COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

2021-C-0739

RYAN BERNI, POOJA PRAZID, STEPHEN HANDWERK, AMBER ROBINSON, JAMES BULLMAN, DARRYL MALEK-WILEY, and KIRK GREEN
Plaintiffs-Respondents

VERSUS

R. KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS LOUISIANA SECRETARY OF STATE
Defendant-Applicant

PLAINTIFFS-RESPONDENTS' MEMORANDUM IN OPPOSITION TO DEFENDANT-APPLICANT'S WRIT APPLICATION

A CIVIL PROCEEDING FROM THE
CIVIL DISTRICT COURT, PARISH OF ORLEANS
SUIT NUMBER 2021-03538, DIVISION C – SECTION 10
THE HONORABLE SIDNEY H. CATES, IV, PRESIDING

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RESPONSE TO WRIT GRANT CONSIDERATION

Plaintiffs/Respondents Ryan Berni, Pooja Prazid, Stephen Handwerk, Amber Robinson, James Bullman, Darryl Malek-Wiley, and Kirk Green ("Plaintiffs") believe this Court should decline to exercise its supervisory jurisdiction because the trial court's rulings on the declinatory and peremptory exceptions filed by Defendant/Applicant Secretary of State R. Kyle Ardoin (the "Secretary") were correct and proper.

The trial court's judgments denying the Secretary's exceptions reflect a thoughtful and appropriate application of Louisiana law, informed by persuasive rulings from other jurisdictions that have addressed the commonplace occurrence of redistricting impasse. On appeal, the Secretary raises the same arguments that the trial court correctly rejected on two occasions—and that are no more availing now than before. The trial court has subject matter jurisdiction over this action because Plaintiffs have alleged a justiciable controversy and are at imminent risk of irreparable harm absent judicial intervention. Venue is proper in Orleans Parish because that is where Plaintiffs are currently suffering the injury of malapportionment—a real and actual injury that confers standing. And the Secretary is the appropriate defendant in redistricting litigation.

The trial court twice reached the correct rulings on these issues. The Secretary's writ application should therefore be denied.

STATEMENT OF THE CASE[1]

In the tumultuous decade since Louisiana's current congressional map was enacted, the state has changed. Hundreds of thousands of new Louisianians were born, and hundreds of thousands died; people from around the world came to live here, while some former Louisiana residents sought opportunities elsewhere; and all

[1] Citations to the record reference the exhibits filed with the Secretary's Original Application for Supervisory Writs to the Honorable Sidney H. Cates, IV, District Judge ("App. 0739").

the while, the flux and churn of internal migration redistributed Louisianians across the state's 64 parishes. The result: each of Louisiana's six congressional districts is now malapportioned. Because the U.S. Constitution prohibits malapportioned districts, continued use of the enacted congressional map is unconstitutional. And absent judicial intervention or new legislation, state law would force the Secretary to use this unconstitutional map in the upcoming congressional elections.

That is why Plaintiffs filed this lawsuit—and why the trial court correctly determined that it has jurisdiction to hear it. Louisiana has a Democratic governor and a Republican-controlled legislature. Where control of the lawmaking process is divided in this way, states often fail to enact new redistricting plans, the result of often unavoidable political impasse.[2] And courts in turn routinely accept jurisdiction over actions like this one and set schedules that will ensure that new, constitutional districts are drawn well in advance of upcoming candidate-filing deadlines and elections.[3] This is the modest relief that Plaintiffs seek: a declaration that the current congressional map is unconstitutionally malapportioned; an injunction prohibiting its continued use; and a schedule with clear deadlines to ensure that a lawful map is adopted, whether legislatively or judicially, sufficiently in advance of the next federal election. If the political impasse persists past the trial court's deadline, then—and *only* then—would the judiciary be tasked with adopting a new map.

Endorsing the Secretary's position that the trial court may not accept jurisdiction despite malapportioned districts would expose Plaintiffs and their fellow

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[2] As the U.S. Supreme Court has noted, "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973). The 2010 redistricting cycle demonstrated the debilitating effect partisan divides can have on the reapportionment process. In a majority of states with divided governments—including Colorado, Minnesota, Mississippi, Nevada, New Mexico, and New York—courts were required to draw congressional maps, legislative maps, or both. Accordingly, there is nothing "speculative" or "groundless" about Plaintiffs' claim that the political branches will fail to enact a new congressional map, as the Secretary suggests. App. 0739, at p. 3. To the contrary, impasse is a recurring feature of the decennial redistricting process.

[3] As one court correctly observed, "[c]omplaints such as the one filed in this court are not uncommon." *Arrington v. Elections Board*, 173 F. Supp. 2d. 858, 860 (E.D. Wis. 2001) (three-judge panel) (collecting cases).

Louisianians to serious constitutional injury. Fortunately, the Secretary's position is wrong. Louisiana's judiciary has the power and duty to act when a plaintiff has established that injury is imminently impending, and that judicial process must begin *now* to make available the tailored relief that courts across the country routinely provide in similar circumstances during every redistricting cycle. Indeed, in Minnesota and Wisconsin—states, like Louisiana, with political divisions between control of the governorship and the houses of the legislature—courts have *already* taken steps to adjudicate lawsuits alleging likely impasse between the political branches.

The Secretary's twice-overruled exceptions provide no compelling argument for dismissal of Plaintiffs' claims. Venue is proper in Orleans Parish, where residents are currently suffering the injury of malapportionment. The current controversy is live, and courts *must* provide the necessary judicial backstop to avoid the harms that will follow from impasse. And the appropriate parties have been named: in redistricting cases, voters in overpopulated districts may sue, and the Secretary must defend. For these reasons and those that follow, the Secretary's application should be denied, and the trial court should be permitted to proceed with the vital task that will soon be before it.

A. Louisiana's congressional districts are malapportioned and the risk of impasse is substantial.

On April 26, 2021, the U.S. Secretary of Commerce delivered the results of the 2020 decennial census to the President.[4] The results reported that Louisiana now has a resident population of 4,657,757, an increase of more than 120,000 over the 2010 population figure.[5] Because the census data make clear that the state's congressional districts as enacted in 2011 do not account for this new population

[4] App. 0739, Ex. N, at p. 179 (First Am. & Suppl. Pet. for Injunctive & Declaratory Relief ("Am. Pet.") ¶ 17).
[5] App. 0739, Ex. N, at p. 179 (Am. Pet. ¶ 18).

number, the current configuration violates state and federal law.[6] Redrawing of Louisiana's congressional districts is therefore required.

Louisiana law provides that the state's congressional district plan be enacted through legislation, which must pass both chambers of the Legislature and be signed by the Governor. *See* La. Const. art. III, § 6. Consequently, the redistricting needed to avoid the injury of unconstitutional malapportionment is confronting a significant obstacle: partisan deadlock. The Republican Party currently controls both chambers of the Legislature, but it lacks the supermajority necessary to override a veto from a Democratic governor.[7] This partisan division among the state's political branches makes it extremely unlikely that they will pass a lawful congressional redistricting plan in time to be used during the upcoming 2022 congressional elections.

Indeed, the Governor has publicly raised the possibility that he will reject the Legislature's proposed congressional map, stating, "I will veto bills that I believe suffer from defects in terms of basic fairness."[8] The Governor has further suggested that fairness requires the drawing of a second majority-Black congressional district—what he has called "a major reworking of the map"—while Republican lawmakers have instead expressed a preference for only "tweaking around the edges" of the current congressional map.[9] It is not only this point of disagreement that has demonstrated the likelihood of impasse: the depth of Louisiana's current political divide and the gridlock that has resulted were further underscored during

[6] App. 0739, Ex. N, at p. 176 (Am. Pet. ¶ 2).
[7] App. 0739, Ex. N, at pp. 177, 180 (Am. Pet. ¶¶ 4, 27).
[8] Blake Paterson & James Finn, *Gov. John Bel Edwards Will Veto Congressional Maps That Aren't 'Fair.' What Does That Mean?*, Advocate (Nov. 20, 2021), https://www.theadvocate.com/baton_rouge/news/article_8ace3fc4-4998-11ec-a9ff-2b154a8d9dd4.html.
[9] Melinda Deslatte, *Louisiana Governor Supports 2nd Minority US House District*, AP (Dec. 16, 2021), https://apnews.com/article/coronavirus-pandemic-health-louisiana-legislature-john-bel-edwards-46f6679aafcc1c2c431c78c44c01f503; *see also* Blake Paterson, *Gov. John Bel Edwards Says 'Fair' Congressional Maps Would Include Another Majority-Black District*, Advocate (Dec. 16, 2021), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_64e99736-5ea6-11ec-bea4-2fa9f0b6f8c9.html ("Gov. John Bel Edwards said Thursday it's only fair that two of the state's six congressional districts include a majority of Black voters, suggesting a veto may be on the table if lawmakers don't agree.").

the Legislature's historic override session earlier this year. Of the 31 bills that the Governor vetoed, the Legislature failed to overturn a single one.[10]

On August 12, 2021, the U.S. Secretary of Commerce delivered to the state its redistricting data file—commonly referred to as "P.L. 94-171 data" in reference to the 1975 legislation that first required this process—in a legacy format that Louisiana can use to tabulate the new population of each political subdivision.[11] These data are typically delivered no later than *April* of the year following the decennial census. In previous cycles, the congressional redistricting plan would therefore have been enacted by now. (For example, during the 2010 cycle, Louisiana enacted its plan on April 14, 2011.) Thus, even aside from the imminent risk of impasse, the redistricting needed in advance of the 2022 midterm elections must proceed on an unprecedently compressed timetable.

