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

PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE, EDWIN RENÉ SOULÉ, ALICE WASHINGTON, CLEE EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS, AMBROSE SIMS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ("NAACP") LOUISIANA STATE CONFERENCE, and POWER COALITION FOR EQUITY AND JUSTICE, Plaintiffs, v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, Defendant.	Case No. 3:22-cv-00211-SDD-SDJ c/w
EDWARD GALMON, SR., CIARA HART, NORRIS HENDERSON, and TRAMELLE HOWARD, Plaintiffs, v. R. KYLE ARDOIN, in his official capacity as Louisiana Secretary of State, Defendant.	Case No. 3:22-cv-00214-SDD-SDJ

GALMON* PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

* In this combined reply, Plaintiffs respond to the opposition briefs filed by Defendant R. Kyle Ardoin, in his official capacity as Louisiana Secretary of State (the "Secretary"), *see* Rec. Doc. No. 101 ("Sec'y Opp'n"); Intervenor-Defendant the State of Louisiana (the "State Intervenor"), *see* Rec. Doc. No. 108 ("State Opp'n"); and Intervenor-Defendants Clay Schexnayder, in his official capacity as Speaker of the Louisiana House of Representatives, and Patrick Page Cortez, in his official capacity as President of the Louisiana Senate (the "Legislative Intervenors," and together with the Secretary and the State Intervenor, "Defendants"), *see* Rec. Doc. No. 109 ("Legis. Opp'n"). Plaintiffs previously filed a motion pursuant to

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Local Civil Rule 7(g) for leave to file a reply that exceeds the 10-page limit, for a total of 20 pages. *See* Rec. Doc. No. 118.

INTRODUCTION

The opposition briefs and expert reports filed by Defendants are an elaborate act of misdirection. Rather than engage with the merits of Plaintiffs' Section 2 claim, Defendants instead rely on irrelevant digressions, novel legal theories, and distortions of binding caselaw. And, most egregiously, they rewrite precedent to serve their own ends—a tactic most glaringly illustrated by the State Intervenor's qualifier, "Assuming for now that *Gingles* controls . . ." State Opp'n 5.

Make no mistake: *Gingles* and its progeny *do* control, no assumptions required. The elements of a Section 2 claim are well established and settled law. And because Plaintiffs have proved the merits of their Section 2 claim—and the equitable preliminary injunction factors readily support immediate relief to safeguard the fundamental rights of Black Louisianians—Plaintiffs' motion should be granted.

ARGUMENT

None of the legal or factual arguments raised by Defendants has merit.

I. Plaintiffs have standing and Section 2 confers a private right of action.

Defendants raise two threshold issues in their opposition briefing: The Secretary contends that Plaintiffs lack standing to assert their claim, *see* Sec'y Opp'n 7–8, while the State Intervenor boldly suggests that, contrary to decades of precedent, Section 2 does not confer a private right of action, *see* State Opp'n 19–21. Neither argument is persuasive.

Plaintiffs clearly have standing because, as Black Louisianians, *see* Exs. 6–9,[1] they have suffered the injury of vote dilution, either because they have been cracked into an area where a Black-performing district should have been drawn under Section 2 or because they have been

[1] Exhibits 1 through 28 were attached to the Declaration of Darrel J. Papillion, filed with Plaintiffs' motion for preliminary injunction. *See* Rec. Doc. No. 42-2. Exhibits 29 through 34 are attached to the Second Declaration of Darrel J. Papillion, filed concurrently with this reply.

packed into a majority-Black district that prevents that required district from being drawn. *See, e.g.*, *Pope v. County of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014) ("[S]upported allegations that Plaintiffs reside in a reasonably compact area that could support additional [majority-minority districts] sufficiently prove[] standing for a Section 2 claim for vote dilution."). The Secretary questions Plaintiffs' standing because they "challenge the entire congressional plan, but only have Plaintiffs living in Congressional Districts 2,[]5, and 6," Sec'y Opp'n 8, but no authority holds that plaintiffs must represent *every* district that might be impacted by a remedial districting plan—either in a Section 2 case or in *any* redistricting matter.[2]

The State Intervenor's claim that Section 2 does not confer a private right of action fares no better. In *Morse v. Republican Party of Virginia*, a majority of the U.S. Supreme Court agreed that "the existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965." 517 U.S. 186, 232 (1996) (Stevens, J.) (plurality opinion on behalf of two justices) (quoting S. Rep. No. 97-417, pt. 1, at 30 (1982)); *accord id.* at 240 (Breyer, J., concurring) (expressly agreeing with Justice Stevens on this point on behalf of three justices); *see also, e.g.*, *Ga. State Conf. of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1275 (N.D. Ga. 2017) (three-judge court) (citing *Morse* and concluding that "Section 2 contains an implied private right of action").

