No. 22-30333

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.

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

v.

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

On Appeal from the United States District Court
for the Middle District of Louisiana
(Nos. 3:22-cv-00211-SDD-SDJ, 3:22-cv-00214-SDD-SDJ)

GALMON PLAINTIFFS-APPELLEES' CONSOLIDATED OPPOSITION TO MOTIONS FOR STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

1. In the district court, this case is captioned as *Press Robinson et al. v. Kyle Ardoin*, No. 3:22-cv-00211-SDD-SDJ (lead case), consolidated with *Edward Galmon, Sr. et al. v. R. Kyle Ardoin*, No. 3:22-cv-00214-SDD-SDJ. In this Court, it is captioned as *Press Robinson et al. v. Kyle Ardoin et al.*, No. 22-30333.

2. Counsel for the *Galmon* Plaintiffs-Appellees certify under Federal Rule of Civil Procedure 26.1 that no plaintiff has any parent corporation and no publicly held corporation owns 10% or more of stock in any organizational plaintiff.

3. Counsel for the *Galmon* Plaintiffs-Appellees further certify 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 disqualification or recusal.

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INTRODUCTION

Following a five-day evidentiary hearing—and having considered two sets of preliminary-injunction briefings, the testimonies of 21 expert and fact witnesses, and hundreds of pages of proposed findings of fact and conclusions of law—the district court applied binding precedent and concluded that Louisiana's new congressional map dilutes the electoral strength of Black voters in violation of Section 2 of the Voting Rights Act. This was not a close case; the district court credited Plaintiffs' witnesses and discounted almost all of Defendants' evidence as irrelevant and unpersuasive. And after hearing from the State's elections commissioner, reviewing the midterm calendar, and considering the representations made by Defendants in prior state-court litigation, the district court found that a remedial map can be feasibly implemented ahead of the 2022 elections.

These findings are entitled to significant deference. And yet Defendants disregard them almost entirely. Indeed, their stay motions constitute an elaborate act of obfuscation. By ignoring the district court's conclusions and distorting precedent beyond recognition, Defendants have attempted to hinder the straightforward application of the governing legal standards to Plaintiffs' overwhelming evidence. But make no mistake:

- **The district court's factual findings are entitled to deference.** The district court found that Plaintiffs readily satisfy the preconditions established in

Thornburg v. Gingles, 478 U.S. 30 (1986), and that the totality of circumstances supports a finding of vote dilution. These findings are amply supported by the factual record and should not be disturbed.

- **Plaintiffs are entitled to relief under controlling law.** The requirements of a Section 2 claim are what the U.S. Supreme Court and this Court have said they are, not what Defendants might wish them to be. Plaintiffs have satisfied each of those requirements.

- **It is not the eve of an election.** Relying on unsupported hyperbole, Defendants contend the 2022 midterm elections are imminent and a remedial map would cause electoral chaos and catastrophe. But this is simply not true—as the district court found, the Legislators conceded, and the record proves.

Ultimately, Defendants might not like the district court's preliminary injunction, but they have given no compelling reason to question that result of the district court's analysis that led to it, let alone grounds sufficient to justify the extraordinary relief of a stay pending appeal. Their motions should be denied, the administrative stay lifted, and a lawful congressional map adopted for the midterm elections.

STATEMENT OF THE CASE

The 2020 census showed that Louisiana's population increased by approximately 125,000 people, growth driven chiefly by the state's minority

communities—and half of it attributable to the Black population. Indeed, Louisiana's Black population increased from 32.80% following the 2010 census to 33.13% in 2020—a net increase of 56,234 people—while Louisiana's white population *decreased* overall, an enduring trend since the 1990s.

The Legislature undertook its redistricting process during a special session in February. They passed two near-identical maps—House Bill ("HB") 1 and Senate Bill 5—that retained the state's single majority-Black district. Governor John Bel Edwards vetoed both maps on March 9, explaining that the failure to draw an additional Black-opportunity district violated the Voting Rights Act. On March 30, the Legislature overrode his veto of HB 1.

Hours later, Plaintiffs filed their complaints, alleging that the new map violates Section 2. Their preliminary-injunction motions followed two weeks later, and the district court held a five-day hearing on the motions beginning on May 9. On June 6, after considering thousands of pages of pre- and post-hearing briefing and expert reports, along with hours of live testimony from 21 witnesses, the district court issued a thorough, 152-page order granting the preliminary-injunction motions. *See generally* Ruling & Order ("Order"). Notably, the district court credited the testimonies of Plaintiffs' witnesses—including William Cooper and Anthony Fairfax, Plaintiffs' mapping experts, finding their opinions "qualitatively superior and more persuasive on the requirements of numerosity and compactness." *Id*. at 97.

By striking contrast, the district court found the testimonies of Defendants' experts—who were unqualified or myopically focused on irrelevant threads of the *Gingles* analysis while disregarding relevant factors and the inquiry as a whole—unhelpful and unpersuasive. *See id*. at 92-97, 120-21, 125-27. Among many findings, the district court concluded that "[g]iven the timing of Louisiana's election and election deadlines, the representations made by Defendants in related litigation, and the lack of evidence demonstrating that it would be administratively impossible to do so, ... the State has sufficient time to implement a new congressional map without risk of chaos." *Id.* at 149.