B. Plaintiffs sought judicial relief to remedy their ongoing constitutional injury.

Recognizing that the pandemic has imposed and will continue to impose significant delays on the congressional redistricting process, and that the current malapportionment of their congressional districts interferes with their right of political association, Plaintiffs initiated this action by filing their original petition on April 26, 2021.[12] They ask the trial court "to declare Louisiana's current congressional district plan unconstitutional, enjoin [the Secretary] from using the current plan in any future election, and implement a new congressional district plan that adheres to the constitutional requirement of one-person, one-vote should the Legislature and Governor fail to do so."[13]

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[10] App. 0739, Ex. N, at p. 180 (Am. Pet. ¶ 28).
[11] App. 0739, Ex. N, at p. 179 (Am. Pet. ¶ 22).
[12] App. 0739, Ex. D, at p. 53 (Pet. for Injunctive & Declaratory Relief at p. 9).
[13] App. 0739, Ex. N, at p. 176 (Am. Pet. ¶ 1).

On August 19, 2021, Plaintiffs filed their amended petition, which added a new plaintiff, removed two plaintiffs, and made other minor changes to reflect newly released census data.

ACTION OF THE TRIAL COURT

The Secretary filed his initial declinatory and peremptory exceptions on May 24, 2021, which Plaintiffs opposed; the trial court heard argument on the exceptions on August 20. On November 16, the trial court overruled each exception, explaining that

> [a]fter considering the pleadings, memoranda, argument of counsel, and the law, the Court finds that challenges to redistricting laws may be brought immediately upon release of official data showing district imbalance before reapportionment occurs in accordance with [*Arrington v. Elections Board*, 173 F. Supp. 2d. 858 (E.D. Wis. 2001) (three-judge panel)]. The Court also finds that venue is proper, because Orleans Parish is where plaintiffs' claim arise, in that plaintiffs' causes of action arise from the malapportionment injury suffered in Orleans parish . . . .[14]

After Plaintiffs filed their amended petition, the Secretary filed a second round of exceptions on September 8. These new exceptions were, as the Secretary indicates in his writ application, substantively identical to his initial exceptions.[15] Given this overlap, the parties waived oral argument, and the trial court again overruled the Secretary's exceptions.[16]

STANDARD OF REVIEW

Each of the exceptions raised by the Secretary is a question of law and is therefore reviewed de novo. *See St. Bernard Par. Gov't v. Perniciaro*, 2019-0604, p. 4 (La. App. 4 Cir. 3/11/20); 2020 WL 1173569, at *2 (exception of lack of subject matter jurisdiction); *Matthews v. United Fire & Cas. Ins. Co.*, 2016-0389, p. 3 (La. App. 4 Cir. 3/8/17); 213 So. 3d 502, 505 (exception of improper venue), *writ denied*, 2017-0594 (La. 5/26/17); 221 So. 3d 857; *Lakewood Prop. Owners' Ass'n v. Smith*,

[14] App. 0739, Ex. A, at p. 38 (Judg. with Incorporated Reasons at p. 1).
[15] App. 0739 at pp. 6–7.
[16] App. 0739, Ex. K, at p. 169 (Judg. at p. 1).

2014-1376, p. 7 (La. App. 4 Cir. 12/23/15); 183 So. 3d 780, 785 (exception of no right of action), *writ denied*, 2016-0138 (La. 2/26/16); 187 So. 3d 469; *Fink v. Bryant*, 2001-0987, p. 4 (La. 11/28/01); 801 So. 2d 346, 349 (exception of no cause of action).

LAW AND ARGUMENT

The Secretary excepted to Plaintiffs' action for four general reasons: (1) lack of subject matter jurisdiction, (2) improper venue, (3) no cause of action, and (4) no right of action. For the reasons discussed below, the trial court correctly rejected each of these arguments.

A. The trial court correctly concluded that it has subject matter jurisdiction.[17]

The Secretary offers a variety of internally inconsistent excuses as to why the trial court should not hear this case—none of which divests it of jurisdiction.

At the outset, this case is justiciable. Plaintiffs currently live in malapportioned districts that will be used in future congressional elections unless a new map is timely adopted. Because the trial court's intervention can prevent this constitutional harm, the case is not moot. And the trial court need not wait until the eve of an unconstitutional election before accepting jurisdiction to remedy Plaintiffs' injuries.

Furthermore, the trial court's exercise of its jurisdiction does not infringe upon any other branch of government. Judicial management of impasse litigation is a common, necessary process that is repeated during every redistricting cycle to ensure equal, undiluted votes for all citizens. The Legislature and Governor remain free to

[17] Throughout his writ application, as in his briefing before the trial court, the Secretary repeatedly offers variations on the same general theme: that Plaintiffs' alleged injuries are unlikely to transpire and thus that the trial court lacks jurisdiction to remedy them. *See, e.g.*, App. 0739 at pp. 11–15, 24–27. In the interests of efficiency and economy, Plaintiffs address all of these related arguments in this section.

enact a new congressional plan; Plaintiffs have requested that the trial court act to remedy their claims only if the political branches do not.

1. This controversy is justiciable because Louisiana's districts are currently malapportioned.

The Secretary wrongly claims that the trial court lacks subject matter jurisdiction because it is not currently known with complete certainty that the political branches will deadlock and fail to pass a congressional redistricting plan. This argument misses the point—and ignores the relevant legal standard.

There can be no dispute that continued use of the current congressional map is unconstitutional. Article I, Section 2 of the U.S. Constitution requires congressional districts to be as equivalent in population as possible "to prevent debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). This constitutional mandate is commonly referred to as the "one-person, one-vote" principle. *See, e.g.*, *Gray v. Sanders*, 372 U.S. 368, 381 (1963). The census data released on April 26, 2021, make clear that the configuration of Louisiana's congressional districts does not account for the current population numbers in the state, violating the "Constitution's plain objective of [] equal representation for equal numbers." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *see also Arrington*, 173 F. Supp. 2d at 860 ("[A]pportionment schemes become instantly unconstitutional upon the release of new decennial census data." (quotation marks and citations omitted)). The U.S. Census Bureau revealed that Louisiana's population as of April 2020 had increased by more than 120,000 people as compared to ten years earlier, and population shifts have not been uniform across the state. In fact, recent data show that there is a greater than *11 percent* population deviation between districts—far from the equal representation the U.S. Constitution requires.

Throughout his writ application, the Secretary mischaracterizes the source of Plaintiffs' alleged injury. He suggests that "Plaintiffs have no right to contest a reapportionment or redistricting plan that has not been devised or put in place, much less taken up by the political branches."[18] But the ongoing malapportionment under the *current* map—not some speculative map that has not yet been adopted—is the source of Plaintiffs' injury. *See Arrington*, 173 F. Supp. 2d at 859 (distinguishing between justiciable challenge to current apportionment of electoral districts and nonjusticiable challenge to "apportionment scheme the state legislature may enact in the future"). While a new congressional map might serve to *remedy* their injuries, Plaintiffs contest the current configuration of their districts, not a hypothetical future map.[19] In short, Plaintiffs are not merely "unsettled by the prospect of failure on the part of the Legislature and Governor and might at some point in the future be aggrieved by partisan indecision";[20] they are *currently* suffering the injury of malapportionment and are at grave risk of future vote dilution as a result of political deadlock and impasse. *See Brown v. Ky. Legis. Rsch. Comm'n*, 966 F. Supp. 2d 709, 718 (E.D. Ky. 2013) (per curiam) (three-judge panel) (rejecting ripeness argument where "[t]he injury claimed by the Plaintiffs is vote dilution caused by [malapportionment] of the [previous cycle's] legislative districts, which is an injury that is current and on-going").[21]

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[18] App. 0739 at p. 5.

