No. 22-30333

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRESS ROBINSON, et al.,
Plaintiffs-Appellees,

v.

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

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

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

v.

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

CLAY SCHEXNAYDER, et al.,
Movants-Appellants.

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

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 1

I. Plaintiffs' Motion for a Preliminary Injunction Is Moot 1

II. Illustrative Maps Combining Dissimilar Communities for No Reason but Race Do Not Satisfy the First Precondition 5

A. Plaintiffs' Proposed Districts Are Not Reasonably Configured 6

B. Plaintiffs' Illustrative Plans, Which Compel Racial Gerrymandering, Cannot Form an Appropriate §2 Baseline 21

C. Semantics Cannot Overcome Deficiencies in Plaintiffs' §2 Claim 27

III. Plaintiffs Have Not Established the Third Precondition 29

CONCLUSION 31

CERTIFICATE OF SERVICE 34

CERTIFICATE OF COMPLIANCE 35

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott v. Perez,
138 S. Ct. 2305 (2018) 18, 19

Allen v. Milligan,
599 U.S. 1 (2023) ..... *passim*

Allen v. Milligan,
Nos. 21-1086, 12-1087 (filed April 25, 2022) 12

Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith,
143 S. Ct. 1258 (2023) 22

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006) 5

Ardoin v. Robinson,
142 S. Ct. 2892 (2022) 2

Banerian v. Benson,
589 F. Supp. 3d 735 (W.D. Mich. 2022) 15

Bartlett v. Strickland,
556 U.S. 1 (2009) 30, 31

Bethune-Hill v. Virginia State Bd. of Elections,
580 U.S. 178 (2017) ..... *passim*

FEC v. NRA Pol. Victory Fund,
513 U.S. 88 (1994) 5

Gill v. Whitford,
138 S. Ct. 1916 (2018) 22

Growe v. Emison,
507 U.S. 25 (1993) 17

Hays v. Louisiana,
936 F. Supp. 360 (W.D. La. 1996) 8, 9, 24, 25

Johnson v. De Grandy,
512 U.S. 997 (1994) 19, 30

Lewis v. Casey,
518 U.S. 343 (1996) 5

LULAC v. Perry,
548 U.S. 399 (2006) 8, 9, 11, 13

Miller v. Johnson,
515 U.S. 900 (1995) ..... *passim*

Nairne v. Ardoin,
3:22-cv-00178, Dkt. No. 110 (entered 7/17/2023)..... 4, 25

Oklahoma v. Castro-Huerta,
142 S. Ct. 2486 (2022) 22

PCI Transp., Inc. v. Fort Worth & W. R. Co.,
418 F.3d 535 (5th Cir. 2005) 15

Singleton v. Allen,
___ F. Supp. 3d ___, 2023 WL 5691156
(N.D. Ala. Sept. 5, 2023)..... 29

Singleton v. Merrill,
582 F. Supp. 3d 924 (N.D. Ala. 2022) 12, 14, 28

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 4

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,
143 S. Ct. 2141 (2023) 23, 24

In re: Taxotere (Docetaxel) Prod. Liab. Litig.,
26 F.4th 256 (5th Cir. 2022)..... 13

Thornburg v. Gingles,
478 U.S. 30 (1986) ..... *passim*

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.,
454 U.S. 464 (1982) 15

Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) 16

Wilkins v. United States,
598 U.S. 152 (2023) 5

Winter v. NRDC, Inc.,
555 U.S. 7 (2008) 2, 3

Wis. Legislature v. Wis. Elections Comm'n,
142 S. Ct. 1245 (2022) 24

INTRODUCTION

Boiled down to essentials, Plaintiffs' supplemental briefs assert that, because the Supreme Court affirmed a provisional finding of §2 liability against Alabama in *Allen v. Milligan*, 599 U.S. 1 (2023), practically every subsequent §2 claim elsewhere must succeed. *Allen* rejected that theory. Louisiana's political geography and voting patterns differ from Alabama's in fundamental respects that Plaintiffs cannot overcome. Their recourse to mischaracterizing Appellants' prior arguments exposes a lack of confidence in their positions on the merits. The Court should vacate or reverse the preliminary injunction.

ARGUMENT

I. Plaintiffs' Motion for a Preliminary Injunction Is Moot.

Robinson Plaintiffs see their supplemental brief concerning "Allen v. Milligan, and any other developments or caselaw," CA5 Dkt. 242 at 1, as an opportunity for a sur-reply on the question of mootness.[1] Robinson Supp. Br. 49-51. But they say nothing persuasive on that topic.

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[1] It is difficult to follow Robinson Plaintiffs' view of the scope of supplemental briefing. On the one hand, they criticize Appellants for citing and discussing case law under the first *Gingles* precondition other than *Allen*. Robinson Supp. Br. 26 n.5. But Appellants explained in their

As Appellants have explained, a motion for injunctive relief becomes moot when the alleged irreparable harm is complete. Reply Brief for Appellants 5-8. Plaintiffs sought provisional relief for the then-imminent 2022 elections, but the Supreme Court's stay order permitted Louisiana to conduct those elections under the challenged redistricting plan. *See Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). In that way, the harm alleged to be irreparable became accomplished beyond remedy, and no other election is scheduled "before a decision on the merits can be rendered." *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008) (citation omitted). Accordingly, Plaintiffs no longer need a preliminary injunction, and their application for one is moot.

