No. 23A281

In the Supreme Court of the United States

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

ROBINSON PLAINTIFFS' REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY OF WRIT OF MANDAMUS

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TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT:

INTRODUCTION

The State's arguments reveal that the grant of the writ of mandamus was predicated on a fallacy. Although the State now embraces the mandamus panel's rationale that the Legislature should have been afforded an opportunity to develop a remedial map—having not requested that opportunity from either the district court or in its mandamus petition—the State confesses that the Legislature had and has no intention of availing itself of such an opportunity so long as the State's appeal of the preliminary injunction is pending. (Indeed, it is striking that the Legislative Intervenors, who have been parties to this litigation since shortly after it was commenced, did not join the mandamus petition and have submitted no brief on the present stay application.[1])

Instead, according to the State, the Legislature has *chosen* not to enact a remedial map while the State's appeal from the district court's preliminary injunction remained pending. That is certainly the Legislature's prerogative. But the Legislature's tactical choice cannot justify a writ of mandamus precluding the district court from moving forward to devise a court-ordered plan to ensure that some map will be in effect pending a final resolution of this litigation. That is particularly so

[1] The State's brief is written on behalf of the Secretary of State and the State Intervenor in the case. The Legislative Intervenors—the Speaker of the Louisiana House of Representatives and the President of the Louisiana Senate—are represented by separate counsel and did not join the application to the Fifth Circuit nor the opposition to Plaintiffs' filings to this Court.

where, as in this case, the Fifth Circuit has already denied the State's motion for a stay pending appeal, and it is squarely contrary to this Court's direction that the case proceed "in the ordinary course and in advance of the 2024 congressional elections in Louisiana." *Ardoin* v. *Robinson*, 143 S. Ct. 2654 (2023).

The State further distorts the procedural history of the case below, maligning the district judge as a rogue actor for moving forward with an orderly process for effectuating the preliminary injunction after the Fifth Circuit and this Court repeatedly declined the State's efforts to halt or further delay that process. Contrary to the State's protestations, there is nothing unusual about how this case has proceeded. Plaintiffs filed a complaint challenging the Legislature's enacted congressional redistricting plan after telegraphing for months that they would do so. They moved for a preliminary injunction on an expedited basis, as is typical with preliminary injunction proceedings. The State mounted a robust defense, including nine witnesses at the hearing and post-trial briefing. Following a five-day evidentiary hearing, the injunction was granted, enjoining use of the Legislature's map. The governor called the Legislature into special session to develop a new map. But before a new map could be adopted through either a legislative or court-supervised process, the State appealed and sought a stay, which the Fifth Circuit denied. At that point, it became inevitable—and entirely proper—that remedial proceedings would go forward in parallel with the appeal of the preliminary injunction. That process was suspended when this Court issued a stay and granted certiorari before judgment in June of 2022. Upon lifting that stay and dismissing the writ of certiorari as

improvidently granted, the case picked up in the lower courts where it had left off—with remedial proceedings in the district court and an appeal of the preliminary injunction pending before the Fifth Circuit.

Since this Court lifted the stay, the State has repeatedly sought to delay the remedial proceedings, urging many of the same arguments it presents here. In response to a request from the Fifth Circuit merits panel to advise it whether the case should be returned to the district court to consider this Court's recent decision in *Allen v. Milligan* in the first instance, the State asked the court to vacate the injunction and remand to the district court; instead, the Fifth Circuit set the appeal for argument. The State then made several requests to delay or suspend remedial proceedings in the district court, each of which was denied. Rather than renew its request for a stay with the Fifth Circuit, the State filed a petition for writ of mandamus.

At bottom, the State's brief simply lays bare its goal of delaying remedial proceedings as long as possible in the hope that the exigencies of the election cycle will overtake that process, and it can conduct another congressional election under a map that two lower courts found likely violates Section 2 of the Voting Rights Act. But a desire for delay and a lack of success in ordinary litigation proceedings are not grounds for mandamus. This Court should grant the application for a stay.

