No. 22-30333

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRESS ROBINSON, et al.,
Plaintiffs-Appellees,

v.

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana,
Defendant-Appellant,

CLAY SCHEXNAYDER, et al.,
Intervenor Defendants-Appellants.

EDWARD GALMON, SR., et al.,
Plaintiffs-Appellees,

v.

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana,
Defendant-Appellant,

CLAY SCHEXNAYDER, et al.,
Movants-Appellants.

On Appeal from the Middle District of Louisiana
Case Nos. 3:22-cv-211, 3:22-cv-214
The Honorable Shelly D. Dick

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Emergency Motion of Legislative Intervenor Defendants-Appellants Under Circuit Rule 27.3 for a Stay Pending Appeal

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Certificate of Interested Persons

***Robinson, et al. v. Ardoin, et al.*, Case No. 22-30333**

Pursuant to Fifth Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Intervenor Defendants-Appellants (movants in the present motion): Clay Schexnayder and Patrick Page Cortez, in their official capacities as Speaker of the Louisiana House of Representatives and President of the Louisiana Senate, represented by Baker & Hostetler LLP attorneys Katherine L. McKnight, Richard B. Raile, E. Mark Braden, Michael W. Mengis, Patrick T. Lewis, Erika Dackin Prouty, and Renee M. Knudsen.

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Intervenor Defendant-Appellant: State of Louisiana, by and through Attorney General Jeff Landry, represented by Louisiana's Office of the Attorney General attorneys Elizabeth Baker Murrill, Angelique Duhon Freel, Carey T. Jones, Jeffrey Michael Wale, Morgan Brungard, and Shae McPhee; and by Holtzman Vogel Josefiak Torchinsky PLLC attorneys Jason B. Torchinsky, Dallin B. Holt, and Phillip Michael Gordon.

Defendant-Appellant: Kyle Ardoin, in his official capacity as Secretary of State for Louisiana, represented by Shows, Cali & Walsh, LLP attorney John Carroll Walsh; and by Nelson Mullins Riley & Scarborough LLP attorneys

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Plaintiffs-Appellees: Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, National for the Advancement of Colored People Louisiana State Conference (NAACP), Power Coalition for Equity and Justice, represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP attorneys Adam Savitt, Amitav Chakraborty, Briana Sheridan, Daniel Sinnreich, Jonathan Hurwitz, Robert A. Atkins, Ryan Rizzuto, Yahonnes Cleary; and by the NAACP Legal Defense Fund attorneys Jared Evans, Kathryn C. Sadasivan, Leah C. Aden, Sara Sara Rohani, Stuart C. Naifeh, and Victoria Wenger; and by ACLU of Louisiana attorneys Nora Ahmed, and Stephanie Legros; and by the ACLU attorneys Samantha Osaki, Sarah E Brannon, Sophia Lin Lakin, and Tiffany Alora Thomas; and by attorneys Tracie L. Washington; and by John Nelson Adcock.

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Plaintiffs-Appellees: Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard, represented by Elias Law Group LLP attorneys Abha Khanna, Jacob D Shelly, Jonathan Patrick Hawley, Lalitha D. Madduri, and Olivia Sedwick; and by Walters Papillion Thomas Cullens, LLC attorneys Jennifer Wise Moroux, Darrel James Papillion, and Renee' Chabert Crasto.

Movant: Vincent Pierre (Chairman of LLBC), represented by Arthur Ray Thomas of Arthur Thomas & Associates and Ernest L. Johnson, I.

Movant: Louisiana Legislative Black Caucus (LLBC), represented by Stephen M. Irving of Steve Irving LLC and Ernest L. Johnson, I.