[19] App. 0739, Ex. N, at p. 176 (Am. Pet. ¶ 1) ("This is an action challenging Louisiana's *current congressional districts*, which were rendered unconstitutionally malapportioned by a decade of population shifts." (emphasis added)).

[20] App. 0739 at p. 3.

[21] The Secretary halfheartedly cites a recent order from a Pennsylvania state court that dismissed an impasse claim similar to Plaintiffs' on ripeness grounds. App. 0739 at p. 13. But that opinion is an outlier, one premised in part on the erroneous belief that voters "will not suffer an injury based on malapportionment harm until an election occurs using malapportioned districts." App. 0739, Ex. S, at p. 298 (Memorandum Opinion at p. 15, *Carter v. Degraffenreid*, No. 132 M.D. 2021 (Pa. Commw. Ct. Oct. 8, 2021)). This conclusion ignores both the broad body of caselaw where courts assumed jurisdiction over impasse cases *and* the current, ongoing harms to voters' associational and political rights caused by malapportionment. *See infra* Section A.3. Played out to its logical conclusion, the Pennsylvania court's reasoning would require voters to suffer significant and irreparable harm—an election conducted under patently unconstitutional circumstances—in order to bring a case seeking to avoid that harm in the first place. This is not the law, and for good reason.

2. Plaintiffs will be forced to vote using Louisiana's currently unconstitutional congressional map if a new plan is not timely enacted.

The Secretary wrongly claims that the judiciary should ignore Louisiana's unconstitutional congressional map and the dilution of Plaintiffs' votes because no one has "propose[d] to utilize [the] current congressional districts drawn in 2011 to hold the regular congressional elections in 2022."[22] But that is *exactly* what state law requires the Secretary to do in the event the political branches fail to timely adopt a new congressional redistricting plan.

Louisiana law provides that the state "shall be divided into six congressional districts" and that those "districts *shall be composed as follows*." La. R.S. 18:1276.1 (emphasis added). The statute then lists the composition of the six districts as enacted following the 2010 census. *See id.* The current map is thus explicitly prescribed by law, since "[u]nder well-established rules of interpretation, the word 'shall' excludes the possibility of being 'optional' or even subject to 'discretion,' but instead 'shall' means imperative, of similar effect and import with the word 'must.'" *La. Fed'n of Tchrs. v. State*, 2013-0120, p. 26 (La. 5/7/13); 118 So. 3d 1033, 1051 (quotation marks and citations omitted). As Plaintiffs allege in their amended petition, an impasse would leave the existing plan in place for next year's election because the Secretary has no discretion to implement a congressional plan that differs from the one prescribed by statute. Unless a new plan is timely adopted, the Secretary *has no choice* but to use the current map in the next election.[23]

Indeed, even the Secretary seems to recognize that such a result would be profoundly unjust, as evidenced by his (ultimately misguided) argument that he need not hold the 2022 midterm elections under the unconstitutional congressional map even if the political branches are unable to overcome their impasse. *See infra* Section A.2.

[22] App. 0739 at p. 15.

[23] The Secretary's lack of discretion in this regard is further demonstrated by federal law. "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected . . . from the districts then prescribed by the law of such State" if, as here, "there is no change in the number of Representatives." 2 U.S.C. § 2a(c). In other words, unless Louisiana is redistricted in the manner provided by law (which is to say, either through a legislative enactment or judicial intervention),

Armed with his incorrect belief that he could choose not to carry out elections under the current map, the Secretary suggests that this matter "is not of sufficient immediacy and reality to warrant the issuance of a declaratory judgment"[24] by relying on cases involving permissive statutes that afforded state actors discretion over whether to apply the law. *See Am. Waste & Pollution Control Co. v. St. Martin Par. Police Jury*, 627 So. 2d 158, 163 (La. 1993) (finding action involving discretionary zoning statute "premature because a *permissive* statute must be rendered operative or threatened to be rendered operative prior to being challenged" (emphasis added)); *La. Fed'n of Tchrs. v. State*, 2011-2226, p. 6 (La. 7/2/12); 94 So. 3d 760, 764 (finding challenge to statutory school district waiver scheme nonjusticiable because no waiver had been requested and Board of Education retained discretion over whether to grant waiver at issue). Here, by contrast, the Secretary *must* carry out congressional elections under the current map absent a legislatively enacted map or an order from a court. The statute requiring use of the existing districts is not permissive, and neither the Secretary nor anyone else has discretion to simply disregard the current map. *See* La. R.S. 18:1276.1. Thus, when the political branches fail to enact a new plan, the Secretary will have no choice but to carry out congressional elections under an indisputably malapportioned map—unless the judiciary steps in. And because use of the current map is not permissive, the Louisiana Supreme Court's concern in the cases relied upon by the Secretary about premature adjudication is simply not present in this case.

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its congressional representatives must be elected from the districts currently prescribed by state law (which is to say, the current map). While the advent of the one-person, one-vote principle has rendered this federal statutory provision unconstitutional, *see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 811–12 (2015), it nonetheless underscores that there is no automatic or fail-safe method of redistricting other than judicial intervention. And the very unconstitutionality of this provision further highlights that any future use of the current map, which is unavoidable if redistricting does not occur, will unconstitutionally dilute Plaintiffs' voting rights.

[24] App. 0739 at p. 25.

For similar reasons, the Secretary's suggestion that the current action is moot misses the mark. Because the malapportioned districts "are still in place, nothing has occurred to render them moot." *Brown*, 966 F. Supp. 2d 718. And rather than asking the Secretary to "follow the law that is already in place,"[25] Plaintiffs actually seek the opposite relief: an order *preventing* the Secretary from using the current map, as is otherwise required by state law. *See* La. R.S. 18:1276.1.

Both the Secretary's mootness *and* ripeness arguments rely on the same flawed premise: that the malapportionment of Louisiana's congressional districts will somehow resolve itself without judicial intervention—*even if the political branches deadlock*—and thus there is no injury for the trial court to remedy.[26] But that is not the case. There are only two possible avenues for congressional redistricting in Louisiana: either a new plan is enacted through legislation, which passes both chambers of the Legislature and is signed by the Governor, *see* La. Const. art. III, § 6, or a new plan is produced through judicial intervention if the political branches deadlock, *see, e.g.*, *Growe v. Emison*, 507 U.S. 25, 33 (1993). *That's it*. Either the political branches will act, or the judiciary will act; because the political branches will not, the judiciary must. There is no third option.

3. The trial court does not need to wait until an unconstitutional election is held to protect Plaintiffs' rights.

Plaintiffs do not need to wait to seek relief from this imminent and impending constitutional violation—and the trial court does not need to delay in exercising its jurisdiction.

Contrary to the Secretary's argument, "it is not necessary to wait until actual injury is sustained before bringing suit." *State v. Rochon*, 2011-0009, p. 9 (La. 10/25/11); 75 So. 3d 876, 883. Instead, as a general matter, "a plaintiff who

[25] App. 0739 at p. 18.
[26] App. 0739 at p. 18 (suggesting that "the objective [P]laintiffs seek has been accomplished by operation of law" simply because "the Constitution and laws command that the State redistrict").

challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *see also La. Associated Gen. Contractors, Inc. v. State ex rel. Div. of Admin.*, 95-2105, p. 7 (La. 3/8/96); 669 So. 2d 1185, 1192 (recognizing that "federal decisions on standing and justiciability should be considered persuasive" (quotation marks and citation omitted)). "It is sufficient if a dispute or controversy as to legal rights is shown, which, in the court's opinion, requires judicial determination—that is, in which the court is convinced that by adjudication a useful purpose will be served." *Perschall v. State*, 96-0322, p. 16 (La. 7/1/97); 697 So. 2d 240, 251. And the state's "declaratory judgment articles are remedial in nature and must be liberally construed and applied so as to give the procedure full effect within the contours of a justiciable controversy." *Id.* at p. 18; 697 So. 2d at 253.

