IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

DR. DOROTHY NAIRNE, REV. CLEE EARNEST LOWE, DR. ALICE WASHINGTON, STEVEN HARRIS, BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, and THE LOUISIANA STATE CONFERENCE OF THE NAACP, *Plaintiffs*, v. R. KYLE ARDOIN, in his official capacity as Secretary of State of Louisiana, *Defendant*.	Civil Action No. 3:22-cv-00178 SDD-SDJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' JOINT MOTION TO STAY PROCEEDINGS

Defendants' *Joint Motion to Stay Proceedings* (ECF No. 184)—filed the night before Thanksgiving—and based purely on speculation about an outlier decision from the Eighth Circuit—is frivolous and should be denied. Plaintiffs, Dr. Dorothy Nairne, Rev. Clee Earnest Lowe, Dr. Alice Washington, Steven Harris, Black Voters Matter Capacity Building Institute, and the Louisiana State Conference of the NAACP, by and through undersigned counsel, respectfully submit this Opposition to Defendants' motion. Granting a stay at this late date would severely prejudice Plaintiffs. Defendants do not even come close to showing good cause for such extraordinary and prejudicial relief.

Judicial power to stay trial proceedings is inherently within the Court's authority "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). The decision of whether to stay proceedings "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254–55. Factors include: "(1) the potential prejudice to the nonmoving party from a brief stay; (2) the hardship and inequity to the moving party if the action is not stayed; and (3) the judicial resources that would be saved by avoiding duplicative litigation." *Synqor, Inc. v. Cisco Sys., Inc.*, No. 2:14-cv-286-RWS-CMC, 2015 WL 12910769 (E.D. Tex. Aug. 10, 2015), at *1.

Defendants' sole basis for seeking a stay spins a chain of hypotheticals from a nonbinding Eighth Circuit decision in *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, aff'd, No. 22-1395, 2023 WL 8011300 (8th Cir. Nov. 20, 2023) ("*Arkansas NAACP*"), the first time since the passage of the Voting Rights Act of 1965 that a federal appellate court has held that only the federal government may bring Section 2 actions. The Court should deny Defendants' motion for at least three independent reasons.

First, binding Fifth Circuit precedent, *Robinson v. Ardoin*, No. 22-30333, 2023 WL 7711063 (5th Cir., Nov. 10, 2023), holds that private parties can bring Section 2 cases. *Id.* at *5 (relying on *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017)). In *Robinson*, the Fifth Circuit emphasized that Section 2 "provides that proceedings to enforce voting guarantees in any state or political subdivision can be brought by the Attorney General *or* by an 'aggrieved person'" and that the private plaintiffs at issue—individual voters and civil rights organizations—were "aggrieved persons" who could seek to enforce Section 2. *Id.* As such, it is therefore clear in this

Circuit that "a right for [private] Plaintiffs to bring these claims" exists. *Id.*[1] Plaintiffs here—individual voters and civil rights organizations—are identically situated, and binding precedent affords them (like the hundreds of litigants to come before them) the right to enforce Section 2.[2]

Second, attempts to "predict the Supreme Court's future decisions" based on a speculative petition for certiorari that has not even been drafted—much less granted—is no basis for a stay. The remote potential for a future change in the law is not a basis for this Court to grant a stay because this Court is beyond to follow the law as it currently exists. The Supreme Court has been clear that courts must refrain from taking it upon themselves to exercise the Supreme Court's prerogatives. S*ee* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (quoting *Rodriguez de Quijas v. Shearson/Am. Exp., Inc*., 490 U.S.

[1] The Defendants' claim that "the Fifth Circuit has not engaged in an in-depth analysis" of the private right of action question is both insulting and wrong. ECF No. 184-1, at 4. The issue was squarely presented by the State in the appeal in *Robinson* and was fully briefed by the parties, and the Fifth Circuit carefully considered the arguments and its own precedent in concluding that private right of action under Section 2 exists. *Robinson*, 2023 WL 7711063, at *5.

[2] Additionally, even if Fifth Circuit reversed its position, it is likely that Plaintiffs' claims in this matter would survive because Plaintiffs' Amended Complaint also raises claims under Section 1983. *See* Amend. Com., EFC. No. 14. Courts have suggested that it is appropriate for parties to invoke § 1983 to enforce Section 2 of the VRA. *See* 42 U.S.C. § 1983; *Coca v. City of Dodge City*, No. 22-1274-EFM, 2023 WL 2987708, at *5-6 (D. Kan., April 18, 2023), motion to certify appeal denied, No. 22012740EFM, 2023 WL 3948472 (D. Kan. June 12, 2023) (holding in a Section 2 Voting Rights Act case that "Plaintiffs may alternatively assert a Section 2 claim under § 1983); *Turtle Mountain Band of Chippewa Indians v. Jaeger*, No. 3:22-CV-22, 2022 WL 2528256, at *3 (D.N.D. July 7, 2022) (holding that it was not necessary to resolve whether Section 2 contains a private of action because "§ 1983 provides a private remedy for violations of Section 2 of the VRA"). Indeed, even the Eighth Circuit's recent opinion acknowledged this. *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, No. 22-1395, 2023 WL 8011300, at *7, *29 (8th Cir. Nov. 20, 2023) ("Private plaintiffs can sue under statutes like 42 U.S.C. § 1983, where appropriate"). Defendants seem to suggest that Plaintiffs have waived these claims by not referencing them in other unrelated subsequent filings in this case but it is sufficient that Plaintiffs raised these claims in their Amendment Complaint and that these claims have never been dismissed by this Court. Moreover, the Pre-Trial Order filed by the parities in this matter makes a clear assertion that jurisdiction is appropriate because Plaintiffs' Section 2 claims "arises under 42 U.S.C. § 1983". Pretrial Order, at 1, (10-27-2023), ECF No. 161.