Amici: Michael Mislove, Lisa J. Fauci, Robert Lipton, and Nicholas Mattei, represented by Jenner & Block LLP attorneys Alex S. Trepp, Andrew J. Plague, Jessica Ring Amunson, Keri L. Holleb Hotaling, and Sam Hirsch, and Barrasso Usdin Kupperman Freeman & Sarver, LLC attorneys Judy Y. Barrasso and Viviana Helen Aldous.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Attorney of Record for Appellants Clay Schexnayder and Patrick Page Cortez

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INTRODUCTION

This Court rarely will encounter a redistricting case as consequential as this or a district-court order as imprudent as the one presented for review. For three decades, Louisiana conducted congressional elections under redistricting plans with one majority-Black district, because a federal court invalidated plans containing two as racial gerrymanders. After the State Legislature adopted a new plan in March 2022 maintaining that status quo, two sets of challengers (Plaintiffs) sued and demanded a new plan with two majority-Black districts as *temporary* relief for the 2022 elections. The district court conducted a hearing and then took no action for 24 days. During that time, the Legislature continued and ultimately concluded its spring legislative session, and the State continued to implement the enacted plan. On June 6, the court provisionally enjoined the enacted plan, stayed and extended the candidate nominating-petition deadline, and gave the Legislature 14 days to enact a new plan with two majority-Black districts. That is a practical impossibility.

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This Court should stay the injunction pending appeal. When a three-judge court in Alabama issued a materially identical injunction (commanding two majority-Black districts rather than one) on a materially identical time frame (four-and-a-half months before an election), the Supreme Court stayed that order. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). A stay is warranted here, as in *Merrill*, based on equitable factors governing election cases, and because this appeal is likely to succeed. To obtain a second majority-Black district, Plaintiffs were required to establish three elements called the "*Gingles*" preconditions. But they have no

prospect of establishing at least the third of those, because their experts admitted their own analyses show its predicates do not exist. Indeed, the district court made the same error that resulted last decade in "the most extensive unconstitutional racial gerrymander ever encountered by a federal court." *Covington v. North Carolina*, 270 F. Supp. 3d 881, 892 (M.D.N.C. 2017). To conduct the 2022 election with two majority-Black districts would risk a widespread equal-protection violation.

Time is of the essence. The Legislature must convene an extraordinary session beginning June 15, at significant public expense. To be fully effective, relief from this Court must issue by **noon, Tuesday, June 14, 2022**, and undersigned counsel certifies that this motion qualifies for emergency treatment pursuant to Fifth Circuit Rule 27.3. The Court should, first, issue an administrative stay pending briefing on this motion, which is a "routine practice" in this Circuit. *In re Abbott*, 800 F. App'x 296, 298 (5th Cir. 2020). It should, second, stay the injunction pending appeal, just as the Supreme Court did in *Merrill*.

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STATEMENT

1. After each decennial census, "[s]tates must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). "Redistricting is never easy." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). This is, in part, because "federal law restrict[s] the use of race in making districting decisions." *Id.* "The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Id.* (citing *Shaw v. Reno*, 509 U.S. 630, 641

(1993) (*Shaw I*)). Districting maps that "sort voters on the basis of race 'are by their very nature odious.'" *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (quoting *Shaw I*, 509 U.S. at 643). As a result, purposefully creating a new majority-minority district is presumptively unconstitutional. *See Cooper v. Harris*, 137 S. Ct. 1455, 1468-69 (2017).

On the other hand, "[a] State violates § 2" of the Voting Rights Act (VRA) "if its districting plan provides 'less opportunity' for racial minorities 'to elect representatives of their choice.'" *Abbott*, 138 S. Ct. at 2315 (quoting *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 425 (2006) (*LULAC*)). The Supreme Court has "interpreted this standard to mean that, under certain circumstances, States must draw 'opportunity' districts in which minority groups form 'effective majorit[ies].'" *Id.* (citation omitted).

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In the face of these "'competing hazards of liability,'" the Supreme Court has "assumed"—but never held—that "compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality opinion)). Satisfying the "strictest scrutiny" is not easy. *Miller v. Johnson*, 515 U.S. 900, 915 (1995). The state must establish the three "*Gingles*" preconditions: that (1) the relevant minority group is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district"; (2) the group is "politically cohesive"; and (3) the "district's white majority…'vote[s] sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S. Ct. at 1470 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)).