Rather than engage with (or even acknowledge) *Morse*, the State Intervenor instead relies on a method for assessing the existence of implied rights of action that the Court later adopted in *Alexander v. Sandoval*, 532 U.S. 275 (2001). *See* State Opp'n 20–21. But where "a precedent of

[2] Indeed, the Secretary's argument is inconsistent with standing doctrine in the redistricting context. Under his theory, a viable malapportionment claim would need at least one plaintiff from *every* district in a challenged map, since each district would need to be redrawn to remedy the malapportionment injury—and yet binding precedent holds that voters in underpopulated districts do *not* have standing to challenge malapportionment because "injury results only to those persons domiciled in the under-represented voting districts." *Fairley v. Patterson*, 493 F.2d 598, 603 (5th Cir. 1974); *see also, e.g.*, *United States v. Hays*, 515 U.S. 737, 744–45 (1995) (only voters in racially gerrymandered districts have standing to challenge map).

[the Supreme] Court has direct application in a case," courts "should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions"—even if it "appears to rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). *Morse* has not been overruled, and the Court has given no indication that a majority of justices intends to revisit its conclusion; indeed, it has repeatedly heard private cases brought under Section 2 without questioning this predicate foundation. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2331–32 (2018); *LULAC v. Perry*, 548 U.S. 399, 409 (2006) (plurality opinion); *see also Shelby County v. Holder*, 570 U.S. 529, 537 (2013) ("Both the Federal Government *and individuals* have sued to enforce § 2." (emphasis added)). Only Justice Thomas joined Justice Gorsuch's recent suggestion that whether or not Section 2 furnishes a private right of action is "an open question," *Brnovich v. DNC*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring)—a concurrence that did not cite *Morse* or any post-*Morse* Section 2 cases. And although the State Intervenor claims that the Fifth Circuit recently "acknowledged that [this issue] is an open question," State Opp'n 20, the concurring opinions it cites said nothing of the sort. *See Thomas v. Reeves*, 961 F.3d 800, 808 (5th Cir. 2020) (per curiam) (Costa, J., concurring) (noting only that "[i]t was not established in the 1970s that Section 2 of the Voting Rights Act provided a private right of action" without suggesting that this remains open question); *id.* at 818 (Willett, J., concurring) (observing only that "[a]s late as 1980, the Supreme Court had not even definitely determined whether § 2 of the Voting Rights Act created a private right of action for voters" (cleaned up)).[3]

[3] In just the last five months, seven federal judges on three district courts have expressly rejected the argument that the State Intervenor offers here. *See Pendergrass v. Raffensperger*, No. 1:21-CV-05339-SCJ, slip op. at 17–20 (N.D. Ga. Jan. 28, 2022); *Singleton v. Merrill*, Nos. 2:21-cv-1291-AMM, 2:21-cv-1530-AMM, 2022 WL 265001, at *78–79 (N.D. Ala. Jan. 24, 2022) (per curiam) (three-judge court); *LULAC v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-

In short, Plaintiffs have both standing to assert their claim and a private right of action with which to bring it—and the Court can and should proceed to the merits.

II. Plaintiffs' illustrative maps satisfy the first *Gingles* precondition.

Plaintiffs have readily proved each of the three *Gingles* preconditions—including demonstrating that "it is possible to 'creat[e] more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.'" *Galmon* Pls.' Mem. of Law in Supp. of Mot. for Prelim. Inj. 6–7, Rec. Doc. No. 42-1 ("Mot.") (alteration in original) (quoting *LULAC*, 548 U.S. at 430). In response, Defendants contend that Mr. Cooper's illustrative maps are insufficient or even unconstitutional. Neither claim is true.

A. Mr. Cooper properly employed the any-part Black metric.

Defendants dispute Mr. Cooper's satisfaction of the numerosity requirement of the first *Gingles* precondition by focusing on one narrow point: his use of the any-part Black voting-age population ("BVAP") metric. *See* State Opp'n 6–10; Legis. Opp'n 14.[4] But where, as here, "the case involves an examination of only one minority group's effective exercise of the electoral franchise," it is "proper to look at *all* individuals who identify themselves as black." *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003). Although the State Intervenor suggests that the use of any-part BVAP in *Ashcroft* was somehow a "big . . . exception" to the norm, State Opp'n 8, they point to nothing in that or any other Supreme Court opinion that cabins use of the metric in any way—and courts across the country have followed the Court's lead and relied on the any-part BVAP

judge court); *see also* Statement of Interest of the United States at 1, *LULAC v. Abbott*, No. 3:21-cv-259 (DCG-JES-JVB) (W.D. Tex. Nov. 30, 2021) ("Private plaintiffs can enforce Section 2 as a statutory cause of action[.]"). Against this backdrop, the recent conclusion of a single district court that Section 2 does not confer a private right of action, *see Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 4:21-cv-01239-LPR, at *9 (E.D. Ark. Feb. 17, 2022), can be understood only as a lone outlier.