Defendants noticed an appeal of the preliminary injunction and filed a joint motion to stay the district court's ruling. The district court denied Defendants' motion, concluding that "there has been no showing of error in the Court's application of the prevailing law," noting "the Legislators' representations [] that there is ample time to consider and enact remedial maps," and explaining that Justice Kavanaugh's concurrence in *Merrill v. Milligan*, 142 S.Ct. 879 (2022) (per curiam), is "inapplicable" because "we are not in a period close to an election." Dist.Ct.Dkt.182 at 2-3 (cleaned up). Defendants' pending motions for a stay pending appeal followed.

ARGUMENT

Defendants' motions steadfastly disregard both decades of Section 2 precedent and the district court's extensive factual findings. This gambit cannot satisfy the demanding standard for a stay pending appeal. The prerogative of reinterpreting *Gingles* or other binding precedent lies with the U.S. Supreme Court, not Defendants or this Court. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997). And, because the Section 2 inquiry "is peculiarly dependent upon the facts of each case" and "requires an intensely local appraisal of the design and impact of the contested electoral mechanisms," "the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution." *Gingles*, 478 U.S. at 79 (cleaned up). "Under that standard of review," the Court must "affirm the [district] court's finding so long as it is 'plausible,'" and "reverse only when 'left with the definite and firm conviction that a mistake has been committed.'" *Cooper v. Harris*, 137 S.Ct. 1455, 1474 (2017) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)).

Defendants point to nothing in the district court's order that indicates it made a mistake of law or fact. Notably, Defendants do *not* dispute many of the district court's findings: not its conclusions that Plaintiffs satisfied the second *Gingles* precondition and that the totality of circumstances supports a finding of vote dilution, nor that Plaintiffs and other Black Louisianians will be irreparably harmed

absent preliminary relief. Instead, Defendants (1) grossly mischaracterize well-established precedent to cast doubt on whether Plaintiffs satisfied the first and third *Gingles* preconditions and (2) ignore their own prior representations and the district court's factual findings to contend that it is too late in the election cycle to implement a lawful congressional map. Whether applying the traditional factors from *Nken v. Holder*, 556 U.S. 418 (2009), or Justice Kavanaugh's proposed election-context variation from his *Merrill* concurrence, *see* 142 S.Ct. at 881 (Kavanaugh, J., concurring), Defendants fall far short of any showing that the extraordinary relief of a stay is warranted.

I. Defendants have failed to demonstrate a likelihood of success in their appeals.

As the district court found, Plaintiffs have readily satisfied the *Gingles* preconditions, and the totality of circumstances compels a finding of unlawful vote dilution. The merits are thus clear-cut in Plaintiffs' favor.

A. Section 2 confers a private right of action.

As an initial matter, the State briefly suggests that Section 2 does not confer a private right of action. *See* State Mot. 13-14 n.6. But 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) (plurality opinion) (quoting S. Rep. No. 97-417, pt. 1, at 30 (1982)); *accord id.* at 240 (Breyer, J., concurring) (expressly agreeing on

this point). *Morse* has not been overruled, and the Court has repeatedly heard private cases brought under Section 2. *See, e.g.*, *Abbott v. Perez*, 138 S.Ct. 2305, 2331-32 (2018); *LULAC v. Perry*, 548 U.S. 399, 409 (2006) (plurality opinion).

A three-judge court in this Circuit recently rejected the same argument. *See LULAC v. Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2021 WL 5762035, at *1 (W.D. Tex. Dec. 3, 2021) (three-judge court). "Absent contrary direction from a higher court," this Court should similarly "decline to break new ground on this particular issue." *Id.*

B. The district court's finding that Plaintiffs satisfied the first *Gingles* precondition was not clearly erroneous.

The district court correctly concluded that Plaintiffs satisfied the first *Gingles* precondition by drawing illustrative districts that satisfy the numerosity and compactness requirements. *See* Order 90, 101. In response, Defendants adopt a kitchen-sink approach that persistently—and inexplicably—ignores the district court's careful and thorough factual findings. These arguments do not provide a "definite and firm conviction that a mistake has been committed." *Cooper*, 137 S.Ct. at 1474 (cleaned up).

Plaintiffs properly employed the any-part BVAP metric. At the outset, the State accuses Plaintiffs of "contort[ing]" the numerosity requirement by employing the any-part BVAP metric. State Mot. 16-17. But the Supreme Court has held that 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). Plaintiffs can hardly be faulted for using the metric expressly endorsed by the Supreme Court—just as courts across the county have done when adjudicating Section 2 claims. *See, e.g.*, *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). As the district court persuasively noted, "[i]t would be paradoxical, to say the least, to turn a blind eye to Louisiana's long and well-documented expansive view of 'Blackness' in favor of a definition on the opposite end of the spectrum" that "gatekeeps Blackness in the context of this Voting Rights case." Order 87.

Race did not predominate in Plaintiffs' illustrative maps. Defendants sound the drumbeat of racial predominance, apparently in the hopes that this Court will simply ignore the district court's finding that race *did not predominate* in the drawing of Plaintiffs' illustrative maps.

