No. 22-30333

In the United States Court of Appeals

for the Fifth Circuit

PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE, EDWIN RENE SOULE, ALICE WASHINGTON, CLEE EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS, AMBROSE SIMS, NAACP LOUISIANA STATE CONFERENCE, AND POWER COALITION FOR EQUITY AND JUSTICE,
PLAINTIFFS-APPELLEES

v.

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

EDWARD GALMON, SR., CIARA HART, NORRIS HENDERSON, AND TRAMELLE HOWARD,
PLAINTIFFS-APPELLEES

v.

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA (CIV. NO. 22-0211 & CIV. NO. 22-0214)
(THE HONORABLE SHELLY D. DICK, C. J.)

BRIEF OF APPELLEES PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE, EDWIN RENE SOULE, ALICE WASHINGTON, CLEE EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS, AMBROSE SIMS, NAACP LOUISIANA STATE CONFERENCE, AND POWER COALITION FOR EQUITY AND JUSTICE

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STATEMENT REGARDING ORAL ARGUMENT

This case already has been set for oral argument on July 8, 2022.

CERTIFICATE OF INTERESTED PERSONS

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: 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.

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: R. 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 Alyssa Riggins, Cassie Holt, John E. Branch, III, Phillip Strach, and Thomas A. Farr.

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 Willis; 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.

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.

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

/S/ *John Adcock*
JOHN ADCOCK

JUNE 27, 2022

STATEMENT OF THE ISSUES

1. Did the district court apply the correct legal standard to plaintiffs' claim under Section 2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10301, when it analyzed that claim under the established framework set forth by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986)?

2. Did the district court correctly find the first *Gingles* precondition satisfied when the unrebutted evidence showed that two reasonably compact congressional districts could be drawn that adhere to traditional redistricting principles as embodied in the Louisiana Legislature's Joint Rule 21, that "unite communities of interest that are not drawn together in the enacted map," and in which Black voters form a majority of the voting age population?

3. Did the district court correctly find the third Gingles precondition satisfied where the unrebutted evidence showed that, under Louisiana's enacted congressional redistricting, white voters vote sufficiently as a bloc to usually defeat candidates preferred by cohesive majorities of Black voters in every congressional district outside the state's only majority-Black district, notwithstanding the existence of limited white support for the Black-preferred candidate?

4. Is Section 2 of the Voting Rights Act of 1965 privately enforceable, as federal courts, including the Supreme Court, have long recognized?

5. Are the district court's findings that plaintiffs will suffer irreparable harm in the absence of a preliminary injunction and that the balance of the equities tilt in favor of an injunction clearly erroneous, and did the district court abuse its discretion in enjoining the use of a congressional redistricting plan that risks diluting the votes of Black Louisianans and ordering the adoption of a non-dilutive plan?

6. Did the district court abuse its discretion in issuing a preliminary injunction against use of Louisiana's congressional redistricting plan where the complaint was filed on the day the challenged plan was enacted, injunction was issued 5 months before the next election, and the court found that the timing of the injunction caused no substantial burden on state officials or risk of confusion for voters?

PRELIMINARY STATEMENT

After a five-day evidentiary hearing, the district court issued a 152-page opinion holding that Louisiana's recently enacted congressional redistricting map dilutes the votes of Black voters in violation of Section 2 of the Voting Rights Act of 1965 ("VRA"), and preliminarily enjoining defendants from conducting the 2022 congressional election using that map. A motion panel of this Circuit, without noted dissent, squarely rejected each of the principal arguments that defendants urge here, and denied defendants' motion for a stay pending appeal.

The district court was correct in holding—based largely on uncontested evidence—that plaintiffs are likely to establish a violation of Section 2 under the governing doctrine of *Thornburg* v. *Gingles*, 478 U.S. 30, 46 (1986). As the evidence at the hearing showed, the challenged plan dilutes the votes of Louisiana's Black citizens—who constitute approximately 33% of the State's population—by "packing" large numbers of Black voters into a single majority Black district (CD2), and "cracking" the State's remaining Black voters among the five majority white districts. The plan provides Black voters "less opportunity for [Black voters] to elect representatives of their choice." *Abbott* v. *Perez*,

138 S.Ct. 2305, 2315 (2018) (cleaned up). That is at the heart of what Section 2 prohibits.

On appeal, defendants ask this Court to discard the well-established *Gingles* principles and to apply radically new legal standards never adopted by the Supreme Court or this Court. But the standards defendants urge not only contravene governing precedent, they would undermine the core purpose of Section 2 by making it virtually impossible for Section 2 plaintiffs to prevail, regardless of the impact of the challenged plan on the ability of minority voters to elect their preferred candidates. Defendants also argue, contrary to decades of precedent, that private plaintiffs cannot even seek relief for Section 2 violations. Finally, defendants ask the Court to overturn the district court's findings of fact, but those findings are strongly supported by the record and readily satisfy the applicable clear error standard of review. Fed. R. App. P. 52(a); *Rogers* v. *Lodge*, 458 U.S. 613, 622-623 (1982). This Court should reject defendants' invitation to second-guess the district court's factual findings and to adopt novel legal rules that would gut Section 2.

The district court correctly held, and the motion panel agreed, that plaintiffs would suffer irreparable injury absent a preliminary injunction

and that the irreparable harm to plaintiffs' voting rights "outweighs the administrative burden articulated by Defendants." ROA.6776. Dilution of plaintiffs' right to an equal vote in this year's election is a grave and irreparable harm. It would not be remedied by a change in the State's map for the 2024 election. The district court had ample authority to enter a preliminary injunction preventing that harm.

The district court and the motion panel also correctly concluded that *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006), does not counsel against an injunction. The district court's order was issued more than five months before the election. And the district court found, based on the testimony of the witnesses at the hearing, that there is ample time to adopt and implement a new map.

COUNTERSTATEMENT OF THE CASE

Background

Louisiana has long disenfranchised and discriminated against its Black citizens, and that history continues to this day. ROA.6764-65; ROA.10569-10583 . Black Louisianans testified without contradiction that the State and its localities continue to take actions that suppress the voting rights of Black voters, such as, as recently as last year, consolidating precincts and closing or moving voting places serving predominantly Black voters in St. Landry and Orleans Parishes. ROA.6766.

Since the early 1980s (except for a brief period in the early 1990s) only one of the State's congressional districts has had a Black majority, although Black citizens represent approximately one-third of the State's population. That district, CD2, was established in the 1980s after a federal court found that the State's prior congressional district plan violated §2. *Major* v. *Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983). Today, CD2 stretches between New Orleans and Baton Rouge, including large concentrations of Black voters in Orleans, Jefferson, and East Baton Rouge Parishes. ROA.9732.

The district court found, based on "mostly unrebutted" evidence, that voting in Louisiana is starkly polarized by race. ROA.6762. One of plaintiffs' experts found that, in the fifteen statewide contests she examined in which one of the candidates was Black, an average of 83.8% of Black voters supported the Black-preferred candidate, while the average percentage of white voters supporting the same candidate was only 11.7%. ROA.10499.

The district court also found that, except in majority Black districts, white voters in Louisiana vote sufficiently as a bloc usually to defeat the candidate preferred by Black voters. ROA.6757-61. No Black candidate has been elected to statewide office since Reconstruction. ROA.6763. No Black candidate has ever been elected to Congress from a majority white district. ROA.6764.The Legislative Process and the Adoption of the Enacted Plan.

Louisiana, like all States, is required to redraw congressional district boundaries after each decennial census to ensure compliance with the one-person, one-vote principle. U.S. Const. art. I § 2. The 2020 census showed that Louisiana's population increased since 2010 and that this growth was driven entirely by growth in minority populations.

ROA.504. It also showed that Black citizens represent approximately 31.2% of the State's voting age population. ROA.461. The initial census counts were delivered in April 2021, and the redistricting data on August 12, 2021, almost fifteen months before the next congressional election.

The Legislature's redistricting criteria. At the outset of its redistricting process, the Legislature adopted Joint Rule 21 setting forth criteria for congressional and other redistricting. The criteria for congressional redistricting included compliance with §2 and the Equal Protection Clause; respecting communities of interest; and, to a lesser degree, respecting established boundaries of political subdivisions and the natural geography of the State to the extent practicable. ROA. 14855. Conspicuously omitted from the criteria for congressional redistricting is any consideration of prior district boundaries (or "core preservation"). While Rule 21 expressly provides that, for State legislative redistricting, "[d]ue consideration shall be given to traditional district alignments to the extent practicable," no such consideration is required for congressional redistricting. *Id*.

The Legislature solicits and receives public input. From October 20, 221 to January 20, 2022, the Legislature conducted ten public

hearings across the State, known as "roadshows," to solicit the public's views about redistricting. ROA.6638. At every hearing, speakers urged the Legislature to create two congressional districts in which the Black voters would have an opportunity to elect their candidates of choice.

The record provides no support for defendants' claim that the Legislature faced "demands for racial segregation." Br.12. Instead, what the record shows is that voter after voter (together with some legislators) urged the Legislature to provide Louisiana's Black voters with the opportunity that white voters have to elect their preferred candidates. Ashley Shelton, the President of plaintiff Power Coalition, testified at the district court hearing that:

> [A second Black opportunity district] is about voice and power and about, you know, Black people being able to have—to be able to elect candidates of choice. And by packing us all into one district, you basically minimize the ability of Black voters to elect candidates of choice.

ROA.16073:11-15. Plaintiff Davante Lewis testified to the same effect in a legislative committee hearing:

> [A]ll I'm asking is that this committee gives Black people minorities and some of us the same privilege that we give [white voters]. … Why do we value the interest of that community more than we value the interest of Black and brown people of this state? When we talk about continuity of what we've done in the history, we've always been second. …

> And so, what I ask of you to do, when you consider these maps is take the totality of our history and why so many of us have to beg and plead just to be considered.

ROA.13175-13176. *See also* ROA.12083-12085; ROA.11843-11844. These and other citizens made no "demands for racial segregation"; they reminded the Legislature of the State's long history of disenfranchising and discriminating against Black Louisianans, and urged it to afford Black voters an equal opportunity as white voters to elect their preferred candidates.

The adoption and veto of the enacted plan. Beginning in February 2022, the Legislature met to consider redistricting. Some legislators submitted proposed plans with two majority-Black opportunity districts and that complied with Joint Rule 21's principles. ROA.882-899.

