD4 to "make the Delta region in Northeast Louisiana a more substantial presence" in CD5. ROA.6670. In so doing, he both protected agricultural interests prioritized by the legislature in CD4 and "[kept] the delta region together"—another legislative priority, ROA.12929—within CD5 while strengthening its voice.

In any case, even if Plaintiffs' maps had split a community of interest favored by the legislature to create a new majority-Black district that united different communities of interest, that would not defeat Plaintiffs' *Gingles* I showing. In *Milligan*, the Supreme Court affirmed a finding that *Gingles* I had been satisfied, notwithstanding the state's

contention that the illustrative map split a community of interest the legislature preferred. *See* 143 S. Ct. at 1505 ("[The district court] did not have to conduct a 'beauty contest' between plaintiffs' maps and the State's. There would be a split community of interest in both."); *see also* *Milligan v. Allen*, Case No. 2:21-cv-01530-AMM, ECF No. 272, at 170 (N.D. Ala. Sept. 5, 2023) ("*Milligan II*") (state's preference for certain communities of interest is not "a trump card" that negates other evidence of vote dilution). That is exactly what the District Court found here, and Defendants offer no basis for holding that finding clearly erroneous.

Finally, Defendants rehash legal arguments made in their principal brief, asserting incorrectly that the District Court's community of interest findings are fatally undermined by the Supreme Court's racial gerrymandering jurisprudence.[5] The thrust of Defendants' first argument is that *LULAC* creates a *per se* rule against drawing different minority communities together in an illustrative plan when the distance between them exceeds some unspecified threshold, no matter how strong

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[5] These arguments are completely untethered to *Milligan* or other recent legal developments. For nearly seven pages in their brief, there is nary a mention of *Milligan*, but *LULAC*, a case from 2006, is cited no less than six times. Def. Supp. Br. 13-20. This argument is improper under Rule 28(j). Fed. R. App. P. 28(j) (allowing briefing only on "authorities [that] come to a party's attention *after*" a brief is filed) (emphasis added).

the evidence of shared interests and no matter how well the illustrative plan adheres to traditional redistricting principles. That argument was wrong before *Milligan* and it is still wrong for the reasons explained in Plaintiffs' principal merits brief. *See* Pl. Br. 29-30, 43.

Defendants' reliance on *Abrams* and *Miller* to make a similar point is likewise incorrect. *See* Def. Supp. Br. 11. Defendants proffer these cases as creating legal bar on joining rural and urban populations in a single district. But no such rule exists. In *Milligan*, the Court affirmed that an illustrative district that joined an urban city (Mobile) to a rural community (the Black Belt) was reasonably configured. 143 S. Ct. 1503-05. Moreover, in *LULAC*, the Court expressly "accept[ed] that in some cases members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district if the areas are in reasonably close proximity." 548 U.S. at 435. In *Miller* and *Abrams*, in contrast, the Court struck down iterations of a district that joined rural and urban populations by "narrow corridors," *Miller v. Johnson*, 515 U.S. 900, 909 (1995), giving the district an "iguana-like shape," *Abrams v. Johnson*, 521 U.S. 74, 88-89 (1997), a departure from traditional redistricting principles that is not present

here. *See Milligan*, 143 S. Ct. at 1509 (distinguishing *Miller* where "Georgia could not create [additional majority-minority] districts without flouting traditional criteria"); *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018) (finding that a state had "good reason" to draw a majority-minority district joined by a highway corridor where the VRA and testimony of some plaintiffs supported the district's creation).[6] Moreover, unlike those cases, here, the record demonstrates that rural and urban voters in the illustrative districts prefer the same candidates, and share many other cultural, social, historical, educational, and economic ties. ROA.6668-6670; ROA.6671-6674; *see Lawyer v. Dep't of Just.*, 521 U.S. 567, 581 (1997) (affirming that a community of interest existed where people shared socioeconomic interests).