The district court "credit[ed] Cooper's testimony" that, although "he was aware of race during the map drawing process," "race was *not* a predominant consideration in his analysis," as he "considered all of the relevant principles in a balanced manner." *Id.* at 98 (emphasis added); *see also id.* at 98-99 (crediting Fairfax testimony "that race did not predominate in his mapping process"). These factual findings were based on a comprehensive review of all the expert testimony, *see, e.g.*,

id. at 92-95, 97 (rejecting Defendants' expert testimony regarding racial predominance), and a detailed assessment of witnesses' credibility, *compare id.* at 98-99, 116-17 (finding Cooper and Fairfax credible), *with id.* at 92 (declining to exclude Bryan but finding "his methodology to be poorly supported") *and id.* at 94 (finding that "Blunt has no experience, skill, training, or specialized knowledge"); *see also Anderson*, 470 U.S. at 575 ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings."). Remarkably, Defendants' arguments on racial predominance fail to even acknowledge, let alone refute, the district court's findings on racial predominance.

Instead, the State relies on the testimony of its expert witnesses, *see* State Mot. 16, 18-22—which the district court correctly discounted as unhelpful and unpersuasive. Rather than credit Mr. Bryan's conclusion that Plaintiffs' "illustrative plans ... were drawn to divide black and white populations," *id.* at 16, the district court found that "Bryan's conclusions are unsupported by the facts and data in this case and thus wholly unreliable" because his analysis relied on "assumptions [that] are not supported by the evidence." Order 93; *see also id.* ("Bryan's analysis lacked rigor and thoroughness, which further undermines the reliability of his opinions."). Indeed, although the State continues to tout Mr. Bryan's illustrations of alleged racially motivated line-drawing, *see* State Mot. 18-21, Bryan failed to examine *any*

traditional districting principles other than race that could explain the districts' configurations, Order 45and he "conceded that that he could not say how much of the 'misallocation' he observed was attributable to a racially-motivated mapdrawing process, as opposed to being reflective of the reality that the Black population in Louisiana is highly segregated." *Id*. at 93. It is hardly surprising that Bryan's singular focus on race led him to conclude that race predominated, but Plaintiffs' experts were not so misguided in drawing their illustrative plans. *Id.*

As for Dr. Blunt's simulations analysis, the district court found not only that "Dr. Blunt's simulation analysis experience is best described as novice," *Id*. at 94-95, but also that "the simulations he ran did not incorporate the traditional principles of redistricting required by law" and accordingly "merit little weight." *Id.* at 95.

Finally, as to Dr. Murray's spatial analysis, the district court correctly noted that his "conclusion that the Black and White populations in Louisiana are heterogeneously distributed" is "nothing more than a commonsense observation which is not a whit probative of the compactness of the districts in the Plaintiffs' illustrative plans." *Id.* at 97.

These findings are entitled to deference, *see Cooper*, 137 S.Ct. at 1474, and certainly nothing in the State's motion compels findings to the contrary—or undermines the district court's conclusion that race did not predominate in the creation of Plaintiffs' illustrative maps.

Plaintiffs' illustrative majority-Black districts unite communities of interest. Plaintiffs' illustrative majority-Black districts do not "link distinct locations on the basis of race" or combine "farflung segments of a racial group with disparate interests." Leg. Mot. 12, 14 (cleaned up); *see also* State Mot. 15. Instead, the district court found that "Plaintiffs made a strong showing that their maps respect [communities of interest] and even unite communities of interest that are not drawn together in the enacted map," which "Defendants have not meaningfully disputed." Order 103. In addition to their mapping experts, who "employed different approaches to identifying communities of interests and considering them in their illustrative maps," *id.* 34-36, 101, "Plaintiffs also presented several lay witnesses who spoke to the shared interests, history, and connections between East Baton Rouge Parish and two areas included together with it in Plaintiffs' illustrative CD 5." *Id.* at 37. One described "the strong historical connection between East Baton Rouge and the Delta parishes," including the "pattern of migration from the Mississippi Delta to Baton Rouge" and "educational ties between the Delta parishes and Baton Rouge." *Id.* at 37-38. Another testified that "St. Landry and Baton Rouge share common policy concerns" stemming from educational and economic ties. *Id.* at 38-40. The Court noted that this "citizen viewpoint testimony ... contributed meaningfully to an understanding of communities of interest." *Id.* at 101.

Defendants, by striking contrast, "did not call *any* witnesses to testify about communities of interest." *Id.* (emphasis added). They can hardly establish racial predominance based on the Supreme Court's characterization of evidence in *another* case in *another* state, *see* Leg. Mot. 14 (citing *LULAC*, 548 U.S. at 433); Sec'y Mot. 8 (similar), while ignoring the unrefuted expert and lay witness evidence in *this* case proving that Plaintiffs' illustrative districts unite communities with deep historical, cultural, and economic ties.

Plaintiffs' illustrative maps are not racial gerrymanders. The facts here are readily distinguishable from those in the racial-gerrymandering cases on which Defendants rely.

In *Cooper v. Harris*, the U.S. Supreme Court found a racial gerrymander where the evidence "show[ed] an announced racial target *that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites*," 137 S.Ct. at 1469 (emphasis added)—a far cry from the evidence here, which established that Messrs. Cooper and Fairfax "balanced all of the relevant principles ... without letting any one of the criteria dominate their drawing process," Order 106. Indeed, *Cooper* reiterated that racial-gerrymandering claims are based primarily on a challenged district's failure to "conform[] to traditional districting principles, such as compactness and respect for county lines." 137 S.Ct. at 1473. Here, where Plaintiffs' illustrative plans perform as well as *or better than* the enacted

plan on every relevant traditional districting criterion, see Order 105-06, *Cooper* is simply inapposite.