[4] Curiously, despite Defendants' insistence that any-part BVAP is an improper metric, their own experts employ this standard measurement in their analyses. *See* State Opp'n Ex. A, at 10 n.2 (Dr. Murray); Legis. Opp'n Ex. C, ¶ 3 n.1 (Dr. Blunt).

metric in Section 2 cases, *see, e.g.*, *Terrebonne Par. Branch NAACP v. Jindal*, 274 F. Supp. 3d 395, 419–20 (M.D. La. 2017), *rev'd on other grounds sub nom. Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020); *Covington v. North Carolina*, 316 F.R.D. 117, 125 n.2 (M.D.N.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 2211 (2017), including cases in which Mr. Cooper has served as an expert, *see, e.g.*, *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, Nos. 1:21-CV-5337-SCJ, 1:21-CV-5339-SCJ, 1:22-CV-122-SCJ, 2022 WL 633312, at *16 (N.D. Ga. Feb. 28, 2022); *Singleton v. Merrill*, Nos. 2:21-cv-1291-AMM, 2:21-cv-1530-AMM, 2022 WL 265001, at *12 n.5 (N.D. Ala. Jan. 24, 2022) (per curiam) (three-judge court); *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1343 (N.D. Ga. 2015); *Mo. State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F. Supp. 3d 1006, 1033 (E.D. Mo. 2016). This precedent makes eminent sense: There is no better way to determine who qualifies as Black than by relying on the very people who identify as such.[5]

In any event, Mr. Cooper's illustrative majority-Black districts satisfy even the most restrictive metric of eligible Black voters: non-Hispanic single-race Black citizen voting-age population. *See* Ex. 29 ¶¶ 41–42 & fig. 5. In short, Plaintiffs indisputably satisfy the numerosity requirement of the first *Gingles* precondition.

B. Mr. Cooper's illustrative plans are not racial gerrymanders.

The State Intervenor claims that Mr. Cooper's "exemplar maps are racial gerrymanders," State Opp'n 13–15—a risible suggestion with no basis in the facts or the law.

Mr. Cooper's illustrative maps are not based predominantly on race. Instead, his proposed districts comply with the neutral criteria adopted by the Legislature, *see* Ex. 20, which "serve[s]

[5] The State Intervenor's attempt to parse who properly counts as "Black" is a chilling reminder of previous efforts to racially classify citizens based on arbitrary guidelines. *See* State Opp'n 7 n.3.

to defeat a claim that a district has been gerrymandered on racial lines." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Mr. Cooper's illustrative maps are just as or even more compact than the new congressional map enacted by House Bill 1 ("HB 1"), both averaged across districts and as to the maps' majority-Black districts in particular. *See* Ex. 3 ¶¶ 72–77 & figs. 18–19. His maps split fewer parishes and municipalities than HB 1, *see id.* ¶¶ 78–82 & fig. 20, and his fourth illustrative map reduces voting district splits to zero, Ex. 29 ¶¶ 11–12. And unlike the enacted congressional plan, Mr. Cooper's maps "comply with . . . Section 2 of the Voting Rights Act," just as the Legislature intended. Ex. 20.

Nevertheless, Defendants contend that Mr. Cooper's maps are noncompact and thus evince improper racial motivation. *See* Sec'y Opp'n 8–13; State Opp'n 11–13. "While no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *LULAC*, 548 U.S. at 433 (cleaned up). As described above, Mr. Cooper's districts do indeed adhere to traditional principles. And his maps further preserve the communities of interest that link St. Landry Parish, Baton Rouge, and the delta parishes along the Louisiana/Mississippi border, *see* Exs. 4–5—testimony that Defendants simply ignore. Defendants might quibble with the extent to which Mr. Cooper's maps preserve their preferred communities of interest,[6] but "there is more than one way to draw a district so that it can reasonably be described as meaningfully adhering to traditional principles." *Chen v. City of Houston*, 206 F.3d 502, 519 (5th Cir. 2000). Mr. Cooper's maps, which

[6] And those preferred communities of interest, at least as conceived by Mr. Hefner, *see* State Opp'n Ex. C, are highly problematic. *See* Ex. 29 ¶¶ 28–32 (critiquing Mr. Hefner's analysis); Ex. 31 at 10–13 (same).

preserve communities of interest and otherwise adhere to neutral redistricting criteria, easily clear this bar.[7]

Notwithstanding Mr. Cooper's compliance with traditional redistricting principles, Defendants try and fail to demonstrate that race was the predominant factor in his illustrative maps. But their arguments, and the expert analyses that buttress them, fall flat.

Dr. Blunt's simulations analysis. Dr. Blunt's 10,000 simulated maps, *see* Legis. Opp'n Ex. C, have no bearing on whether a plan complies with all relevant redistricting criteria. As Dr. Blunt recognizes, his simulations can only incorporate a limited number of traditional districting factors, *see id.* Ex. C, ¶ 15, and notably *cannot* account for communities of interest—a paramount redistricting criterion in Louisiana, *see* Ex. 20, and one that, as described above, naturally gives rise to an additional majority-minority district. Dr. Blunt's simulation sets are of limited value in determining what is likely to occur when drawing maps under real-world constraints, as evidenced by the fact that *HB 1 itself* would not satisfy his prescribed parameters. *See* Ex. 30 ¶ 11. His excessively theoretical simulations certainly cannot be used to demonstrate that race predominated in the creation of Mr. Cooper's illustrative maps.