The Legislature enacted none of these plans. Instead, on February 18, 2022, it adopted a congressional plan with only a single majority-Black district, and five districts with large white voting-age majorities. ROA.6638. In the enacted plan, CD2, the majority Black district has a 58.65% Black voting age population ("BVAP"); all other districts have a BVAP of below 34%. ROA.10686; ROA.9647, Fig. 10. The enacted plan

is highly segregated by race: under the plan, only 31% of Louisiana's Black population lives in a majority-minority district, while 91.5% of the White population lives in a majority-White district. ROA.3624.

Defendants purported to justify the enacted plan by citing the Legislature's "adopted criteria" referencing "core districts as they [were] configured" and "preserving the traditional boundaries," Br.10, 13. But Joint Rule 21 excludes core retention as a criterion for congressional redistricting. ROA.14855. The district court found that the Legislature's asserted justifications for the plan it enacted were "tenuous." ROA.6773-74. It pointed to the shifting justification offered by legislators for rejecting plans with two majority Black districts—for example, initially citing population equality as their foremost priority, and then "retreat[ing] from the previously expressed need for 'zero-deviation' districts" when a proposed plan was introduced with a second majority-minority district and lower population deviation. ROA.6773.

On March 9, the Governor vetoed both bills on the ground that they were "not fair to the people of Louisiana and [did] not meet the standards set forth in the federal Voting Rights Act." ROA.1011-1012.

State court malapportionment litigation. Shortly after the Governor's veto, plaintiffs filed petitions in Louisiana state court alleging that the still-operative 2010 map violated the one-person, one-vote requirement. *NAACP* v. *Ardoin*, No. C-716837, Nineteenth Judicial District Court, Parish of East Baton Rouge (Mar. 15, 2022).

Defendants argued that these actions should be dismissed as unripe because Louisiana's "election calendar is one of the latest in the nation," Louisiana was not scheduled to hold its "congressional *primary* election" until November 8, 2022, and "the candidate qualification period [July 20-22, 2022] could be moved back, if necessary … without impacting voters." ROA.10364 (emphasis in original). They asserted:

The election deadlines that actually impact voters do not occur until October 2022, like the deadlines for voter registration (October 11, 2022, for in-person, DMV, or by mail, and October 18, 2022 for online registration) and the early voting period (October 25 to November 1, 2022). *Id.*

Legislative override. On March 30, 2022, the Legislature overrode the Governor's veto, and the enacted plan became law. ROA.6639.

Preliminary Injunction Proceedings and the District Court's Ruling

Plaintiffs commenced these actions the day of the veto override. They alleged that the enacted plan dilutes the voting strength of the State's Black voters in violation of §2, and sought preliminary and permanent injunctive relief. ROA.65-119. Plaintiffs named as defendant the Secretary of State, the State's chief election official. The court permitted intervention of the State's legislative leaders and Attorney General.

Plaintiffs moved for a preliminary injunction to enjoin the use of the enacted plan in the November 2022 election, and the district court held an expedited five-day evidentiary hearing on May 9-13, 2022. As the motion panel noted, defendants made a "tactical choice" at the hearing not to present evidence on issues central to the *Gingles* inquiry, including "leav[ing] the plaintiffs' evidence of compactness largely uncontested," ROA.6864, and, in what the district court termed a "glaring omission," choosing not to call any witnesses to testify about communities of interest, ROA.6735. Likewise, defendants offered no testimony disputing plaintiffs' expert evidence of racially polarized voting or the factors relevant to the totality of circumstances. ROA.6762; ROA.4744.

Additionally, although the legislative intervenors "joined the suit on the premise that they could represent 'the policy considerations underpinning' the enacted plan, defendants offered no direct evidence on that point." ROA.6773 (quoting ROA.177). No legislator appeared at the hearing to testify and be subject to cross-examination.

On May 18, 2022, the parties filed post-hearing briefs and proposed findings of fact and conclusions of law. On June 6, 2022, the district court granted plaintiffs' motion for a preliminary injunction. In a 152-page Ruling and Order, the court held that plaintiffs are substantially likely to prevail on each of the preconditions for establishing Section 2 liability under *Thornburg* v. *Gingles*, 478 U.S. 30, 46 (1986), and, as *Gingles* also requires, with regard to the totality of circumstances. ROA.6722-6776. The court found that plaintiffs would suffer irreparable harm "if voting takes place in the 2022 Louisiana congressional elections based on a redistricting plan that violates federal law" and that "has been shown to dilute Plaintiffs' votes." ROA.6775-6776.

The court rejected the defendants' argument under *Purcell* v. *Gonzalez,* 549 U.S. 1 (2006), that an injunction was improper because there was insufficient time for the State to enact and implement a new

redistricting plan in time for the 2022 election. The court found, based upon testimony of the State's elections commissioner and other witnesses, "that a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." ROA.6782. The court also questioned "the credibility of Defendants' assertions regarding the imminence of [pre-election] deadlines" in light of their prior representations to the state court that "[t]he election deadlines that actually impact voters do not occur until October 2022." ROA.6779-6780.

Recognizing that, when a §2 violation is found, the State's legislature should be given a "reasonable opportunity … to adopt a substitute measure," the district court gave the Legislature until June 20, 2022 to enact a legally compliant redistricting plan. ROA.6636, 6784-6785. The court emphasized that the Legislature retained "broad discretion" in adopting a remedial map. ROA.6785 (cleaned up). It noted also that "[t]he Legislature would not be starting from scratch; bills were introduced during the redistricting process that could provide a starting point, as could the illustrative maps in this case, or the maps submitted by the *amici*." ROA.6782 (cleaned up).

On June 7, the day after the court's ruling, the Governor, with the constitutionally required 7-day notice, called the Legislature into extraordinary session for June 15-20 to consider redistricting. *See* Proclamation Number 89 JBE 2022, Louisiana Office of the Governor, available at https://gov.louisiana.gov/assets/Proclamations/2022/89JBE2022CallSpecialSession.pdf.

Defendants' motions for a stay pending appeal.

Defendants filed notices of appeal and a motion in the district court for stay pending appeal. The district court denied the motion on June 9, 2022, ROA.6848, and defendants renewed their request in this Court. ROA.6861. On June 12, 2022, the motion panel denied defendants' motion for a stay and directed expedited briefing and oral argument. ROA.6859, 90.

The panel concluded that the defendants "have not met their burden of making a strong showing of likely success on the merits" in their appeal. ROA.6859. It rejected the principal arguments that defendants urge here, including their argument that plaintiffs' illustrative maps were unconstitutional racial gerrymanders and that plaintiffs could not satisfy the third *Gingles* precondition because of

evidence of some white crossover voting. ROA.6862, 78-79. The panel also rejected defendants' contention that a stay was warranted under *Purcell*. The panel "agree[d] with the district court" that defendants had not shown that compliance with the injunction "would inflict more than ordinary 'bureaucratic strain' on state election officials." ROA. 6884-86 (quoting ROA.6779).

On June 17, 2022, the Secretary of State and the Attorney General filed an emergency application in the Supreme Court for an administrative stay and stay pending appeal, and a petition for certiorari before judgment. *Ardoin* v. *Robinson*, No. 21A814 (Sup. Ct.). The application and petition have been fully briefed and are pending.

Subsequent developments

On June 13, 2022—the day after this Court denied defendants' motions for a stay—the legislative intervenors moved in the district court to extend the deadline for the Legislature to adopt a remedial plan to June 30. ROA.15492. On June 16, the district court held a hearing on the legislative intervenor's motion for an extension of the deadline, and, at the court's direction, the intervenors appeared and testified about their request. ROA.15510, 55.

Contrary to defendants' assertions, it was the Legislature, not the district court, that treated the legislative process with "disdain" and rendered it "merely a formality," Br.1. Testimony at the hearing showed that, despite the intervenors' assurances to the court that "the Legislature intends to make a good-faith effort in the meantime to enact a plan that satisfies the principles the Court articulated," ROA.15496, the Legislature had taken no meaningful steps in the ten days since the court's injunction to propose or consider a remedial plan. Neither house had conducted or even scheduled any committee hearings before the session commenced (although committees can and do meet between sessions). Press reports, which defendants did not deny, quoted legislative leaders stating that the Legislature would take no action before the appellate process had fully played out. ROA.15518.

The district court denied the intervenors' motion for additional time. It found that its deadline provided sufficient time to enact remedial maps. The court took judicial notice that the Legislature had passed a budget in four days in 2017 and a redistricting bill in 1994 in six days. ROA.16592.

On June 18, two days after the court denied its motion asking for additional time—and two days before the court's June 20 deadline—the Legislature adjourned without adopting a remedial redistricting plan, or even conducting a floor debate on any such plan.[1]

In accordance with the schedule set by the district court, on June 22, after the Legislature adjourned, plaintiffs submitted a proposed remedial map and supporting a memorandum. ECF.225, *Robinson* v. *Ardoin*, Civ. No. 22-0211 (M.D. La. June 22). Defendants advised the court that they would not propose a remedial plan. ECF.224, *Robinson* v. *Ardoin*, Civ. No. 22-0211 (M.D. La. June 22). A hearing on potential remedies is scheduled for June 29.

[1] House Adjournment Times, https://legis.la.gov/legis/Times.aspx?sid=222ES&c=H; Senate Adjournment Times, https://legis.la.gov/legis/Times.aspx?sid=222ES&c=S.

SUMMARY OF ARGUMENT

Applying the well-established *Gingles* standard governing claims arising under §2 of the VRA, the district court found that plaintiffs demonstrated a "substantial likelihood of success" in proving each of the three *Gingles* preconditions and establishing, under the totality of the circumstances, that Louisiana's congressional redistricting plan denies Black voters an equal opportunity to participate in the political process and elect candidates of their choice. The defendants leave essentially unaddressed the district court's factual findings and conclusions on the core questions posed by *Gingles*. Indeed, they do not contest at all the district court's conclusion that plaintiffs satisfied the second *Gingles* precondition or that the so-called Senate Factors weigh predominantly in plaintiffs' favor. And with respect to the first and third *Gingles* preconditions, defendants left plaintiffs' evidence largely unrebutted, failing to call a single witness to testify about communities of interest or to challenge the analysis of plaintiffs' experts on any of the other traditional redistricting principles they considered. Instead, defendants advance a series of legal arguments that would radically alter the *Gingles* standard and make it virtually impossible for plaintiffs to prove a

violation of §2 no matter how stark the evidence of vote dilution. None of these arguments is supported by the authority defendants rely on, and even if they were, defendants have failed to support the factual predicates on which they are based with reliable or probative evidence.