Similarly, on remand after the Supreme Court clarified the legal standard for identifying racial gerrymanders, the district court in *Bethune Hill v. Virginia State Board of Elections* found both direct evidence of racial predominance from the map-drawer's statements and circumstantial evidence that traditional districting criteria were subordinated in service of race. 326 F.Supp.3d 128, 145 (E.D. Va. 2018). Here, by contrast, the district court found, based on the testimony of the expert mappers and the illustrative plans' objective compliance with traditional districting factors, that race was *not* the overriding consideration behind Mr. Cooper's and Mr. Fairfax's illustrative maps. Order 98. And while Defendants suggest that the evidence at issue in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015), was "materially identical" to the evidence at issue here, Leg. Mot. 13, they are incorrect about that too. There, the traditional redistricting factor that primarily justified the challenged districts was population equality. *See Ala. Legis. Black Caucus*, 575 U.S. at 271-72. The Court concluded that "once the legislature's 'equal population' objectives are put to the side—*i.e.*, seen as a background principle—then there is strong, perhaps overwhelming, evidence that race did predominate as a factor." *Id.* at 273. Here, again by contrast, Plaintiffs' experts drew their illustrative plans to

achieve compliance with a host of traditional districting principles, with no one consideration predominating over others.

While Defendants reference the "odious" race-based districting at issue in *Wisconsin Legislature v. Wisconsin Elections Commission*, that decision hinged on an insufficient application of Section 2 precedent, 142 S.Ct. 1245, 1248-51 (2022) (per curiam) (cleaned up), whereas the district court's extensive and thoughtful order in this case could hardly be considered inadequate.

Finally, the Secretary suggests that Plaintiffs' illustrative maps "bear striking similarities" to the Georgia congressional plan invalidated in *Miller v. Johnson*, 515 U.S. 900 (1995). But there, the Supreme Court emphasized that racial-gerrymandering claims require proof "that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Id.* at 916. Here, again, the district court found that Plaintiffs' illustrative plans match or even exceed the enacted plan on traditional criteria. *See* Order 105-06. Far from being "worlds apart in culture," *Miller* 515 U.S. at 908, Plaintiffs' evidence—and the district court's findings—demonstrate the links between Baton Rouge, St. Landry Parish, and the Delta Parishes, areas of common interest that are united in Plaintiffs' illustrative districts. *See* Order 101-03.

The district court rightly discounted Defendants' prior "invocation of *Hays*"—and the invalidation of Louisiana's additional majority-Black districts in the

1990s—as "a red herring," given the significant factual and demographic distinctions between those invalidated maps and Plaintiffs' illustrative maps. Order 106-10. Defendants' latest attempts to clumsily shoehorn Plaintiffs' evidence into prior racial-gerrymandering cases are no more availing here.

Ultimately, far from raising a "serious legal issue," Leg. Mot. 15 (quoting *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 58 (5th Cir. 2014)), Defendants have merely offered a novel theory—that *any* consideration of race as part of the *Gingles* inquiry constitutes an unlawful racial gerrymander—that is wholly divorced from four decades of Section 2 precedent. As the 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 does not lead inevitably to impermissible race discrimination.

Shaw v. Reno, 509 U.S.630, 646 (1993). Indeed, 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). Consideration is not the same as predominance, and nothing in

Defendants' motion—and certainly none of their evidence presented at the district court's hearing—indicates that race *predominated* in Plaintiffs' illustrative districts.[1]

In short, Plaintiffs demonstrated that their illustrative districts satisfy the numerosity requirement and are compact in terms of both statistical metrics and the communities that comprise them. They thus satisfied the first *Gingles* precondition.

C. The district court's finding that Plaintiffs satisfied the third *Gingles* precondition was not clearly erroneous.

Plaintiffs indisputably satisfied the third *Gingles* precondition. Defendants wrongly suggest that the evidence in the record established only "that black voters and white voters voted differently" and "that black voters and white voters would have elected different candidates if they had voted separately." Leg. Mot. 9 (cleaned

[1] Even if it had—and even if this Court had not rejected the cavalier application of the racial-gerrymandering doctrine to the *Gingles* inquiry, *see Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996)—"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*, 515 U.S. at 916, 920 (applying strict scrutiny to racial-gerrymandering claims and requiring that such maps be "narrowly tailored to achieve a compelling interest"); *Bethune-Hill*, 137 S.Ct. at 801 ("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 and the district court's findings, along with the numerous maps rejected during the legislative process and Governor Edwards's veto, provide indisputably "good reasons" to believe a second majority-opportunity district is required under the Voting Rights Act. *Ala. Legis. Black Caucus*, 575 U.S. at 278 (cleaned up). Plaintiffs' illustrative plans would thus satisfy the requirements of strict scrutiny against a hypothetical racial-gerrymandering claim.

up); *see also* State Mot. 25. This fleeting summary ignores the district court's actual findings as to white bloc voting and its impact on electoral outcomes.

Plaintiffs demonstrated legally significant racially polarized voting. Crediting Plaintiffs' experts, the district court found that "[b]oth Dr. Palmer and Dr. Handley examined this issue, amassed detailed data, and arrived at the same conclusion: that White voters consistently bloc vote *to defeat the candidates of choice of Black voters*." Order 124 (emphasis added). Defendants do not actually *dispute* this finding on the third *Gingles* precondition; they simply ignore it—a particularly glaring omission given that one of their own racially polarized voting experts agreed that white-preferred candidates usually defeat Black-preferred candidates in Louisiana. Dist.Ct.Dkt.162-4 at 159:9-15.