Mr. Bryan's geographic splits analysis. The upshot of Mr. Bryan's report is that Mr. Cooper's illustrative majority-Black districts were designed to include Black voters. *See* State Opp'n Ex. A. But there is nothing surprising about a conclusion that a district offered to satisfy the first *Gingles* precondition—which poses an "objective, numerical test: Do minorities make up

[7] Defendants repeatedly compare Mr. Cooper's illustrative majority-Black Fifth Congressional Districts with the state's majority-Black Fourth Congressional Districts from the mid-1990s, multiple iterations of which were ruled unconstitutional by federal courts. *See, e.g.*, Sec'y Opp'n 9. But even a cursory comparison demonstrates the significant differences between these districts in terms of compactness and communities of interest. *Compare Hays v. Louisiana*, 936 F. Supp. 360, 373–74 (W.D. La. 1996) (per curiam) (three-judge court) (depicting snaking districts stretching from Baton Rouge to Shreveport), *with* Ex. 3 ¶¶ 58, 64, 69 & figs. 12, 14, 16 (depicting Mr. Cooper's compact illustrative districts).

more than 50 percent of the voting-age population in the relevant geographic area?" *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (plurality opinion)—includes significant minority populations. Moreover, as Mr. Cooper notes, Mr. Bryan's theory of "misallocation" is not useful in the context of redistricting because, "[d]ue to segregated housing patterns in Louisiana, population distribution across a jurisdiction is not uniform by race," and it is therefore "difficult to split areas that mirror the jurisdiction-wide racial percentages." Ex. 29 ¶ 27.

Dr. Hood's core retention and district racial composition analyses. Dr. Hood's analyses do nothing more than prove that Mr. Cooper's illustrative plans are dissimilar to HB 1 and the state's 2011 congressional plan. *See* Legis. Opp'n Ex. A. This is hardly a revelatory discovery given that an enacted map must necessarily change to create a new majority-minority district. *See* Ex. 29 ¶ 33. As for Dr. Hood's district racial composition analysis, his conclusion that more Black Louisianians are drawn into the illustrative Fifth Congressional Districts than HB 1's Fifth Congressional District is again unsurprising. *See* Legis. Opp'n Ex. A, at 5. It only illustrates what Dr. Hood eventually concedes: that Plaintiffs' illustrative plans successfully create *two* Black-opportunity districts, whereas HB 1 includes only one.

Dr. Murray's spatial analysis. All Dr. Murray's expert report demonstrates is that Black and white voters in Louisiana are clustered differently—hardly a novel finding, and one that leads Dr. Murray to *no* specific claims or conclusions about redistricting. *See* State Opp'n Ex. B. In its brief, the State Intervenor interprets Dr. Murray's findings about the distances between the centers of Black populations to conclude that Mr. Cooper's illustrative majority-Black districts are noncompact. *See id.* at 12. But it is inevitable that not all Black population clusters are spatially proximate to one another in a large congressional district with nearly 800,000 Louisianians. Mere

distance alone cannot be offhandedly treated as a proxy for dissimilarity—especially given the other evidence about shared communities of interest presented by Plaintiffs.[8]

Ultimately, these experts demonstrate nothing more than that race was *considered* by Mr. Cooper when he drew his maps, and that likewise "some awareness of race likely is required to draw two majority-Black districts." *Singleton v. Merrill*, Nos. 2:21-cv-1291-AMM, 2:21-cv-1530-AMM, 2022 WL 272636, at *5 (N.D. Ala. Jan. 27, 2022) (three-judge court). This conclusion "is unremarkable, not stunning," *id.* (cleaned up)—"the first *Gingles* factor is an inquiry into causation that necessarily classifies voters by their race." *Clark v. Calhoun County*, 88 F.3d 1393, 1407 (5th Cir. 1996).[9] Because courts "*require* plaintiffs to show that it is possible to draw majority-minority voting districts," "[t]o penalize [Plaintiffs] . . . for attempting to make the very showing that *Gingles*[and its progeny] demand would be to make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action." *Davis v. Chiles*, 139 F.3d 1414, 1425–26 (11th Cir. 1998); *accord Singleton*, 2022 WL 272636, at *7 ("[A] rule that rejects as unconstitutionally race-focused a remedial plan for attempting to satisfy the *Gingles* I numerosity requirement would preclude any plaintiff from ever stating a Section Two claim."). Consideration is not the same as predominance, and none of Defendants' arguments or expert analyses provide any compelling evidence that race *predominated* in Mr. Cooper's illustrative districts. *Cf., e.g.*, Ex. 29 ¶ 6 ("[R]ace did not predominate in the drawing of any of these illustrative plans.").

[8] Indeed, Dr. Murray's report also demonstrates the vast distances between clusters of Louisiana's *white* population, which are nevertheless grouped together in the same congressional districts in HB 1. Given the predominant position of communities of interest among the Legislature's redistricting criteria, *see* Ex. 20, *none* of the enacted districts would apparently satisfy these adopted principles based on spatial analysis.

[9] The State Intervenor suggests that *Clark* is inapplicable here because "[t]he posture of this case is demonstrably different," State Opp'n 15, but that is a distinction without a difference—the Fifth Circuit's conclusions about the interplay between Section 2 and the racial gerrymandering doctrine are relevant regardless of the procedural posture of the case.

