No. 23-30642

In the United States Court of Appeals for the Fifth Circuit

IN RE JEFF LANDRY,
IN HIS OFFICIAL CAPACITY AS THE LOUISIANA ATTORNEY GENERAL AND
KYLE R. ARDOIN, IN HIS OFFICIAL CAPACITY AS LOUISIANA SECRETARY OF STATE,

Petitioners

PETITIONERS' REPLY BRIEF

On Petition for a Writ of Mandamus from the
United States District Court
for the Middle District of Louisiana
No. 3:22-cv-00211 (Hon. Shelly D. Dick)

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CERTIFICATE OF INTERESTED PERSONS

Under the fourth sentence of Fifth Circuit Rule 28.2.1, the Petitioners are governmental parties and therefore need not furnish a certificate of interested parties.

Dated: September 21, 2023

/s/ Jason B. Torchinsky
JASON B. TORCHINSKY

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INTRODUCTION

This petition is manifestly *not* about "ordinary docket management." *See* Robinson Resp. at 1; *accord* Galmon Resp. at 1. As set out in the State's Petition, the issue screeching for this Court's intervention is the district court's *refusal* to set a trial, and instead to conduct a three-day *remedial* hearing without ever fully and fairly resolving whether the Plaintiffs are *actually entitled* to the relief that the district court is poised to enter. Issuing a remedy without establishing liability is a constitutional violation of the highest order, and the district court has made it crystal clear that it intends to squelch any full and fair opportunity for the State to show that it acted in accordance with all applicable law when it created its congressional voting-district boundaries.

Preliminary injunctions are necessarily *preliminary*. This is why a court may issue them on a truncated record and through proceedings that relax the rules of evidence (points wholly ignored by the Plaintiffs and the district court in their respective filings). The trade-off, however, is that they may only issue to maintain the status quo while a case proceeds, and they may only issue if maintaining the status quo is

necessary to prevent an immediate injury that cannot be remedied unless the status quo is maintained.

The status quo is this. It's September 2023. There are no congressional elections until November 2024. The State could have *no* voting-district map as of the day of this filing, and the Plaintiffs would suffer no injury for the better part of a year.

There may yet still be time for the court to fully and fairly litigate the merits of the Plaintiffs claims while leaving time for the appellate process—*if the district court sets a trial and holds it soon*.[1] There will certainly not be time if the district court refuses to set a trial until some

[1] The district court's refusal to set a trial on the merits and instead to proceed with a remedial proceeding places the litigants in a position to have *less* time to fairly and fully litigate the case, including fulsome discovery and briefing, before the next election. This is somewhat of a theme in this case, as the Court ordered the parties to brief a schedule for the remedial proceeding and then wholly failed to act for a *month* (which is 50 percent of the time that the State had to prepare for the remedial phase) before issuing a schedule. *Compare* ECF No. 250 ("The parties shall meet and confer and jointly submit a proposed pre-hearing scheduling order on or before Friday July 21, 2023.") *with* ECF No. 275 (September 7, 2023 order setting pre-hearing deadlines). The schedule was issued only *after* the State informed the district court that there was insufficient time for a fulsome hearing. *See, e.g.*, ECF No. 260-1, at 6. Fundamentally, what the State asks for here is fairness as embodied by the Federal Rules, federalism, due process, and old-fashioned common sense, which they have thus far been denied.

indefinite point after it issues a preliminary-injunction remedial map, and the Plaintiffs know this.[2] And even as recently as its filing in this writ proceeding, the district court has *still* declined to say when (or even if) it will set a trial,[3] choosing instead to double down on its decision to grant wholly unnecessary and jurisdictionally unsound *preliminary*-injunctive relief. If the district court persists in its refusal to hold a trial in advance of the 2024 congressional elections (which will obliterate any chance for this Court to conduct meaningful appellate review), it will inexorably mean that the preliminary-injunction remedial map that it is about to foist upon the State will govern the 2024 congressional elections.

The State has a right to its day in court—and not a truncated day during which the rules of evidence are relaxed, and the district court need only decide likelihood of success on the merits instead of actual success

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[2] Indeed, the *Robinson* Plaintiffs explicitly made this point in the brief they filed in *Robinson v. Ardoin*. *See* 9/6/2023 Supp. Br. of Robinson Plaintiffs, *Robinson v. Ardoin*, No. 22-30333 (5th Cir.) (construing as "specious" the argument that there is enough time to hold a trial on the merits).

[3] Even now, the district court will not commit to actually holding a trial. *See* Dist. Ct. Resp. at 1 ("After the merits panel completes its review, *should this matter proceed to a trial on the merits*, the Court will be guided by this Court's merit panel ruling and the most recent pronouncement of the United States Supreme Court." (emphasis added)).

on the merits. The district court is denying the State this right. This Court, by issuing this Petition, can preserve the State's right, but if it chooses not to, the injury will petrify into irreparability. For all these reasons, the writ should issue.