Robinson Plaintiffs do not meaningfully challenge these basic points. They say "the District Court's preliminary injunction was not

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reply brief that *Allen*-related arguments cannot feasibly be presented apart from other arguments under the first precondition, so Appellants consolidated their first-precondition arguments in their supplemental brief. *See* Reply Brief for Appellants 2 n.1 (outlining this rationale). On the other hand, Robinson Plaintiffs address, not only the first precondition, but also mootness and the third precondition, which *Allen* did not address. *See* Robinson Supp. Br. 44-46, 49-51. The Court would be justified in ignoring these arguments, but Appellants respond in kind in case the Court finds the scope of the Robinson supplemental brief proper.

limited to the 2022 election." Robinson Supp. Br. 50. But they do not explain how there was or is "a likelihood of irreparable injury" for any other election. *Winter*, 555 U.S. at 21. Instead, they insist "any possibility of irreparable harm" satisfies the standard. *See* Robinson Supp. Br. 50. But the Supreme Court rejected that argument in *Winter*, holding that "just a possibility" does not qualify. *Winter*, 555 U.S. at 22. Consistent with that standard, the district court's findings of irreparable harm addressed only "the 2022 Louisiana congressional elections," not the 2024 elections. ROA.6775; *see also* Robinson Supp. Br. 50-51 (quoting finding concerning "the 2022 election").

Robinson Plaintiffs then say "the possibility of a full trial on the merits" is "specious," Robinson Supp. Br. 50, but that *ipse dixit* does not make out an irreparable-harm showing. And it is incorrect. About 13 months separate oral argument in this case before this Court from the 2024 election, and the same district court adjudicating this matter is—right now—conducting expedited proceedings towards final judgment in a considerably more complicated §2 challenge to Louisiana's state house and senate redistricting plans, which will undergo trial in November, even though state legislative elections do not occur until 2027. *See*

Scheduling Order, *Nairne v. Ardoin*, 3:22-cv-00178, Dkt. No. 110 (entered 7/17/2023).[2] The district court also set a three-day preliminary-injunction remedial hearing in this case from October 3 to 5, 2023, which could be time allocated to litigating this case on the merits. *See* Reply Brief for Appellants 2-3 n.2. With reasonable diligence, Plaintiffs can prosecute this case to final judgment in advance of the 2024 election season, but their transparent goal is to thwart merits litigation to give the district court's provisional remedy the practical effect of a final judgment for at least the 2024 elections, but without a trial.

Robinson Plaintiffs also look for a jurisdictional ruling in their favor in *Allen v. Milligan*, Robinson Supp. Br. 49, but it did not address mootness. *See* 599 U.S. at 17-41. Robinson Plaintiffs seek to read into *Allen* a jurisdictional ruling they say it should have delivered, but the Supreme Court has repeatedly held "that drive-by jurisdictional rulings" like this "have no precedential effect." *Steel Co. v. Citizens for a Better*

[2] *Nairne* was also stayed pending *Allen*, but—when both cases began again—the district court prioritized an expedited trial in *Nairne* (despite that the next regular legislative elections will not occur until 2027) over the congressional case (despite that the next regular congressional elections will occur in 2024).

Env't, 523 U.S. 83, 91 (1998). Put differently, if jurisdiction is "neither challenged nor discussed" in a Supreme Court decision, it "has no precedential effect" on the question of jurisdiction. *Lewis v. Casey*, 518 U.S. 343, 353 n.2 (1996); *accord FEC v. NRA Pol. Victory Fund*, 513 U.S. 88, 97 (1994); *Wilkins v. United States*, 598 U.S. 152, 160 (2023); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). *Allen*'s silence does not override established mootness doctrine.

II. Illustrative Maps Combining Dissimilar Communities for No Reason but Race Do Not Satisfy the First Precondition.

On the merits, Plaintiffs ask the Court to look for *Allen*'s meaning in everything except what *Allen* said. *Allen* held that the "requirements" of §2 are "exacting," that §2 suits should be "rarely . . . successful," and that "[f]orcing proportional representation is unlawful." 599 U.S. at 28–29. Plaintiffs in essence argue that *Allen* rendered the first precondition practically non-existent, directed judgment in favor of most every §2 claim as long as demographers with the aid of technology can produce a technically compliant map, and demanded proportional representation for more or less every racial and ethnic group in more or less every state. Although Plaintiffs do not say these points out loud, that is the practical import of their arguments.

They are, in sum, arguing to a different opinion from what the Supreme Court issued.