It is insufficient that advocacy groups "want[] a State to create" a majority-minority district, *Abbott*, 138 S. Ct. at 2334, or that a government actor demands this, *Miller*, 515 U.S. at 922; *Shaw v. Hunt*, 517 U.S. 899, 911-12 (1996) (*Shaw II*). The Supreme Court has forbidden states from maximizing the number of majority-minority districts. *Shaw II*, 517 U.S. at 913. "Nor is proportional representation the benchmark." *Gonzalez v. City of Aurora*, 535 F.3d 594, 598 (7th Cir. 2008). No defendant has successfully invoked Section 2 in the Supreme Court as a racial-gerrymandering defense.

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Louisiana is no exception. After the 1990 census, the Louisiana Legislature twice enacted congressional plans with two majority-minority districts; both were invalidated under the Constitution. *Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993) (*Hays I*); *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996) (*Hays IV*). The three-judge court imposed a remedial plan with one majority-Black district anchored in Orleans Parish (CD2). *Hays IV*, 936 F. Supp. at 372.

2. In the 2000s and 2010s, the Legislature carried that concept forward, maintaining CD2 as a majority-Black district but declining to create more. The U.S. Department of Justice precleared these plans under VRA Section 5. Black population has not materially grown as a matter of proportion; as in 1994, it has been "approximately 30%" of the voting-age population, *Hays v. Louisiana*, 862 F. Supp. 119, 124 n.4 (W.D. La. 1994) (*Hays II*); Dist.Ct.Dkt.162-4, at 220:8-14. Meanwhile, after the 2010 census, Louisiana lost a congressional district, going from seven to six.

In the 2020 apportionment, Louisiana retained six districts. But population shifts necessitated redistricting to "achieve population equality 'as nearly as is practicable.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (citation omitted). The Legislature enacted a plan that preserved "the traditional boundaries as best as possible" and "keeps the status quo." Dist.Ct.Dkt.169-212, at 12:13-17, 6:19-7:4. On average, the plan maintains more than 96% of constituents per district in the same district as before. Dist.Ct.Dkt.162-4, at 212:24-213:6. Like prior plans, CD2 remained a majority-Black district, which Plaintiffs' expert called a "carbon copy" of last decade's rendition. Dist.Ct.Dkt.160-1, at 88:17-20. Plaintiffs do not allege any district in the enacted plan was drawn with predominantly racial intent. Dist.Ct.Dkt.137.

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3. The Legislature faced "demands" to engage in race-based redistricting. *See Abbott*, 138 S. Ct. at 2334. Some public commenters and legislators contended that, "[b]ecause over 1/3 of Louisiana's population is minority…at least 2 of the 6 districts should have a fair chance of electing a member of a minority." Dist.Ct.Dkt.1, ¶ 48. The Governor, too, called for an additional "minority" district. Dist.Ct.Dkt.52, at 3; *compare Hays I*, 839 F. Supp. at 1196 n.1; *Miller*, 515 U.S. at 917-18; *see also Shaw II*, 517 U.S. at 902-03. No one advocating this presented "a strong basis in evidence to conclude that § 2 demands such race-based steps." *Cooper*, 137 S. Ct. at 1471. Plaintiffs refused to provide statistical studies of voting patterns they alleged they conducted. Dist.Ct.Dkt.169-187, at 135:21-137:5, 141:2-14; Dist.Ct.Dkt.169-195, at 22:11-23:15.

The Legislature resisted these calls "to segregate the races for purposes of voting." *Shaw I*, 509 U.S. at 642. It ultimately enacted the above-described plan. The Governor vetoed both bills for failing to achieve his predetermined racial target. The Legislature overrode the veto on March 30, 2022.

4. Two sets of Plaintiffs filed suit against the Louisiana Secretary of State under VRA Section 2, and the cases were consolidated. The Attorney General, on behalf of the State, and the President of the Louisiana Senate and Speaker of the House of Representatives (the Legislative Appellants and Movants here) intervened. Plaintiffs moved for a preliminary injunction, requesting a new redistricting plan as temporary relief.

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The district court conducted a hearing and then took no action for 24 days. On June 6, it issued a preliminary injunction that "**ORDERS** the Louisiana Legislature to enact a remedial plan" which "includes an additional majority-Black congressional district." Ex. A ("Op.") 2. The court afforded the Legislature 14 days to do so. The court also moved the candidate nominating-petition deadline from June 22 to July 8. Op. 3. The same day, the three sets of defendants (Appellants) appealed, Ex. B, and moved the district court for a stay, which was denied on June 9, Ex. C.