This finding should end the inquiry. But rather than engage with what the third *Gingles* precondition actually requires, Defendants invent a whole new legal standard of their own. First, Defendants miss the target of the third *Gingles* precondition analysis. Defendants' arguments center on their assessment of voting behavior and electoral outcomes in Plaintiffs' illustrative districts. *See* Leg. Mot. 8-12; State Mot. 24-27. But the relevant question is not whether white crossover voting helps elect the Black-preferred candidate in *illustrative* districts, but whether white bloc voting usually defeats the Black-preferred candidate in the *enacted* map. *See LULAC v. Abbott*, No. 3:21-CV-259-DCG-JES-JVB, 2022 WL 1631301, at *15

(W.D. Tex. May 23, 2022) (three-judge court) (explaining that "the second and third preconditions are not mirror-image requirements for different racial groups" because while "a *Gingles* plaintiff must show the second precondition for the minority population that would be included in its proposed district," "the third precondition must be established for the *challenged* districting"). Plaintiffs' experts demonstrated, and the district court found, that Black voters are unable to elect their candidates of choice under the enacted map in the area where Plaintiffs' illustrative districts would be drawn. This, once again, ends the inquiry into the third *Gingles* precondition.

Defendants fundamentally misunderstand the meaning of "legally significant racially polarized voting." *Covington*—a case on which Defendants predominantly rely—readily provides the definition: "the third *Gingles* precondition requires racial bloc voting that is 'legally significant'—that is, majority bloc voting at such a level that it enables the majority group 'usually to defeat the minority's preferred candidates.'" 316 F.R.D. at 167 (M.D.N.C. 2016) (quoting *Gingles*, 478 U.S. at 56). Plaintiffs have satisfied this straightforward requirement.

Third, Defendants misread binding precedent on the legal significance of white crossover voting. Defendants read into *Bartlett v. Strickland*, 556 U.S. 1 (2009) (plurality opinion), a rule that substantial white crossover voting automatically forecloses a finding of legally significant racially polarized voting. Not so: There, the Court merely noted that "[i]n areas with substantial crossover

voting it is *unlikely* that the plaintiffs would be able to establish the third *Gingles* precondition." *Id.* at 24 (emphasis added). This was just a logical application of *Gingles*—after all, if enough white voters support a Black-preferred candidate, then they would not vote as a bloc to defeat that candidate. Levels of crossover voting insufficient to overcome white bloc voting do not negate the third *Gingles* precondition; to the contrary, *Gingles* explicitly noted that "a white bloc vote that normally will defeat the combined strength of minority support *plus white 'crossover' votes* rises to the level of legally significant white bloc voting." 478 U.S. at 56 (emphasis added). In short, this precondition poses a straightforward objective question: Does white bloc voting usually defeat Black-preferred candidates? Where, as here, the answer is undisputedly in the affirmative, then the precondition is satisfied notwithstanding the existence of white crossover voting.

Defendants also misapply *Covington* and *Cooper* to suggest that an illustrative district that could elect a Black-preferred candidate with a BVAP below 50% does not satisfy the third *Gingles* precondition. But both of those cases involved attempted *defenses* under the Voting Rights Act, not affirmative Section 2 claims. And in both cases, courts concluded that the legislature failed to establish in the challenged districts the existence of "racial bloc voting that, absent some remedy, would enable the majority usually to defeat the minority group's candidate of choice." *Covington*, 316 F.R.D. at 167-68. Indeed, as the *Cooper* Court explained, "electoral history

provided no evidence that a § 2 plaintiff could demonstrate the third *Gingles* prerequisite" because Black-preferred candidates *already* prevailed in the challenged districts. 137 S.Ct. at 1460. Quoting *Bartlett*, Defendants similarly suggest that "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*.'" Leg. Mot. 9 (quoting *Bartlett*, 556 U.S. at 24). What *Bartlett* actually explained—and consistent with the third precondition's focus on the *enacted* map, not *illustrative* maps—is that "majority-minority districts would not be required" in areas where Black voters are already electing their candidates of choice. 556 U.S. at 24. Such electoral success would prove that bloc voting is not defeating Black-preferred candidates—and thus foreclose the third *Gingles* precondition.

Here, in short, Plaintiffs *did* demonstrate that white bloc voting usually defeats Black-preferred candidates in the area encompassed by Plaintiffs' illustrative majority-Black districts. Black-preferred candidates *will not prevail* in this area "without a VRA remedy." *Covington*, 316 F.R.D. at 168. Accordingly, Plaintiffs have satisfied the third *Gingles* precondition.[2]

[2] The Secretary also suggests that Plaintiffs cannot satisfy the third precondition because Black-preferred candidates prevail in *one* of the parishes included in Plaintiffs' illustrative districts. *See* Sec'y Mot. 6. But the Supreme Court has made clear that "redistricting analysis must take place at the district level," and cannot