In the end, the fact that race was a factor in Mr. Cooper's map drawing is not impermissible, but inevitable: As the U.S. Supreme Court has observed, "redistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness"—the sort that Mr. Cooper had when he drew his illustrative maps—"does not lead inevitably to impermissible race discrimination." *Shaw*, 509 U.S. at 646; *see also Ga. State Conf. of NAACP*, 118 F. Supp. 3d at 1344–45 (rejecting same argument Defendants offer here).[10]

III. Voting in Louisiana is racially polarized.

Neither Defendants nor their experts credibly contest Dr. Palmer's conclusions that the second and third *Gingles* preconditions are satisfied here. To the contrary, Dr. Alford and Dr. Lewis both rely on Dr. Palmer's data, and Dr. Alford expressly endorses Dr. Palmer's methodology for estimating racially polarized voting. *See* Ex. 30 ¶¶ 3–4.

Rather than dispute Dr. Palmer's conclusion that voting in Louisiana is racially polarized, Defendants instead try to move the goalposts, arguing that Plaintiffs must prove that polarization

[10] Even if the racial gerrymandering doctrine could be applied to Plaintiffs' Section 2 claim—a gambit that courts have rejected, *see, e.g.*, *Clark*, 88 F.3d at 1406–07—and even if race did predominate over other factors in Mr. Cooper's illustrative plans—a conclusion with no basis in the record—"a district created to comply with § 2 that uses race as the predominant factor in drawing district lines may survive strict scrutiny." *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 950 F. Supp. 2d 1294, 1305 (N.D. Ga. 2013), *aff'd in part, rev'd in part on other grounds*, 775 F.3d 1336 (11th Cir. 2015); *see also Miller v. Johnson*, 515 U.S. 900, 916, 920 (1995) (applying strict scrutiny to racial gerrymandering claims and requiring that such maps be "narrowly tailored to achieve a compelling interest"); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) ("As in previous cases . . . the Court assumes, without deciding, that the State's interest in complying with the Voting Rights Act was compelling."). Here, the sum total of Plaintiffs' evidence, along with the numerous maps rejected during the legislative process and Governor Edwards's veto, provides indisputably "good reasons" to believe a second majority-opportunity district is required under the Voting Rights Act. *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015) (cleaned up). Plaintiffs' illustrative plans would thus satisfy the requirements of strict scrutiny against a hypothetical racial gerrymandering claim.

is caused by race and not partisanship. *See* State Opp'n 16–19; Legis. Opp'n 16–17. But the Fifth Circuit has never held that Section 2 requires a threshold determination that voters are motivated solely by race when evaluating the existence of racially polarized voting. In fact, it has indicated the opposite, concluding that a district court "err[ed] by placing the burden on plaintiffs to disprove that factors other than race affect voting patterns" as part of the *Gingles* analysis. *Teague v. Attala County*, 92 F.3d 283, 290 (5th Cir. 1996). This is consistent with the position of the *Gingles* plurality, which held that racially polarized voting "refers only to the existence of a correlation between the race of voters and the selection of certain candidates." *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986) (plurality opinion); *see also id.* at 73 ("All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations."). A showing that party and *not* race is the source of polarization "is for the defendants to make." *Teague*, 92 F.3d at 290. And all Dr. Alford demonstrates is the mere existence of a partisan divide, which reveals nothing about *why* Black and white voters support candidates from different parties—and is therefore not enough to shift the burden to Plaintiffs.

Even if it were, Dr. Lichtman demonstrates that any partisan correlation is inextricably tied to race. As he explains, "party labels by themselves do not motivate racially polarized voting," but rather "to the extent that racial voting aligns along party lines, race not party is the driving causal mechanism." Ex. 3 at 28; *see also* Ex. 31 at 3–7. Voting in Louisiana is the product of significant ideological changes between the two major parties, which in turn facilitated a seismic party realignment among Black and white voters across the Deep South: "Through the late twentieth and early twenty-first centuries, the parties reversed their traditional roles in the state with Democrats now associated with racial values, policies, and attitudes appealing to Blacks and Republicans the reverse." Ex. 3 at 29. Indeed, "[t]he conjoining of party and race in Louisiana is

demonstrated both by the policy positions held by Democratic and Republican officeholders and by the race-related attitudes and beliefs of rank-and-file Democratic and Republican voters"; for example, "all Republicans Senators and House members in Louisiana receive very low scores . . . on the rankings of both the NAACP and the Leadership Conference on Civil and Human Rights, organizations dedicated to promoting minority rights." *Id.* at 29–30. Dr. Lichtman also found that "there are substantial differences among rank-and-file Republican and Democratic voters in Louisiana on racial attitudes and views." *Id.* at 31; *see also* Ex. 31 at 4–6. In short, because race drives party affiliation in Louisiana, race explains the polarization of Louisiana's electorate.[11]

Defendants' other arguments regarding racially polarized voting fare no better. The Secretary suggests that Plaintiffs' case fails because Mr. Cooper's illustrative majority-Black districts contain East Baton Rouge Parish, which they claim has "no evidence of legally significant racially polarized voting" and "significant white cross over voting." Sec'y Opp'n 16–17. But the U.S. Supreme Court has made clear that "redistricting analysis must take place at the district level," and cannot look at "only one, small part of the district" like a single county or parish. *Abbott*, 138 S. Ct. at 2331–32. And at any rate, East Baton Rouge Parish *does* have racially polarized voting, as both Dr. Palmer and Defendants' own experts confirm. *See* Ex. 30 ¶¶ 9–10.