ARGUMENT

Under the "traditional" standard governing stays pending appeal, a court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will

substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (citation omitted). A movant "need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *United States v. Baylor Univ. Med. Ctr.*, 711 F.2d 38, 39 (5th Cir. 1983) (citation omitted).

As the Supreme Court "has often indicated, however, that traditional test for a stay does not apply…in election cases when a lower court has issued an injunction of a state's election law in the period close to an election." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). The Supreme Court "has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election, and [the Supreme] Court in turn has often stayed lower federal court injunctions that contravened that principle." *Id.* A court addressing an injunction in the period close to an election must inquire, at a minimum, whether the "plaintiff establishe[d] at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Id.* at 881. A stay is warranted under any applicable standard.

I. Likelihood of Success

The Court should have "little difficulty concluding that the legal questions presented by this case are serious, both to the litigants involved and the public

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at large, and that a substantial question is presented for [the Fifth Circuit] to resolve." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014).

A.1. Plaintiffs have little hope of establishing at trial the critical "threshold conditions." *Cooper*, 137 S. Ct. at 1470. As noted, a Section 2 challenger must establish three preconditions, the third being an "amount of white bloc voting that can generally 'minimize or cancel' black voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 56 (citations omitted). Unless this is established, "there neither has been a wrong nor can be a remedy." *Growe v. Emison*, 507 U.S. 25, 41 (1993).

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The question is not "whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'" *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (en banc). The Supreme Court defined "legally significant white bloc voting" as a level of white voter opposition against minority-preferred candidates such that the "white bloc…normally will defeat the combined strength of minority support plus white 'crossover' votes" (i.e., white voters supporting minority-preferred candidates). *Gingles*, 478 U.S. at 31. This precondition cannot be shown "[i]n areas with substantial crossover voting." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009); *see also Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) ("[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters" (citation omitted)).

A.2. Plaintiffs failed to prove, or even address, this element. To be sure, Plaintiffs sponsored, and the district court credited, expert testimony to the effect

that "black voters and white voters voted differently" in examined elections, Dist.Ct.Dkt.164-1, at 13:12-13; *see also id.* 20:9-10, and that "black voters and white voters would have elected different candidates if they had voted separately." *Id.* 21:2-4. But this merely established "(to no one's great surprise) that in [Louisiana], as in most States, there are discernible, non-random relationships between race and voting." *Cooper*, 137 S. Ct. at 1471 n.5. The finding falls short of *legal* significance.

A political scientist can describe voting as "polarized" in any "circumstance in which 'different races vote in blocs for different candidates.'" *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016) (three-judge court), *aff'd*, 137 S. Ct. 2211 (2017) (citation omitted). But white bloc voting becomes legally significant only if it "exist[s] at such a level that the candidate of choice of African-American voters would usually be defeated *without a VRA remedy*." *Id.* at 168 (emphasis added). A VRA remedy is a 50% minority voting-age population (VAP) district. *See Bartlett*, 556 U.S. at 19. As the Supreme Court explained in *Bartlett*, where white crossover voting is sufficient to create a functioning minority-opportunity district at below 50% minority VAP, "majority-minority districts *would not be required in the first place*." *Id.* at 24 (emphasis added).

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The Supreme Court confirmed this in *Covington*, which addressed "the most extensive unconstitutional racial gerrymander ever encountered by a federal court." *Covington*, 270 F. Supp. 3d at 892. The North Carolina legislature created 28 majority-minority districts in its legislative plans, based on expert analyses finding "statistically significant racially polarized voting in 50 of the 51

counties studied." *Covington*, 316 F.R.D. at 169 (quotation marks omitted). A three-judge court invalidated each district, and the Supreme Court summarily affirmed. *North Carolina v. Covington*, 137 S. Ct. 2211 (2017). The case was not close. *Covington*, 270 F. Supp. 3d at 892 ("The Supreme Court affirmed that conclusion without argument and without dissent. And the Supreme Court unanimously held that Senator Rucho and Representative Lewis incorrectly believed that the Voting Rights Act required construction of majority-minority districts.").