Plaintiffs demonstrated that Louisiana's polarized voting is the product of race. Finally, the State suggests that "partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens, which means there is no legally significant racially polarized voting under the third *Gingles* precondition." State Mot. 26 (cleaned up). While Plaintiffs need not prove the cause of racially polarized voting, this is yet another manifestation of Defendants' disregard for the evidentiary record and the district court's factual findings. The State relies entirely on the inferences of its expert, Dr. John Alford, *see id.* at 26-27. The district court "d[id] not credit this opinion as helpful," noting that his "conclusions conflict with the opinions of other experts in this case who employed more robust methodology." Order 120. As the district court explained, "Dr. Alford merely looked at the results reported by Dr. Palmer and Dr. Handley and opined that polarized voting" is not caused by the race of the candidate—a conclusion at once unsupported ("Dr. Alford does not know exactly why voting is polarized") *and* contradicted by Dr. Palmer, who "demonstrated that the race of the candidate does have an effect; he found that Black voters support Black candidates more often in a statistically observable way." *Id.* at 121. Moreover, the district court concluded that,

> contra Defendants' assertion that polarization is attributable to partisanship and not race, the evidence of the historical realignment of

look at "only one, small part of the district" like a single parish. *Abbott*, 138 S.Ct. at 2331-32.

> Black voters from voting Republican to voting Democrat undercuts the argument that the vote is polarized along party lines and not racial lines. The realignment of Black voters from Democrat to Republican is strong evidence that, party affiliation notwithstanding, Black voters cohesively for candidates who are aligned on issues connected to race.

Id. at 128. This credited expert evidence that polarization is attributable to race and not partisanship was unrebutted by Defendants—and serves to refute the State's baseless claim that Louisiana's polarized voting is attributable only to party.

II. Equitable considerations weigh heavily against a stay of the district court's preliminary injunction.

Unlike Defendants, Plaintiffs and other Black Louisianians will be irreparably harmed if the November elections are held under the enacted congressional map. The equities counsel strongly against a stay.

A. Defendants are not at risk of irreparable harm.

The argument of last resort in favor of unlawful election schemes is always to claim that it is too late to remedy the violation. Defendants tack on this familiar excuse, but much more is required than their cursory cites to *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), and *Merrill*. Defendants fail to offer any meaningful justification for *why* those cases should apply here. In fact, the relevant considerations are altogether lacking.

Purcell vacated a court of appeals order that had overturned the district court and suspended voter identification rules mere weeks before an election. 549 U.S. at 4. The Supreme Court faulted the court of appeals for failing "to give deference to

the discretion of the District Court," and noted that the risk that voter ID laws would disenfranchise qualified voters had to be weighed against the risk that court orders "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4-5. As *Purcell* admonished, the district court's factual findings here are also due considerable deference. But that is where the parallels end. For good reason, Defendants do not even suggest that voters will avoid the polls in November due to confusion over districts that can be finalized in June.

Merrill is also readily distinguishable. *See infra*, Part III. Because the stay in that case was not accompanied by any opinion for the Court, Defendants rely on Justice Kavanaugh's concurrence, which suggested that an election-related injunction may be appropriate even "in the period close to an election" where, as relevant here, "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring).[3] Justice Kavanaugh did not define "the period close to an election," but we *know* it does not encompass the period here—where the injunction was issued *155 days* before the primary election—because *after Merrill*

[3] Justice Kavanaugh would also consider the underlying merits, *see supra* Part I; the irreparable harm suffered by Plaintiffs absent the injunction, *see infra* Part II.B; and whether plaintiffs unduly delayed in bringing suit (here, Plaintiffs filed their complaint the same day the congressional plan was enacted). *See* 142 S.Ct. at 881 (Kavanaugh, J., concurring).

the Court held that "sufficient time" remained for Wisconsin's high court "to take additional evidence" and adopt new state senate and state assembly maps *139 days* before the primary election. *Wis. Legislature*, 142 S.Ct. at 1248, 1251. And here, the remedial phase can be even more efficient. Whereas Wisconsin's legislature contains 33 senate seats and 99 assembly seats, Louisiana is apportioned only six congressional seats that need to be redrawn. And whereas the Wisconsin litigation involved a malapportionment challenge, and the Supreme Court chided the state court's opinion for citing insufficient evidence to justify the application of Section 2, here the district court held a week-long hearing on Section 2 and issued a 152-page opinion replete with the necessary findings—no re-opening of the evidentiary record is necessary. After the Supreme Court's remand, final districts in Wisconsin were not adopted until April 15, 116 days before the August 9 primary. *See Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469 (Wis. 2021). The parallel date for Louisiana's November 8 primary is July 15—well after the June 20 deadline the district court ordered for final maps here.

In addition to the Supreme Court's necessary implication that Louisiana is not in the "period close to an election," the Legislators have said so explicitly. As the district court noted, in March of this year,

> President Cortez and Speaker Schexnayder asserted that: "the candidate qualification period could be moved back, if necessary, as other states have done this cycle, without impacting voters." They further represented that: "**[t]he election deadlines that actually impact voters**

> **do not occur until October 2022**... Therefore, there remains several months on Louisiana's election calendar to complete the process." There was no rush, they assured the court, because Louisiana's "election calendar is one of the latest in the nation."

Order 146 (alterations in original) (footnotes omitted) (emphasis added).