I. The State's opposition confirms that Plaintiffs are likely to succeed in establishing that issuing the writ of mandamus was improper.

A. The State has disavowed that the mandamus was required to secure any clear and indisputable right.

The State's brief in opposition demonstrates that the writ of mandamus is predicated on a fallacy. The mandamus panel rested its ruling on the premise that the district court erred in failing to "afford the legislative body that becomes liable for a Section 2 violation the first opportunity to accomplish the difficult and politically fraught task of redistricting." App. 495. But the State does not dispute that, following vacatur of the stay pending this Court's decision in *Milligan*, the Legislature had the opportunity to "take[] it upon itself to create a remedial map" in compliance with the district court's order to do just that. Opp. at 16.[2] Instead, the State admits that the Legislature made a deliberate choice *not* to draw any remedial map to avoid "effect[ing] a remedy against itself" until the conclusion of the appeal on the merits of the preliminary injunction. *Id.* (The State does not clarify whether the Legislature

[2] The State's own briefing explains why the mandamus panel could not properly have considered the State's resuscitation of its additional arguments (Opp. at 6–7) that it had insufficient time to implement a remedial map between the issuance of the preliminary injunction and the date in 2022 on which the district court originally scheduled the remedial hearing. One of the core premises of the State's argument that it had "no other choice but to petition for a writ of mandamus" is that, "even though the appeal from the 2022 preliminary-injunction order remained pending at the Fifth Circuit, the Fifth Circuit has no jurisdiction to consider arguments related to proceedings that occurred *after* that appeal was perfected in June 2022." Opp. at 10 (emphasis in original). But the State raised its arguments about the inadequate time it was afforded to draw a map between the preliminary injunction and the remedial hearing scheduled to take place in 2022 in motions for a stay pending appeal (App. 132, 134–35, 138–43, 159, 164, 173, 175–177) and its briefs appealing the preliminary injunction (*Robinson v. Ardoin*, No. 22-30333, Doc. 155-1 at 1 & Doc. 248 at 29–31), foreclosing any argument that the mandamus petition was the only vehicle for the State to raise these grievances.

would call itself into session to draw a remedial map following a Fifth Circuit ruling in Plaintiffs' favor, or whether the Legislature would continue to wait while the State seeks review in this Court of any adverse decision from the Fifth Circuit.)

That choice is the Legislature's prerogative, of course. Plaintiffs do not contend that the Legislature *had* to draw a remedial map before the conclusion of the appeal. But the Legislature's choice has consequences. The Legislature declined the opportunity to draw a new map with the full knowledge that the Fifth Circuit had already denied a motion for a stay of remedial proceedings in the district court pending appeal of the preliminary injunction. The State cannot now transform the Legislature's refusal to avail itself of the opportunity to draw a remedial map into an automatic stay that prevents the district court from moving forward with a remedial hearing despite the Fifth Circuit's express denial of an equivalent stay and its refusal of the State's request for vacatur of the injunction. And indeed, this Court also acknowledged that the case would continue in the same posture it was in June 2022 when it directed, in lifting the stay, that the case proceed in the ordinary course and in advance of the 2024 congressional elections.

The State's admission that the Legislature does not wish to draw a new map until after the exhaustion of appeals from the district court's preliminary injunction and its concession that the Legislature would not actually draw a new map at this time even if it were given more time to do so eviscerates the mandamus panel's basis for issuing the writ of mandamus. The mandamus panel concluded that the State had a clear and indisputable right to the writ of mandamus because the Legislature "must

usually be afforded an adequate opportunity to enact revised districts before the federal court steps in to assume that authority." App. 489. Even assuming *arguendo* that the Legislature was entitled to a second opportunity to enact a remedial map prior to the remedial hearing (*but see* Emergency Stay App. at 22–26), the State's position that the Legislature knowingly and intentionally *declined to avail itself of the opportunity* to draw a new map after the stay was lifted makes plain that issuing the writ of mandamus was erroneous.