Moreover, specific to this case, "challenges to districting laws may be brought immediately upon release of official data showing district imbalance—that is to say, *before* reapportionment occurs." *Arrington*, 173 F. Supp. 2d at 860 (quotation marks and citation omitted). Courts are routinely called upon in situations like this one, and the U.S. Supreme Court has repeatedly recognized that they must act in these circumstances. As it explained five decades ago,

> [w]hile a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy . . . , individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief against the alleged malapportionment, which the individual voters seek, might be achieved.

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964). The need for judicial intervention in these cases is underscored by the dire consequences that result from a failure to timely redistrict: once an election has come and gone, and Plaintiffs' votes have been diluted, their injuries cannot be "undone through

monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987); *see also Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) ("A restriction on the fundamental right to vote [] constitutes irreparable injury."). Moreover, Plaintiffs do not allege only a vote-dilution injury. Until a lawful congressional map is in place such that candidates can prepare to run in appropriate districts, Plaintiffs cannot "assess candidate qualifications and positions, organize and advocate for preferred candidates, and associate with like-minded voters."[27] Plaintiffs thus face both an *imminent* malapportionment injury and an *ongoing* injury to their associational rights. They need not wait any longer to seek redress from the judiciary.

A nearly identical case, *Arrington v. Elections Board*, is instructive.[28] The *Arrington* complaint was, like Plaintiffs' original petition, filed shortly after the release of census data identifying how many congressional seats each state would be allotted, and prior to the release of tabulated data used to draw districts. *See* 173 F. Supp. 2d at 858. The *Arrington* plaintiffs resided in districts that had become overpopulated, leaving them "under-represented in comparison with residents of other districts." *Id.* at 859. The *Arrington* plaintiffs sought the same relief Plaintiffs seek here: a declaration that the then-existing districts were unconstitutional; an injunction against the map's use in future elections; and, if the political process did not yield a new plan, judicial intervention to implement a constitutional map. *See id.*

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[27] App. 0739, Ex. N, at pp. 182–83 (Am. Pet. ¶ 41).

[28] In his writ application, the Secretary disingenuously argues that "[t]he trial court erred in resorting to a Wisconsin federal court decision based upon Wisconsin statutory law as controlling over well-established legal principles of Louisiana law." App. 0739 at p. 10. Neither Plaintiffs nor the trial court claimed that *Arrington* or any other federal caselaw is controlling on a Louisiana state court. Instead, Plaintiffs have argued, and the trial court agreed, that the factual scenario underlying *Arrington* is analogous to this case and therefore the decision provides instructive guidance. And there is no authority suggesting that federal caselaw cannot be *persuasive* when applying Louisiana's legal principles, especially where—as with issues of subject matter jurisdiction and standing—Louisiana's applicable standards reflect the federal law standards. *See, e.g.*, *Bradix v. Advance Stores Co.*, 2017-0166, pp. 4–5 (La. App. 4 Cir. 8/16/17); 226 So. 3d 523, 528 (noting that "federal cases regarding Article III standing .... can be persuasive" when considering Louisiana's standing requirement). Moreover, the *Arrington* decision was *not* "based upon Wisconsin statutory law"; the relevant analysis considered by Plaintiffs and the trial court concerned Article III of the U.S. Constitution—which, again, is persuasive in the context of Louisiana's own standing rules. *See id.*; 226 So. 3d at 528.

The *Arrington* court rejected the argument that the case should be dismissed for lack of standing or ripeness because the possibility remained open that the state legislature would enact a new plan and remedy the plaintiffs' injury, *see id.* at 860–61—the same argument that the Secretary makes in this action. That decision was driven by the fact that the *Arrington* plaintiffs alleged that they would be injured if the law remained as it was when the suit was filed and that there was no reasonable prospect that the state legislature would enact a new plan due to a partisan division between the state's political branches—just like Plaintiffs here allege. The *Arrington* court also noted that the plaintiffs alleged associational harms that manifested long before an election, thus preventing them from influencing members of congress, contributing to candidates, and more—again, just as Plaintiffs allege here. The fact that the political branches *could* have prevented the plaintiffs' claimed injury was "irrelevant" to the *Arrington* court's conclusion because the plaintiffs had "realistically allege[d] actual, imminent harm," in part because 12 of the 43 states that needed to redistrict during the prior cycle failed to legislatively enact congressional redistricting plans. *Id.* at 862. The court ultimately declined to "dismiss the plaintiffs' complaint and wait to see if the legislature enacts its own districting plan in a timely fashion" and instead retained jurisdiction, stayed proceedings, and "establish[ed], under its docket-management powers, a time when it would take evidence and adopt its own plan if the legislature had by then failed to act." *Id.* at 865.[29]

Consistent with *Arrington*'s reasoning, the Supreme Courts of Minnesota and Wisconsin have already put the gears of judicial redistricting into motion under similar circumstances. Like in Louisiana, control of Minnesota's and Wisconsin's

[29] This year, another three-judge panel considering Wisconsin impasse claims adopted the *Arrington* court's position, explaining that, "[g]iven this historical pattern [of judicial intervention in the redistricting process], and the urgent requirement of prompt action," the impasse claims were justiciable. *Hunter v. Bostelmann*, Nos. 21-cv-512-jdp-ajs-eec, 21-cv-534-jdp-ajs-eec, 2021 WL 4206654, at *4 (W.D. Wis. Sept. 16, 2021) (three-judge panel).

political branches is currently divided between Democrats and Republicans, creating a high risk of an irreparable impasse that will prevent the enactment of constitutionally apportioned maps in time for next year's elections. Recognizing the need to prepare for judicial intervention, these states' supreme courts have asserted jurisdiction in lawsuits that alleged legislative deadlock—including, in Minnesota, a lawsuit that was filed even *before* the release of census data in April.[30] In appointing a special redistricting panel, the Minnesota Supreme Court noted that this process "must commence soon in order to permit the judicial branch to fulfill its proper role in assuring that valid redistricting plans are in place for the state legislative and congressional elections in 2022."[31] The Minnesota panel has already started its work, addressing procedural issues like intervention, undertaking hearings across the state to foster public input in the redistricting process, issuing its guiding redistricting principles, and accepting plan submissions.[32] Similarly, in Wisconsin, the state supreme court has accepted jurisdiction of impasse litigation, parties have already proposed remedial maps, and a week of hearings and oral argument is scheduled for January.[33]

[30] App. 0739, Ex. R, at pp. 246–47 (Order at pp. 1–2, *Sachs v. Simon*, No. A21-0546 (Minn. May 20, 2021)); App. 0739, Ex. R, at pp. 249–51 (Order at pp. 1–3, *Wattson v. Simon*, No. A21-0243 (Minn. Mar. 22, 2021)); Order at p. 1, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Nov. 17, 2021) (attached as Exhibit 1).

[31] App. 0739, Ex. R, at p. 254 (Order at p. 2, *Wattson v. Simon*, Nos. A21-0243, A21-0546 (Minn. June 30, 2021)).

[32] App. 0739, Ex. R, at pp. 259–60 (Scheduling Order No. 1 at pp. 2–3, *Wattson v. Simon*, Nos. A21-0243, A21-0546 (Minn. Spec. Redistricting Panel July 22, 2021)). In its order stating its redistricting principles and plan submission requirements, the Minnesota special redistricting panel suggested that "the issue of the constitutionality of the current districts is not ripe for our decision." App. 0739, Ex. R, at p. 264 (Order Stating Preliminary Conclusions, Redistricting Principles, and Requirements for Plan Submissions ("*Wattson* Order") at p. 3, *Wattson v. Simon*, Nos. A21-0243, A21-0546 (Minn. Spec. Redistricting Panel Nov. 18, 2021)). Notably, however, the panel also concluded that it "has subject-matter jurisdiction over [that] action." App. 0739, Ex. R, at p. 263 (*Wattson* Order at p. 2). The panel's reference to "ripeness" is thus better understood as a prudential consideration, as it emphasized that "[t]he task of redrawing the districts falls to the legislature" in the first instance and that the legislative deadline has not yet passed. App. 0739, Ex. R, at p. 264 (*Wattson* Order at p. 3). This conclusion is consistent with Plaintiffs' requested relief in this case. App. 0739, Ex. N, at p. 183 (Am. Pet. at p. 8) (asking trial court to "[i]mplement a new congressional district plan . . . if the political branches fail to enact a plan").