***Gingles* I**: Defendants challenge the district court's finding that none of plaintiffs' six illustrative plans adheres to the traditional redistricting principle requiring respect for communities of interest, arguing that the plans combine "farflung" communities in the Delta region and Baton Rouge solely on the basis of race without consideration of whether they share political, cultural, or socioeconomic interests. But plaintiffs offered and the district court credited extensive evidence of a shared history, shared culture, shared educational concerns and institutions, and shared socioeconomic concerns linking these and other areas joined in plaintiffs' illustrative districts. The court likewise credited testimony that New Orleans and Baton Rouge diverge significantly in their economic and political interests and were inappropriately grouped together in the enacted plan. Defendants have failed to show that these findings were clearly erroneous.

Defendants' arguments that illustrative plans drawn by experts seeking to satisfy the standard set forth by the Supreme Court in *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), are per se racial gerrymanders and that *Gingles* can be satisfied only by a plan generated by a computer algorithm are both illogical and unsupported by the case law. Illustrative plans are not remedial plans or enacted and are not subject to the same standards. *Clark* v. *Calhoun Cnty.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996). And the Supreme Court has long regarded the need to comply with the VRA a valid reason for race to be considered and even to predominate, so long as race is not considered more than necessary to remedy the VRA violation. *E.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 91-92 (1997). Precluding a showing of racial vote dilution because the mapdrawer considered race is non-sensical and would render §2 essentially unenforceable.

Gingles III. Likewise, Defendants' contention that Supreme Court precedent precludes §2 liability where any amount of white support for Black-preferred candidates exists—even when the evidence establishes that it is insufficient for the Black-preferred candidate to win in any existing district—flies in the face of reason and established doctrine. Louisiana cannot justify depriving Black voters of equal electoral

opportunities "merely by pointing out that it could have—but did not—give minority voters an opportunity to elect candidates of their choice without creating a majority-minority district." ROA.6879.

Private right of action. The Court should reject Defendants' invitation, based on a single outlier case, to overturn decades of precedent concluded that private plaintiffs who have been directly injured, like Plaintiffs here, have a right of action to enforce and seek redress for Section 2 violations. *See*, *e.g.*, *Morse* v. *Republican Party of Virginia*, 517 U.S. 186, 232 (1996).

Equities. Based on a careful review of the record and consideration of the testimony of the state's chief election administrator, the district court concluded that the balance of the equities tips in favor of the plaintiffs and that a preliminary injunction is in the public interest. None of the findings on which that determination is based are clearly erroneous and the injunction was not an abuse of discretion. Requiring the 2022 congressional election to be conducted under a new redistricting plan will prevent irreparable injury to plaintiffs and will not result in "massive equal protection violations," as defendants content. The legislature or the district court have an obligation to tailor a remedial plan narrowly to

address the VRA violation the district court found, but still retain leeway in the developing a remedial plan. *Cooper*, 137 S. Ct. at 472.

The *Purcell* principle does not counsel against an injunction here nor in favor of a stay. The district court's injunction was issued more than 5 months in advance of the closest election. That is more than the margin the Supreme Court has found sufficient for a state to develop a new redistricting plan. *Wisconsin Legislature* v. *Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022) (per curiam). In addition, the district court found that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion," ROA.6782, and the motion panel agreed. The district court's finding is well-supported by the record and easily satisfies clear error review.

STANDARD OF REVIEW

This Court reviews the decision to grant or deny a preliminary injunction for abuse of discretion. *Texas All. for Retired Americans v. Scott*, 28 F.4th 669 (5th Cir. 2022). "[B]ecause Section 2 vote dilution disputes are determinations peculiarly dependent upon the facts of each case that require an intensely local appraisal of the design and impact of

the contested electoral mechanisms," review of findings of fact related to the Gingles preconditions and vote dilution are for clear error. *Sensley* v. *Albritton*, 385 F.3d 591, 595 (5th Cir. 2004) (internal citation and alterations omitted); *see also Gingles*, 478 U.S. at 79. "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Gonzalez* v. *Harris Cnty.*, Tex., 601 F. App'x 255, 259 (5th Cir. 2015). Credibility determinations are owed "singular deference." *Cooper* v. *Harris*, 137 S. Ct. 1455, 1465 (2017) (citation omitted). "If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021).

ARGUMENT

I. The District Court Correctly Held that Plaintiffs Are Likely to Succeed on the Merits of their Voting Rights Act Claim.

Section 2 of the VRA provides that "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner

which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a).

Section 2(b) sets forth the means of proving a violation and was "patterned after the language used by Justice White . . . in *White* v. *Regester*, 412 U.S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971)." *Chisom* v. *Roemer*, 501 U.S. 380, 398 (1991). "A State violates § 2 if its districting plan provides 'less opportunity' for racial minorities 'to elect representatives of their choice.'" *Abbott* v. *Perez*, 138 S. Ct. 2305, 2315 (2018) (quoting *League of United Latin American Citizens* v. *Perry,* 548 U.S. 399, 425 (2006)).

In concluding that Louisiana's congressional redistricting plan violates §2, the district court applied the familiar *Gingles* standard, which requires proof of three objective "threshold requirements." *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986) (O'Connor, J, concurring). ROA.6642-43. Plaintiffs must show that: (1) the minority group is "sufficiently large and compact to constitute a majority in a reasonably configured district," (2) the minority group is "politically cohesive," and (3) the majority votes "sufficiently as a bloc to enable it to

usually defeat the minority group's preferred candidate." *Wis. Legis.*, 142 S. Ct. at 1245 (citing *Gingles*, 478 U.S. at 50-51).

After analyzing the *Gingles* requirements, the district court proceeded "to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett*, 556 U.S. at 12 (2009); ROA.6643. That determination is made by applying the "Senate Factors," which are derived from a report of the Senate Judiciary Committee accompanying the 1982 amendments to the VRA, and were adopted by the Supreme Court in *Gingles*. 478 U.S. at 44-46. "No one of the factors is dispositive; the plaintiffs need not prove a majority of them; other factors may be relevant." *Westwego Citizens for Better Gov't* v. *City of Westwego*, 946 F.2d 1109, 1120 (5th Cir. 1991).

At the totality of circumstances stage, the district court also properly considered "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426. When a statewide districting plan is the subject of a vote dilution claim, "the proportionality analysis ordinarily is statewide." ROA.6643.

The district court applied the correct legal standards, and each of the district courts factual findings were well-supported by Plaintiffs' evidence, much of which was unrebutted. Its conclusion that Plaintiffs are substantially likely to succeed on the merits must therefore be affirmed.

A. The District Court Applied Established Legal Principles and Made No Clear Error in Finding that an Additional Reasonably Configured Majority-Minority Congressional District Can Be Created.

1. The District Court Applied the Correct Legal Standard in Its Analysis of Plaintiffs' Gingles *I Evidence*

The first *Gingles* precondition ("*Gingles* I") compares the challenged practice to a "reasonable alternative voting practice" that increases minorities' "opportunities." *Reno* v. *Bossier Par. Sch. Bd.*, 520 U.S. 471, 480 (1997); *see* ROA.6653. To satisfy *Gingles* I, a minority group must be "sufficiently large and compact to constitute a majority in a reasonably configured district." *Wisc. Legis.*, 142 S. Ct. at 1248.[2] Where a minority group is "sufficiently large and compact" to form a majority in an

[2] Defendants suggest, in a footnote, that the district court improperly assessed the *Gingles* I "numerosity" requirement because it failed to use the "less liberal definition of 'Black' used by the United States Department of Justice." Br.53 n.9. As the district court properly held, Defendants' argument is foreclosed by *Georgia* v. *Ashcroft*, 539 U.S. 461, 474 n.1 (2003). *See* ROA.6720.

additional hypothetical district but, in the existing plan, was "packed" into a single district to create a supermajority or "cracked" across multiple districts, "then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect a candidate of choice is a present and discernible wrong." *Strickland*, 556 U.S. at 18–19 (citation omitted).

The district court also applied the correct legal standard in the analysis of the minority group's geographical compactness—*i.e.*, whether a majority-minority district can be drawn consistent with traditional districting principles. *Abrams* v. *Johnson*, 521 U.S. 74, 91-92 (1997); ROA.6652. While the §2 compactness inquiry "refers to the compactness of the minority population, not to the compactness of the contested district," *LULAC*, 548 U.S. at 433, the compactness of the minority population can be measured by whether it can be drawn into a reasonably configured district consistent with traditional redistricting principles. *Abrams*, 521 U.S. at 91-92. Accordingly, and contrary to Defendants' argument, Br.35, "mathematical measures" of the proposed district's compactness, while not the complete analysis, are relevant to assessing one of those traditional principles, and the district court properly

considered them. ROA.6725-26. A *Gingles* I illustrative plan need not outperform the existing plan or perfectly satisfy every traditional districting criterion, *Barnett* v. *City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998). And while "a district that combines two farflung segments of a racial group with disparate interests" does not satisfy the first *Gingles* precondition, "members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district." *LULAC*, 548 U.S. at 433 (citing *Abrams*, 521 U.S. at 111–12)). Accordingly, a district may be reasonably compact if it joins areas that share "socio-economic status, education, employment, health, and other characteristics," *LULAC*, 548 U.S. at 432; *see also Bush*, 517 U.S. at 964.

