No. 23A_____

IN THE SUPREME COURT OF THE UNITED STATES

IN RE JEFF LANDRY, *IN HIS OFFICIAL CAPACITY AS THE LOUISIANA ATTORNEY GENERAL*, ET AL.

On Application for Stay Pending Appeal from the United States Court of Appeals for the Fifth Circuit

EMERGENCY APPLICATION FOR STAY OF WRIT OF MANDAMUS

Jacob D. Shelly
Daniel Cohen
Qizhou Ge
ELIAS LAW GROUP LLP
250 Massachusetts Ave, NW
Suite 400
Washington, D.C. 20001
(202) 968-4490

Abha Khanna
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue,
Suite 2100
Seattle, Washington 98101
(206) 656-0177
AKhanna@elias.law

Counsel for the Galmon *Applicants*

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants include individual voters Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard, who were Respondents in the proceedings below.

Respondents include Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, National Association for the Advancement of Colored People Louisiana State Conference, and Power Coalition for Equity and Justice, who were Respondents in the proceeding below.

Respondents include Kyle Ardoin, in his official capacity as the Secretary of State for Louisiana, who was Petitioner in the proceedings below.

Respondents also include Clay Schexnayder, in his official capacity as the Speaker of the Louisiana House of Representatives, and Patrick Page Cortez, in his official capacity as the President of the Louisiana Senate, who were Defendant-Intervenors in the proceedings below.

Respondents also include the State of Louisiana, by and through Attorney General Jeff Landry, which was Petitioner-Intervenor in the proceedings below.

The proceedings below were:

1. *Robinson, et al. v. Ardoin, et al.*, No. 3:22-cv-00211 (M.D. La.).

2. *Galmon, et al. v. Ardoin, et al.*, No. 3:22-cv-00214 (M.D. La.), which was consolidated with *Robinson*.

3. *In re Jeff Landry*, No. 23–30642 (5th Cir.), on petition for writ of mandamus from the United States District Court for the Middle District of Louisiana, No. 3:22-cv-00211 (Hon. Shelly D. Dick).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Applicants represent that they do not have any parent entities and do not issue stock.

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TO THE HONORABLE SAMUEL ALITO, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIFTH CIRCUIT.

Ever since the district court preliminarily enjoined Louisiana's congressional districting map in June 2022, Defendants below—the State of Louisiana, Louisiana Secretary of State Kyle Ardoin, and Louisiana's legislative leaders—have sought to avoid the entry of a remedial plan. Yesterday, the Fifth Circuit's last-minute writ of mandamus granted that relief by ordering the district court to cancel a remedial-phase hearing scheduled for next week. The ruling reflects a series of egregious mistakes that must be corrected.

First, the mandamus panel granted the writ on a basis that was not requested, and that has not been at issue in this case for well over a year. The panel concluded that the district court "had no warrant to undertake redistricting" "without having afforded the Louisiana legislature the first opportunity to comply with its ruling." App. 120a. To be sure, the Legislature *did* have the first opportunity to enact a remedial map, and both the district court and a Fifth Circuit motions panel determined that the allotted two weeks was sufficient, especially given that the Legislature made no serious efforts during that time to pass a remedial plan. But in the fifteen months since the legislative leaders' request for an extension was denied—including in the past three months since the remedial proceedings resumed after this Court vacated its stay—the legislative leaders have *not once* asked *any court* where proceedings have been pending—including the district court, Fifth Circuit, and this Court—for *any* additional time for the legislative process. In fact, *the legislative leaders did not join the request for mandamus below*.

The mandamus panel criticized the district court's remedial-phase scheduling order, observing that "[n]o mention was made about the state legislature's entitlement to attempt to conform the districts to the court's preliminary injunction determinations." App. 115a. In a critical respect, the panel was right—literally no mention has been made of this issue since June 2022 by anybody in this case, including the parties that petitioned for mandamus, and including the legislative leaders who have been active in this litigation from its inception as real parties in interest to defend the Legislature's prerogatives. If the Legislature desired additional time to enact a new congressional map since the stay was vacated in June 2023, surely its leaders would have said so in one of their two letters to this Court asking to continue the previous stay, in their letter to the Fifth Circuit merits panel asking it to remand with instructions to cancel the remedial hearing, in one of their two conferrals with Plaintiffs and three status conferences with the district court about scheduling matters, in one of their three district court filings related to the remedial schedule, or in the mandamus petition itself. The absence of any such request is dispositive. While no party contests the Legislature's right to enact a lawful districting plan in the first instance—a right that would not be abridged by concurrent remedial-phase judicial proceedings—the Legislature has openly declined that opportunity here. The district court provided *eleven weeks' notice* of the rescheduled hearing that has now been vacated, which reserved ample time for the legislative process.