[33] Order at pp. 1–3, *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA (Wis. Nov. 17, 2021) (attached as Exhibit 1).

Just as in Minnesota and Wisconsin, the partisan division between Louisiana's legislature and governor precludes any reasonable prospect that the political process will timely yield a redistricting plan ahead of the 2022 congressional elections—especially given the tightly compressed timeline caused by pandemic-related census delays. And just as in those cases, and many others like them, judicial intervention is needed to ensure that political impasse does not result in the dilution of Plaintiffs' and other Louisianians' voting rights. *See, e.g.*, *Growe*, 507 U.S. at 27; *Scott v. Germano*, 381 U.S. 407, 409 (1965); *Mellow v. Mitchell*, 607 A.2d 204, 205–06 (Pa. 1992); *Flateau v. Anderson*, 537 F. Supp. 257, 259 (S.D.N.Y. 1982) (per curiam) (three-judge panel).

4. The trial court's exercise of its jurisdiction does not usurp the other branches' powers to enact a congressional redistricting plan.

Contrary to the Secretary's claims, Plaintiffs do not ask the trial court to "invade the province of the legislative and executive branches of government assume control over the functions of all three branches."[34] Nor have they "petitioned the Orleans Parish District Court to seize control of the Congressional redistricting process by granting them declaratory and injunctive relief."[35] Instead, they have made the reasonable and wholly defensible request that the trial court prepare itself to undertake judicial redistricting *if* the political branches fail to timely complete their constitutional obligations.

As the U.S. Supreme Court has recognized, state courts play a crucial role in protecting voters against dilution when a state's political branches fail to redistrict on their own. *See, e.g.*, *Growe*, 507 U.S. at 33 ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." (citing *Scott*, 381 U.S. at 409)). Consistent with

[34] App. 0739 at p. 4.
[35] App. 0739 at p. 3.

this principle, Plaintiffs ask the trial court to implement its own congressional plan *only* "if the political branches fail to enact a plan."[36] This request is both necessary and appropriate.

As the Secretary acknowledges, redistricting is "unique."[37] It is the rare lawmaking activity that is *required* by the U.S. Constitution, which makes it unlike discretionary legislative matters such as naming highways or regulating insurance. Those elective issues are necessarily reserved for the political branches alone because the Legislature's failure to name a segment of the state's transportation infrastructure or regulate insurance audits does not violate any law—and thus could not inflict any legal injury. In stark contrast, a state's failure to fulfill its redistricting obligation unconstitutionally dilutes its citizens' right to vote and impairs their freedom of association. The judiciary's assigned role is to enjoin and redress precisely these sorts of injuries. *See* La. Const. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

This case does not present a dispute over which institution is responsible in the first instance for congressional redistricting in Louisiana—Plaintiffs and the Secretary agree that task is the Legislature's. Instead, the question is how the rights of Louisiana voters will be remedied when the political branches fail to enact a new congressional plan. The Secretary seems to suggest that the Legislature could decline to redraw its congressional districts after census data is published, and voters in overpopulated districts would be helpless until the Legislature changes its mind

[36] App. 0739, Ex. N, at p. 183 (Am. Pet. at p. 8).
[37] App. 0739 at p. 16.

because the judiciary would be powerless to act.[38] Such a scenario would be unconscionable, which is why courts have squarely rejected it. *See Wesberry*, 376 U.S. at 7 (holding, in congressional apportionment case, that "[t]he right to vote is too important in our free society to be stripped of judicial protection" on political question grounds). Where congressional districts are malapportioned—whether because of legislative action *or* inaction—the law "embraces action by state and federal courts." *Branch v. Smith*, 538 U.S. 254, 272 (2003).

None of the requests that Plaintiffs make in their prayer for relief exceeds the trial court's institutional power. Courts routinely enter declaratory judgments and grant injunctive relief. *See* La. C.C.P. arts. 1871, 3601(A). Merely establishing a litigation schedule is an ordinary—and, given the strict election calendar here, essential—judicial function. *Cf. Konrad v. Jefferson Par. Council*, 520 So. 2d 393, 397 (La. 1988) (recognizing that courts have power "to do all things reasonably necessary for the exercise of their functions as courts"). And judicial adoption of election maps is a necessary remedy when state legislatures fail to satisfy their constitutional redistricting duties. As the U.S. Supreme Court has explained,

> [l]egislative bodies should not leave their reapportionment tasks to the [] courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the [] court to devise and impose a reapportionment plan pending later legislative action.

Wise v. Lipscomb, 437 U.S. 535, 540 (1978) (citation omitted) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)). While *Wise* specifically considered the occasional need for *federal* courts to wield the line-drawing pen, the U.S. Supreme Court has also recognized and "specifically encouraged" the role of *state* judiciaries to formulate valid redistricting plans when necessary. *Scott*, 381 U.S. at 409; *see also*

[38] App. 0739 at p. 17–18 ("Plaintiffs want the Orleans Parish District Court to intercede in the congressional redistricting process . . . . The courts are not given such power in the Louisiana Constitutional scheme.").

Growe, 507 U.S. at 34 (requiring federal courts to defer to state courts' timely efforts to redraw legislative and congressional districts).

All of these decisions recognize that judicial adoption of a redistricting plan neither co-opts nor displaces a legislature's authority. Here, having been assigned the redistricting responsibility in the first instance, the Legislature may not default on its constitutional duty and then claim that the branch responsible for redressing constitutional injuries is powerless to do anything. *That* would warp the separation of powers. As the Louisiana Supreme Court has recognized, "from its inception the Louisiana judiciary had an important role in the formulation of law and done far more than merely apply statutory provisions." *Unwired Telecom Corp. v. Parish of Calcasieu*, 2003-0732, p. 18 (La. 1/19/05); 903 So. 2d 392, 405. The relief that Plaintiffs request is entirely consistent with this role.[39]

B. The trial court correctly concluded that venue is proper in Orleans Parish.

The Secretary argues that Orleans Parish is an improper venue for this suit, claiming instead that La. R.S. 13:5104 requires that the action be heard in East Baton Rouge Parish "because the operative events described in the petition all occur" in that jurisdiction.[40] This argument, however, relies on both a misunderstanding of Louisiana's venue statute and a mischaracterization of Plaintiffs' claims.[41]

A suit against the Secretary "arising out of the discharge of his official duties" can be filed in either of two venues: "the district court of the judicial district in which the state capitol is located or in the district court having jurisdiction in the parish in which the cause of action arises." La. R.S. 13:5104(A). Although East Baton Rouge

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[39] Moreover, unlike the plaintiffs in *Hoag v. State*, 2004-0857 (La. 12/1/04); 889 So. 2d 1019, who sought a writ of mandamus to compel the Legislature to appropriate certain funds, Plaintiffs here are not requesting that the trial court order the Legislature to do anything. The Secretary's reliance on that case, App. 0739 at p. 17, is thus unpersuasive.

[40] App. 0739 at p. 4.

[41] Alternatively, should this Court conclude that venue is only proper in East Baton Rouge Parish, then Plaintiffs agree that transfer rather than dismissal is the appropriate remedy. *See Habig v. Popeye's Inc.*, 553 So. 2d 963, 967 (La. 1989).

Parish would be an appropriate venue for this action—as the Secretary notes, "[t]here can be little argument that Louisiana's state capitol is located in East Baton Rouge Parish"[42]—Orleans Parish is *also* a proper venue because it is where Plaintiffs' claims arise, as the trial court correctly concluded.[43]

The Louisiana Supreme Court has explained that "where [a] cause of action arises" is "[t]he place where the operative facts occurred which support the plaintiff's entitlement to recovery." *Impastato v. State*, 2010-1998, p. 2 (La. 11/19/10); 50 So. 3d 1277, 1278 (per curiam). Plaintiffs' two causes of action are premised on the malapportionment of their congressional districts: "[i]n light of the significant population shifts that have occurred since the 2010 Census, and the recent publication of the results of the 2020 Census, the current configuration of Louisiana's congressional districts—which were drawn based on 2010 Census data—is now unconstitutionally malapportioned."[44] Courts have made clear that malapportionment is an injury "felt by individuals *in overpopulated districts* who actually suffer a diminution in the efficacy of their votes and their proportional voice in the legislature." *Garcia v. 2011 Legis. Reapportionment Comm'n*, 559 F. App'x 128, 133 (3d Cir. 2014) (emphasis added) (citing *Reynolds v. Sims*, 377 U.S. 533, 561–63 (1964)). Indeed, in such cases, "injury results *only* to those persons domiciled in the under-represented voting districts." *Fairley v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974) (emphasis added); *cf. United States v. Hays*, 515 U.S. 737, 744–45 (1995) (explaining in standing context that racial gerrymandering injury is felt by voters in gerrymandered districts). In short, Plaintiffs allege injuries stemming from the malapportionment of Louisiana's congressional districts—including injury suffered in Orleans Parish. Under La. R.S. 13:5104(A), Orleans Parish is therefore a proper venue for this action.