As the motion panel observed, "the *Gingles* inquiry relates to specific districts—not redistricting plans as a whole." ROA.6867 (citing *Wis. Legis*, 142 S. Ct. at 1250). The panel stated that the district failed to analyze the illustrative plans' adherence to traditional redistricting principles at a district-specific level, but it appeared to overlook relevant portions of the district court's opinion and record evidence that supported it. The district court considered the geographical compactness scores for

the two proposed majority-Black districts in each of Mr. Cooper's illustrative plans, and found that they compared favorably to the existing majority-Black district in the enacted plan as well as to the most and least compact districts in the enacted plan. See ROA.6661.[3] Likewise, the court analyzed communities of interest that were preserved or united in the specific illustrative majority-Black districts. *E.g.*, ROA.6668-70.[4]

Defendants advance several arguments that would radically alter these established legal standards. First, they argue that because a district court in the 1990s struck down a second VRA district that "slash[ed] a giant but somewhat shaky 'Z' across the state," *Hays* v. *State of La.*, 839 F. Supp. 1188, 1199 (W.D. La. 1993), *vacated on other grounds sub nom. Louisiana* v. *Hays*, 512 U.S. 1230 (1994) ("*Hays I*"), Louisiana

[3] Although the district court did not reproduce it in its decision, Plaintiffs expert Anthony Fairfax also provided a district-by-district analysis of compactness in his report, which demonstrates that his specific illustrative majority-Black districts are reasonably compact when measured against the enacted plan. ROA.10742-48.

[4] The motion panel also faulted the district court for failing to perform a district-specific analysis of parish and subdivision splits. ROA.6865. Unlike compactness scores, which can be calculated for a specific district, splitting a subdivision always impacts multiple districts because a split subdivision is by definition split between two or more districts. Accordingly, it is appropriate to analyze splits not only for the specific proposed majority-minority district, but also for the surrounding districts from which it is created. And as he did for compactness scores, Mr. Fairfax reported parish, municipality, and census designated place splits at the district level. *See, e.g.*, ROA.10749-10750; ROA.14938; ROA.15040. Again, none of defendants' experts contested his reporting.

is immune from §2 liability even after decades of demographic change and even where an appropriately configured illustrative district is presented. Br.31-32. Second, they argue that an illustrative plan intentionally created to satisfy *Gingles* I is *ipso facto* a racial gerrymander and cannot survive strict scrutiny. Br.48-50. Third, they argue that §2 plaintiffs cannot satisfy *Gingles* I unless their proposed alternative plan has been created with no consideration of race, such as by computer algorithm. Br.55-56. These arguments run counter to the text and purpose of §2, contravene decades of Supreme Court precedent, and defy common sense.

(a) Hays *did not create a per se rule against a second majority-minority district in Louisiana.*

Defendants argue that a 1990s case striking down a congressional redistricting plan containing two majority-Black districts immunize Louisiana from liability now. Br.72. But "[v]ote dilution suits are peculiarly dependent upon the facts of each case." *Harding*, v. *Cnty. Of Dallas, Texas*, 948 F.3d 302, 306 (5th Cir. 2020). They cannot be resolved in the abstract or by reference to conditions in a different part of the state, *cf. Shaw II*, 517 U.S. at 916-17 (VRA violation in one part of the state is

not cured by creating a majority-minority district elsewhere), or conditions that existed decades ago.

The districts at issue in *Hays*, which were challenged as racial gerrymanders, were struck down because they failed to satisfy traditional redistricting principles and because the State offered no rationale for packing Black voters into the second VRA district at such high BVAP concentrations. *See Hays I*, 839 F. Supp. at 1207-08; *Hays* v. *State of La.*, 862 F. Supp. 119, 124 (W.D. La.), *aff'd sub nom. St. Cyr* v. *Hays*, 513 U.S. 1054 (1994), and *vacated sub nom. United States* v. *Hays*, 515 U.S. 737 (1995) ("*Hays II*"). The *Hays* court never held that two majority-Black districts are *per se* invalid. On the contrary, based upon testimony by the legislature's redistricting technician, the court concluded that

> the Legislature could have developed and adopted a redistricting plan—even one with a second majority black district—that reflected greater respect for traditional redistricting criteria and that was less disruptive to the traditional political, social, economic, ethnic, geographical, and religious organization of the State.

Hays I, 839 F. Supp. at 1209. Thus, as the district court observed, "Hays, decided on census data and demographics 30 years ago, is not a magical incantation with the power to freeze Louisiana's congressional

maps in perpetuity." ROA.6744. Further, plaintiffs' current maps are scarcely similar to *Hays*. *Id*.

(b) Gingles *I does not implicate the Equal Protection Clause.*

A plaintiff's effort to satisfy *Gingles* I is not subject to the racial predominance analysis of *Shaw* and *Miller*. Most obviously, the racial predominance analysis does not apply to *Gingles* I because the Equal Protection Clause is implicated only where there is *state* action. *United States v. Morrison*, 529 U.S. 598, 621 (2000) (citation omitted). "The constitutional violation in racial gerrymandering cases stems from the *racial purpose of state action*." *Bethune Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (emphasis added). State action is not implicated when a private litigant offers an illustrative plan to satisfy the first *Gingles* precondition.

The district court properly held that defendants' argument to the contrary is foreclosed by this Court's decision in *Clark v. Calhoun Cnty.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996) (*Miller*'s predominant racial purpose analysis "does not apply to the first *Gingles* precondition"). Defendants argue that this aspect of *Clark* has been overruled by *Abbott* and *Harding*, Br.46-47 (citing *Abbott*, 138 S. Ct. at 2333; *Harding*, 948

F.3d at 309-10), but as the motion panel observed, those cases merely hold that §2 "plaintiffs must demonstrate that their proposed districts will perform to elect minority-preferred candidates." ROA.6874.[5]

Defendants are wrong that the purpose of a *Gingles* I illustrative plan is to show "what the State should have done." Br. 44 (emphasis omitted). Rather, the illustrative plan is intended to show that "it is the current districting system and not [some other factor] that is the source of their disproportionately weak political strength," and that an alternative district configuration is possible that would increase minority voters' opportunity to elect their candidates of choice. *Clark*, 88 F.3d at 1406. But that alternative plan, presented to satisfy *Gingles* I, imposes no mandates on the state or the court.

As the motion panel held, "Illustrative maps are just that—illustrative. The Legislature need not enact any of them." ROA.6874; *accord Shaw II*, 517 U.S. at 917 n.9 ("States retain broad discretion in

[5] Defendants also argue that concerns about the impact that imposing a racial predominance requirement on *Gingles* I would have on the ongoing viability of §2 "ignores that in every single racial-predominance case, the cause of racial predominance was the good-faith intent to achieve VRA compliance." Br.59. But the cases they cite were racial gerrymandering cases, and their argument merely highlights the difference between a map drawn by a state for use in actual elections and one drawn by an expert witness to illustrate vote dilution for purposes of the *Gingles* test.

drawing districts to comply with the mandate of §2," and need not adopt the plan proposed by the plaintiffs); *Bartlett,* 556 U.S. at 23 ("§ 2 allows States to choose their own method of complying with the VRA, and . . . that may include drawing crossover districts."); *Barnett* v. *City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998) ("The plaintiff is not required to propose an alternative map that is 'final' in the 'final offer' arbitration sense, . . . the fine-tuning of the alternative can be left to the remedial stage of the litigation."). Only at the remedial stage, if race predominates in a plan adopted by *the state* or ordered by *the court*, would strict scrutiny apply. *Clark*, 88 F.3d at 1405-06 ("race-based redistricting . . . done for remedial purposes[] is subject to strict scrutiny.")

Even if the Supreme Court's racial gerrymandering jurisprudence were applicable to an illustrative *Gingles* I plan, the district court properly analyzed whether race predominated as a question of fact. ROA.6750; *see Cooper*, 137 S. Ct. at 1468-69 (analyzing whether the district court's factual finding of racial predominance was clearly erroneous). Under *Cooper*, race predominates where: (1) a mapmaker "purposefully established a racial target," and (2) the racial target "had a direct and significant impact" on the challenged district's configuration.

Cooper, 137 S. Ct. at 1468-69. Thus, proof that a mapmaker had racial target does not, on its own, establish racial predominance, *id.*, contrary to Defendants' contention. Br.58. Racial considerations must also "provide[] the essential basis for the lines drawn." *Bethune-Hill*, 137 S. Ct. at 799.[6]

Moreover, Defendants ignore half the strict scrutiny test (even if it applied to *Gingles* I illustrative plans). On Defendants' view, any illustrative plan that was drawn with consciousness of race would automatically fail *Gingles* I. But, as the district court recognized, ROA.6745, a district drawn for predominantly racial reasons can survive strict scrutiny if it is narrowly tailored to comply with §2. *Perez*, 138 S. Ct. at 2315 ("compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed."); *cf. LULAC*, 548 U.S. at 518 ("I would hold that compliance with § 5 of the Voting Rights Act can be such a[compelling] interest") (Scalia, J., concurring in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas &

[6] Defendants argue that proof that a district departs from traditional redistricting principles is not required to show racial predominance. Br.58. True enough, see *Bethune-Hill*, 137 S. Ct. at 799. But the Supreme Court has never "affirmed a predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles." *Id.*

Alito, JJ.); *accord Bethune-Hill*, 137 S. Ct. at 800-01 (upholding a narrowly tailored VRA district). Where a §2 violation has been shown based on a plaintiff's illustrative plan, even one drawn using race, the required compelling state interest to support the consideration of race to remedy the violation has been established.

(C) Illustrative plans need not be drawn using race-neutral criteria or computer algorithms.

Defendants argue that Section 2 plaintiffs must blind themselves to race in seeking to satisfy *Gingles* I. Br.41-42. But there is no authority for that proposition and it makes no sense—the standard itself expressly requires a race-conscious showing, namely that members of a minority group are numerous and compact enough to comprise an additional majority-minority district. *Bartlett*, 556 U.S. at 17. Given this evidentiary demand, there can be nothing wrong with experts considering race in assessing whether the standard is satisfied.

As an initial matter, *Gingles* I already limits the role of race by requiring plaintiffs' plans to "take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." *LULAC*, 548 U.S. at 433 (citation omitted). So long as a plaintiffs' illustrative maps adhere to those principles, there can be

nothing wrong in considering race when seeking to demonstrate that a minority group is sufficiently numerous and compact.

Indeed, there is no other way to make such an assessment than to consider race. To satisfy *Gingles* 1, plaintiffs must identify a hypothetical map in which "the minority population in the potential election district is greater than 50 percent." *Bartlett,* 556 U.S. at 19-20; *see Clark II*, 88 F.3d at 1407. There is no way to satisfy that standard without considering race. As the motion panel pointed out, "If the plaintiffs' *Gingles* showing is invalid because [they considered race], it is difficult to see how any *Gingles* showing could be successful." ROA.6875.