The District Court applied the correct legal standard in concluding that Plaintiffs' illustrative plans contain an additional reasonably configured majority-Black district, and that conclusion is well supported

[6] Defendants' reliance on *Sensley v. Albritton*, 385 F.3d 591, 597 (5th Cir. 2004), is even more misplaced. That case involved districts for the Union Parish Police Jury, not congressional districts. A 15-mile distance between minority populations at the parish level may or may not be too much, but it says nothing about what would be appropriate in a congressional district. Moreover, like *Miller* and *Abrams*, and unlike here, the district court in *Sensley* found the district at issue not reasonably configured because it "linked together [distant Black communities] by a narrow corridor of land," and this Court declined to declare that finding clearly erroneous. *Id.*

by the record and is not clearly erroneous. The preliminary injunction must be affirmed.

II. *Milligan* Affirms the District Court's Conclusion That *Shaw's* Racial Predominance Framework Does Not Require Reversal.

A. The District Court Correctly Found That Plaintiffs' Illustrative Plans Were Not Racial Gerrymanders.

Milligan reaffirms that it is permissible to consider race when developing illustrative maps to satisfy the first *Gingles* precondition. Indeed, as the majority stressed, "[t]he very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of* its racial composition—that is, because it creates an additional majority-minority district that does not then exist." 143 S. Ct. at 1512 n.7 (emphasis in original); *see also id.* at 1516–17 ("[T]his Court and the lower federal courts . . . have authorized race-based redistricting as a remedy for state districting maps that violate § 2."). In holding that the consideration of race does not preclude satisfying *Gingles* I, the Supreme Court rejected an argument essentially identical to the one Defendants make here—that the *Milligan* plaintiffs' illustrative plans failed *Gingles* I because race was a consideration in their design. *See Milligan*, 143 S. Ct. at 1506–07

(rejecting argument that "the illustrative plan that plaintiffs adduce for the first *Gingles* precondition cannot have been 'based' on race").

Relying on the *Milligan dissent*, Defendants assert that *Milligan* established a new rule that illustrative maps developed to satisfy the first *Gingles* precondition must survive the racial predominance analysis of *Shaw* and its progeny. *See* Def. Supp. Br. 25 (quoting *Milligan*, 143 S. Ct. at 1527 (Thomas, J., dissenting)). But the *Milligan* majority never reached that question. Rather, the plurality concluded that race *had not* predominated in the plaintiffs' illustrative plans, and therefore did not need to resolve the question of how to apply *Gingles* I if race does predominate in the creation of an illustrative map. *See Milligan*, 143 S. Ct. at 1510–12 (plurality opinion). Justice Kavanaugh did not address the point directly, but he voted to affirm the district court's finding that *Gingles* I was satisfied notwithstanding the acknowledgment of the plaintiffs' experts that they considered race as a factor in developing their illustrative plans. *See id.* at 1511 (describing testimony of demographer Bill Cooper). And Justice Kavanaugh joined the majority in holding that § 2 "authorize[s] race-based redistricting" "under certain circumstances"

and that this does not exceed Congress' remedial authority under the Fifteenth Amendment. *Id.* at 1516–17.

Because a majority of Justices in *Milligan* did not reach the issue, this Court's precedent that a racial predominance analysis is not necessary at *Gingles* I remains controlling. *See Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1406–07 (5th Cir. 1996); *see also Robinson*, 37 F.4th at 223 (citing *Clark* and holding that this Circuit has "rejected the proposition that a plaintiff's attempt to satisfy the first *Gingles* precondition is invalid if the plaintiff acts with a racial purpose.").

Defendants also assert that *Milligan*'s citation of *Shaw v. Reno*, 509 U.S. 630 (1993) (*Shaw I*), *Miller v. Johnson*, 515 U.S. 900 (1995), and *Bush v. Vera*, 517 U.S. 952 (1996), implicitly imports a racial gerrymandering analysis into *Gingles* I simply because they are racial gerrymandering cases. Def. Supp. Br. 26–27 (citing 143 S. Ct. at 1508–10). But none of those cases precluded an illustrative plan from satisfying *Gingles* I because race predominated, but rather, because the districts did not satisfy traditional redistricting principles. *See Milligan*, 143 S. Ct. at 1508 (in *Shaw I*, § 2 did not justify "proposed district [that] was not reasonably compact"); *id.* at 1508–09 (in *Miller*, VRA provided no

justification for districts that "flout[ed] traditional criteria"); *id.* at 1509–10 (in *Vera*, § 2 did not provide justification for districts that did not adhere to traditional redistricting criteria). None of those cases hold that *Gingles* I cannot be satisfied where, as the District Court found here, Plaintiffs' illustrative maps *were* reasonably configured because they *do* comply with traditional redistricting principles, and *Milligan*'s citation of them does not require courts to engage in a racial gerrymandering analysis at the *Gingles* I stage.