The problem was that North Carolina's experts addressed "the general term 'racially polarized voting'" which "simply refers to when different racial groups 'vote in blocs for different candidates.'" *Covington*, 316 F.R.D. at 170 (citation omitted). They missed "crucial difference between legally significant and statistically significant racially polarized voting." *Id.* Non-actionable polarized voting becomes legally significant only when "racial bloc voting is operating at such a level that it would actually minimize or cancel minority voters' ability to elect representatives of their choice, *if no remedial district were drawn*." *Id.* at 168 (quotation and edit marks omitted; emphasis added). The question is whether "the candidate of choice of African-American voters would usually be defeated *without a VRA remedy*." *Id.* (emphasis added).

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A.3. This case is no closer than *Covington*. Plaintiffs' experts testified that white crossover voting is sufficiently robust that a majority-Black-voting-age-population (BVAP) district is unnecessary to afford equal Black electoral opportunity. Dr. Palmer testified that there is meaningful white crossover voting,

Dist.Ct.Dkt.160-1, at 339:18-343:10, and that CD2 and CD5 need not be majority-Black to enable Black voters to elect their preferred candidates, *id.* 346:18-21. Dr. Lichtman acknowledged that white crossover voting consistently ranges from 20% to 26%. Dist.Ct.Dkt.164-1, at 198:14-18; *see Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (finding significant crossover voting where "the average percentage of whites voting for black candidates across Georgia ranged from 22% to 38%); *McConchie v. Scholz*, 2021 WL 6197318, at *8 (N.D. Ill. Dec. 30, 2021) (finding crossover voting exceeding 25% to be "significant"). He agreed that a district around 40% BVAP can perform. Dist.Ct.Dkt.164-1, at 198:14-200:20. Dr. Handley testified that it is possible districts below 50% BVAP may perform. *Id.* 75:7-11. Likewise, a sophisticated *amicus* brief of Tulane and Louisiana State University math and computer science professors analyzed nineteen elections and found that districts of 42% BVAP afford an equal Black electoral opportunity. Dist.Ct.Dkt.97 at 23, 27, 34-35. There is *no contrary record evidence*. No witness testified, and no analysis showed, that Black voters are unable to elect their preferred candidates without a 50% BVAP district.[1]

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A.4. The district court failed to ask the correct legal question. It observed that "[w]hite crossover voting was inherently included in the analysis performed by Dr. Palmer and Dr. Handley." Op. 123, 126. But the question is not whether

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[1] Indeed, Plaintiffs' contention that their remedial districts will afford an equal minority electoral opportunity depends on white crossover voting, as their experts concede that the success of the Black preferred candidates in their projected election results occurs only with white cooperation. Dist.Ct.Dkt.164-1, at 54:18–55:18; *id.* 62:3–13.

an analysis included white crossover voting but whether white bloc voting is "legally significant." *Gingles*, 478 U.S. at 31. That cannot be so where, as here, Black voters can elect "representatives of their choice" even "if no remedial district were drawn." *Covington*, 316 F.R.D. at 168 (quotation and edit marks omitted). The district court understood the distinction between expert opinion and legal conclusions at the hearing and forbade counsel from cross-examining Plaintiffs' experts about the legal significance of white bloc voting levels. Dist.Ct.Dkt.164-1, at 52:24-53:19. It is hard to see why the same court believed it could resolve the third precondition question simply by crediting experts.

The district court also attempted to sweep away this fundamental flaw by shifting the burden. It found that the defense failed to produce "sufficient data" on the third precondition and observed that Plaintiffs' experts' testimony regarding the need for a 50% BVAP remedial district was tentative. Op. 126-27. This "twisted the burden of proof beyond recognition." *Abbott*, 138 S. Ct. at 2333. "Section 2 'does not assume the existence of racial bloc voting; plaintiffs must prove it.'" *Growe*, 507 U.S. at 42 (citation omitted).