Defendants' suggestion that a map drawer could permissibly adjust the black population to create a majority-minority district after producing a map, so long as they begin the process knowing nothing about the demographics and human geography of the state makes no sense. As the Supreme Court has recognized, "the legislature always is aware of race when it draws district lines." *Shaw* v. *Reno*, 509 U.S. 630, 646 (1993) ("*Shaw I*"). Holding §2 plaintiffs to a different standard by requiring them to draw majority-minority districts blindfolded, is contrary to common sense and is not supported by the law.

Defendants' suggestion that plans generated by a computer algorithm using limited quantitative metrics offer a "race neutral" method of producing illustrative plans is similarly flawed. Defendants' citation of a single case from the Seventh Circuit in which the court seemingly required plaintiffs to demonstrate that an appropriate illustrative plan could be randomly generated by a computer, is unavailing. Br.41-42 (citing *Gonzales*, 535 F.3d at 599-60). Defendants cite no authority from this circuit or the Supreme Court for such a proposition. On the contrary, courts in this circuit have repeatedly found §2 violations in the absence of computer-generated illustrative plans. And as the district court found, algorithmically generated plans do not provide a helpful or valid benchmark for assessing vote dilution, particularly when they ignore race and key criteria like communities of interest. ROA.6728-29.

2. The District Court's Finding That Plaintiffs Satisfied Gingles *I is Not Clearly Erroneous.*

Defendants mount two attacks on the district court's findings with respect to *Gingles* I. First, they argue that the district court improperly found that the illustrative districts appropriately account for traditional redistricting principles, particularly communities of interest. And

second, they fault the district court's findings on racial predominance. In neither case do they point to any record evidence suggesting that the district court's findings were clearly erroneous. Rather, they disregard the district court's findings and the evidence on which they were based, and effectively ask this court to review the record *de novo*.

(a) The Illustrative Plans Unite Communities of Interest that are Divided in the Enacted Plan.

The district court found that plaintiffs' illustrative maps "respect [communities of interest] and even unite communities of interest that are not drawn together in the enacted plan." ROA.6737. This finding was based on substantial and largely unrebutted testimony from plaintiffs' experts and lay witnesses. For example, the court credited the testimony of plaintiffs' demographer, Mr. Fairfax, that he sought to preserve communities of interest by combining areas with like socioeconomic characteristics in his proposed second majority-Black district, and that using that data led him to conclude that the areas in that illustrative district could be appropriately grouped together. ROA.6668-70, 6735.

The district court also considered testimony from lay witnesses who spoke to the shared interests, history, and connections between East Baton Rouge Parish and areas included with it in plaintiffs' illustrative

CD 5. Christopher Tyson testified that he and other Black people in Baton Rouge have strong ties to the Delta region "through family, through faith networks, [and] through cultural experiences." ROA.3788. Likewise, Charles Cravins testified about linking "St. Landry with Lafayette and Baton Rouge, would allow St. Landry to maintain connections with the centers of influence that are important to making their voice heard." The testimony on which the district court relied also included educational, cultural ties, sports, and other areas of life connecting the relevant areas. *E.g.*, ROA.3789-90 (testimony that Black students in rural Louisiana commonly attend high school and college in Baton Rouge). The district court also credited testimony that Baton Rouge and New Orleans have divergent interests, *e.g.*, ROA.6672, as supporting the mapmakers' decision to remove East Baton Rouge Parish from CD2 and use it to anchor CD5. ROA.6665. Defendants' assertion that "neither of Plaintiffs' demography experts could identify meaningful shared interests among these regions" joined in CD5 is flatly contradicted by the testimony and the district court's findings. The court also

considered the statements by legislators and from roadshow testimony, Br.34, 38, and found them not probative. ROA.6735-36.[7]

The record thus belies defendants' contention that the illustrative plans join "farflung segments of a racial group" for whom "the only common index . . . is race." Br.31-32. On the contrary, the district court's ruling, which found strong socioeconomic, educational, and cultural ties among the areas drawn into illustrative CD5, establishes that the communities joined in the district have "similar needs and interests" that extend well beyond race. *LULAC*, 547 at 435. By contrast, in *LULAC*, the state had joined two distinct and distant Latino communities by a narrow strip of land, with no evidence that they shared needs or interests. *LULAC*, 548 U.S. at 424. That could not be further from the situation here.

Defendants also fault the district court for relying on two fact witnesses who spoke about the connections between Baton Rouge and,

[7] Defendants refer to "the opinion of the state's expert that rural regions of northeast Louisiana do not belong culturally with urban population in Baton Rouge," Br.39, but none of defendants' experts expressed that opinion, and indeed, none were qualified to express such an opinion. As the district court found, Defendants "did not call any witnesses to testify about communities of interest." ROA.6735; *see also* ROA.6674-75 (finding that defendants' expert Bryan did not provide testimony on "communities of interest, or other traditional redistricting criteria").

respectively, the Delta Parishes and St. Landry Parish. Defendants assert that these witnesses' testimony was inconsistent and that the court could not properly credit them both, but they hang this assertion on a very thin reed: According to Defendants', one witness's testimony that Baton Rouge is part of south Louisiana conflicts with another witness's testimony that Baton Rouge and the Delta have historical and cultural ties. Br.36-37. But there is no inconsistency, and the district court properly credited both witnesses' testimony, and Defendants' point to nothing that would amount to clear error in that decision.[8]

(b) The Illustrative Plans Satisfy Traditional Redistricting Criteria on a Plan-wide and District-By-District Basis as Well as or Better than the Enacted Plan.

The district court found that the illustrative plans outperformed the enacted plan on most or all of the traditional redistricting criteria. The court found that plaintiffs' illustrative districts are reasonably

[8] Defendants' also complain that the district court gave short shrift to their argument that the illustrative plans separate military communities. Br.11 n.3. Neither of the military bases is in either of the illustrative majority-Black districts. They are in neighboring majority-white districts, the boundaries of which, had Defendants taken seriously their opportunity to develop a remedial plan of their own, could have been—and could still be—adjusted. "Defendants offer[ed] no assessment of how Plaintiffs' maps treat their other two stated communities of interest, preserving the Acadiana region and joining cities with their suburbs," ROA.6736, and thus, it was impossible for the district court to assess how those communities fair in the illustrative plans or to assign any weight to that evidence.

compact; split fewer parishes, municipalities, and census places or core based statistical areas than the enacted plan; preserve communities of interest; are contiguous; and have populations near the ideal size. ROA.6733-6737. Those findings are supported by the evidence and are not clearly erroneous.

Defendants fault the district court for analyzing the illustrative plan as a whole rather than the specific illustrative majority-Black districts. In fact, the district court did both, and found that the individual districts, as well as the plan as a whole, reasonably adhere to traditional redistricting principles. *See* ROA.6661 (citing the district-specific compactness scores for Mr. Cooper's illustrative plans).[9]

For example, with respect to mathematical compactness, CD2 in each of Mr. Fairfax's illustrative plans is more compact by every measure than CD2 in the enacted plan. *Compare* ROA.10743, *with* ROA.10745. Likewise, illustrative CD5's compactness is comparable to CD5 in the enacted plan and well within the range of typical for congressional districts in Louisiana. *Compare* ROA.10743, *with* ROA.10745 and

[9] As the discussion above makes clear, the district court focused intensively on the communities of interest joined in illustrative CD5 as well as on plan-wide measures, such as the number of split census places and core based statistical areas.

ROA.10747. Defendants did not dispute this evidence or offer their own compactness analysis.

Likewise, Mr. Fairfax's CD5 splits 5 parishes in maps 2 and 2A, and 8 parishes in map 1. ROA.10749-10750 (map 1); ROA.14938 (map 2); ROA.15040 (map 2A). That compares favorably to Louisiana's enacted maps: in both the 2011 plan and the H.B.1 plan, Louisiana's CD 2 splits 9 parishes; CD 5 splits 4 parishes in the 2011 plan, and 2 parishes in the H.B. 1 plan. And adjacent CD 6 splits 11 parishes in both the 2011 plan and the H.B.1 plan. ROA.10751-10754. Accordingly, the district court correctly concluded that plaintiffs' illustrative maps satisfied the correct standard under *Gingles* I, analyzed at both district-specific and plan-wide level.

(c) Race Did Not Predominate in the Creation of Plaintiffs Illustrative Plans.

As explained above, the Supreme Court's racial predominance analysis does not apply to illustrative plans offered to satisfy *Gingles* I. Even if it did apply, however, the court found, based on its assessments of the demeanor and credibility of plaintiffs' experts and the substance of their illustrative maps, that race was not the predominant factor in creating those maps. On the contrary, the court found that "[t]here is *no*

factual evidence that race predominated in the creation of the illustrative maps in this case." ROA.6750 (emphasis in original).

Racial predominance requires a finding 1) that the map-drawer had a specific racial target, and 2) that the target "had a direct and significant impact" on the configuration of the district. *Cooper*, 137 S. Ct. 1469. Here, the racial target has been supplied by the Supreme Court in *Bartlett*, and the plaintiffs' map-makers sought to satisfy that standard. As to the second element, the district court found that both of Plaintiffs' *Gingles* I experts "offered persuasive testimony regarding how they balanced all of the relevant [traditional redistricting] principles, including the Legislature's Joint Rule 21, without letting any one of the criteria dominate their drawing process." ROA.6737, 6740; *see also* ROA.6751; ROA.6668.

In contrast, the court found that "Defendants' purported evidence of racial predomination amounts to nothing more than their misconstruing any mention of race by Plaintiffs' expert witnesses as evidence of racial predomination." ROA.6750. Defendants point to the district court's finding that the experts "considered race to the extent necessary to test for numerosity and compactness," Br.49-50 (citing

ROA.6733), but that statement hardly amounts to a finding that the target had "a significant influence" on the ultimate configuration of the districts. Similarly, that Plaintiffs' experts consulted race data in the map-drawing software to get a general sense of where in the state it might be possible to create a majority-Black district and that they periodically returned to that data to determine if their districts—configured, as explained, based on non-racial criteria—were above or below 50% BVAP, Br.50, also does not imply that the racial target had a significant impact on the district configuration.