The Legislative Intervenors argue that the third *Gingles* precondition cannot be satisfied because "there are sufficient levels of white crossover voting to afford Black voters an equal electoral opportunity without a 50% BVAP district." Legis. Opp'n 14–16. But that is simply irrelevant: While a crossover district might be a sufficient *remedy* in a Section 2 case, the initial

[11] Dr. Lichtman also notes "evidence of racially polarized voting in Louisiana independent of party": the 2008 Democratic primary in Louisiana between Barack Obama and Hillary Clinton saw racial polarization, with Black voters supporting Obama 86% to 13% and white voters supporting Clinton 58% to 30%. Ex. 3 at 32–33; *see also* Ex. 31 at 6.

liability determination requires Section 2 plaintiffs to offer a majority-Black district, *see Bartlett*, 556 U.S. at 19–20—precisely what Plaintiffs and their experts have provided.

IV. The Senate Factors support a finding of vote dilution.

Plaintiffs and their experts have proved that the Senate Factors uniformly support a finding of vote dilution. None of Defendants' counterarguments is persuasive.

Voting-related discrimination in Louisiana is not a vestige of the past. Although the Legislative Intervenors suggest that Plaintiffs "have little to say" on the topic of recent evidence of discrimination, Legis. Opp'n 20, Dr. Lichtman's report discusses at length instances of State-sponsored discrimination from the 21st century in voting and other areas, *see* Ex. 3 at 13–27; Ex. 31 at 2.

Louisiana's de facto majority-vote requirement was not the product of innocent motivations. The Legislative Intervenors also contend that the state's open primary system and consequent majority-vote requirement were simply responses to *Foster v. Love*, 522 U.S. 67 (1997), and not the results of discriminatory impulses. *See* Legis. Opp'n 20–21. Setting aside the fact that this Senate Factor is not concerned with discriminatory motive—it instead asks only whether the "electoral practices [] enhance vote dilution," *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 494 (5th Cir. 1991), which the majority-vote requirement certainly does, *see* Mot. 13–14; Ex. 3 at 33–34—Dr. Lichtman's rebuttal report demonstrates that the majority-vote requirement predates *Foster* by decades and was designed to insulate *white* incumbents from competitive electoral challenges. *See* Ex. 31 at 7–8.

Socioeconomic disparities hinder Black Louisianians' participation in the political process. The Legislative Intervenors baldly suggest that Black Louisianians do not experience reduced political participation, *see* Legis. Opp'n 21–22—a conclusion that again ignores Dr. Lichtman's findings *and* the findings of the Secretary's own expert, *see* Ex. 3 at 36–39; Ex. 31 at

8–9; *see also Citizens for a Better Gretna v. City of Gretna*, 636 F. Supp. 1113, 1120 (E.D. La. 1986) (describing how "historical disadvantages continue through the present day and undoubtedly hinder the ability of the black community to participate effectively in the political process"), *aff'd*, 834 F.2d 496 (5th Cir. 1987).

Core retention is a tenuous justification for HB 1. Defendants repeatedly emphasize core retention as the Legislature's primary objective in enacting HB 1. *See* Sec'y Opp'n 17–18; Legis. Opp'n 4–8, 12–13. But core retention was *not* one of the Legislature's enumerated redistricting criteria, *see* Ex. 20, and so justification on this basis is tenuous at best.

Plaintiffs appropriately used proportionality. Lastly, the Legislative Intervenors suggest that Plaintiffs have demanded proportional representation under Section 2. *See* Legis. Opp'n 17–18. Not so—Plaintiffs have not claimed and do not argue now that the Voting Rights Act mandates proportional representation. Instead, Plaintiffs have relied on proportionality analysis for the proper purpose: as helpful evidence of vote dilution. *See* Mot. 20–21; *see also, e.g.*, *LULAC*, 548 U.S. at 437.

V. It is not too late for this Court to order preliminary injunctive relief.

Defendants do not dispute that Plaintiffs and other Black Louisianians would suffer irreparable harm if an election is held under a congressional map that violates Section 2, or that the "cautious protection of . . . franchise-related rights is without question in the public interest." *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005). Instead, they sound the same drumbeat: that it is too late in the election cycle to offer the relief Plaintiffs seek. *See* Sec'y Opp'n 18–24; State Opp'n 21–23; Legis. Opp'n 23–25. But their arguments ignore the underpinnings of the doctrine they seek to vindicate, Louisiana's unique—and uniquely delayed—election calendar, and their own representations in prior litigation.