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[42] App. 0739 at p. 20.
[43] App. 0739, Ex. A, at p. 38 (Judg. with Incorporated Reasons at p. 1).
[44] App. 0739, Ex. N, at p. 182 (Am. Pet. ¶ 37).

The Secretary's arguments to the contrary are unavailing. He claims that "East Baton Rouge is [] the Parish in which the action will arise" because "[c]ongressional maps will be drawn, redistricting debated, bills passed and redistricting approved or vetoed at the state capitol," and thus "all of the operative events relating to redistricting upon which plaintiffs' claims depend will occur in East Baton Rouge."[45] But this mischaracterizes Plaintiffs' claims, which arise from the current malapportionment of the state's congressional districts, *not* from any official action. This is a salient distinction, one illuminated by the Louisiana Supreme Court in *Impastato*.

There, the Court "recognized that many courts had held that where a state agency's ministerial or administrative actions are called into question, East Baton Rouge Parish is the only appropriate forum." *Impastato*, 2010-1998, p. 2; 50 So. 3d at 1278. But in that case, the Court expressly noted that the plaintiffs' "causes of action did not arise from hurricane damage to their homes," but instead "from determinations made later by Road Home personnel in East Baton Rouge Parish." *Id.*; 50 So. 3d at 1278. Here, by contrast, Plaintiffs' causes of action arise from the malapportionment injury suffered in Orleans Parish—*not* from state action in East Baton Rouge Parish. The Secretary's reliance on the Court's opinions in *Colvin v. Louisiana Patient's Compensation Fund Oversight Board*, 2006-1104 (La. 1/17/07); 947 So. 2d 15, *Devillier v. State*, 590 So. 2d 1184 (La. 1991) (per curiam), and similar cases involving ministerial duties are thus inapposite because those involved challenges to administrative actions that occurred in East Baton Rouge Parish, *not* claims premised on injuries sustained in other jurisdictions. *See Colvin*, 2006-1104, p. 14; 947 So. 2d at 24 ("[T]he operative facts which support plaintiffs' entitlement to recovery, i.e., the PCFOB's administrative decision not to settle their claims, all

[45] App. 0739 at pp. 20–21.

occurred in East Baton Rouge Parish."); *Devillier*, 590 So. 2d at 1184 ("An action to prohibit a state agency from assessing a statutory fine based on the unconstitutionality of the statute must be brought in East Baton Rouge Parish.").[46]

The Secretary also suggests that Plaintiffs' "notion of venue where a person is aggrieved would make every judicial district in the state a proper venue for any plaintiff complaining that they live in a congressional district with a population imbalance," and then proceeds to weave a web of horribles in which he "could well be called upon to comply with 64 court orders that may be contradictory and conflicting."[47] These musings do not change the fact that Plaintiffs have suffered an injury in Orleans Parish, which alone satisfies the applicable rule; the Secretary cannot unilaterally rewrite Louisiana's venue statute to remove the provision conferring venue "in the district court having jurisdiction in the parish in which the cause of action arises," La. R.S. 13:5104(A), in any case where plaintiffs might be injured in multiple parishes.

Moreover, the Secretary's concerns are ultimately farfetched. Courts have concluded that standing to challenge malapportionment lies only with plaintiffs in *over*populated districts, not *under*populated districts. *See, e.g.*, *Fairley*, 493 F.2d at 603. It is therefore legally impossible for Louisianians in all 64 parishes to assert malapportionment claims against the state's congressional map. The Secretary also ignores that, if he were indeed faced with additional lawsuits in multiple venues, he

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[46] Incidentally, Louisiana courts have concluded that the location of a plaintiff's injury *can* constitute an appropriate venue for suit even where the injury is the result of state action or negligence. *See, e.g.*, *Gilbert v. State ex rel. Dep't of Transp. & Dev.*, 2018-49, p. 3 (La. App. 3 Cir. 6/6/18); 2018 WL 2731903, at *2 ("A review of the record reveals that Gilbert's accident, allegedly caused by DOTD's negligence, occurred in Terrebonne Parish."); *Shannon v. Vannoy*, 2017-1722, p. 14 (La. App. 1 Cir. 6/1/18); 251 So. 3d 442, 452 (concluding that, "in accordance with La. R.S. 13:5104(A) and (B)," plaintiff "was required . . . to file suit against Warden Vannoy and the State . . . either in East Baton Rouge Parish *or* East Feliciana Parish" where alleged injury occurred in East Feliciana Parish (emphasis added)); *McKenzie v. Imperial Fire & Cas. Ins. Co.*, 2012-1648, pp. 9–10 (La. App. 1 Cir. 7/30/13); 122 So. 3d 42, 49 ("[T]he action then became subject to the mandatory venue provisions set forth in La. R.S. 13:5104(A) and was transferred to the 22nd JDC for St. Tammany Parish (*where the accident occurred*) . . . ." (emphasis added)), *writ denied*, 2013-2066 (La. 12/6/13); 129 So. 3d 534.

[47] App. 0739 at p. 23.

could file an exception of lis pendens in the later-filed suits and avoid conflicting orders.[48]

C. The trial court correctly concluded that Plaintiffs have stated a cause of action.

The Secretary asserts that Plaintiffs fail to state a cause of action, restating his argument that Plaintiffs' claims are "academic, theoretical, or based on a contingency which may or may not arise."[49] This is, essentially, a rehash of his justiciability argument. For the sake of efficiency, Plaintiffs will briefly summarize their arguments instead of repeating in full the myriad reasons why the Secretary's views on justiciability and ripeness are misguided.

The general rule "is that an exception of no cause of action must be overruled unless the allegations of the petition exclude every reasonable hypothesis other than the premise upon which the defense is based; that is, unless plaintiff has no cause of action under any evidence admissible under the pleadings." *Haskins v. Clary*, 346 So. 2d 193, 195 (La. 1977). For the purpose of determining the validity of the peremptory exception of no cause of action, "all well-pleaded allegations of fact are accepted as true, and if the allegations set forth a cause of action as to any part of the demand, the exception must be overruled." *Id.* at 194. "Liberal rules of pleading prevail in Louisiana and each pleading should be so construed as to do substantial

[48] Louisiana Code of Civil Procedure article 531 provides that "[w]hen two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto . . . ." Because "[t]he test for lis pendens is to determine whether a final judgment in the first suit would be res judicata" in subsequent suits, "three requirements must be satisfied for dismissal of a suit pursuant to an exception of lis pendens: (1) there must be two or more suits pending; (2) the suits must involve the same transaction or occurrence, and (3) the suits must involve the same parties in the same capacities." *Black v. Exxon Mobil Corp.*, 14-524, p. 3 (La. App. 5 Cir. 11/25/14); 165 So. 3d 1013, 1015. The first and second requirements would be easily met if the Secretary were faced with multiple malapportionment suits. And with respect to the third requirement, "[t]he 'identity of parties' prerequisite for res judicata does not mean that the parties must be the same physical or material parties, so long as they appear in the same quality or capacity"; in other words, the parties need only "be the same 'in the legal sense of the word.'" *Id.* at p. 4; 165 So. 3d at 1016 (quoting *Berrigan v. Deutsch, Kerrigan & Stiles, LLP*, 2001-0612, p. 6 (La. App. 4 Cir. 1/2/02); 806 So. 2d 163, 167). Different voters who claim the same malapportionment injury might well satisfy this requirement.

[49] App. 0739 at p. 14.

justice." La. C.C.P. art. 865. Whenever "it can reasonably do so, [a] court should maintain a petition so as to afford the litigant an opportunity to present his evidence." *Haskins*, 346 So. 2d at 194–95.