Defendants highlight maps produced by their expert, Mr. Bryan, purporting to show the "misallocation" of Black and white population in the illustrative districts. As the Defendants acknowledge, Br.54, the district court concluded that Mr. Bryan's " conclusions carried little, if any, probative value on the question of racial predominance." ROA.6726. The court noted that Mr. Bryan "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," ROA.6727, nor "did he examine socioeconomic data or other traditional redistricting

principles in determining that race prevailed." ROA.6679. Defendants' contend that although Mr. Bryan's opinions and methods were discredited, the maps he created based on those methods were not, and this Court should draw its own conclusions from them unassisted by any credible expert witness. Br.54-55. But that is wrong: the maps do not speak for themselves; they merely illustrate Mr. Bryan's purported racial "misallocation" analysis, which the district court found poorly supported and unpersuasive. ROA.6726-28. Mr. Bryan's maps were discredited along with his methods, and this Court should reject the Defendants' invitation to contravene Rule 52(a) and review that evidence *de novo*.

Defendants also argue that the removal of Baton Rouge from CD2 to form the anchor of CD5 "is another form of racial predominance." Br.54. But the district court (and the legislature during the roadshow) heard evidence that the inclusion of Baton Rouge in a district with New Orleans diluted the voices of Baton Rouge voters. ROA.6672-73. Likewise, Mr. Fairfax testified that removing Baton Rouge from CD2 allowed him to make CD2 much more compact. ROA.3741. The court credited both of these non-racial explanations for that choice, and its finding is not clearly erroneous.

Defendants also resort to their computer-simulations expert, Dr. Blunt. But the district court recognized that Dr. Blunt is a "novice" in the field of simulation analysis and gave his opinions "little weight," finding "the simulations he ran did not incorporate the traditional principles of redistricting required by law." ROA.6729. Defendants cite *Raleigh Wake Citizens Ass'n* v. *Wake Cnty. Bd. of Elections*, 827 F.3d 333, 344 (4th Cir. 2016) ("*RWCA*"), a partisan gerrymandering case, to argue that this court should overturn the district court's rejection of their simulation evidence. Br.55. In *RWCA*, however, the Fourth Circuit found that the district court had misconstrued the purpose for which the simulations evidence had been offered, which was to show that partisanship and not traditional principles, explained the county's districting decisions. 827 F.3d at 344. Here, the district court understood the purpose of Defendants' simulation evidence, *see* ROA.6728; she simply found it unreliable and unpersuasive. ROA.6729.[10]

Finally, Defendants resort to the bald assertion it is "implausible" that Mr. Fairfax and Mr. Cooper drew their illustrative plans without

[10] Defendants cite *Gonzalez*, 535 F.3d. at 600, to argue that plaintiffs' failure to supply their own simulation analysis should doom their case. Br.56-57. But no court has held that simulations evidence is required to prove a §2 violation.

allowing race to predominate. Br.54. But the district court concluded otherwise and that finding is not clearly erroneous.

B. The District Court's Finding the White Bloc Voting Results in the Usual Defeat of Black-Preferred Candidates Was Not Clearly Erroneous and Was Consistent with Applicable Precedent.

1. The District Court Analyzed Plaintiffs' Gingles *III Evidence Under the Correct Legal Standard*

The third *Gingles* precondition requires plaintiffs to show that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 51. *See also LULAC*, 548 U.S. at 427 (third *Gingles* precondition satisfied where "the projected results in [the challenged district] show that the Anglo citizen voting-age majority will often, if not always, prevent Latinos from electing the candidate of their choice in the district"); *Growe* v. *Emison*, 507 U.S. 25, 40 (1993) (holding that the third *Gingles* precondition helps to establish that "the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population").

Defendants' focus on whether white bloc voting is "legally significant" does not aid their case. Br.2, 25, 60-63. "Legally significant" white bloc voting can occur even where some white voters support the Black-preferred candidate, so long as "a white bloc vote [] normally will

defeat the combined strength of minority support plus white 'crossover' votes." *Gingles*, 478 U.S. at 31. This standard recognizes that the existence of some white crossover voting can coexist with "legally significant" white bloc voting. *See id.* at 58-59 (finding legally significant white bloc voting where crossover voting was as high as 50% in some elections); *see also Teague* v. *Attala County*, 92 F.3d 283, 291-92 (5th Cir. 1996); *Westwego Citizens for Better Gov't* v. *City of Westwego*, 946 F.2d 1109, 1118-20 (5th Cir. 1991); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1248-49 (5th Cir. 1988) (all finding a Section 2 violation despite evidence of crossover voting).

Defendants ask this Court to throw out the well-established legal standard and adopt a new one that would preclude §2 plaintiffs from satisfying *Gingles* III in almost all cases. Defendants contend that "white bloc voting is not legally significant if remedial districts of 50% minority VAP are unnecessary to create equal electoral opportunity. Br.25. Under defendants' theory, they are immune from §2 liability if virtually *any* white voters support a Black-preferred candidate, because in such circumstances a hypothetical district could potentially be drawn in which the Black voting-age population of less than 50% could elect—with the

help of a small number of white crossover voters—the Black-preferred candidate.

That is not the test. As the motion panel explained, the *Gingles* III test "focus[es] on the actual challenged districting." ROA.6879 (citing *Cooper*, 137 S.Ct. at 1470; *LULAC*, 548 U.S. at 427; *Growe*, 507 U.S. at 40). Defendants cite no case supporting their theory that *Gingles* III cannot be satisfied if a hypothetical redistricting plan might have been—but was not—adopted in which the white crossover votes, together with a less than 50% BVAP. As the motion panel determined, "it would be bizarre if a state could satisfy its VRA obligations merely by pointing out that it could have—but did not—give minority voters an opportunity to elect candidates of their choice without creating a majority-minority district." ROA.6879.

The cases on which defendants rely are inapposite. In *Cooper*, 137 S. Ct. at 1465-66, the Supreme Court found that the third *Gingles* precondition could not be met because Black voters had *already* been electing their candidates of choice in the prior districts, despite comprising less than 50% of the voting-age population. *Id*. at 1471-72. As the motion panel explained, *Cooper* holds only that "[i]f a minority group

can already elect its preferred candidates, it does not matter whether that ability accrues in a majority-minority or a performing crossover district." ROA.6880. Here, in contrast to the record in *Cooper*, Black voters in majority-white districts in Louisiana are *not* able to elect their preferred candidates.

Equally inapposite is *Covington* v. *North Carolina*, 270 F.Supp.3d 881 (M.D.N.C. 2017), *aff'd per curiam*, 137 S.Ct. 2211 (2017) (cited in Br.62-63). The evidence in that case showed that the standard was not satisfied with respect to the challenged districts because, in most of those districts, "a majority of non-African-American voters preferred the African-American voters' candidate of choice." *Covington* v. *North Carolina*, 316 F.R.D. 117, 170-71 (M.D.N.C. 2016). Here, the evidence showed that, in the majority white districts in the enacted plan, the relevant test is satisfied because white bloc voting was routinely sufficient to defeat Black-preferred candidates.

Finally, defendants' reliance on *Bartlett* is similarly misplaced. Br.61, 67-68. Defendants argue that, under *Bartlett*, white bloc voting is not "legally significant" if a hypothetical district with a Black voting age

population of less than 50% could reliably elect Black-preferred candidates with the support of white crossover voters. *Id.*

Defendants' argument conflates the requirements for VRA liability with the scope of a possible VRA remedy. The *Cooper* Court explained that while *Bartlett* had held that a Section 2 does not *require* a crossover district (and thus, that the absence of a crossover district cannot be used to establish liability), it may nevertheless be *satisfied* by one. *See Cooper*, 137 S.Ct. at 1461 (citing *Bartlett*, 556 U.S. at 13 (2009)). In other words, to show that Section 2 has been violated, a plaintiff must demonstrate that a reasonably compact district can be drawn in which the minority voting age population exceeds 50% (*Gingles* I), and that without some remedy, the candidates in support of whom the minority group votes cohesively (*Gingles* II) will usually be defeated (*Gingles* III). *Bartlett* does not change that standard for establishing liability under Section 2.

Thus, it is simply incorrect to assert that the ruling adopted by the motion panel "would render either crossover districts mandatory or redistricting impossible." Br.68. On the contrary, as the Supreme Court has emphasized (and as the district court noted), "States retain broad

discretion in drawing districts to comply with the mandate of § 2." *Shaw II*, 517 U.S. at 917 n. 9 (quoted in ROA.6785).

2. The District Court's Finding that Plaintiffs Satisfied Gingles *III Is Supported by Overwhelming and Largely Unrebutted Evidence.*

The district court properly applied well-established legal standards governing *Gingles* III and found, based on largely unrebutted evidence, that plaintiffs satisfied those standards. ROA.6757.

The record strongly supports the district court's finding that the *Gingles* III standard was satisfied. The uncontested evidence, including the testimony of plaintiffs' voting experts, showed that in the white-majority districts in the enacted plan white voters "consistently bloc vote to defeat the candidates of choice of Black voters." ROA.6758. Defendants do not dispute these conclusions. Br.66 (acknowledging "[t]hat is true"). Defendants' experts proffered no testimony to the contrary.

Defendants assert that plaintiffs' experts showed only "polarized voting," defined as where "black voters and white voters voted differently," and they assert that this would exist whenever "bare majorities of Black voters and white voters vote for different candidates."

Br.64-65. That is not what the record showed. Plaintiffs' experts testified to "stark" racial polarization: one of plaintiffs' experts, Dr. Palmer, testified that in the elections he considered an average of only 20.8% of white voters supported the Black preferred candidate; the other, Dr. Handley, analyzing a different range of elections, found that the corresponding figure was only 11.7%. ROA.6757.