A. The *Purcell* doctrine exists to protect voters, not the State.

As an initial matter, it is essential to remember *why* the *Purcell* doctrine exists and the principle's stated limitations. The doctrine has its origins in the U.S. Supreme Court's recognition that "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). The focus was on *voter protection*; the Court did *not* base its decision on general concerns about election machinery or administrative inconvenience. And while the Court noted that "[a]s an election draws closer, that risk will increase," *id.* at 5, the *Purcell* opinion was issued on October 20, 2006—less than *three weeks* before that year's midterm elections. Although subsequent Court activity broadened application of the *Purcell* principle beyond that temporal limitation, none of those cases involved a challenge to an unlawful districting plan considered *six months* before a primary election and more than two months before a candidate qualifying deadline. Moreover, Justice Kavanaugh's recent concurrence acknowledged that the *Purcell* doctrine is not "absolute"; instead, it is simply "a sensible refinement of ordinary stay principles for the election context" that considers whether "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). Here, the change Plaintiffs propose—a new congressional map—is feasible.

B. Defendants previously represented that a new congressional map was not urgently needed.

As a consequence of Louisiana's open primary system, the state's primary election day is the same as the general election day in the rest of the country: November 8, 2022. Ex. 24. That is more than six months from now. As noted by Sherri Wharton Hadskey, the Secretary's election administration witness, most of the other applicable deadlines for this election cycle follow July

22, the close of the candidate qualifying period. *See* Sec'y Opp'n Ex. D, ¶ 16. The only earlier date identified by Ms. Hadskey is June 22, the deadline for nominating petitions. *See id.* Ex. D, ¶¶ 14–16. But although Ms. Hadskey treats this date as inviolable—and the Secretary suggests that "election chaos" would result if a new map is implemented, Sec'y Opp'n 23—the Legislative Intervenors asserted exactly the opposite just six weeks ago before a state court:

> [T]he candidate qualification period could be moved back, if necessary, as other states have done this cycle, without impacting voters. . . .
>
> *The election deadlines that actually impact voters do not occur until October 2022*, like the deadlines for voter registration (October 11, 2022, for in-person, DMV, or by mail, and October 18, 2022 for online registration) and the early voting period (October 25 to November 1, 2022). . . .
>
> Therefore, *there remains several months on Louisiana's election calendar to complete the [redistricting] process*.

Findings of Fact, Conclusions of Law, & Proposed Judgments on Behalf of Intervenors, Louisiana House of Representatives Speaker Clay Schexnayder & Louisiana Senate President Patrick Page Cortez at 7–8, *Bullman v. Ardoin*, No. C-716690 (La. 19th Jud. Dist. Ct. Mar. 25, 2022) (emphasis added) (attached as Ex. 32). These representations mirror those previously made by counsel for the Secretary, who explained to the state court that a new congressional map could be successfully enacted and implemented *after* June 6 of this year. *See* Mot. 23 & n.3; Exs. 26–28. Counsel for the Secretary indicated that "[e]ven if the Governor ends up vetoing a bill" passed in the Legislature's regular session—which is set to end on June 6, *see* Ex. 25—the Legislature could still "override" or "call themselves into another session," thus pushing enactment of a new congressional map well into the summer. Transcript of Exception Hearing at 35:26–31, *Bullman v. Ardoin*, No. C-716690 (La. 19th Jud. Dist. Ct. Apr. 11, 2022) (attached as Ex. 33); *see also id.* at 14:3–8 (noting that Legislature "ha[s] the ability to go into a[n] override session" to pass new congressional map); *id.* at 30:21–32 (claiming that judicial redistricting deadline of June 17 would allow court to

"substitute [its] judgment . . . with regard to . . . a clearly legislative function"); *id.* at 32:3–20 (observing that Louisiana does not have "a hard deadline for redistricting" and that "the Legislature . . . can also amend the election code if necessary to deal with congressional reapportionment"); *id.* at 37:5–22 (similar). Counsel for the Secretary also suggested that "[t]here is just not a protectable interest as to a candidate [who] wants to have more time to be able to decide to run in an election," *id.* at 37:17–19, which further belies the Secretary's newfound concern over "the effect of jeopardizing the ability of lower-income citizens to run for office," Sec'y Opp'n 20.[12]

At best, Defendants have been inconsistent in their descriptions of the state's election calendar and the import of the deadlines that comprise it. At worst, they have been disingenuous, recharacterizing the urgency of the situation to best serve their own litigation strategy rather than the needs of Louisiana voters. Given that the voting rights of more than 1.5 million Black Louisianians are at issue in this case—and that the *Purcell* doctrine implicates *equitable* considerations—even inconsistency is difficult to accept.

C. Even under Defendants' characterization of the election calendar, relief can be implemented ahead of the midterm elections.

Taking Defendants at their word in this case and treating the June 22 date as a functional deadline, there is still ample time to implement a remedial congressional plan for Louisiana—even if this Court were to wait several weeks to order a new map. The Legislature would need only a brief period to craft a new congressional map. *See, e.g.*, *Harper v. Hall*, 867 S.E.2d 554, 558 (N.C.

[12] No more compelling is the Secretary's apparent concerns with the cost of a remedial plan, given that the State's interests in this litigation are now being represented by *three* sets of defendants and nearly two dozen lawyers, including from four private law firms. *See* Sec'y Opp'n 24–25; State Opp'n 24–25; Legis. Opp'n 26; *see also* Ex. 34 (noting that as of March counsel for Legislative Intervenors had "charged the Louisiana Legislature $78,081 for providing 'redistricting advice'" and planned to "escalate" fees "to $60,000 per month once the state was sued over the maps").