As discussed at length above—and as pleaded in Plaintiffs' amended petition—Louisiana's congressional districts are unconstitutionally malapportioned and the political branches will fail to adopt new districts in time for the next elections. The resulting injury must be redressed long before the 2022 midterm elections so that candidates can prepare their campaigns and Louisianians, including Plaintiffs, can evaluate their options and associate with like-minded voters. Until and unless the Legislature enacts a lawful map, the trial court must prepare to do so. Contrary to the Secretary's representations, Plaintiffs' amended petition is consistent with the ordinary course of redistricting litigation, and the trial court has the power to provide the relief that Plaintiffs seek. Both the law and the facts as Plaintiffs have alleged them support this action; Plaintiffs have thus pleaded a cognizable cause of action.

D. The trial court correctly concluded that Plaintiffs have a real and actual interest in the matter asserted.

The Secretary wrongly asserts that "Plaintiffs lack the kind of real and actual interest required by" the Louisiana Code of Civil Procedure because they "do not show that they have a special interest in redistricting apart from the general public."[50] To the contrary, Plaintiffs—who reside in overpopulated districts—have standing to bring this action.

Under Louisiana law, "an action can be brought only by a person having a real and actual interest which he asserts." La. C.C.P. art. 681. Courts—including the U.S. Supreme Court—have routinely concluded that voters in overpopulated districts possess a particularized injury, distinct from the general public, that conveys

[50] App. 0739 at p. 5.

standing to bring suit. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 206–08 (1962) (holding that voters in overpopulated legislative districts have standing to sue); *Gill v. Whitford*, 138 S. Ct. 1916, 1929–31 (2018) (explaining that "injuries giving rise to [malapportionment] claims were individual and personal in nature because the claims were brought by voters who alleged facts showing disadvantage to themselves as individuals" (quotation marks and citations omitted)); *see also Bradix v. Advance Stores Co.*, 2017-0166, pp. 4–5 (La. App. 4 Cir. 8/16/17); 226 So. 3d 523, 528 (noting that "federal cases regarding Article III standing .... can be persuasive" when considering Louisiana's standing requirement). Plaintiffs here, like the plaintiffs in previous malapportionment cases, "assert[] a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Baker*, 369 U.S. at 208 (quotation marks and citations omitted). Because Plaintiffs seek to safeguard their personal voting power against constitutional deprivation, they have asserted a "real and actual interest" in this action.[51]

The Secretary also suggests that "any harm that may befall plaintiffs from a particular reapportionment or redistricting plan that might occur in the future is

[51] The Secretary, incidentally, overplays his hand by suggesting that a "special interest which is separate and distinct from the interest of the public at large" is required of plaintiffs in all cases. App. 0739 at p. 28 (quoting *All. for Affordable Energy v. Council of City of New Orleans*, 96-0700, p. 6 (La. 7/2/96); 677 So. 2d 424, 428). The Louisiana Supreme Court has specified that "[w]ithout a showing of some special interest in the performance sought *of a public board, officer or commission* which is separate and distinct from the interest of the public at large, plaintiff will not be permitted to proceed." *League of Women Voters of New Orleans v. City of New Orleans*, 381 So. 2d 441, 447 (La. 1980) (emphasis added); *accord All. for Affordable Energy*, 96-0700, p. 6; 677 So. 2d at 428 (distinguishing between "plaintiffs [] seeking to compel [] defendants to perform certain functions," who must "show that they had some special interest which is separate and distinct from the general public," and "a citizen seeking to *restrain* unlawful action by a public entity," who "is not required to demonstrate a special or particular interest distinct from the public at large" (quotation marks and citations omitted)). Here, Plaintiffs are not seeking to compel performance from the Secretary or any other state official; instead, they seek to *enjoin* the Secretary from implementing Louisiana's current congressional map. They seek affirmative relief only from the trial court, not "a public board, officer or commission." Accordingly, even though Plaintiffs have both a real and actual interest *and* a special interest distinct from the general public, it is not clear that the latter would even be required in this case.

entirely speculative,"[52] but this is simply another reiteration of his justiciability argument. And the primary case on which he relies, *Soileau v. Wal-Mart Stores, Inc.*, 2019-0040 (La. 6/26/19); 285 So. 3d 420, is readily distinguishable. There, the plaintiff's claim for relief was explicitly foreclosed by a statute providing that "presentation and filing of the petition . . . *shall be premature* unless" certain predicate circumstances existed. *Id.* at p. 3; 285 So. 3d at 423 (quoting La. R.S. 23:1314(A)). Here, by contrast, there is no analogous statute at play. Additionally, unlike the allegations in *Soileau*, the risks of impasse and malapportionment here are neither hypothetical nor abstract: redistricting is required to remedy the constitutional injury of malapportionment; the political branches are poised to deadlock; and the only alternative is judicial intervention.

E. The trial court correctly concluded that the Secretary is the appropriate defendant.

Although the Secretary claims that he has "no substantial connection or meaningful involvement in the redistricting process,"[53] there can be no question that the Secretary is an appropriate defendant in redistricting litigation. The Secretary is, after all, the "chief election officer in the state." La. R.S. 18:421. And courts have denied previous Secretaries' efforts to avoid participation in suits like this one. In *Hall v. Louisiana*, for example, the court found former Secretary of State Tom Schedler to be the proper defendant in a redistricting lawsuit because (1) the Secretary enforces election plans, (2) no case law exists suggesting the Secretary is *not* the proper defendant in such cases, (3) the Secretary is often the defendant in voting rights cases, and (4) the Secretary would be forced to comply with and be involved in enforcing any injunctive relief. *See* 974 F. Supp. 2d 978, 993 (M.D. La. 2013). The Secretary must surely be familiar with this line of precedent; his own effort to dismiss a redistricting complaint on similar grounds was denied less than

[52] App. 0739 at p. 5.
[53] App. 0739 at p. 5.

three years ago. *See Johnson v. Ardoin*, No. CV 18-625-SDD-EWD, 2019 WL 2329319, at *3 (M.D. La. May 31, 2019) (finding Secretary to be proper defendant in redistricting action and noting that other courts have concluded similarly in voting rights cases). The Secretary is thus responsible for defending this action.[54]

F. This matter should not be stayed.

Finally, although the Secretary urges "that further proceedings in this matter should be stayed until a final decision and ruling on the writ application is issued,"[55] Plaintiffs submit that a stay in this matter would be inappropriate and counterproductive.[56]

As Plaintiffs have noted throughout these proceedings, redistricting is a fact-intensive process for which time is of the essence, especially given the delays imposed this cycle by the ongoing pandemic. Plaintiffs submit that the gears of judicial redistricting must be put into motion now to avoid unnecessary and harmful delays in the event of impasse. In denying a request for a stay of a malapportionment lawsuit during the last redistricting cycle, the three-judge panel in *Brown* explained the need for proactive case management in these cases:

> The Court remains hopeful, but time is short for all. . . . [T]hough the Plaintiffs do not seek and the Court does not intend to provide relief that obstructs the legislature, actions must be taken now to prepare for the possibility that the state institutions will be unable to fulfill their duty in a timely manner. . . .
>
> [I]f the legislature were to fail in passing constitutional legislative districts and the Court were not prepared to do so, the fundamental

[54] Outside of Louisiana, courts routinely adjudicate redistricting cases where secretaries of state are named as defendants. *See, e.g.*, *Growe*, 507 U.S. at 27; *White v. Weiser*, 412 U.S. 783, 786 (1973); *Kirkpatrick*, 394 U.S. at 528; *see also supra* Section A.3 (discussing current impasse litigation in Minnesota where secretary of state is named defendant).

[55] App. 0739 at p. viii.

[56] The Secretary notes that the trial court twice denied his requests for a stay. App. 0739 at p. vii. "Generally, a trial court's denial of a motion for stay should not be disturbed absent an abuse of discretion." *Hester v. Hester*, 98-0854, p. 4 (La. App. 4 Cir. 5/13/98); 715 So. 2d 40, 42, *writ denied*, 98-1561 (La. 9/18/98); 724 So. 2d 764. But here, the Secretary does not actually assign error to the trial court's denials of his stay requests or otherwise suggest that the denials constituted an abuse of discretion. At any rate, for the reasons described above, the denials were not an abuse of discretion; timely resolution of this matter is needed to ensure that all Louisianians, Plaintiffs included, have the opportunity to vote in constitutionally apportioned congressional districts.

> voting rights of both the Plaintiffs and the general public would be severely threatened.