Defendants' repeated assertions that plaintiffs' experts "admitted their own studies show a VRA remedy is unnecessary" misrepresent the record. Br.65; *see id*. at 2 (asserting that plaintiffs' experts "conceded … that there is no legally significant white bloc voting"). Dr. Handley testified only that it was "possible" that a hypothetical "BVAP of less than 50% in Congressional District 2 would allow black voters to elect their candidate of choice," but emphasized that she had not analyzed the issue. ROA.15927. Likewise, Dr. Palmer did not testify "that there is meaningful crossover voting" in any district in the enacted plan, Br.65. He simply responded affirmatively to the hypothetical question whether it is possible to "have strong evidence of racially polarized voting but still have meaningful crossover voting." ROA.15858. Finally, Dr. Lichtman—who was not proffered as an expert in racially polarized voting, and had

done no analysis of voting patterns in Louisiana for this case—when asked whether it was necessary for Louisiana to create districts of more than 50% to elect Black-preferred candidates to Congress, responded only that "you would have to do the district specific analysis," but that, "generic[ally]," and without having conducted the required analysis, he "wouldn't rule out" that possibility. ROA.16026-16027.[11]

C. The Overwhelming Weight of Authority Recognizes that Section 2 Is Privately Enforceable.

"[T]he existence of the private right of action under Section 2 [of the VRA] . . . has been clearly intended by Congress since 1965." *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (plurality opinion) (quoting S. Rep. 97-417, at 30 (1982)). That conclusion follows from the VRA's plain text and structure. And it is consistent with its legislative history and decades-long congressional understanding.

[11] Defendants complain that plaintiffs did not present an analysis showing "the minority voting-age population level at which a district becomes effective in providing a realistic opportunity for voters of that minority group to elect candidates of their choice." Br.64 (quoting *Covington*, 316 F.R.D. at 169 & n.46.) But *Covington* mentioned this analysis only in passing, as one possible means of establishing the third *Gingles* factor. *Covington* v. *North Carolina*, 316 F.R.D. at 169. Neither *Covington* nor any other case defendants cite holds that a "district effectiveness analysis" is *required* to satisfy the third *Gingles* factor.

In 1982, Congress amended Section 2 to establish a discriminatory "results" standard for liability, and made clear that private parties could sue to enforce it. The 1982 Senate Report "reiterate[d] the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965." S. Rep. No. 97-417, at 30 (citing *Allen v. Board of Elections*, 393 U.S 544 (1969)). And the House Report confirmed Congress's "inten[t] that citizens have a private cause of action to enforce their rights under Section 2. H.R. Rep. No. 97–227, at 32.

In accordance with Congress's intent, the text of the VRA supports a private right of action to enforce Section 2.[12] Section 2 readily meets both of the requirements set forth under *Sandoval* for finding a private of action: (1) it contains a "private right," as evinced by "rights-creating" language; and (2) the VRA provides for "a private remedy." *Alexander v. Sandoval*, 532 U.S. 275, 286–88 (2001). Section 2 expressly protects the

[12] Plaintiffs brought their Section 2 claim under 42 U.S.C. § 1983, as well as the statute itself. Whether a statute is privately enforceable under Section 1983 and whether it is enforceable on its own via an implied right of action are separate, but partially overlapping inquiries. *See Gonzaga v. Doe*, 536 U.S. 273 (2002). Section 1983 provides a right of action to sue for damages or equitable relief where a person has been "subjected to … the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983. Thus, where Congress has passed a law securing an individual right, "the right is presumptively enforceable by § 1983." *Id*. at 284.

"right of any citizen ...to vote," 52 U.S.C. §10301(a), precisely the "rights-creating language" that courts look for when determining that Congress implied a private right of action in a statute. And two other VRA provisions—Section 3 and Section 14—provide a private remedy for Section 2 violations. *See, e.g.*, *Veasey* v. *Perry,* 29 F. Supp. 3d 896, 905-07 (S.D. Tex. 2014).

Thus, the Supreme Court in *Morse* acknowledged the existence of a private right to enforce Section 2: "the existence of the private right of action under Section 2 ... has been clearly intended by Congress since 1965." 517 U.S. at 232 (lead opinion of Stevens, J., joined by one other Justice) (quoting S. Rep. 97-417, at 30); *see also id.* at 240 (Breyer, J. concurring, joined by two other Justices). Other than a single outlier case relied on by defendants, Br. 69 (citing *Ark. State Conf. NAACP* v. *Ark. Bd. of Apportionment*, 2022 WL 496908, (E.D. Ark. Feb. 17, 2022)), very lower court to have considered the question has followed *Morse* to conclude that there is a private right of action to enforce Section 2.[13]

[13] *See e.g.*, *Alpha Phi Alpha Fraternity, Inc.* v. *Raffensperger*, No. 1:21-cv-5337-SCJ, 2022 WL 633312, at *11 n.10 (N.D. Ga. Feb. 28, 2022); *Milligan,* 2022 WL 265001, at *79 (three-judge court); *League of United Latin Am. Citizens* v. *Abbott*, No. EP-21-CV-00259-DCG-JES-JVB, 2021 WL 5762035, *1 (W.D. Tex. Dec. 3, 2021) (three-judge court); *Ga. State Conf. of the NAACP* v. *Georgia,* 269 F. Supp. 3d 1266, 1275 (N.D.

II. The Equities Tilt Sharply in Favor of a Preliminary Injunction and *Purcell* Does Not Require Otherwise.

The district court correctly held that Plaintiffs would be irreparably injured without a preliminary injunction and that the balance of equities tilt sharply in Plaintiffs' favor. The injury faced by Plaintiffs and similarly situated Black voters is a grave one—an abridgment of their fundamental right to vote free from racial discrimination. ROA.6775 ("Voting is a fundamental political right, because it is preservative of all rights.") (citing *Democratic Exec. Comm. of Fla.* v. *Lee*, 915 F.3d 1312, 1315 (11th Cir. 2019)) (internal alterations omitted). Vote dilution "irreparably injures the plaintiffs' right to vote and to have an equal opportunity to participate in the political process." *Patino* v. *City of Pasadena*, 229 F. Supp. 3d 582, 590 (S.D. Tex. 2017). The "restriction on [this] fundamental right to vote therefore constitutes irreparable injury." *Michigan State A. Philip Randolph Inst.* v. *Johnson*, 833 F.3d 656 (6th Cir. 2016).

Defendants do not dispute that an election in violation of the VRA's "ban on racial discrimination in voting," *Shelby County* v. *Holder*, 570

Ga. 2017) (three-judge court); *Veasey,* 29 F. Supp. 3d at 906; *Perry-Bey,* 678 F. Supp. 2d at 362.

U.S. 529, 557 (2013), constitutes irreparable harm. ROA.6775. In comparison to this harm, the administrative burden shouldered by the State is "entirely ordinary." ROA.6887. The district court found that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." ROA.6776-6783.

A. The Scope of the District Court's Relief was Proper

Defendants argue that a preliminary injunction is improper because an injunction may only "preserve the relative positions of the parties," and that the relief afforded by the district court goes beyond that permitted scope. Br.72-74 (citing *Univ. of Texas* v. *Camenisch*, 451 U.S. 390 (1981)). But allowing the 2022 elections to go forward under these circumstances (and for the first time using the challenged plan) does not "'preserve' the relative positions of the parties." Instead, it imposes an irreparable injury on plaintiffs and other Black voters. That is because "once the election occurs, there can be no do-over and no redress," so the injury to "voters is real and completely irreparable if nothing is done to enjoin" the challenged conduct. *League of Women Voters of N.C.* v. *North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014).

Here, if injunctive relief is not in place, plaintiffs will be deprived of the opportunity to cast undiluted votes in the "pivotal," Br.23, 2022 congressional elections. That harm would not be undone if a subsequent permanent injunction prevents dilution of their votes in *later* elections. As this court has held, in determining whether a preliminary injunction is appropriate, "[t]he focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Canal Auth. of State of Fla.* v. *Callaway*, 489 F.2d 567, 576 (5th Cir. 1974) ("If the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury.").[14]

Contrary to defendants' assertion, Br.73, "courts frequently issue preliminary injunctions that order relief beyond mere preservation of the status quo." ROA.6784. Defendants dismiss multiple examples cited by the district court, *see id.*, and ignore countless others in which courts have ordered redistricting relief at the preliminary injunction stage, including

[14] Defendants' issues, Br.72-73, with this Court's decision in *Canal Auth. of State of Fla.* v. *Callaway*, do not undercut the logic of the passage cited by the district court in its opinion. ROA.6783-84 (citing 489 F.2d at 576). Defendants identify no authority that reject its guidance, and courts in this circuit have long relied on the decision. *See, e.g.*, *Second Baptist Church* v. *City of San Antonio*, No. 5:20-CV-29-DAE, 2020 WL 6821334 (W.D. Tex. Feb. 24, 2020).

in the context of Section 2 claims.[15] In contrast, "[p]ermitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect." *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988). The necessary implication of defendants' argument is that courts are powerless to prevent illegal vote dilution on a preliminary injunction, even if in the interim one or more elections will be held in violation of federal law. That is not the law. [16]

The cases defendants cite are readily distinguishable. Br.73. Most involve circumstances where plaintiffs were unable to establish a likelihood of success on the merits or irreparable harm.[17] In *Pileggi* v.

[15] *See, e.g.*, *Baltimore Cnty. Branch of NAACP* v. *Baltimore Cnty., Maryland*, No. 21-CV-03232-LKG, 2022 WL 657562 (D. Md. Feb. 22, 2022); *Wright* v. *Sumter Cnty. Bd. of Elections & Registration*, 361 F. Supp. 3d 1296 (M.D. Ga. 2018), *aff'd*, 979 F.3d 1282 (11th Cir. 2020); *Georgia State Conf. of the NAACP* v. *Fayette Cnty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338 (N.D. Ga. 2015); *Rios* v. *Bexar Metro. Water Dist.*, No. CIV A SA-96-CA-335, 2006 WL 2711819 (W.D. Tex. Sept. 21, 2006); *Quick Bear Quiver* v. *Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005); *Arbor Hill Concerned Citizens Neighborhood Ass'n* v. *Cnty. of Albany*, 281 F. Supp. 2d 436 (N.D.N.Y. 2003).

[16] It is true, as defendants assert, that apart from a brief period in the 1990s Louisiana "has never conducted its congressional elections with a plan employing two majority-Black congressional districts" and that the enacted plan resembles "those used for generations." Br.72, 75. In light of the extensive and unrebutted testimony about Louisiana's long history of disenfranchising Black voters, as well as the vote-dilutive nature of the enacted plan, defendants' argument that this history should be dispositive (or even persuasive) has no merit.

[17] *See Cardona* v. *Oakland Unified Sch. Dist.*, 785 F. Supp. 837 (N.D. Cal. 1992); *Kostick* v. *Nago*, 878 F. Supp. 2d 1124 (D. Haw. 2012); *Perez* v. *Texas*, 2015 WL 6829596 (W.D. Tex. Nov. 6, 2015); *Valenti* v. *Dempsey*, 211 F. Supp. 911 (D. Conn.