B. The State failed to demonstrate that it has "no other adequate means" to obtain the relief it seeks.

The State's contention that there was "no other way to secure relief" except for a writ of mandamus, Opp. at 17, is contravened by the lengthy procedural record of its failed attempts to do just that. The State has had numerous opportunities to seek the same relief it seeks through writ of mandamus. *See* App. 113, 432, 543; Emergency Stay App. at 8–11. Indeed, it has been seeking that relief since the day the injunction was granted. The State sought a stay from the Fifth Circuit, which was denied. It sought a stay from this Court, which was granted. When that stay was lifted, it asked this Court to set the case for briefing and argument rather than return it to the lower courts, but that request was denied. On remand to the Fifth Circuit, the State asked the Fifth Circuit to summarily vacate the injunction and remand the case to the district court for further proceedings in light of *Milligan*, but that request, too, was denied. In the district court, the state asked the court to forego remedial proceedings and set the case for trial. When the district court denied that request and

scheduled a remedial hearing, the State sought on more than one occasion to cancel or continue that hearing, and in each case, the motion was denied.

The State's assertion that the Fifth Circuit merits panel that heard oral argument on October 6, 2023, lacks jurisdiction to address what it sees as the district court's more recent errors is beside the point. Opp. at 17. The merits panel has and has always had the power to issue a stay of the order being appealed under Fed. R. App. P. 8. Indeed, the motions panel that denied the stay in 2022 acknowledged that the merits panel might take a different view either before or after briefing and argument. *See Robinson* v. *Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022). The merits panel has not done so *sua sponte*, and the State never renewed its request for a stay with the panel after remand from this Court, perhaps because it lacks confidence that such a request would be successful. Alternatively, as the State acknowledges, Opp. at 17, it has the right to appeal any order imposing a remedial map, and such an appeal could be consolidated with the appeal of the preliminary injunction before the same panel.[3] The simple truth is that the State has taken action, and can still take action, to press its arguments and obtain relief through the normal avenues of district court motions practice and direct appeal. The fact that the State has failed in the efforts it has made thus far, and that it has failed to avail itself of other avenues for relief, does not meet the "high bar" of demonstrating that it has no other adequate means to

[3] Indeed, the State could have waited until the remedial process was complete before appealing the injunction, which would have avoided the piecemeal proceedings from the outset. In other words, the dual-track nature of the current proceedings—if it is a problem at all—is a problem of the State's own making.

obtain relief such that mandamus is warranted. *In re Depuy Orthopaedics*, 870 F.3d 345, 352 (5th Cir. 2017).

II. The only injury here is to the Plaintiffs, and the balance of equities favors relief.

The State argues that the balance of equities tilts in favor of keeping the mandamus in effect because, it contends, a remedial hearing "would hamper the full and final resolution of the Plaintiff's claims." Opp. at 21. The State's argument misses the mark.[4] Plaintiffs, too, desire a trial on the merits as soon as possible so that its claims may "be fully, fairly, and finally adjudicated." *Id.* But a remedial proceeding (and any subsequent State appeal of the remedial map) does not conflict with conducting a trial on the merits nor does it deprive the State of its "day in court." *Id.* at 16. The district court has every ability to conduct a remedial hearing—for which "preparation . . . was essentially complete," App. 579—while expeditiously proceeding to a trial on the merits well in advance of the 2024 elections. *See also* App. 504 ("There is no support for the assertion that the hearing, lasting for three days at the beginning of October, is mutually exclusive with progression to a full merits trial.").