2022) (providing 14 days for legislature to adopt new congressional *and* state legislative plans); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, Nos. 2021-1193, 2021-1198, 2021-1210, 2022 WL 110261, at *28 (Ohio Jan. 12, 2022) (providing 10 days for redistricting body to adopt new state legislative plans); *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (three-judge court) (providing 14 days for legislature to adopt new congressional plan); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1357 (N.D. Ga. 2004) (per curiam) (three-judge court) (providing two-and-a-half weeks for legislature to adopt new legislative plans). Although the Legislative Intervenors observe that "it took the Legislature much longer here" to enact HB 1, Legis. Opp'n 25, the remedial redistricting process can proceed at a much more expeditious pace given the various alternative plans proposed during the legislative process that contained two districts where Black voters could elect their candidates of choice, *see* Mot. 2–3; Ex. 12, and the illustrative plans produced by Mr. Cooper and Anthony Fairfax in these consolidated cases. The redistricting process need not start from scratch, and the Legislature should not sell itself short to forestall relief ahead of the midterm elections.

Moreover, in the event that the Legislature cannot or will not implement a remedial map ahead of the June 22 deadline, this Court can do so—and can undertake that process concurrently with the Legislature to ensure that a new map is timely implemented. *See Connor v. Finch*, 431 U.S. 407, 414–15 (1977); *see also, e.g.*, *N.C. League of Conservation Voters v. Hall*, Nos. 21 CVS 015426, 21 CVS 500085, slip op. at 2 (N.C. Super. Ct. Feb. 8, 2022) (three-judge court) (describing plan for court adoption of remedial congressional and state legislative maps).[13]

[13] Moreover, if the Legislature is concerned about the deadline for nominating petitions, it retains the authority to move it. Notably, the deadline for nominating petitions for certain special elections is only 14 days prior to the end of the qualifying period, not 30 days, while nominating petitions are due *during* the qualifying period when qualifying is reopened following the death of a candidate. *See* La. R.S. 18:465(E)(1)(a)–(b). These alternatives are open to the Legislature at its discretion, and indeed, in previous

Ultimately, the purpose of the *Purcell* doctrine is to protect voters—not to insulate the State from its obligations under federal law. The weaponization of *Purcell* to deny timely relief under the Voting Rights Act should not be tolerated here.[14]

CONCLUSION

In closing, the Legislative Intervenors suggest that a preliminary injunction is unwarranted here because it would "create a new state of affairs that never before existed at this stage." Legis. Opp'n 23. But as the Fifth Circuit recognized decades ago,

> [t]he purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits. It often happens that this purpose is furthered by preservation of the status quo, but not always. If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury . . . . The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo.

Canal Auth. v. Callaway, 489 F.2d 567, 576 (5th Cir. 1974); *accord Second Baptist Church v. City of San Antonio*, No. 5:20-CV-29-DAE, 2020 WL 6821334, at *3 (W.D. Tex. Feb. 24, 2020). Such is the case here. Louisiana's new congressional map dilutes the electoral strength of Black voters,

litigation, the Legislative Intervenors noted that election deadlines could be "moved back, if necessary, . . . without impacting voters." Ex. 32 at 8. And this Court itself could delay the deadline for nominating petitions (and any other deadlines) as needed. *See, e.g.*, *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972) (per curiam) (federal courts "ha[ve] the power appropriately to extend the time limitations [set by election calendars] imposed by state law"); *United States v. New York*, No. 1:10-cv-1214 (GLS/RFT), 2012 WL 254263, at *2 (N.D.N.Y. Jan. 27, 2012) (moving primary date to ensure UOCAVA compliance); *Quilter v. Voinovich*, 794 F. Supp. 760, 762 (N.D. Ohio 1992) (three-judge court) (court ordered rescheduling of primary election to permit drawing of remedial legislative plans).

[14] As a final equitable flourish, the State Intervenor grouses—"in the most strenuous terms"—about the expedited treatment of Plaintiffs' motion, claiming that "[t]he actions of this Court are prejudicial to the defense and, as such, are prejudicial to both Defendants and the public interest." State Opp'n 23–24. Their objections ring hollow for several reasons: The State Intervenor *chose* to participate in this lawsuit via intervention; counsel for the State Intervenor represented to the Court at the April 14 status conference that this proposed schedule was acceptable; and the State Intervenor managed to produce a robust opposition brief and *four* expert reports in the time provided. And at any rate, the public interest will be best served here by remedying a clear violation of Section 2—not in delaying relief and irreparably harming Black Louisianians' voting rights.

and so disruption of the status quo is required to prevent irreparable harm to Plaintiffs' fundamental rights. Plaintiffs have readily satisfied the established elements under Section 2 of the Voting Rights Act, a new congressional map can be feasibly implemented ahead of the midterm elections, and Plaintiffs' motion for preliminary injunction should therefore be granted.

Dated: May 2, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been filed electronically with the Clerk of Court using the CM/ECF filing system. Notice of this filing will be sent to all counsel of record via operation of the Court's electronic filing system.

Baton Rouge, Louisiana, this 2nd day of May, 2022.

s/ Darrel J. Papillion
Darrel J. Papillion