A. Plaintiffs' Proposed Districts Are Not Reasonably Configured.

Allen reaffirmed that the first precondition is satisfied only by illustrative majority-minority districts that "comport[] with traditional districting criteria" and that this standard is "exacting," *Allen*, 599 U.S. at 18, 30, and must be "rigorously" applied, *id.* at 44 n.2 (Kavanaugh, J., concurring). As Appellants have explained, that standard is not met in Louisiana by proposals that join dissimilar urban and suburban communities in East and West Baton Rouge Parishes with the rural Delta Parishes 180 miles away, and divide major cities along racial lines. Supp. Brief for Appellants 6-10. The Black communities Plaintiffs propose be joined are not compact, and no community of interest unites these entirely dissimilar regions. Plaintiffs' responses are unpersuasive.

1. Galmon Plaintiffs propose that the standard *Allen* called "exacting," *id.* at 30, is nothing of the sort. They say the first precondition is satisfied by any majority-minority district short of a "monstrosity," such as a district "no wider than the interstate corridor" or one that "traced the shape of 'a sacred Mayan bird.'" Galmon Supp. Br. 13

(citations omitted). Of course, districts that are bizarre like those are not "reasonably configured." *Allen*, 599 U.S. at 18. But the inverse—that any district that is *not* bizarre *is* reasonably configured—does not follow. *Allen* made this point clear by including in its catalogue of unreasonable districts the one invalidated in *Miller v. Johnson*, 515 U.S. 900 (1995), which joined areas "that had absolutely nothing to do with each other," including both "urban centers" and "rural counties." *Allen*, 599 U.S. at 28 (alteration accepted).

The Court in *Miller* had recognized that the infirm district was not "bizarre on its face," but that did not matter "because bizarreness is [not] a necessary element of the constitutional wrong." *Miller*, 515 U.S. at 913. The district was defective because "it connect[ed] the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture." *Id.* at 908; *see also Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 188 (2017) (discussing and reaffirming *Miller*). By describing *Miller* at length in its catalogue of unreasonable districts, *Allen* confirmed that bizarreness is also not the standard under §2. *See* 599 U.S. at 27-28.

Indeed, if it were, there would have been no purpose to *Allen*'s examination of communities of interest, *see id.* at 20-21, since the Court had already examined district lines and found no "tentacles, appendages, bizarre shapes, or any other obvious irregularities," *id.* at 20. Missing that analytical progression, Robinson Plaintiffs recast *Miller* (and *Allen*, by implication) as superficially focused on district contours, proposing that *Miller* turned on the "narrow corridors" connecting some parts of the infirm district. Robinson Supp. Br. 27. But that double counts an examination of "shapes." *Allen*, 599 U.S. at 20. It also conflates "the compactness of the minority population" with "the compactness of the contested district." *LULAC v. Perry*, 548 U.S. 399, 433 (2006). "Compactness is," after all, "more than 'style points.'" *Id.* at 434.

Although Plaintiffs may have managed tidier lines in their illustrative plans than those of Louisiana districts rejected as racial gerrymanders 30 years ago, *see* Opening Brief for Appellants 8-9, the distinct communities united in these infirm proposals are all the same. *See Hays v. Louisiana*, 936 F. Supp. 360, 368-70 (W.D. La. 1996). And they are no more compact in the relevant sense now than they were then. Plaintiffs' expert impliedly conceded this by noting that the 1990s "were

the days when GIS software was not necessarily available" and that technology could have changed the result in *Hays*. ROA.4986. That is not the lesson taught in any case, from *Hays* to *Allen*. Supreme Court precedent directs the §2 inquiry to the compactness of the minority population, not to the skill or ingenuity of the map-drawer. In this case, the demographers for both sets of Plaintiffs divided the State's major cities surgically along racial residential patterns, which only confirms the Black community is not compact.

Plaintiffs' arguments also mistake the necessary for the sufficient. It is surely essential that a proposed majority-minority district "look consistent with traditional, race-neutral principles," but that cannot be enough. *Bethune-Hill*, 580 U.S. at 190. The district must also function as "a community of interest." *Allen*, 599 U.S. at 20. That standard is not met by "a district that combines two farflung segments of a racial group with disparate interests," *LULAC*, 548 U.S. at 433, or one that joins areas "that have absolutely nothing to do with each other," *Miller*, 515 U.S. at 908 (citation omitted). If "[n]othing has changed" after *Allen*, Galmon Supp. Br. 1, then certainly that principle has not.

2. Yet Plaintiffs do not argue to it. Their expert testimony does not even attempt to say what discrete features lie in common between East and West Baton Rouge Parishes and the Delta Parishes. They are certainly not geographically proximate. There is no evidence that "one compact Black population" runs 180 miles from the State's northeast border all the way down to Baton Rouge. Galmon Supp. Br. 13 (citing ROA.6671, which says nothing like that). And, while it may be necessary that Plaintiffs' plans "avoid[] splitting Core Based Statistical Areas," Robinson Supp. Br. 17, it cannot be sufficient if those areas are nevertheless "miles apart in distance and worlds apart in culture," *Miller*, 515 U.S. at 908; *see* Supp. Brief for Appellants 13-14. It is also insufficient that Plaintiffs' experts looked at "socioeconomic data," Robinson Supp Br. 18, when that data reveals only differences, not similarities. *See* Supp. Brief for Appellants 15-17. Plaintiffs' supplemental briefs identify no specific data point that shows commonality in any respect between East and West Baton Rouge Parishes and the Delta Parishes. This deficiency is not just "some differences" between these regions. Galmon Supp. Br. 25. They have nothing in common.