Further, even if Defendants' interpretation of *Milligan* were correct (and it is not), a finding of racial predominance would not doom a districting plan: the Court would then need to determine whether such racial predominance was narrowly tailored to achieve the compelling governmental interest in compliance with the VRA. *See e.g.*, *Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (race-based redistricting satisfies strict scrutiny if narrowly tailored to comply with the VRA). But Defendants do not grapple with how strict scrutiny would apply to an illustrative plan offered to satisfy the evidentiary burden of *Gingles* I. They simply assume that racial predominance is automatically fatal to the *Gingles* I analysis. Def. Supp. Br. 25. And because they also

maintain that any intentional effort to meet *Gingles* I—which requires plaintiffs to create illustrative districts that are majority-minority—is conclusive evidence of racial predominance, their argument is in effect an argument for overruling *Gingles*. That is what Alabama asked the Supreme Court to do in *Milligan*, and the Supreme Court declined the invitation. 143 S. Ct. at 1510; *id.* at 1517 (Kavanaugh, J., concurring).

At bottom, Defendants' arguments about racial predominance and *Gingles* I are simply a distraction because *Milligan* leaves no doubt that race was appropriately considered in the creation of Plaintiffs' illustrative districts. Here, as in *Milligan*, the District Court found that race did not predominate in the development of Plaintiffs' illustrative maps. ROA.6751; *Milligan*, 143 S. Ct. at 1510–11. As explained below, that factual finding is amply supported by the testimony of Plaintiffs' experts credited by the District Court that while they considered race, it was but one factor they balanced against other redistricting considerations—no one of which predominated over the others.

Defendants make several arguments, most repeated from their initial brief, that the District Court's factual findings should be set aside. None of them provides grounds for reversal. First, they assert that the

acknowledgement by Plaintiffs' experts that they sought to create districts with a BVAP exceeding 50%—as the Supreme Court requires in a § 2 case, *see Bartlett v. Strickland*, 556 U.S. 1, 19–20 (2009)—amounts to racial predominance as a matter of law. *Compare* Def. Supp. Br. 32–38, *with* Def. Br. 48–54. Defendants fail to address how *Milligan* might impact this Court's consideration of Plaintiffs' effort to satisfy the standard set by the Supreme Court—or even to mention *Milligan* at all in this section of their brief outside of a single footnote maintaining that *Milligan* sheds no light on the issue. *See* Def. Supp. Br. 32–38; *id.* at 32 n.5 (repeating the assertion that *Milligan* produced no majority on how the racial predominance analysis applies in a § 2 case).[7]

In fact, *Milligan* confirms Defendants' argument—which was already untenable, as explained in Plaintiffs' principal brief, see Pl. Br. 36–40—is foreclosed by Supreme Court precedent. In *Milligan*, the majority recognized that the "very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of* its racial composition—

[7] Defendants' argument that *Milligan* sheds no new light on the predominance standard this Court should apply constitutes a clear acknowledgement that the entirety of Section II.B of their brief is not "appropriate for Rule 28(j) letters," Court Directive, ECF No. 242 (5th Cir. Jun. 28, 2023), and should be disregarded.

that is, because it creates an additional majority-minority district that does not then exist." 143 S. Ct. at 1511–12 n.7. This is what *Gingles* I, as construed in *Bartlett*, 556 U.S. at 19–20, demands, and *Milligan* makes clear that attempting to make the required showing does not amount to racial gerrymandering. *See* 143 S. Ct. at 1512 (plurality) (rejecting the argument that racial predominance invalidates illustrative maps created with goal of satisfying *Gingles*); *id.* at 1518–19 (Kavanaugh, J., concurring) (explaining that in certain circumstances, "*Gingles* requires the creation of a majority-minority district" and that the Constitution does permit "race-based redistricting").