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B. Plaintiffs are also unlikely to establish the first *Gingles* precondition, which requires proof that additional "reasonably configured" majority-Black districts may be drawn. *Wis. Legislature*, 142 S. Ct. at 1248. A plan cannot be reasonably configured when it "segregate[s] the races for purposes of voting." *Shaw I*, 509 U.S. at 642. A district that links "distinct locations" on the basis of race does not qualify. *Sensley v. Albritton*, 385 F.3d 591, 597 (5th Cir. 2004).

That is the case here. Plaintiffs' experts presented remedial maps created "using [a] 50 percent voting age population as" a "threshold," Dist.Ct.Dkt.160-1, at 208:2-4, and they never drafted plans with one Black-minority district "because [they were] specifically asked to draw two by the plaintiffs," *id.* 123:1-4. Each plan was similar in that it grouped areas in and around Baton Rouge, which their own sponsored testimony referred to as "south Louisiana," Dist.Ct.Dkt.160-1 at 240:23-241:3; *see also id*. 240:24-247:20, with the delta parishes of northeast Louisiana, 180 miles away. Plaintiffs' demography expert consulted racial data at the outset of map-drawing "to get an idea where the black population is inside the state in order to begin drawing," Dist.Ct.Dkt.160-1, at 209:6-8, because "you can't draw a plan in an area where black population doesn't exist," *id.* 209:22-23. Then, the expert continued assigning voters on the basis of race, to "pull the BVAP percentages back up to check [his] work." *Id.* 210:9-12; *see also id.* 210:12-212:4 (similar).

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The district court found that the defense's racial-gerrymandering objections were "hypercritical," Op. 117, but the Supreme Court has found the same evidentiary indicators to compel findings of racial predominance. *Cooper*, 137 S. Ct. at 1469 (affirming district court finding of a "textbook example" of "race-based districting"); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (reversing finding of a lack of racial predominance); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 273 (2015) (calling materially identical evidence "strong, perhaps overwhelming, evidence that race did predominate"). There can be no question that that Plaintiffs' experts (1) "purposefully

established a racial target" that "African-Americans should make up no less than a majority of the voting-age population," and (2) the racial target "had a direct and significant impact" on the "configuration" of districts—which is how the Supreme Court defines predominance. *Cooper*, 137 S. Ct. at 1468-69.

The district court also concluded that *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996), deems racial predominance irrelevant to Section 2 claims, Op. 112-13, but the Supreme Court subsequently held in *LULAC* that the first *Gingles* precondition is not satisfied by "a district that combines two farflung segments of a racial group with disparate interests" and warned that Section 2 does not countenance districting decisions that "assume from a group of voters race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls.'" 548 U.S. at 433 (alteration accepted; citation omitted). The district court's directive (at Op. 2) that the Legislature create "an additional majority-Black congressional district," somewhere—anywhere—contravenes that holding and does not "protect[] the rights of individual voters," but rather depends on vague statewide ideals of "proportional representation," *Gonzalez*, 535 F.3d at 598. Implementing it would amount to racial segregation.

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Meanwhile, the Supreme Court issued a stay in *Merrill* to address whether racially predominant districts form an appropriate Section 2 baseline. *See Merrill*, 142 S. Ct. at 879; *id.* at 884-89 (Kagan, J., dissenting) (describing the appellants' legal theory). Both this Court and the Supreme Court are empowered to revisit *Clark* and are likely to do so when subsequent precedent confirms that race-based districting is "odious." *Wis. Legislature*, 142 S. Ct. at 1248. "It is not [this Court's]

task today to resolve the merits of this conflict in deciding the instant motion." *Campaign for S. Equal.*, 773 F.3d at 58. It is sufficient that Appellants raise at least one "serious legal issue." *Id.* (citation omitted).

II. The Equities

"The equities do not justify withholding interim relief." *NFIB v. Dep't of Lab., Occupational Safety & Health Admin.*, 142 S. Ct. 661, 665-66 (2022). They *command* relief. *See Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). This Court, of course, "must follow the dictates of the Supreme Court." *Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014) (Costa, J., concurring in the judgment) (voting to stay injunction because the Supreme Court had stayed similar injunctions in recent decisions).