Plaintiffs are not shy to announce that the driving force behind their configurations "is race." *LULAC*, 548 U.S. at 435. Plaintiffs admit that the community they perceive in their illustrative version of CD5 is "a single-race community." Galmon Supp. Br. 10. Plaintiffs say *Allen* ratified a single-race approach to communities of interest, even though *LULAC* expressly rejected it. *See LULAC*, 548 U.S. at 435. *Allen* did no such thing, and *LULAC* remains good law. In recognizing that the illustrative district before it properly combined a "community of interest called the Black Belt," *Allen* emphasized that this name derived from the region's "fertile soil"—not anyone's skin color—and that its residents "share a rural geography, concentrated poverty, unequal access to government services," and "lack of adequate healthcare," which are all commonalities apart from race (and which apply to all races). 599 U.S. at 21. Plaintiffs, by contrast, admit their vague community-of-interest considerations concern only unifying far flung Black residents with no common interests.

Although *Allen* looked to one race-related factor, "a lineal connection to the many enslaved people brought there to work in the antebellum period," 599 U.S. at 21 (quotation marks omitted), that

phrase—in context—did not make the holistic analysis a "single-race" analysis like Plaintiffs'. For one thing, a lineal connection to enslaved people is more than a racial connection; it connotes a common ancestry and ties to a place not all Black persons have in common. For another thing, this was just one of five factors. The district court, in fact, rejected the charge that its findings concerning the Black Belt were "a 'blunt proxy' for race."[3] *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1014 (N.D. Ala. 2022). By contrast, Plaintiffs here embrace that charge.

3. Regardless, there is no competent evidence of a community of interest of any kind—single-race or otherwise—uniting East and West Baton Rouge Parishes with the Delta Parishes. Plaintiffs seek to analogize this case to *Allen*, but it presents the opposite fact pattern. In *Allen*, Alabama complained that the illustrative plan divided a community of interest called the Gulf Coast that the state believed should remain united. 599 U.S. at 21. Here, by contrast, the problem is Plaintiffs'

[3] Robinson Plaintiffs ask the Court to read significance into the placement of Mobile in the illustrative plan in *Allen*. Robinson Supp. Br. 27. But *Allen* said nothing meaningful about Mobile in examining communities of interest, *see* 599 U.S. at 21, which is presumably because Alabama barely mentioned it, *see* Brief for Appellants, *Allen v. Milligan*, Nos. 21-1086, 12-1087 at 56-64 (filed April 25, 2022).

combining regions with no common interests. *See Miller*, 515 U.S. at 908; *LULAC*, 548 U.S. at 435. This case, then, does not concern the type of "beauty contest" *Allen* disclaimed. 599 U.S. at 21 (alteration accepted). The problem here is the absence of evidence that people of any race in these far-flung regions belong together in a court-mandated district.

Galmon Plaintiffs direct this Court, not to the district court's findings, but to the *stay panel's* assertion that there was "extensive lay testimony supporting their claim that the black populations in the illustrative CD 5 were culturally compact." Galmon Supp. Br. 25 (quoting ROA.6867) (emphasis omitted). The stay panel admitted it had "little time to review the record," ROA.6859, and it apparently did not see that the "extensive" testimony was from one individual, Mr. Tyson, who was not qualified or presented as an expert witness. *See* ROA.6671 (page cited at ROA.6859). Mr. Tyson testified as to what happened "in the 1860s," ROA.6671, which was not within his "personal knowledge," *In re: Taxotere (Docetaxel) Prod. Liab. Litig.*, 26 F.4th 256, 265 (5th Cir. 2022). More fundamentally, testimony about a "historical connection" related in some way to "faith, family, and culture," ROA.6671, says nothing—standing alone—concrete about communities of interest today.

And that evidence does indeed stand alone. Unlike in *Allen*, no expert testimony supports Mr. Tyson's assertions. *See* 559 U.S. at 21; *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1012-13 (N.D. Ala. 2022).[4] And another lay witness, Mr. Cravins, testified to a shared community between Baton Rouge and "south Louisiana," which is the opposite of northeast Louisiana. ROA.5064-71. The district court did not address this conflict. Galmon Plaintiffs try to smooth it over by noting that Mr. Cravins was "distinguishing St. Landry Parish from the *northwestern* part of Louisiana," Galmon Supp. Br. 26, but they cannot stop and start the rules of logic at will: a place distinct from northwest Louisiana on the basis that it is in south Louisiana is equally distinct from northeast Louisiana, which is also not in south Louisiana.[5]

In all events, it is difficult to see how calling lay witnesses to testify about communities of interest can do anything but transform federal courts into "publicly funded forums for the ventilation of public

[4] In fact, the parties in *Allen* stipulated that the Black Belt is a community of interest. *See Singleton*, 582 F. Supp. 3d at 953.