Defendants' citation of *Cooper v. Harris* does not change the analysis. Def. Supp. Br. 33–35 (citing *Cooper v. Harris*, 581 U.S. 285 (2017)). *Cooper* in no way suggests that it is impermissible for plaintiffs to intentionally draw majority-minority districts—which, to repeat, *Milligan* emphasizes is required as part of the plaintiffs' *Gingles* I burden. *See* 143 S. Ct. at 1512 n.7. Indeed, *Cooper* has nothing to do with illustrative maps under *Gingles* I at all. 581 U.S. at 302 n.4 (explaining that *Gingles* I was not contested). Rather, the issue in *Cooper* was the legislature's use of an express racial target of 50% Black voting age

population, even though there was no evidence that § 2 required such a district because there was no evidence of racial bloc voting that would be necessary to satisfy *Gingles* III. *Id.* at 302 (finding that "electoral history provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite").

Nothing in *Cooper* renders it invalid for Plaintiffs' experts to consider race when attempting to create a majority-minority district to satisfy the Supreme Court's *Gingles* standard. *Accord Milligan*, 143 S. Ct. at 1510 (plurality opinion) ("[I]n the context of districting … being aware of racial considerations … is permissible"); *id.* at 1512 ("The contention that mapmakers must be entirely 'blind' to race has no footing in our § 2 case law."); *id.* at 1518 (Kavanaugh, J., concurring) (concluding that § 2's "effects test, as applied by *Gingles* to redistricting, requires in certain circumstances that courts account for the race of voters . . . .").

Defendants' mount a similar attack based on the acknowledgment from Plaintiffs' experts that they unpacked and uncracked districts in the enacted plan by moving areas with significant Black population into a new majority-Black district. Def. Supp. Br. 36. This, Defendants say, is proof of racial predominance. *Id.* Once again, they cite inapposite racial

gerrymandering cases where courts concluded there was insufficient evidence of a VRA violation to justify race-based line-drawing. *Id.* (citing *Wis. Legis.*, 142 S. Ct. at 1248–49 & n.1 (invalidating majority-minority district as a racial gerrymander where there was no evidence of *Gingles* II and III); *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 173–74 (E.D. Va. 2018) (finding reallocation of population into or out of a district to increase the BVAP was racial gerrymandering absent evidence that higher BVAP was necessary to comply with the VRA)). Additionally, as Justice Kavanaugh explained in his *Milligan* concurrence, "*Gingles* requires the creation of a majority-minority district only when, among other things, a State's redistricting map cracks or packs a large and 'geographically compact' minority population." 143 S. Ct. at 1518 (Kavanagh, J., concurring). The only way to create a majority-minority district when a map packs or cracks the minority population is by moving the packed or cracked population to a new majority-minority district.

Defendants then turn to maps created prepared by their expert witness Thomas Bryan, whose methodology the District Court found to be "poorly supported," and whose analysis "lacked rigor and

thoroughness." ROA.6726–27. When the same defense expert testified in *Milligan*, the district court there likewise found his opinions "partial, selectively informed, and poorly supported." 143 S. Ct. at 1505. Nevertheless, and in spite of their own expert's inability to "explain why, if [his methodology's] underlying assumptions are false, his resulting opinion is reliable," ROA.6727, Defendants ask this Court to accept Mr. Bryan's maps at face value. But because of the flaws in his methodology and analysis, the District Court determined that Mr. Bryan's "conclusions carried little, if any, probative value on the question of racial predominance," ROA.6726, and that determination is entitled to deference. *See First State*, 841 F.2d at 133 ("It is not the province of an appeals court to reweigh evidence or judge the credibility of witnesses.").