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A. There can be no question that, without a stay, Appellants will suffer irreparable harm. "When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Id.* at 895 (citation omitted). "If the district court judgment is ultimately reversed, the State cannot run the election over again, this time applying" the enacted redistricting plan. *Id.* at 896; *see also Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020). In addition, Appellants "would plainly suffer irreparable harm were the stay not granted," because "[u]nder the District Court order the legislature must either adopt an alternative redistricting plan before [June 20]…or face the prospect that the District Court will implement its own redistricting plan." *Karcher v. Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers) (issuing stay in redistricting appeal brought by legislative leaders).

B. The public interest favors a stay. This is so under the rule that, "because the State is the appealing party, its interest and aforementioned harm merge with that of the public." *Tex. Democratic Party*, 961 F.3d at 412 (alterations accepted; citation omitted).

The injunction imposes an additional, unacceptable risk to the public by ordering the 2022 elections to be conducted under a "congressional redistricting plan that includes an additional majority-Black congressional district," Op. 2, which is presumptively unconstitutional, *Cooper*, 137 S. Ct. at 1468-69. If any aspect of the district court's Section 2 analysis turns out to be incorrect, the 2022 election will have impaired the equal-protection rights of hundreds of thousands of Louisiana voters. What the district court has commanded the Supreme Court has called by its "very nature odious." *Wis. Legislature*, 142 S. Ct. at 1248 (citation omitted). Thus, the public interest favors a stay because "it is in the public interest…to prevent the State from violating the requirements of federal law." *Texas Democratic Party*, 961 F.3d at 412 (alterations accepted; citation omitted).

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C.1. A stay is independently compelled by the *Purcell* principle, "which establish[es] (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Merrill*, 142 S. Ct. at 879 (Kavanaugh, J. concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). This principle (which long predates *Purcell*) "has been the guidon to a number of courts that have refrained from enjoining impending elections," *Chisom v. Roemer*, 853 F.2d 1186, 1190 (5th Cir. 1988),

"even in the face of an undisputed constitutional violation," *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). In cases where a lower court has chosen differently, "the Supreme Court" has consistently "stayed [that] district court's hand." *Chisom*, 853 F.2d at 1190. *Merrill* is just the Supreme Court's latest correction of this all-too-familiar error. 142 S. Ct. at 879; *see also id.* at 879-82 (Kavanaugh, J., concurring).

There is no breathing room between *Merrill* and this case. As here, the court in *Merrill* commanded Alabama to conduct the 2022 election under a plan with two majority-minority districts rather than one. *Singleton v. Merrill*, 2022 WL 265001, at *77 (N.D. Ala. Jan. 24, 2022). Like the court below, the district court in *Merrill* made findings that the injunction would not harm election administration. *Id.* at *51-52. Any assertion that the same result should not follow here is "an incredibly difficult sell." *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 2022 WL 496908, at *5 (E.D. Ark. Feb. 17, 2022). The court below observed that Louisiana's elections are five months later than Alabama's, Op. 148, but its injunction issued nearly five months later than the *Merrill* injunction.

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C.2. Nor do the district court's findings concerning election administration merit any credence. First, the court cited decisions issuing remedial plans after final judgment in redistricting cases. Op. 149 & n.443. But "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). The court cited only one case that has ever ordered a new

redistricting plan to be crafted as *provisional* relief: the district-court *Merrill* decision. Op. 50 n.449.

Second, the court failed to account for the time it will take to craft a remedial plan. The order requires the Louisiana Legislature to enact redistricting legislation by June 20, but the deadline is virtually unattainable. Because the district court failed to act until the spring legislative session ended, an extraordinary session is required, and, by operation of a seven-day notice requirement, La. Const. art. 3, § 2(B), it cannot begin until June 15. The Louisiana Constitution also requires that "each bill shall be read at least by title on three separate days in each house." La. Const. art. 3, § 15(D); *Doll v. City of New Orleans*, 85 So.2d 514, 515 (La. 1956). Further, the Constitution provides that "[n]o bill shall be considered for final passage unless a committee has held a public hearing and reported on the bill." La. Const. art. 3, § 15(D). And after a bill passes the Legislature, the Governor must sign it (or take no action) before it becomes law. And then there is the redistricting process itself, which is "the most difficult task a legislative body ever undertakes." *Covington*, 316 F.R.D. at 125.