Aichele, defendants were already complying with a prior state court order in effect and the election was only eleven weeks away. 843 F. Supp. 2d 584, 592-96 (E.D. Pa. 2012). In *Diaz* v. *Silver*, there was no proposed alternative plan and the state legislature had not been given a chance first to implement a plan. 932 F. Supp. 462, 468-69 (E.D.N.Y. 1996). There are no similar facts here.

B. Defendants' Speculative Claim of Widespread Equal Protection Violations is Without Merit

Defendants assert that the district court's injunction is improper because it risks imposing an equal protection violation by requiring a plan that, they contend, would invariably be an unconstitutional racial gerrymander. Br.74. But nothing in the district court's order compels a remedial plan that violates the Equal Protection Clause. On the contrary, the court gave the legislature flexibility in developing a remedial plan. ROA.6785-86. The district court has already found a high likelihood that the enacted plan violates §2. ROA.6775. Remedying that violation provides the necessary compelling state interest for consideration of race in developing a remedial plan without violating the Fourteenth

1962); *Shapiro* v. *Berger*, 328 F. Supp. 2d 496 (S.D.N.Y. 2004); *NAACP-Greensboro Branch* v. *Guilford Cnty. Bd. of Elections*, 858 F. Supp. 2d 516 (M.D.N.C. 2012).

Amendment. ROA.6745. Moreover, the Legislature and the district court now have the benefit of extensive expert analysis of voting patterns, allowing for any remedy to be narrowly tailored to address the violation. *Id.*

The lower court cases defendants cite do not compel a different result. Br.91-92. They show only that, where a district court holds that constitutional rights *are likely to be violated*, they may outweigh statutory harms. *See Gordon* v. *Holder*, 721 F.3d 638, 645, 653 (D.C. Cir. 2013) (affirming a district court's preliminary injunction enjoining a statute where that court also held that the statute was likely unconstitutional); *Jackson Women's Health Org.* v. *Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (similar). There is no such likelihood here.

C. The *Purcell* Principle is No Bar to Injunctive Relief

As the motion panel concluded in denying a stay: "the defendants have not identified a comparable case" where the Supreme Court has applied the principle of election nonintervention (the *Purcell* principle) so far in advance of an election. ROA.6883. The panel's 33-page decision demonstrates that *Purcell* does not preclude or counsel against a preliminary injunction.

The preliminary injunction here is consistent with the principles explained by Justice Kavanaugh in *Merrill* v. *Milligan* that "federal district courts ordinarily should not enjoin state election laws in the period close to an election," particularly where and such changes would impose "significant cost, confusion, or hardship." 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). The district court entered its preliminary injunction more than five months before Election Day and more than four months before the start of early voting. ROA.6782. As defendants represented to the court in the state malapportionment case, there is more than enough time to ensure a lawful districting plan is in place. ROA.6779-6880. The district court found, and the motion panel agreed, that the injunction would not impose undue cost, confusion, or hardship. ROA.6783; ROA.6886. And, as discussed above, the evidence supporting the district court's determinations on the merits was largely uncontested.

The Supreme Court concluded in *Wisconsin Legislature* v. *Wisconsin Elections Commission*, 142 S. Ct. 1245 (2022) (per curiam), that even less time before the election did not preclude it from directing the state to redraw its state legislative maps. There, after the governor

and legislature reached an impasse in the redistricting process, the Wisconsin Supreme Court, exercising its authority under state law, adopted a new map of state legislative districts. *Id.* at 1247. In a decision issued closer in time to the relevant election than the district court's injunction here (139 days in Wisconsin, compared to 155 days in this case), the Supreme Court ordered Wisconsin to redraw its state legislative maps. The Court concluded that the State had "sufficient time to adopt maps consistent with the timetable" for the primary. *Id.* at 1248. The district court here found that five months was enough time for Louisiana adopt a new plan without impacting its ability to administer its election. ROA.6782.

Defendants do not cite, much less try to distinguish, the *Wisconsin* ruling, although the district court relied heavily on that ruling and considered it "guiding precedent." *Id*. *Wisconsin* makes clear that federal courts can prohibit a state from using unlawful maps if new maps can be implemented without substantial cost and confusion and with sufficient time before the relevant election. *Accord Merrill*, 142 S. Ct. at 881–82 (Kavanaugh, J., concurring). The Supreme Court held that that standard

was satisfied in Wisconsin, and the district court found that the same is true here.

Defendants' reliance on *Merrill* is misplaced. In *Merrill*, the candidate qualifying deadline was days away at the time of the district court's ruling, and absentee ballots for the primary elections were scheduled to go out about seven weeks later, *Merrill*, 142 S. Ct. at 879. Here the district court's decision was issued more than five months before Election Day, four and a half months before the start of early voting, and six weeks before the candidate qualifying deadline. *See* ROA.6782. Defendants offer no basis to deviate from the panel's *Purcell* analysis.

Defendants argue that the district court and the motion panel erred in concluding that there was sufficient time to enact new maps with no more than "ordinary 'bureaucratic strain' on state election officials." ROA.6886. Relying on testimony from State election commissioner, the district court found that "the State has sufficient time to implement a new congressional map without risk of chaos." ROA.6783. In addition, the court considered undisputed testimony from the Governor's executive counsel, Matthew Block, who explained that Louisiana has the administrative capacity to draw a new map before the 2022 election, and

has successfully adjusted election rules in the past in response to events ranging from hurricanes to COVID-19. *See* ROA.6713-14. The election commissioner similarly testified that her office has moved election dates themselves "due to emergencies, due to hurricanes, due to things like that." ROA.16496.

Defendants attempt to amplify administrative burden by purporting to describe in detail the process of implementing a congressional district plan using the State's computerized system, and the other election responsibilities. *See* Br.78–82. But their discussion skirts the core issue of how much time those tasks take and how much, if any, burden and confusion they would cause if a new map is enacted. For example, defendants' brief includes lengthy discussions of "ensuring voters are assigned correctly into the state's election database system called ERIN" and the need to "program and prepare ballots," but they offer no evidence that these tasks are not feasible before the election. Br.78, 80. The district court already considered this testimony (as did the motion panel) and concluded that the burdens described did not counsel against the preliminary injunction. *See* ROA.6714-6716, ROA.6778-6779. That other statutory election deadlines are tied to the

congressional candidate deadlines is irrelevant; the district court and the motion panel correctly concluded that those deadlines provide sufficient time to implement a new map, and the Legislative Defendants represented to the state court that "the candidate qualification period could be moved back, if necessary … without impacting voters." ROA.10364.

Defendants cite one example in one parish in which errors purportedly occurred as a result of late census information causing a "rushed entry of voter information." Br.82. That cherry-picked example does not call into question the district court's finding that there is minimal risk of voter confusion, which was supported the many instances last-minute voting changes implemented without error to which Mr. Block testified. Nor does it explain why an injunction entered some five months before Election Day would have that result.

Defendants argue that the court erred in crediting Mr. Block's testimony "over [the testimony] of the State's chief elections officer," Ms. Hadskey. But the district court did no such thing. Ms. Hadskey agreed with Mr. Block that the state has successfully handled elections that involved last minute changes. *See* ROA.16099-102. The district court did

not question Ms. Hadskey's credibility. It merely found that her expression of "general concern" about changes to the congressional map did not preclude an injunction where she had not offered "specific reasons" why the new map could not be implemented in sufficient time for the November election. ROA.6778.

Defendants contend that federal courts "consistently" stay lower court injunctions in upcoming elections, Appl. Br.76, but that is not what their cases demonstrate. For example, the Fifth Circuit's decision in *Chisom* arose in peculiar circumstances unlike those here. There, the district court, holding that Louisiana's multimember judicial election system violated the Voting Rights Act, had enjoined the upcoming Supreme Court election altogether, meaning that all voters would be deprived of their right to vote and risking either that Louisiana would be left with one fewer Justice after the end of the sitting Justice's term, or that—if that Justice were appointed to fill the vacancy—he would be precluded from seeking reelection in the future. *See Chisom* v. *Roemer*, 853 F.2d 1186, 1190 (5th Cir. 1988). Here, in contrast, elections will take

place on November 8, 2022 under the district court's remedial map just as they would without it; the case raises none of the concerns in *Chisom*.[18]

The other factors that Justice Kavanaugh noted in *Merrill* likewise do not support a stay. *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). As the district court's opinion demonstrates, and as discussed in more detail above, the merits are clearcut in plaintiffs' favor; indeed, plaintiffs' evidence on the *Gingles* factors was largely uncontested.

Nor have plaintiffs "unduly delayed" bringing the complaint to court." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). On the contrary, plaintiffs filed their complaints the very day the challenged maps were enacted, ROA.65, and plaintiffs and the district court acted with extraordinary expedition in fully litigating and deciding a complex preliminary injunction motion within 67 days after the action was commenced (a process defendants complain was "rushed," Br.15).

[18] The few other redistricting cases defendants cite in which the Supreme Court stayed a lower federal court preliminary injunction either contain no reasoning or are distinct from this case. For example, in *Karcher*, Justice Brennan issued a stay, noting a fair prospect that a three-judge panel's congressional reapportionment plan was unconstitutional, *Karcher* v. *Daggett*, 455 U.S. 1303, 1306 (1982) (Brennan, J., in chambers). Here both the district court and Fifth Circuit held that none of defendants' attacks on the merits of the district court's opinion were likely to prevail on appeal.

CONCLUSION

This Court should affirm the district court's preliminary injunction.

Respectfully submitted,

/s/ *John Adcock*

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JUNE 27, 2022

CERTIFICATE OF SERVICE

I, John Adcock, a member of the Bar of this Court and counsel for appellees certify that, on June 27, 2022, a copy of Appellees' Response in Opposition to Appellant's Motion to Stay Preliminary Injunction was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/S/*John Adcock*
JOHN ADCOCK

CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, John Adcock, a member of the Bar of this Court and counsel for appellees certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.3, that the Appellees' Response in Opposition to Appellant's Motion to Stay Preliminary Injunction is proportionately spaced, has a typeface of 14 points or more, and contains 14,763 words.

/S/ *John Adcock*
JOHN ADCOCK

JUNE 27, 2022