In contrast to its assessment of Mr. Bryan's testimony, the District Court found persuasive Plaintiffs' experts' explanations of how they balanced various factors when developing their plans "without allowing any single factor to predominate." ROA.6666; *see also* ROA.6733 (Mr. Fairfax "was adamant and credible in his testimony that race did not predominate in his mapping process."). The district court in *Milligan* found very similar evidence sufficient to demonstrate that race was

considered appropriately in developing illustrative plans in *Milligan*. 582 F. Supp. 3d. at 962–64, 978–79, 1029–30. The Supreme Court affirmed that ruling. *See* 143 S. Ct. at 1512 n.7; *accord id.* at 1511–12 (plurality); *id.* at 1518 (Kavanaugh, J., concurring) (§ 2 does not require race-blindness).

B. *SFFA* Provides No Basis for Disregarding *Milligan.*

Having previously acknowledged that this case raises the same issues as *Milligan*, Defendants now make an extraordinary about-face, and claim this case is actually governed by the Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023) ("*SFFA*"). But *SFFA* is not about redistricting or the VRA, and Chief Justice Roberts's opinion for the Court in *SFFA* certainly does not undermine or call into question his opinion just three weeks earlier in *Milligan*.

SFFA is factually and legally inapposite here. In *SFFA*, the Supreme Court addressed the use of race to achieve racial diversity in the student body at institutions of higher education. 143 S. Ct. at 2166. *SFFA* did not involve the use of race to meet an evidentiary burden. *Milligan* directly addressed that point and said that it can. 143 S. Ct. at

1512 n.7. To the extent *SFFA* is relevant here, it is in its conclusion that "remediating specific, identified instances of past discrimination that violated the Constitution or a statute" remains among the "compelling interests that permit resort to race-based government action." *SFFA*, 143 S. Ct. at 2162 (citing *Shaw II*, 517 U. S. 899, 909–910 (1996)). Here, the District Court and Plaintiffs' experts considered race for exactly that remedial purpose. Defendants' arguments that SFFA requires reversal must be rejected.

First, Defendants claim that attempting to draw an illustrative plan that includes an additional district with a majority-Black voting age population constitutes "outright racial balancing." Def. Supp. Br. 29 (citing *SFFA*, 143 S. Ct. at 2172). According to Defendants, that Plaintiffs' experts "freely admitted" to having drawn "districts that skate just a smidgen above the numerical quota of 50% BVAP," as *Gingles* requires, violates equal protection as articulated in *SFFA*. Def. Supp. Br. 29. But as explained above, barring plaintiffs from adducing illustrative plans that attempt to meet a numeric threshold the Supreme Court itself has set would require overruling *Gingles*, a step the Court expressly declined to take in *Milligan*. 143 S. Ct. at 1512 (plurality opinion)

(explaining that the "inescapable consequence" of an argument that the use of a 50% target is invalid is that "*Gingles* must be overruled," and declining to take that step); *id.* at 1517 (Kavanaugh, J., concurring) ("[T]he upshot of Alabama's argument is that the Court should overrule *Gingles*."). It is not plausible that the Supreme Court upheld the *Gingles* framework in *Milligan* only to overrule it *sub silentio* in *SFFA* three weeks later.

Second, Defendants contend that *SFFA* prohibits drawing Black communities into the same district based on "stereotyping." Def. Supp. Br. 29–30. But "stereotyping" in the districting context was prohibited long before *SFFA*, and, in part because of concerns about stereotyping voters, the Court has at times invalidated districts for combining geographically dispersed communities without evidence of shared interests. *See, e.g.*, *LULAC v. Perry*, 548 U.S. at 435. But, as explained above, that simply was not what happened here. The District Court made well-supported factual findings that the voters drawn together in Plaintiffs' illustrative districts were geographically compact and shared interests beyond their common experience of racial discrimination. *See supra*, Part I.C. Defendants again attempt to dress up attacks on the

District Court's factual findings as constitutional arguments. Those findings are subject to clear error review, and nothing in *SFFA* suggests new grounds for reversing them.