The Legislators' position has now apparently changed. But the calendar remains the same: The October deadlines Defendants cited in March remain October deadlines today. The Legislature could postpone the July candidate-qualification period now just as it could have months ago—though under this Court's injunction, that will not even be necessary. *See id*. at 3. The only material difference between March and now is that previously the Legislature anticipated that it could use the summer to draw a map with a single district where Black voters could elect their candidates of choice, and now the Court has ordered it to draw two such districts. If June is not too late to adopt an unlawful map, surely it is not too late to adopt a map that adheres to the Voting Rights Act.[4]

Because Louisiana is not in the "period close to an election" as the Supreme Court understands that phrase, there is no need to further analyze whether remedying the Section 2 violation is "feasible" without "significant cost, confusion, or

[4] Defendants attribute their shifting position to the fact that, in the state court impasse case, the court "need not adjudicate liability." Leg. Mot. 19 n.2. Far from a distinction, this is another *similarity* between then and now. Because the Court has already concluded that Plaintiffs are likely to prove liability, remedial map-drawing can occur immediately.

hardship." *Merrill*, 142 S.Ct. at 881 (Kavanaugh, J., concurring). But that proposed test is satisfied in any event. Defendants hand-wave at "election administration" concerns, but the Legislators' sole complaint is that the district court is rushing the remedial process. Leg. Mot. 18. If the Legislature cannot remedy the legal violation, that is not an argument in favor of staying *any* remedy—it is a concession that the Legislature should step aside. The Supreme Court and the Fifth Circuit "have acknowledged that when it is not practicable to permit a legislative body this opportunity because of an impending election, 'it becomes the "unwelcome obligation" of the federal court to devise and impose a [remedy] pending later legislative action.'" *Veasey v. Abbott*, 830 F.3d 216, 270 (5th Cir. 2016) (alterations in original) (quoting *Wise v. Lipscomb*, 437 U.S. 535 (1978)); *see also id.* (favorably citing *Perry v. Perez*, 565 U.S. 388 (2012), for "implicitly approving of a district court's decision to devise an interim redistricting plan rather than permit the legislature to impose a new plan in light of the fast-approaching election").

Moreover, any rush is at the Defendants' own urging, given their newfound concerns about the approaching November election. It is of Defendants' own making, given their repeated efforts to slow this litigation through postponements and stays. And it is not a rush at all—Defendants have been on notice for months, if not years, that the chosen district configuration would be litigated, *see* Order 126 n.350; Complaint, *Johnson v. Ardoin*, No. 3:18-cv-00625-SDD-EWD (M.D. La.

June 13, 2018) (challenging similar configuration), and they already have access to a number of potential remedial maps from this litigation and the recent legislative session. Finally, a stay pending appeal is not necessary to buy Defendants more time. The district court has already represented that, if necessary, it "will favorably consider a Motion to extend the time to allow the Legislature to complete its work." Dist.Ct.Dkt.182 at 3.

The Secretary and the State repeat the same cynical argument that the Legislature was free to violate the Voting Rights Act because there is insufficient time to adopt a remedy, misreading the cited cases and conspicuously failing to mention *Wisconsin Legislature*.[5] They also cite testimony of Sherri Hadskey, Louisiana's Commissioner of Elections, that she would rather not have to prepare for elections under a remedial congressional map. State Mot. 8-10; Sec'y Mot 14-15. But that hardly settles the equities—hundreds of thousands of Black Louisianians would rather not be assigned to districts that violate their federal voting rights.

Ms. Hadskey claimed that the adoption of a remedial redistricting map would require her to redo a few tasks and otherwise prepare for the congressional primary elections in addition to her other duties. *See* State Mot. 8-10; Sec'y Mot 14-15. For

[5] The State instead relies on *Texas Democratic Party v. Abbott*, 961 F.3d 389 (5th Cir. 2020), *see* State Mot. 3, 19-20, which predated *Wisconsin Legislature*, is not a redistricting case, and stayed an injunction only after determining defendants were likely to succeed on the merits—the case did not mention, let alone turn on, *Purcell*.

a 30-year veteran of election administration, *see* Order 173, these routine assignments do not amount to "heroic efforts." To the extent some tasks, like the mailing of voter cards to certain registrants, will be repeated if the injunction in maintained, this duplication is of Defendants' own making. Ms. Hadskey testified that a previous round of voter cards was not prepared until April 25, 2022, a week after Plaintiffs filed their complaint and when it was entirely foreseeable that a subsequent mailing would be required. May 13 Tr. 51:12-16. As Ms. Hadskey also testified, voter mailings are sent in frequent intervals during the summer months. *See id.* at 33:11-13 (cards related to voter registration canvas), 35:11-16 (cards related to school board districts); 35:23-25 (notices related to municipal districting). It is simply implausible that alerting voters that they have been assigned to a remedial congressional district will be a meaningful source of confusion, particularly where, as here, elections officials have touted their award-winning mobile app and website to notify voters of election-related updates. *See* Order 145.

Additionally, a recitation of administrative redistricting tasks resolves nothing—the operative question is whether there is time for the usual duties to be completed, and Ms. Hadskey's testimony does not suggest otherwise. As the district court found, Ms. Hadskey confirmed that ample time remains to implement a new map. For example, despite "demonstrat[ing] general concern about the prospect of having to issue a new round of notices to voters, she did not provide any specific

reasons why this task cannot be completed in sufficient time for November elections." Order 144. Same for all of her other assignments. Indeed, there was always a likelihood that election preparations would be postponed until the summer months—if the Legislature had failed to override Governor Edwards' veto of its congressional map, Defendants advertised that a new map could be adopted in June. GX-32 at 5-8.