What matters is not whether an election is "imminent," Opp. at 22, but instead whether meaningful relief can be instituted in time to avoid the irreparable harm

[4] At times, the State suggests that the writ of mandamus has the effect of precluding adoption of a remedial redistricting plan prior to trial on the merits. *See, e.g.*, Opp. at 20. But the writ only *delayed* the remedial proceedings, and indeed, the mandamus panel could not have done what the State suggests without effectively overturning the preliminary injunction, the merits of which is currently pending before a separate panel. Rather than acknowledge the limits of the writ and the limited authority of mandamus panel, the State spends much of its brief arguing the merits of the underlying preliminary injunction—an issue that was not before the mandamus panel and that is not before this Court. This Court should disregard those misplaced arguments.

inherent in proceeding with unlawful maps. In the present case, there is no assurance that the courts will be able to fully and finally address Plaintiffs' claims sufficiently in advance of the 2024 elections that imposition of a remedy after trial will not be barred by the *Purcell* doctrine. The State's carefully worded brief provides no assurance in that regard. It asserts only that "it remains *possible* that the Plaintiffs' Section 2 claims will be fully resolved before another congressional election cycle." Opp. at 6 (emphasis added). And the State tells the Court, as it told the Fifth Circuit merits panel, that an "orderly" 2024 election can take place only if "there is a final resolution on liability and a map is in place by May 2024," Opp. at 20—only seven months from now.

What the State fails to acknowledge is that it has also repeatedly endeavored to delay a trial on the merits. Just last week, it argued to the Fifth Circuit merits panel that, in view of this year's statewide executive and state legislative elections, a trial cannot take place this calendar year and may only take place after February 15 of next year, after newly elected state officials will have taken office. The State has also already signaled its intention to appeal any outcome of the trial on the merits and a desire to hold a special remedial redistricting session only after its appeals have been exhausted. *See, e.g.*, App. 470. And only after that, according to the State, can a court-supervised remedial process begin. The district court ordered the remedial hearing based on its preliminary injunction to guard against the risk that prolonged litigation and legislative action would result in a second congressional election under an unlawful map before a final judgment can be rendered. That assessment was made

in light of the district court's familiarity with the proceedings thus far and in accordance with its well-established powers to manage its own docket.

The State suffers no harm if remedial proceedings move forward alongside any merits proceedings. Indeed, the only thing that the State's mandamus petition accomplishes is further delay of the final resolution of this case and the necessary attendant relief through the entry of remedial maps.[5] This delay comes at the heavy price of risking that, yet again, the fundamental voting rights of Plaintiffs and thousands of Black voters in Louisiana will be impaired by having to vote in another election under a congressional district map that the district court held likely dilutes their votes unlawfully. Staying (or reversing) the writ of mandamus would enable the district court to reschedule the remedial hearing at the earliest possible date, which

[5] The State's shifting positions on the timing required to enter final judgment prior to 2024 congressional elections are consistent with its repeated prior attempts to delay this case and should give this Court pause about the State's alleged desire for prompt resolution. Last year, the State represented to the district court that May 18, 2022 was too late under *Purcell* to implement a new district map in time for the 2022 congressional elections. *Robinson* v. *Ardoin*, 3:22-cv-00211-SDD-SDJ, Doc. 158 at 22–25. And in its September 15, 2023 mandamus petition to the Fifth Circuit, the State represented that "the 2024 congressional elections are roughly sixteen months away," which is "just enough time to hold a trial on the merits of the Plaintiffs claims and to allow the appellate process to run its course in advance of those elections." App. 470. Yet just last Friday, the State represented to the Fifth Circuit that four to six weeks before the July candidate qualifying deadlines would be sufficient time to implement a new map, and in its response brief, the State now argues that an election can occur if there is final resolution and a map in place by "late May 2024." Opp. at 20; *see also* Oral Argument at 8:47–9:13, *Robinson* v. *Ardoin*, No. 22-30333, https://www.ca5.uscourts.gov/OralArgRecordings/22/22-30333_10-6-2023.mp3 ("Q: When would everything have to be wrapped up? . . . Is that four to six weeks? A: Probably something like that."). The State's inconsistent positions and delay of a remedy by seeking mandamus contradict the notion that it "doesn't want" "unresolved Section 2 litigation" to continue past the 2024 election. Opp. at 18.

is the only way to insure against further harm and vindicate the public interest in conducting congressional elections under a lawful map.

CONCLUSION

Plaintiffs' emergency application for a stay should be granted.

Respectfully submitted,

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