Third, Defendants argue that *SFFA* demands an understanding of *Gingles* that includes a "logical end point." Def. Supp. Br. 30–31. Their only argument that the District Court's application of the *Gingles* framework violates this principle is that in its totality of the circumstances analysis, it considered one Senate Factor out of nine that expressly calls for courts to look at "history." Def. Supp. Br. 31. Of course, the Senate Factors are part of the *Gingles* standard, *see Gingles*, 478 U.S. at 36, and it would have been error for the District Court to disregard that controlling precedent. Beyond that single argument, Defendants revert back to their oft-heard refrain that because a Louisiana plan with a second majority-Black district was struck down in the 1990s as a racial gerrymander, no plan with a second majority-Black district can ever be valid in Louisiana, no matter how much demographic conditions change and no matter how stark racially polarized voting patterns remain. Def. Supp. Br. 31. It appears that it is Defendants who are stuck in the past. For the reasons explained in Plaintiffs principal brief, *see* Pl. Br. 31–34,

that argument does not provide grounds for reversal of the District Court's order—much less a reason for overturning *Gingles*.

Moreover, in *Milligan*, the majority articulated precisely the mechanism that ensures the *Gingles* framework will sunset on its own as conditions change—thereby ensuring that the statute remains tied to "current conditions." Def. Supp. Br. 31. In the discussion of how any tendency of *Gingles* toward proportionality will lessen over time, the Court observed that "as residential segregation decreases—as it has 'sharply' done since the 1970s—satisfying traditional districting criteria such as the compactness requirement 'becomes more difficult.'" 143 S. Ct. at 1509 (citing T. Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L. J. 261, 279, & n.105 (2020)). Likewise, as voting becomes less racially polarized, it will be more difficult to satisfy the second and third *Gingles* preconditions because it will be more difficult for states to draw districts in which Black-preferred candidates are usually defeated. Neither of these changes has yet come to pass in Louisiana, however. *See* ROA.6662 (citing expert testimony that "housing segregation … still prevails in the current day."); ROA.6685–6694 (describing evidence of

racially polarized voting). There are no grounds to interpret *SFFA* as requiring § 2 or *Gingles* to be discarded as no longer necessary.

III. Plaintiffs' Illustrative Plans Satisfy the Third Precondition.

Milligan reaffirmed the analytical framework courts apply in assessing the third *Gingles* precondition, which demands a showing that "the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 143 S. Ct. at 1503 (quoting *Gingles*, 478 U.S. at 51).

Although, Defendants failed to meaningfully contest the existence of racially polarized voting, ROA. 6757–6761, they nevertheless argue that the evidence does not establish what they call "legally significant" polarized voting. Def. Br. 60–65.[8] Defendants assert that in Louisiana, a district could hypothetically be drawn in which Black voters do *not* make up a majority but are nevertheless able to elect their candidate of choice with the help of some number of white voters who "cross over" to vote for the same candidate. According to Defendants, "legally significant" polarized voting cannot be found where such a hypothetical "crossover

[8] Defendants state in their supplemental brief that they stand by the *Gingles* III arguments in their reply brief. Def. Supp. Br. 3 n.1. Plaintiffs likewise incorporate and do not waive the *Gingles* III arguments in their principal brief. Pl. Br. 51–55.

district" is possible—even when the state has refused to draw it. But, as the motions panel held, "what really matters" for [*Gingles* III] is "the challenged plan," not "a hypothetical [crossover] district" that the state "could have—but did not"—choose to draw. *Robinson*, 37 F.4th at 226–27. *Milligan* reaffirms this obvious truth, holding that the purpose of the third *Gingles* precondition is to establish that "*the challenged districting* thwarts a distinctive minority vote." 143 S. Ct. at 1503 (emphasis added).

Plaintiffs here offered the same kind of evidence of polarized voting as had the plaintiffs in *Milligan*, demonstrating similar levels of extreme racial polarization. *Compare*, *e.g.*, ROA.6757 (describing evidence that white voters' support for Black-preferred candidates ranged from 11.7% to 20.8%), *with Milligan*, 143 S. Ct. at 1505–06 (affirming district court's *Gingles* II and III findings based on evidence that "white voters supported Black-preferred candidates with 15.4% of the vote"). In *Milligan*, the Supreme Court found this evidence sufficient to establish the third *Gingles* precondition—that is, that polarized voting resulted in the usual defeat of Black-preferred candidates—despite similar levels of crossover voting. 143 S. Ct. at 1505. The District Court's finding on a very

similar record that Plaintiffs satisfied *Gingles* III is undeniably supported by the evidence and is not clearly erroneous.