ARGUMENT

I. GIVEN THE CIRCUMSTANCES IN THIS CASE (NOT SOME OTHER), THE STATE HAS AN INDISPUTABLE RIGHT TO A TRIAL ON THE MERITS BEFORE THE DISTRICT COURT ORDERS A REMEDY.

The State's petition set out at length why it has a manifest right to the relief it seeks here, Pet. at 13–20, which distills to an opportunity to make its case at a fulsome and fair trial on the merits of the Plaintiffs' Section 2 claims that proceeds along a reasonable schedule. Given the exigency of these proceedings, it will refer the Court to that filing, while addressing primarily the Plaintiffs' and the district court's counterarguments. None have any merit whatsoever.

A. The most glaringly specious argument, one relied on by both sets of Plaintiffs, is that the district court's preliminary-injunction order "enjoins the Secretary of State from 'conducting *any* congressional elections' under the enacted plan." Robinson Resp. at 2–3 (quoting *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 766 (M.D. La. 2022) (emphasis

in original)).[4] That the district court issued an inappropriately broad preliminary injunction solves nothing. Doing so, and then declining to set a trial to obviate the need for extraordinary injunctive preliminary relief, *aggravates* the problem, rather than alleviating it.

At the risk of redundancy, a ruling at the preliminary-injunction stage is *not* the same as a final merits determination. The point of a preliminary injunction is to "preserve the status quo" until a "full hearing" on final relief. *Wenner v. Tex. Lottery Comm'n*, 123 F.3d 321, 326 (5th Cir. 1997) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). This is true as a matter of common English usage (preliminary in fact does mean preliminary) and more than four decades of U.S. Supreme Court caselaw: "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." *Camenisch*, 451 U.S. at 395.[5]

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[4] *See also* Robinson Resp. at 18 ("Petitioners point to nothing in the preliminary injunction that limits its scope to the 2022 Congressional elections."); *accord* Galmon Resp. at 3, 14.

[5] This is made even more galling because the injunctive relief that the district court stands ready to issue is *mandatory* not merely *prohibitory*. The status quo is about to be upended and a new state law (i.e., a new redistricting map) is about to be foisted upon the State via the district court acting as an ersatz legislature.

Given these principles, the district court may not fritter away time that could be devoted to a full and fair trial on the merits by entering a preliminary injunction order keyed towards "*any* congressional elections." *Robinson*, 605 F. Supp. 3d at 766 (emphasis added). Doing so while refusing to set a final trial essentially converts a preliminary injunction into a de facto permanent injunction without abiding by the Rule 65 strictures for doing so. There is no conceivable principle that justifies the district court's decision to take this tact, and neither the Plaintiffs nor the district court have even attempted to articulate one.

A motion for injunctive relief becomes moot when the alleged immediate irreparable harm is complete. That happened in 2022. No other election is scheduled "before a decision on the merits can be rendered." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). This means that the preliminary-injunction remedial stage is moot,[6] a final trial must be set, and the district court's attempt to resurrect the

[6] *Allen v. Milligan*, 143 S. Ct. 1487 (2023), provides the Plaintiffs with no recourse. The parties in *Allen* did not raise any mootness claims, and the Supreme Court has repeatedly held "that drive-by jurisdictional rulings" like that "have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

former instead of scheduling the latter exceeds its jurisdiction and entitles the State to mandamus relief.

B. The district court's argument is essentially that all the work it did regarding the preliminary injunction hearing can translate to a final trial on the merits: "There is no risk of redundant proceedings because the evidence adduced at the injunction hearings is admissible at trial and becomes part of the trial record along with any new evidence admitted at trial." Dist. Ct. Resp. at 2. That is wrong. And every court/authority to address the issue has agreed that it is wrong.

"Inasmuch as the grant of preliminary injunction is discretionary, the trial court should be allowed to give even inadmissible evidence some weight when it is thought advisable to do so in order to serve the primary purpose of preventing irreparable harm before a trial can be held." 11 C. Wright & A. Miller, Federal Practice & Procedure § 2949 at 471. Indeed:

> Affidavits and other hearsay materials are often received in preliminary injunction proceedings. The dispositive question is not their classification as hearsay but whether, weighing all the attendant factors, including the need for expedition, this type of evidence was appropriate given the character and objectives of the injunctive proceeding.

Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 558 (5th Cir. 1987) (quoting *Asseo v. Pan Am. Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986)).

Cases standing for this point are legion.[7] That the district court has failed to grasp this elementary point (and has argued against it in support of its erroneous decisions) underscores how badly this Court needs to issue this writ.