Brown v. Kentucky, Nos. 13-cv-68 DJB-GFVT-WOB, 13-cv-25 DJB-GFVT-WOB, 2013 WL 3280003, at *4 (E.D. Ky. June 27, 2013) (three-judge panel). The same concerns about timeliness and injury that motivated the *Brown* panel are present here. To ensure that the judicial redistricting process can be timely completed in the event of impasse, this matter should proceed, and the Secretary's request for a stay should be denied.

Moreover, although the Secretary claims that this matter should be stayed to prevent "great cost" and "irreparable injury" to himself,[57] he at no point addresses the relevant inquiry: how a stay would benefit *this Court*. "A stay of proceedings is issued for the benefit of the court and is [] designed to preserve the existing status of the litigants until the court has had sufficient time to review the record and make a determination of the issues presented." *M.P.G. Constr., Inc. v. Dep't of Transp. & Dev.*, 2003-0164, p. 8 (La. App. 1 Cir. 4/2/04); 878 So. 2d 624, 630, *writ denied*, 2004-0975 (La. 6/4/04); 876 So. 2d 85. The Secretary provides no indication that this Court lacks sufficient time to review the writ application such that a stay is warranted. And indeed, there are currently no pending motions, deadlines, or hearings that need to be stayed to allow the Court to review the record and make its determination.

CONCLUSION

"No right is more precious in a free country than that of having a voice in the election of those who make the laws." *Wesberry*, 376 U.S. at 17. Consistent with this constitutional dictate and the one-person, one-vote principle, courts regularly intervene to ensure that congressional maps are properly redistricted—particularly

[57] App. 0739 at p. viii–ix.

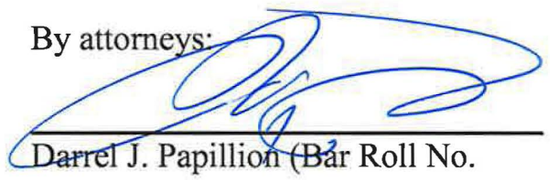
where, as here, the political branches are divided and the risk if impasse is substantial.

Faced with this commonplace request for judicial relief, the Secretary tries to portray Plaintiffs' case as an unwarranted expansion of judicial power, an intrusion into the ambit of the political branches. But none of the exceptions raised by the Secretary changes the fact that Plaintiffs are entitled to relief. The state's congressional districts are malapportioned, the political branches are poised to deadlock, and the trial court's immediate intervention is needed to ensure that a new map is timely adopted and that Plaintiffs' votes are not diluted. The course of action Plaintiffs seek in the face of impasse is not only prudent, but amply supported by both precedent and state law. This matter is ripe for adjudication and readily justiciable, and the trial court should be allowed to proceed and ensure that the complicated task of redistricting is completed in advance of the upcoming midterm elections.

The trial court correctly denied the Secretary's declinatory and peremptory exceptions, concluding that it has jurisdiction to hear this case and that Plaintiffs are the proper parties to bring it. For these reasons and those above, the Secretary's writ application should be denied.

[SIGNATURE BLOCK ON NEXT PAGE]

By attorneys:



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VERIFICATION AND AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

BEFORE ME, the undersigned Notary Public, personally came and appeared:

DARREL J. PAPILLION

who did depose and state that:

1. He is attorney of record for the Plaintiffs-Respondents herein;

2. The allegations contained within this Opposition to the Writ Application are true and correct; and

3. A copy of the foregoing Opposition to the Writ Application has been served on this date, via U.S. Mail and email, upon the following:

   The Honorable Sidney H. Cates, IV
   Civil District Court
   Division C
   421 Loyola Avenue, Room 306
   New Orleans, LA 70112

4. A copy of the foregoing Opposition to the Writ Application has been served on this date, via U.S. Mail and email, upon counsel for Defendant-Applicant, R. Kyle Ardoin, in his Official Capacity as Louisiana Secretary of State, as follows:

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Darrel J. Papillion

SWORN TO AND SUBSCRIBED before me,
Notary Public, on this 27th day of
December, 2021.

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Jennifer Wise Moroux
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La Bar No.: 31368
State of Louisiana
Parish of East Baton Rouge
My Commission is for Life

OFFICIAL SEAL
JENNIFER WISE MOROUX
NOTARY ID # 89493
STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE
My Commission is for Life

EXHIBIT 1

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November 17, 2021

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You are hereby notified that the Court has entered the following order:

No. 2021AP1450-OA Johnson v. Wisconsin Elections Commission

Pending before the court is an original action filed by petitioners Billie Johnson, et al. This order provides scheduling expectations for the parties in the event new maps are not enacted into law, and it becomes necessary for this court to award judicial relief.

The court intends to issue an opinion on or about November 30, 2021, answering the first three questions posed in this court's order dated October 14, 2021, and briefed by the parties and amici, namely: (1) Under the relevant state and federal laws, what factors should we consider in evaluating or creating new maps? (2) The petitioners ask us to modify existing maps using a "least-change" approach. Should we do so, and if not, what approach should we use? and (3) Is the partisan makeup of districts a valid factor for us to consider in evaluating or creating new maps?

Upon issuance of the court's decision on the first three questions, the parties are encouraged to review discovery and record development needs and are advised that the following deadlines will apply:

IT IS ORDERED that by 4:00 p.m. on December 3, 2021, if parties desire discovery, they shall submit a joint proposed discovery plan that details from whom and how discovery will be sought, with all discovery to be completed on or before December 23, 2021;

IT IS FURTHER ORDERED that on or before 12:00 noon on December 15, 2021, each party (including all intervenors) may file a proposed map (for state assembly, state senate, and congress), complying with the parameters set forth in the court's forthcoming decision, a supporting brief, and an expert report; or, a party may file a letter-brief stating the party supports a map proposed by another party. Any brief filed in support of a proposed map shall not exceed 50 pages if a monospaced font is used or 11,000 words if a proportional serif font is used. A letter-brief filed in support of another party's proposed map shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that any expert report filed in support of a proposed map and accompanying its supporting brief shall strive for brevity and shall contain an executive summary not to exceed five pages if a monospaced font is used or 1,100 words if a proportional serif font is used;

IT IS FURTHER ORDERED that on or before 12:00 noon on December 30, 2021, each party may file a responsive brief which shall not exceed 25 pages if a monospaced font is used or 5,500 words if a proportional serif font is used. A party that elects to support another party's proposed map may file a letter-brief that shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that any non-party that wishes to file a non-party brief amicus curiae in support of or in opposition to a proposed map must file a motion for leave of the court to file a non-party brief. Wis. Stat. § (Rule) 809.19 (7). Non-parties should consult this court's Internal Operating Procedure III.B.6.c., concerning the nature of non-parties who may be granted leave to file a non-party brief. A proposed non-party brief must accompany the motion for leave to file it and shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used. Any motion for leave with the proposed non-party brief attached shall be filed no later than 12:00 noon on January 4, 2022. Any proposed non-party brief for which this court does not grant leave will not be considered by the court;

IT IS FURTHER ORDERED that on or before 12:00 noon on January 4, 2022, each party may file a reply brief, which shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used. A party that elects to support another party's proposed map may file a letter-brief that shall not exceed 15 pages if a monospaced font is used or 3,300 words if a proportional serif font is used;

IT IS FURTHER ORDERED that the form, pagination, appendix, and certification requirements shall be the same as those governing standard appellate briefing in this court for a brief-in chief, response, and reply;

IT IS FURTHER ORDERED that any party that filed a proposed map and subsequently determines that it merits a correction or modification, may file a motion seeking the court's leave to amend the proposed map. Such motion shall include a description of the amendments, the reasons for them, a proposed amended map, and shall state whether the motion is unopposed by other the parties. The court may request responses from the other parties; unsolicited responses to such a motion will be disfavored;

IT IS FURTHER ORDERED that the parties are advised that the court may elect to conduct a hearing and/or oral argument on one or more of four consecutive days beginning January 18, 2022; and

IT IS FURTHER ORDERED that all filings in this matter shall be filed as an attachment in pdf format to an email addressed to clerk@wicourts.gov. See Wis. Stat. §§ 809.70, 809.80 and 809.81. A paper original and 10 copies of each filed document must be received by the clerk of this court by 12:00 noon of the business day following submission by email, with the document bearing the following notation on the top of the first page: "This document was previously filed via email."

Sheila T. Reiff
Clerk of Supreme Court

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