IV. The District Court Properly Considered Proportionality.

"[P]roportionality is not dispositive in a challenge to single-member districting, [but] it is a relevant fact in the totality of circumstances to be analyzed when determining whether members of a minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *De Grandy*, 512 U.S. at 1000) (internal citations omitted); *see also LULAC*, 548 U.S. at 436 ("[W]hether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area" is a "relevant consideration."). *Milligan* confirms that the District Court appropriately weighed proportionality in the totality of the circumstances analysis. Here, the District Court wove proportionality into its analysis, not as dispositive evidence of a § 2 violation, but as one factor in the totality of circumstances. ROA.6774. The court noted that Black voters were disproportionately underrepresented in Louisiana's congressional delegation. *Id.* Accordingly, the court concluded that proportionality

weighed in Plaintiffs' favor in the totality of the circumstances. *Id.* That finding is not clearly erroneous.

Defendants offer no argument that the District Court's consideration of proportionality in the totality of the circumstances was improper or erroneous. *See* Def. Supp. Br. 20–24. Instead, they assert that *Milligan* "reorients the 'framework' to reject 'racial proportionality.'" They then attack the decision below because of its *outcome*—because, in this case, the result is representation roughly proportional to Black voters' share of Louisiana's population. *Id.* This, Defendants claim, "is highly improbable," *id.* at 24, and they warn, "if the district court's order is affirmed, proportionality will be the law of this Circuit," *id.* at 20.

But *Milligan* rejected the same argument Defendants make here: that if *Gingles* requires an additional majority-Black district in this case, then it "inevitably demands racial proportionality" everywhere. *Milligan* 143 S. Ct. at 1508.; *see also id.* at 1517–18 (Kavanaugh, J., concurring) ("Alabama's premise is wrong . . . *Gingles* does not mandate a proportional number of majority-minority districts."). In so doing, the *Milligan* court held that, "properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality." *Id.* at 1508. *Milligan*

held that the *Gingles* I requirement that districts be reasonably configured "limited any tendency of the VRA to compel proportionality." 143 S. Ct. at 1509. As Defendants concede, the Supreme Court has rejected plans that "would bring States closer to proportionality *when those plans violate traditional redistricting criteria*." Def. Supp. Br. 20 (quoting *Milligan* 143 S. Ct. at 1510 n.4) (emphasis added). Here, however, the District Court, properly applied *Gingles* I, *see supra*, Part I, and concluded that "[Plaintiffs'] illustrative plans . . . satisfy the reasonable compactness requirement of *Gingles* I." ROA.6740.

And while "[f]orcing proportional representation is unlawful," *Milligan*, 143 S. Ct. at 1509, the mere fact that a § 2 claim might result in proportional representation of a minority group—as was the case in *Milligan* itself, *see Singleton*, 582 F. Supp. 3d at 1025–26—does not automatically render it invalid. That a plan with two majority-Black districts might make Black voters' representation in Louisiana's congressional delegation proportional to their numbers in the State's population does not render those conclusions clearly erroneous.

V. The Preliminary Injunction Is Not Moot.

Defendants incorrectly argue that because the 2022 congressional elections have already taken place under the challenged plan, the "harm" that Plaintiffs seek to enjoin is "complete," mooting the preliminary injunction. Reply Br. at 6. This argument fundamentally misunderstands the nature of the District Court's preliminary injunction. Here, the District Court enjoined the Louisiana Secretary of State from "conducting *any* congressional elections under the map enacted by the Louisiana Legislature in H.B. 1." ROA.6636 (emphasis added).