[5] Galmon Plaintiffs say Mr. Cravins testified to a connection between St. Landry Parish and northeastern Louisiana. Galmon Supp. Br. 26. But their record citation does not support that assertion. *See* ROA.5069. And it falls short of a tie between Baton Rouge and the Delta Parishes.

grievances." *Cf. Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982); *see Banerian v. Benson*, 589 F. Supp. 3d 735, 738 (W.D. Mich. 2022) (three-judge court) (per Kethledge, J.). On the authority of this case, if affirmed, the next litigants (on both sides) can call five lay witnesses, the next 25, and the next 500. Until all the many millions of residents of a state have had their say, the inquiry could never be reliably conducted, or even completed. That is presumably why the Supreme Court in *Allen* found that lay testimony from "[o]nly two witnesses" says very little, even for litigants who do not bear the burden of proof. 599 U.S. at 21. Plaintiffs resist that holding, *see* Robinson Supp. Br. 22; Galmon Supp. Br. 24-25, but do not explain how only one lay witness—contradicted by other of their witnesses—can "clearly carr[y] the[ir] burden of persuasion." *PCI Transp., Inc. v. Fort Worth & W. R. Co.*, 418 F.3d 535, 545 (5th Cir. 2005).

4. That is especially so, given that the legislative record also contradicts Plaintiffs' basic assertions. It reveals specific interests the sponsor of the redistricting plan perceived to be united and divided in the challenged plan. Supp. Brief for Appellants 8. Those interests, in turn, are precisely the types of interests *Allen* looked to, such as "a rural

geography, concentrated poverty, unequal access to government services," and "lack of adequate healthcare." 599 U.S. at 21; *see* ROA.12929-30 (rural geography, poverty, access to services and healthcare). There is no evidence that East and West Baton Rouge Parishes and the Delta Parishes share similar concerns on these issues, and the most probative source of evidence shows they do not.

Both sets of Plaintiffs, like the district court, say this does not count because it was not introduced through a live witness. Galmon Supp. Br. 23; Robinson Supp. Br. 19. And like the district court, Plaintiffs provide no sound reason why that must be so. Galmon Plaintiffs do not deny that the legislative record is probative in cases involving "legislative intent." Galmon Supp. Br. 23; *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) (explaining that "legislative . . . history may be highly relevant" to legislative motive, "especially where there are contemporary statements by members of the decision making body, minutes of its meetings, or reports"). They say this inquiry does not involve legislative intent, but it does—what communities of interest did the Legislature actually intend to bring together and maintain apart? Recognizing this, the district court faulted Appellants for having "not

offered any evidence related to whether or how the Legislature" identified communities of interest, ROA.6736, which was plainly directed at its intent. If lay witness testimony is probative, the Legislature's contemporaneous record is all the more probative. Besides, if Plaintiffs can call one resident of 4.6+ million to opine on communities of interest, surely what the Legislature had to say on that topic merits consideration. After all, the Constitution renders redistricting "primarily the duty and responsibility of the State through its *legislature* . . . ." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added).

Robinson Plaintiffs then assert citizen testimony from legislative hearings supports their proposed configurations of Louisiana. Robinson Supp. Br. 21. But they identify none that speaks to any common interests shared between East and West Baton Rouge Parishes and the Delta Parishes. Some testimony they cite describes *conflict* between these regions, observing that "money that flows . . . in South Louisiana" and that "this little corner of Northeast Louisiana . . . doesn't get any money for housing." ROA.11432-34. The remainder consists of generic citizen assertions that another majority-Black district be configured *somewhere* to achieve racial proportionality, with no assertion of shared interests

between East and West Baton Rouge Parishes and the Delta Parishes. *See* ROA.11428-30 (asserting that another majority-minority district is appropriate "[i]n a state where one third of the population is black"); ROA.11434-35 (similar); ROA.11442-45 (similar); ROA.11445-47 (similar); ROA.11451-53 (similar); ROA.11628-34 (similar); ROA.11646-47 (similar); ROA.11792-94 (similar); ROA.11802-05 (similar); ROA.11824-26 (similar); ROA.11826-29 (similar); ROA.11829-30 (similar); ROA.11830-33 (similar); ROA.11845-46 (similar); ROA.11846-49 (similar); ROA.11854-56 (similar).[6] The assertions of legislators likewise demonstrate a concern with proportionality, or simply with another majority-Black district, not with shared common interests between East and West Baton Rouge Parishes and the Delta Parishes. ROA.11737-41; ROA.14032-36; ROA.13949-53; ROA.14002-08; ROA.14010-13; ROA.14016-21; ROA.14573-83; ROA.14264-65; ROA.14597-606; ROA.14772-75. As the Supreme Court explained in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), there is little probative meaning in citizens' desire to create another majority-minority district because

[6] Some testimony Robinson Plaintiffs cite says nothing relevant to this case. *See, e.g.*, ROA.11635-37 (discussion of prison gerrymandering).

they may "have an overly expansive understanding of what § 2 demands." *Id.* at 2334.