477, 484 (1989))) (emphasis added); *see also* U.S. v. Coil, 442 F.3d 912, 916 (5th Cir. 2006) ("The Fifth Circuit has consistently followed the Supreme Court's admonition in Rodriguez de Quijas and Agostini." (citations omitted)). This is why courts repeatedly rejected similar requests for stays pending the outcome of *Allen v. Milligan*, 599 U.S. 1 (2023), even when certiorari before the Supreme Court had actually been granted. *See, e.g.,* United States v. Galveston County, Texas, et al., No. 3:22-CV-93 (S.D. Tex. May 24, 2022), ECF No. 28 (denying motion to stay proceedings pending Merrill); LULAC v. Abbott, No. 3:21-CV-00259-DCG-JES-JVB (W.D. Tex. April 22, 2022), ECF No. 246 (summary order denying motion to stay case pending Merrill before receipt of opposition briefing); cf. Guardian Techs., LLC v. X10 Wireless Tech., Inc., No. 3:09-CV-0649-B, 2011 WL 308658, at *2 (N.D. Tex. Jan. 25, 2011) ("Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." (quoting Landis, 299 U.S. at 255)). Trial in this case starts in three days, and contrary to Defendants' assertions, there is currently no "separate case that may substantially affect, or otherwise prove dispositive" of this matter. ECF No. 184-1, at 4. The question of whether there is a private right of action under Section 2 of the VRA is settled law that this Court must follow.

The same is true of a motion for *en banc* rehearing. ECF 184-1, at 2, 4. Here, the Defendants have sought an extension of time to seek *en banc* review of the private right of action question in the Robinson appeal. *Id.* That extension has not been and may never be granted, and Defendants have not filed a petition for *en banc* rehearing, much less has rehearing been granted. In other words, Defendants are seeking a stay based on a petition for rehearing that *might* be filed and, if it is filed, *might* be granted, and if granted, *might* result in the *en banc* Fifth Circuit overturning multiple precedents to align itself with the sole circuit to reject a private right of

action under Section 2 and against the other circuits that have recognized the right of private citizens to assert Section 2 claims. A motion seeking the stay of a trial scheduled for the following business day must be grounded in something more concrete than hypotheticals and "what if" scenarios. The party seeking to change the Court's schedule has the burden of showing why there is good cause for the requested change. *See, e.g*, *Squyres v. Heico Companies, L.L.C.,* 782 F.3d 224, 237 (5th Cir. 2015); *Filgueira v. U.S. Bank Nat'l Ass'n,* 734 F.3d 420, 422 (5th Cir. 2013). No good cause has been shown.

Third, Plaintiffs face *substantial* injury from a stay order granted at this late stage. As Plaintiffs have repeatedly explained, and as this Court has repeatedly credited through past orders, the November 27, 2023 trial date best ensures that Plaintiffs' fundamental right to vote is protected and avoids the risk that *Purcell* concerns will require Plaintiffs and similarly situated voters to live with unlawful districts for years.[3] The instant motion is Defendants' *sixth* attempt to delay these proceedings (and the adjudication of Plaintiffs' rights to vote) without justification. *See* ECF Nos. 92, 99, 101, 107, and 112. As the Court has acknowledged, there must be a decision on the merits of Plaintiffs' Voting Rights Act claims in time to allow this Court to consider relief in the form of a special election in November 2024, and for any appeals to be exhausted. *See League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 248 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress. The injury to these voters is real and completely irreparable if nothing is done to enjoin this law."). In this latest motion, Defendants *again* conspicuously refuse to address the problems that any stay

[3] Defendants allege only de minimis financial injuries arising from trial, ECF No. 184-1, at 5, that do not amount to irreparable harm needed to warrant a stay. *Restaurant Law Ctr. v. U.S. Dep't of Labor*, 66 F.4th 593, 597 (5th Cir. 2023) ("[E]conomic costs may count as irreparable harm 'where they cannot be recovered in the ordinary course of litigation.'") (citations omitted).

of these proceedings would cause in light of *Purcell* (perhaps because their true motive is to ensure that any relief obtained by Plaintiffs through these proceedings cannot be effected immediately, as it should). Delaying the trial would threaten the potential for relief in 2024 and might result in the denial of effective relief until deep into the latter half of the 2020s. That risk is well worth guarding against because it would constitute irreparable harm to Plaintiffs' and others' fundamental rights under Section 2 of the Voting Rights Act.

For the foregoing reasons, the Court should deny Defendants' Joint Motion to Stay Proceedings and allow this matter to proceed with trial on November 27, 2023, as currently set.

Date: November 24, 2023

Respectfully submitted,

/s/ John Adcock

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CERTIFICATE OF SERVICE

I certify that on November 24, 2023 this document was filed electronically on the Court's electronic case filing system. Notice of the filing will be served on all counsel of record through the Court's system.

/s/ Sarah Brannon