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The district court set the Legislature up to fail. That error alone contravenes the rule that a federal court must "afford a *reasonable* opportunity for the legislature to meet [federal] requirements" in a remedial plan. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added); *accord Jones v. City of Lubbock*, 727 F.2d 364, 387 (5th Cir. 1984).

Third, the district court's intention to "issue additional orders to enact a remedial plan," Op. 2, does little to mitigate the risk of meltdown. It took the

district court 67 days from filing, and 24 days from the hearing, to issue an injunction. There is no reason to believe a remedial order will issue any more promptly. A remedial phase in redistricting litigation presents a new adversarial proceeding requiring opportunities for competing submissions, expert analyses and discovery, evidentiary hearings, and typically the appointment of a special master. *See, e.g.*, *Terrebonne Par. Branch NAACP v. Edwards*, 399 F. Supp. 3d 608 (M.D. La. 2019); *United States v. Brown*, 561 F.3d 420, 436 (5th Cir. 2009) ("The district court held two evidentiary hearings before determining the appropriate remedy."). A court-ordered plan must comply with the law, including the Equal Protection Clause. *Clark*, 88 F.3d at 1407. And the need for expedition does not excuse a court from utilizing effective "procedures." *Jones*, 727 F.2d at 387.

A new plan is unlikely to be in place for some time, and it is a mystery how the 2022 election can be administered with no plan in place. Ultimately, the end date of the congressional elections cannot be moved, *Foster v. Love*, 522 U.S. 67, 69 (1997), and there is every prospect that administering a redistricting plan at this late hour will require, at best, "heroic efforts." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring).[2]

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[2] The district court erroneously found relevance in statements by Legislative Appellants in state impasse litigation in March 2022 to the effect that it was then unnecessary for the court to implement a new plan before the legislative session ended in late March. Op. 145-46; Ex. C at 2. The court failed to appreciate the difference in timing (March versus June); the different animal of impasse litigation, where the court need not adjudicate liability; and the extensive litigation necessary before a new map can be in place.

D. Any harm Plaintiffs may incur through a stay "does not outweigh the other three factors." *Veasey*, 769 F.3d at 896. "In consideration of this factor, the maintenance of the status quo is important." *Louisiana v. Biden*, 2022 WL 866282, at *3 (5th Cir. Mar. 16, 2022). Louisiana has for decades conducted congressional elections under plans with one majority-Black district. A stay would preserve that status quo pending review of the difficult legal questions at issue here.

CONCLUSION

The Court should stay the injunction below pending appeal.

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Dated: June 9, 2022

/s/ Richard B. Raile

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Certificate of Conference

I hereby certify that I contacted opposing counsel about the imminent filing of this motion, and an opposition will be filed.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Certificate of Compliance with Rule 27.3

Pursuant to Fifth Circuit Rule 27.3, I hereby certify the following:

- Before filing this motion, counsel for Appellants Clay Schexnayder and Patrick Page Cortez ("Appellants") contacted the clerk's office and opposing counsel to advise them of Appellants' intent to file this motion.
- The facts stated herein supporting emergency consideration of this motion are true and complete.
- The Court's review of this motion is requested by Tuesday, June 14, 2022, at noon, or alternatively, Appellants request a temporary administrative stay pending the Court's review at the earliest possible date.
- True and correct copies of the relevant orders are filed concurrently with this motion, and other relevant documents cited herein are available electronically including on Pacer and are identified by their district court docket number as Dist.Ct.Dkt.[#] at [page #].
- This motion is being served at the same time it is being filed.

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Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Certificate of Compliance

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. ("Rule") 27(d)(2) because it is 5,199 words, excluding the parts that are exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced typeface with serifs.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

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Certificate of Service

I hereby certify that on June 9, 2022, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Dated: June 9, 2022

/s/ Richard B. Raile
RICHARD B. RAILE