5. The proportionality some Louisiana residents desire is what Plaintiffs demand and what the district court ordered. *See* Supp. Brief for Appellants 20-24. Robinson Plaintiffs say *Allen* "rejected the same argument Defendants make here" concerning proportionality. Robinson Supp. Br. 47; *see also* Galmon Supp. Br. 12. But *Allen* held that "[f]orcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2." 599 U.S. at 28. That is the same argument Appellants make here.

Plaintiffs next say *Allen* somehow supports the district court's "weigh[ing] [of] proportionality in the totality of the circumstances analysis." Robinson Supp. Br. 46. But nothing in *Allen* says that, and the case Plaintiffs cite, *Johnson v. De Grandy*, 512 U.S. 997 (1994), imposed a proportionality rule to cap the number of majority-minority districts a §2 challenger can reasonably demand. *See id.* at 1022-23. It did not treat the absence of proportionality as a basis of §2 liability.

More fundamentally, *Allen* made clear that the first *Gingles* precondition "limit[s] any tendency of the VRA to compel proportionality."

599 U.S. at 28. Thus, the "exacting requirements" must be fashioned to "limit judicial intervention" in the sensitive state function of redistricting. *Id.* at 29-30; *see also id.* at 42-43 & n.2 (Kavanaugh, J., concurring). But Plaintiffs insist there are no teeth in the first precondition. Any quasi-competent plaintiff can (1) draw up a plan with a new majority-minority district, (2) find *one* resident among millions in any state to say it respects some community of interest, (3) meet superficial mathematical or cosmetic standards skilled experts can reverse engineer after the fact, and (4) obtain proportional representation. That is all that happened here, and Robinson Plaintiffs' assertion that this is merely an "*outcome*," Robinson Supp. Br. 47, only proves it will nearly always be the outcome if the decision below is affirmed. *Allen* said the first precondition does not "demand[] that were another majority-black district could be drawn, it must be drawn," 599 U.S. at 24 (quotation marks omitted), because the first precondition is "exacting," *id.* at 30. The adjective "exacting" does not accurately describe Plaintiffs' arguments or the district court's rationale.[7]

[7] If a standard is "exacting," it should be applied after fulsome litigation on the merits, rather than on a highly expedited and prejudicial provisional basis.

B. Plaintiffs' Illustrative Plans, Which Compel Racial Gerrymandering, Cannot Form an Appropriate §2 Baseline.

The lack of compactness of the minority population is a sufficient basis for reversal, and the Court can and should end the analysis there. For the sake of completeness, this brief addresses an independent basis for reversal: that Plaintiffs' illustrative plans fail the *Gingles* thresholds and therefore do not establish any VRA violations. *See* Supp. Brief for Appellants 24-39. Plaintiffs mischaracterize Appellants' arguments on this point and misapprehend *Allen*'s import for these arguments.

1. Plaintiffs say Appellants demand "a veil of racial ignorance," Galmon Supp. Br. 15, and deny that "it is permissible to consider race when developing illustrative maps," Robinson Supp. Br. 29. That is not what Appellants argued. Rather, they argued that the first *Gingles* precondition is not satisfied where "race was the predominant factor motivating the . . . decision to place a significant number of voters within or without a particular district." *Bethune-Hill*, 580 U.S. at 188 (cited in *Allen*, 599 U.S. at 31). That is not a race-blind standard. It provides flexibility for the creation of majority-minority districts that are naturally occurring under local demographics and traditional districting

criteria. But a majority-minority district extending from Lafayette to Baton Rouge, to the Delta Parishes is not naturally occurring and could only be configured if "neutral considerations" were "cast aside." *Bethune-Hill*, 580 U.S. at 190. Where that happens, an illustrative plan fails the first step of *Gingles*.

Robinson Plaintiffs say *Allen* "never reached [the] question" whether the first *Gingles* precondition encompasses a predominance inquiry, because "the plurality concluded that race *had not* predominated in the plaintiffs' illustrative plans." Robinson Supp. Br. 30. This gets the order of operations backwards. The plurality would not have needed to find a standard *satisfied* if it were not first *applicable*, and the plurality stated that it was applying the "predominance" line the Court has "long drawn." 599 U.S. at 33.[8]

[8] With four dissenting Justices voting for a predominance standard, *see* 599 U.S. at 59 (Thomas, J., dissenting), the total votes for that standard is eight—easily clearing the count needed for a holding. *See* Supp. Brief for Appellants 25-26. Indeed, the dissent understood that the plurality opinion imposes a predominance standard, *id.*, and the plurality did not disagree—as the Court typically does when dissenting or concurring opinions misrepresent what it holds, *see, e.g.*, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2504 (2022); *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 143 S. Ct. 1258 n.10 (2023); *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018).