As the district court credited, Matthew Block, the Governor's executive counsel, explained that Louisiana has a responsive elections apparatus that is not only capable of implementing last-minute adjustments to election dates and deadlines, but has done so several times in just the past decade. *See* Order 79. "He stated that he was unaware of any electoral chaos that ensued, and that he has heard nothing to dispute that the Secretary of State was able to successfully administer these elections." *Id.*[6] The district court thus found, consistent with the evidence presented, that "the implementation of a remedial congressional map is realistically

[6] The Secretary baldly misconstrues Mr. Block's testimony, representing that the "premise" of his contribution was that the congressional primary could feasibly be administered only if the November election date were postponed. *See* Sec'y Mot. 19. That is wrong. Mr. Block testified that Louisiana's recent history of changing election dates through emergency procedures—with nary a glitch—necessarily reflected a less-disruptive power to change *pre-election* deadlines, including the candidate qualifying deadline, that anchors Defendants' arguments here. *See* May 11 Tr. 21:7-10; 19:23-20:7.

attainable well before the 2022 November elections in Louisiana." *Id.* at 142. There is no basis to second-guess this well-reasoned, record-based finding.

B. Plaintiffs and other Black Louisianians will be irreparably harmed by a stay.

Defendants do not dispute that a stay will irreparably harm Plaintiffs. If congressional elections are held under an unlawful map, then Black Louisianians' voting rights will be unlawfully diluted—a violation of their fundamental rights for which there is no adequate remedy. "[O]nce the election occurs, there can be no do-over and no redress" for citizens whose voting rights were violated. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Accordingly, "[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury." *Id.* (citing *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012); *Williams v. Salerno*, 792 F.2d 323, 326 (2d Cir. 1986)).[7]

C. Staying the preliminary injunction would gravely harm the public interest.

As courts have recognized, 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); *accord Ga. State Conf. of NAACP*

[7] The Secretary goes so far as to suggest that Plaintiffs would "*benefit*" from a stay because they would not have to "pay for continued litigation" before the Supreme Court's ruling in *Merrill*. Sec'y Mot. 12 (emphasis added). This ignores the irreparable harm that would be imposed on Plaintiffs and other Black Louisianians by forcing them to cast ballots under an unlawful congressional plan.

v. Fayette Cnty. Bd. of Comm'rs, 118 F.Supp.3d 1338, 1348-49 (N.D. Ga. 2015) ("[T]he public interest is best served by ensuring not simply that more voters have a chance to vote but ensuring that all citizens ... have an equal opportunity to elect the representatives of their choice."). Moreover, "[i]t is clear that it would not be equitable or in the public's interest to allow the state ... to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (second alteration in original) (quoting *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011)); *see also Bank One, Utah v. Guttau*, 190 F.3d 844, 848 (8th Cir. 1999) ("[T]he public interest will perforce be served by enjoining the enforcement of the invalid provisions of state law."). Accordingly, the public interest would most assuredly be served by enjoining implementation of a congressional districting scheme that violates Section 2.[8]

III. The U.S. Supreme Court's stay in *Merrill* does not compel a stay here.

The Legislators claim that a stay is required here because of the purported lack of "breathing room" between this case and *Merrill*. Leg. Mot. 17. The Secretary

[8] The State mentions in passing that "the court discounted the significance of the June 20 nominating deadline because it found most candidates have historically paid the filing fee." State Mot. 10-11. That discounting was appropriate: Ms. Hadskey could not recall a *single instance* in her tenure where a congressional candidate filed by nominating petition. May 13 Tr. 58:8-59:21. The equitable burden imposed on hypothetical candidates by postponing the deadline for a never-used process is negligible, at best.

makes a similar argument, suggesting that "[t]he specific legal issues common to *Merrill* are dispositive issues in the instant case." Sec'y Mot. 8-13. But the fact that the Supreme Court stayed the Alabama injunction should not compel *this* Court to stay *this* case. Simply put, we do not know *why* the Supreme Court stayed that injunction. And the Supreme Court has expressly cautioned against the sort of jurisprudential divination that Defendants now invite, explaining that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 237 (alteration in original) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Moreover, even Justice Kavanaugh's *Merrill* concurrence observed that the Supreme Court's "stay order *does not make or signal any change to voting rights law*." 142 S.Ct. at 879 (Kavanaugh, J., concurring) (emphasis added). Accordingly, the legal standards applicable to Plaintiffs' Section 2 claims are the same as before: *Gingles* and its progeny.

The district court found—and Defendants have not persuasively disputed—that Plaintiffs have readily satisfied the *Gingles* preconditions and that the Senate Factors that guide the totality of circumstances analysis support a finding of unlawful vote dilution. This is, ultimately, a straightforward Voting Rights Act case, one

supported by voluminous (and effectively unrebutted) evidence. *Merrill* neither changes this fact nor requires a stay of the district court's preliminary injunction.

CONCLUSION

For the foregoing reasons, Defendants' motions for a stay pending appeal should be denied and the Court's administrative stay should be lifted.

Dated: June 10, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document contains 7,788 words, excluding parts exempted by Federal Rule of Appellate Procedure 32(f), pursuant to the *Galmon* Plaintiffs-Appellees' concurrently filed motion for leave to file an opposition to emergency motions to stay that exceeds word limits.

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/s/ Olivia N. Sedwick
Olivia N. Sedwick

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that counsel for the Defendants-Appellants are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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