C. Finally, the changing legal landscape matters tremendously. Even if *Allen v. Milligan*, 143 S. Ct. 1487 (2023), left intact the *Gingles* test, it does not follow that *Allen* changed *nothing* that courts throughout the Nation need to consider as they address Section 2 cases going forward. Louisiana's political geography and voting patterns differ from Alabama's in fundamental respects that the Plaintiffs refuse to acknowledge, and given the extraordinarily fact-intensive way in which Section 2 cases must be litigated, these differences are critical. *Allen*, at a minimum, affects the way that the district court must consider proportionality, communities of interest, and compactness of minority

[7] *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013); *Solis v. Ascension Par. Sch. Bd.*, No. 17-00677-BAJ-RLB, 2018 U.S. Dist. LEXIS 132237, at *2 (M.D. La. Aug. 6, 2018); *Shreveport Chapter #237 of United Daughters of the Confederacy v. Caddo Par. Comm'n*, No. 17-1346, 2018 U.S. Dist. LEXIS 80905, at *12 (W.D. La. May 14, 2018); *Louisiana v. Ctrs. for Disease Control & Prevention*, 603 F. Supp. 3d 406, 417 n.37 (W.D. La. 2022); *Mendoza v. Garrett*, 358 F. Supp. 3d 1145, 1160 (D. Or. 2018)

communities, 143 S. Ct. at 1505, 1509, each of which played into the district court's analysis during the preliminary-injunction proceedings, *see Robinson*, 605 F. Supp. 3d at 851. And *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023), (at a minimum) should give the district court pause when considering whether the State of Louisiana should be forced to engage in the sort of racial sorting the Equal Protection Clause abhors.

II. THE DISTRICT COURT'S REFUSAL TO SET A TRIAL BEFORE IT ISSUES A REMEDY MEANS THAT MANDAMUS IS THE ONLY WAY FOR THE STATE TO GET THE RELIEF TO WHICH IT IS ENTITLED.

To be sure, these issues discussed above cannot be addressed during the forthcoming merits argument before this Court. This Court has no power to affect the proceedings that occurred after the State's 2022 notice of appeal. And the Plaintiffs have said nothing that can change this point.

According to the Robinson Plaintiffs, the State has implied that "the fully briefed merits appeal of the preliminary injunction is inadequate because the record on appeal is incomplete and fails to include intervening events. This Court, however, has the benefit of substantial, up-to-date, briefing from both parties on the merits." Robinson Resp. at 22. The legal error in that statement is palpable. The incompleteness of

the *record* cannot be remedied through *briefing* submitted to an appellate court that does not have the authority to take evidence. Creating the evidentiary record *must* happen at the district court level. And the opportunity to create the evidentiary record through a full and fair trial on the merits is what the State wants, what the Federal Rules provide for, and what the district court (with the urging of the Plaintiffs) has refused.

The notion that the State "can appeal in the ordinary course (as they already have), challenge on such an appeal any remedial map the district court may adopt, and attempt again to stay the injunction pending appeal," is even more farcical (and it is entirely inconsistent with the arguments the Robinson Plaintiffs made in the brief they filed in the preliminary injunction appeal). *Compare supra* n.2 *with* Robinson Resp. at 21; *accord* Galmon Resp. at 14. As set out at length, there is no time for an appeal "in the ordinary course" from the district court's moot remedial hearing, and then from a trial that the district court has yet to set, for ultimate resolution before the 2024 congressional elections. If these maps are to be set before the 2024 congressional elections, the parties need a full trial to be set as soon as practicable.

III. MANDAMUS IS APPROPRIATE BECAUSE THIS CASE IS EXTRAORDINARY.

Finally, this is the type of extraordinarily important case for which mandamus is appropriate. Indeed, even the Plaintiffs concede that it is "deeply important to the litigants and the people of Georgia [sic]." Galmon Resp. at 4. The fairness of the franchise in Louisiana is at issue here, as are principles as deeply important to the fabric of our Nation as the Equal Protection rights of thousands, if not millions, of Louisiana voters. This case matters terrifically, and the Court should take the opportunity to ensure that these profoundly important proceedings are litigated fully in accord with all principles of due process, fairness, and with principles of federalism that the State should enjoy.

CONCLUSION

For all these reasons, the Court should issue the petition for a writ of mandamus.

Dated: September 21, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it is 2,497 words, excluding the parts that are exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Century Schoolbook font, a proportionally spaced typeface with serifs.

Dated: September 21, 2023

/s/ Jason B. Torchinsky
JASON B. TORCHINSKY

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2023, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, which will serve it on all counsel of record, as well as the district court.

I hereby further certify that on September 21, 2023, a true and correct copy of the foregoing was caused to be delivered to the district court by Federal Express:

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