Robinson Plaintiffs claim that, if race predominated, "the Court would then need to determine whether such racial predominance was narrowly tailored to achieve the compelling governmental interest." Robinson Supp. Br. 32. As an initial matter, Plaintiffs would fail any narrow-tailoring test because their illustrative maps combine far-flung minority communities and split the State's major cities along racial lines. So the point is academic. In any event, the question here is not whether duly enacted legislation violates the Constitution—where a narrow-tailoring inquiry would be essential—but whether Plaintiffs' illustrative maps "satisfy the first step of *Gingles*." *Allen*, 599 U.S. at 33 (plurality opinion). If that step is not satisfied, then the challengers lose—full stop. *See id.* at 18 (majority opinion).

2. Plaintiffs do not deny that their illustrative plans, if established as the §2 baseline, would compel Louisiana to implement a redistricting plan having all the features of the affirmative action plans condemned in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (*SFFA*). And they agree that their construction of §2 imposes a racial-balancing requirement, Galmon Supp. Br. 15 n.3, that overcomes all non-racial criteria, *see, e.g.*, Galmon Supp.

Br. 8-10; Robinson Supp. Br. 15-30. Plaintiffs call *SFFA* "altogether-unrelated," Galmon Supp. Br. 18, because it "is not about redistricting or the VRA," Robinson Supp. Br. 39. But the same Equal Protection Clause that governs "commercial property," "beaches and bathhouses," "golf courses," "busing," "public parks," "transportation facilities," "education," and "peremptory jury strikes," *SFFA*, 143 S. Ct. at 2161 (cataloguing cases), and governs redistricting, *see, e.g.*, *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022); *Miller*, 515 U.S. at 927.

Contrary to Robinson Plaintiffs' assertions (at 42), there is no "logical end" point to the racially predominant redistricting Plaintiffs' §2 theory would impose. As applied here, their theory is commanding race-based redistricting today that was held to be both unnecessary and unlawful 30 years ago. *See Hays*, 839 F. Supp. at 1199. Robinson Plaintiffs do not explain how there could be an end point when the standards are only becoming less restrictive—and race-based—over time.

And their arguments, by their sheer confusedness, show that will not occur if they prevail. One the one hand, Plaintiffs say that §2 claims will be more difficult "as residential segregation decreases." Robinson Supp. Br. 43 (quoting *Allen*, 599 U.S. at 28). But, in the prior paragraph,

they accuse Appellants of being "stuck in the past" because "demographic conditions change," Robinson Supp. Br. 42, which must mean segregation in Louisiana has become *more* pronounced since the 1990s.[9] The district court did not find that. In fact, elsewhere in Robinson Plaintiffs' brief they say (quoting the district court) that the first precondition could be "easily" met today because "of historical housing segregation which still prevails in the current day." Robinson Supp. Br. 11 (quoting ROA.6662). Obviously, "historical" housing segregation—which would have been at least as pronounced in the 1990s as today—cannot explain why the first precondition could not be met in *Hays* but—Plaintiffs insist—can be met now.

So what explains this contradiction? The §2 standard the district court applied is more lenient, more race-based, and more dependent on proportionality than it has ever been. That is the standard Plaintiffs advocate, the standard the district court adopted, and the standard this Court would make the law of this Circuit if it affirms.[10]

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[9] Louisiana's Black population is today almost exactly what it was in the early 1990s. *Compare* 862 F. Supp. at 124 n.4 *with* ROA.6707.

[10] The Court need not take Appellants' word on this. In *Nairne*, some Plaintiffs have joined other challengers for yet another §2 case

3. There can be no serious doubt that Plaintiffs' illustrative plans elevated proportionality over traditional redistricting principles and the requirement that any VRA remedy consist of a geographically compact minority population. This becomes obvious when examining the Supreme Court's robust body of racial-gerrymandering precedents, which direct courts to examine both "circumstantial evidence of a district's shape and demographics [and] more direct evidence going to . . . purpose." *Bethune-Hill*, 580 U.S. at 187. Rather than engage with that standard, Robinson Plaintiffs characterize Appellants' position as the contention that seeking "to create districts with a BVAP exceeding 50% . . . amounts to racial predominance as a matter of law." Robinson Supp. Br. 34. Appellants did not argue that. Rather, as the Supreme Court has clearly stated, "the use of an express racial target" is one item of evidence suggesting predominance. *Bethune-Hill*, 580 U.S. at 192. Thus, Appellants correctly noted the express target as part of a holistic inquiry. *See* Supp. Br. for Appellants 33-34.

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challenging Louisiana's legislative plans, demanding an increase of *nine* new majority-minority districts, exceeding proportionality. Obviously, Plaintiffs, their counsel, and their funders do not believe there is an end point to court-ordered majority-minority districts.

There is much more to the inquiry than that. *See id.* at 34-38. Robinson Plaintiffs selectively pick apart a small portion of it, *see* Robinson Supp. Br. 37-39, but they miss the forest for the trees. The fundamental problem is that a 50% BVAP target for *two* districts is highly constraining under Louisiana's current demographics and the dispersed nature of the State's Black population. Only one basic configuration satisfies the target, Plaintiffs' experts found that configuration and built upon it, and they had to undertake surgical line-drawing at the highest and lowest levels of the plan to achieve their non-negotiable goal. *See* Supp. Brief for Appellants 32-38; Opening Brief for Appellants 48-59. Together, the evidence unmistakably establishes that race was the overriding goal driving these configurations, and the district court's contrary conclusion exhibits legal error.