In June, *Milligan* affirmed a similarly worded injunction approximately six months after the 2022 election. *See Singleton*, 582 F. Supp. 3d at 936 (enjoining Alabama Secretary of State Merrill "from conducting *any* congressional elections according" to the enacted map) (emphasis added). Of course, mootness would have deprived the Supreme Court of subject matter jurisdiction over the Alabama district court's injunction. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978) ("At the threshold, we confront a question of mootness. Although not raised by the parties, this issue implicates our jurisdiction"). It would therefore have been proper for the Supreme Court

to raise it *sua sponte* if it had any mootness concerns. *Id.*; *see also Rocky v. King*, 900 F.2d 864, 866 (5th Cir. 1990) (explaining that mootness is a jurisdictional issue that "quite clearly can be raised *sua sponte*"). Thus, *Milligan*'s affirmance of the Alabama district court's preliminary injunction—approximately six months after the 2022 congressional election—demonstrates that the preliminary injunction was not moot. On remand, the *Milligan* district court agreed. "Black Alabamians will be forced, if we do not address the matter, to continue to vote under a map that we have found likely violates Section Two." *Milligan II*, ECF No. 272, at 121 n.20. That, the court held, "constitutes a live and ongoing injury." *Id.*

The same is true here. By its terms, the District Court's preliminary injunction was not limited to the 2022 election. And for good reason. Defendants' specious argument that the possibility of a full trial on the merits in advance of 2024 discharges any possibility of irreparable harm ignores the District Court's factual findings about the ongoing and irreparable harm to Plaintiffs. As the District Court's order expressly recognized, "If the 2022 election is conducted under a map which has been shown to dilute Plaintiffs' votes, Plaintiffs' injury will persist unless the

map is changed for 2024." ROA.6775-6776. The point of a preliminary injunction is to prevent such harm while the judicial process plays out. *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 441 F.2d 560, 561 (5th Cir. 1971); *cf. Knox v. Service Employees*, 567 U.S. 298, 307 (2012) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot."). Because the preliminary injunction remains necessary to prevent imminent irreparable harm, it is not moot.

CONCLUSION

This Court should affirm the District Court's preliminary injunction.

Respectfully submitted,

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September 6, 2023

CERTIFICATE OF SERVICE

I, Stuart Naifeh, a member of the Bar of this Court and counsel for appellees certify that, on September 6, 2023, a copy of the Supplemental Brief of Appellees was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/S/ Stuart Naifeh
STUART NAIFEH

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Stuart Naifeh, a member of the Bar of this Court and counsel for appellees certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.3, that the Supplemental Brief of Appellees is proportionately spaced, has a typeface of 14 points or more, except for footnotes, which are 12 points, and contains 10,029 words.

/S/ Stuart Naifeh
STUART NAIFEH

September 6, 2023

APPENDIX

Louisiana Congressional Districts HB1 Plan

Source: U.S. Census Bureau 2020 Census Data;
Louisiana State Legislature tRedistricting website

By: Tony Fairfax, CensusChannel LLC
Date: 4/4/22
Version 1

Louisiana Congressional District 6 HB1 Plan

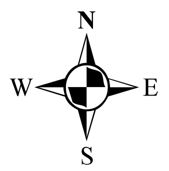
Avoyelles
West Feliciana
East Feliciana
5
St. Helena
Washington
St. Landry
Evangeline
4
Pointe Coupee
Tangipahoa
East Baton Rouge
West Baton Rouge
Livingston
St. Tammany
Acadia
St. Martin
Lafayette
Iberville
Ascension
St. John the Baptist
Orleans
St. James
2
St. Charles
St. Bernard
Jefferson
Assumption
3
Vermilion
St. Mary
6
Iberia
Lafourche
1
Plaquemines
Terrebonne

Legend

Parishes
Water
DISTRICT
1
2
3
4
5
6

Source: U.S. Census Bureau 2020 Census Data

By: Tony Fairfax, CensusChannel LLC
Date: 4/4/22
Version 1



Louisiana Congressional Districts Illustrative Plan 2

Source: U.S. Census Bureau 2020 Census Data

By: Tony Fairfax, CensusChannel LLC
Date: 4/28/22
Version 1