C. Semantics Cannot Overcome Deficiencies in Plaintiffs' §2 Claim.

At base, Plaintiffs' supplemental briefs argue simply that this case is just a victory lap for the redistricting plaintiffs' bar after *Allen*. Once Alabama's redistricting plan was found to violate §2, they suggest, the plan of its neighbor must as well. Yet it is difficult to think of an argument more contradicted by *Allen*'s "exacting" standard. *Allen*, 599

U.S. at 30. If the Supreme Court had believed it was issuing §2 liability in gross for the nation—or even a subset of it—the Court surely would not have emphasized that proportionality based on Black voting population exists only in three states, that the §2 standard is more difficult to achieve than ever, and that they do (and should) "rarely" succeed. *Id.* at 28. *Allen* addressed unique conditions in Alabama and cannot be read as an invitation for courts to impose proportionality everywhere else.

Having no basis for this dominant theme of their briefs in *Allen* itself, Plaintiffs make the untenable contention that Appellants have already conceded this point. *See, e.g.*, Galmon Supp. Br. 5-6; Robinson Supp. Br. 2-3. Nothing could be further from the truth. Appellants have always been clear that "[t]his case presents an even *weaker* case on the merits for Plaintiffs than for the challengers in *Merrill* [i.e., *Allen*]." Opening Brief for Appellants 2 (emphasis added). The greater subsumes the lesser. So—of course—Appellants argued that reversal by the Supreme Court in *Allen* would compel reversal in this case, which is all the quotations Plaintiffs collect say when read in context. But the lesser does not subsume the greater. The Court's closely divided affirmance in

Allen does not mean that a weaker case in Louisiana necessarily succeeds as well. The very fact that Plaintiffs feel compelled to misconstrue arguments of Appellants' counsel as they do—as their overriding theme—reveals a lack of confidence in their ability to persuade on the merits.

III. Plaintiffs Have Not Established the Third Precondition.

To see how different Louisiana is from Alabama, the Court need only look at voting patterns. At the remedy phase in *Allen*, the district court found that, in Alabama, a congressional district of nearly 40% BVAP would practically never enable Black voters to elect their preferred candidates. *See Singleton v. Allen*, ___ F. Supp. 3d ___, 2023 WL 5691156, at *34 (N.D. Ala. Sept. 5, 2023). By contrast, Plaintiffs' experts admit that, in Louisiana, districts "[i]n the 40 percent range" would perform as at least equal-opportunity districts. *See* Reply Brief for Appellant 12-13 (quoting record in this case). An amicus brief of mathematics and computer-science professors at LSU and Tulane University presents an analysis of nineteen elections asserting that districts of about 42% BVAP afford an equal minority electoral opportunity. ROA.1854; ROA.1858; ROA.1865-66. Thus, while Alabama presents an instance "of intensive

racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate," *Allen*, 599 U.S. at 30 (alterations accepted; quotation marks omitted), Louisiana consists of "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). In such cases, "majority-minority districts [are] not . . . required in the first place." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (plurality opinion). As Appellants have explained, §2 liability cannot lie on that basis alone. Opening Brief for Appellants 59-69; Reply Brief for Appellants 9-20.

Robinson Plaintiffs do not mention this stark difference, even as they feel the need to address the third precondition, *see* Robinson Supp. Br. 44-46, on which there was "no serious dispute" in *Allen* (and, thus, no meaningful discussion), 599 U.S. at 22. And it is simply not true that Plaintiffs' "offered the same kind of evidence of polarized voting as had the plaintiffs in *Milligan*," or that the "levels" are likewise "extreme." Robinson Supp. Br. 45. Plaintiffs' experts admitted that majority-minority districts are unnecessary in Louisiana to create equal minority

opportunity. Reply Brief for Appellants 10-13 (quoting Plaintiffs' experts). The Supreme Court explained in *Bartlett* that the third precondition is "not met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." *Bartlett*, 556 U.S. at 16 (plurality opinion). In fact, *Bartlett* criticized the petitioners' counsel in that case for having "conceded the third *Gingles* requirement in state court." *Id.* Appellants did not concede the third precondition here, and Plaintiffs did not show a likelihood of success on it.

CONCLUSION

The Court should vacate or reverse the preliminary injunction and remand this matter to the district court with instructions to conduct a trial on the merits in time for the 2024 congressional elections.

Dated: September 27, 2023

*s/ Richard B. Raile**

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2023, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Dated: September 27, 2023 *s/ Phillip J. Strach*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing is 6,303 words, excluding the parts that are exempted under Fed. R. App. P. ("Rule") 32(f), and is in compliance with the Court's June 28, 2023 Directive, CA5 Dkt. No. 242, and the type-volume limitation of Rule 32(a)(7)(B) for reply briefs. It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Century Schoolbook font, a proportionally spaced typeface with serifs.

Dated: September 27, 2023 *s/ Phillip J. Strach*