The mandamus panel appropriately rejected the arguments that Defendants did make in favor of cancelling the remedial hearing. It should not have granted relief on alternative grounds that are entirely unfounded.

Second, mandamus is a flagrantly inappropriate mechanism to micromanage a district court's docket management. When this Court stayed proceedings in this case on June 28, 2022, the parties were on the literal eve of a remedial hearing scheduled for the following day. After the stay was vacated on June 26, 2023, on July 17, the district court reset the previously scheduled hearing for October 3–5. The mandamus panel concluded that this ordinary rescheduling of a hearing that parties had already fully prepared for was so beyond the pale that it required "one of the most potent weapons in the judicial arsenal." App. 115a. This is a gross abuse of the writ.

Third, mandamus is not an appropriate substitute for appeal. On August 25, 2023, Defendants asked the district court to cancel the remedial hearing, raising the same arguments about mootness and new case law that animated their petition for mandamus. The district court denied the motion on August 29. The mandamus petition followed on September 15. But mandamus was never intended as an easy fallback for litigants unable to satisfy the standards for interlocutory review or too impatient to await an appeal of final judgment. *See, e.g.*, *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

The mandamus panel observed that Defendants' appeal of the preliminary injunction is pending before a Fifth Circuit merits panel, and it fretted that "[d]enying mandamus effectively means a two-track set of appeals on the merits and the court-

ordered plan," which would "embarrass the federal judiciary and thwart rational procedures." App. 116a–117a. This is incoherent. The *mandamus petition* created a two-track set of appellate case numbers arising out of the same case. And the mandamus order does nothing to mitigate the prospect of simultaneous future appeals of the merits and the court-ordered plan. Permitting litigants to evade the orderly appellate process prescribed by the federal rules by seeking a writ of mandamus over routine scheduling orders surely will thwart rational procedures. And embarrassment is best avoided by adhering to the actual facts and law contested in each dispute.

The Court should stay the writ of mandamus and the accompanying mandate.[1]

OPINIONS BELOW

Applicants seek an administrative stay and a stay or injunction pending appeal of the Fifth Circuit's mandamus order, entered on September 28, 2023. The Fifth Circuit mandamus panel's opinion is reproduced at App. 112a–129a. The district court's denial of Respondents' motion to cancel the remedial hearing at issue is reproduced at App. 62a–63a. The Fifth Circuit mandamus panel's order denying the emergency motion for stay is reproduced at 130a.

JURISDICTION

This Court has jurisdiction to resolve this application under 28 U.S.C. Sections 1331 and 2101(f).

[1] In the alternative, if the Court declines to grant the stay, Applicants respectfully suggest the Court construe this application as a petition for writ of certiorari, grant the petition, and summarily reverse.

STATEMENT OF THE CASE

I. The Legislature has been represented through the duration of this litigation.

Plaintiffs filed their complaint against Secretary of State Kyle Ardoin on March 30, 2022, challenging Louisiana's congressional districting map as a violation of Section 2 of the Voting Rights Act. *See Robinson v. Ardoin*, 605 F. Supp. 3d 759, 768 (M.D. La. 2022). Six days later, Louisiana's legislative leaders—Speaker of the Louisiana House of Representatives Clay Shexnayder and Louisiana Senate President Patrick Page Cortez (the "Legislative Intervenors")—intervened to represent the Legislature's interests. *Id.* Shortly thereafter, the State of Louisiana, by and through its Attorney General, intervened as well. *Id.* These Defendants have been active participants throughout this case.

II. The district court provided the Legislature an opportunity to remedy the Section 2 violation.

On June 6, 2022, the district court preliminarily enjoined Louisiana's congressional map and previewed that it would begin the process of identifying a remedial plan if the Legislature did not enact its own remedy by June 20, 2022. *See Robinson*, 605 F. Supp. 3d at 766. Defendants complained that 14 days was insufficient to enact a remedial plan because of the rules governing the legislative process. But as the district court explained in denying the stay motion, Defendants' argument was unpersuasive, as the legislative process (including committee hearings and bill readings) would take, at most, 10 of the 14 days provided. *Robinson v. Ardoin*, No. CV 22-211-SDD-SDJ, 2022 WL 2092551, at *1 (M.D. La. June 9, 2023).

On June 12, 2022, the Fifth Circuit motions panel affirmed the denial of Defendants' stay request. It recognized that the timeline prescribed by the district court preserved at least five full working days, and "the defendants do not explain, beyond bare assertion, how or why that period is too short." *Robinson v. Ardoin*, 37 F.4th 208, 232 (5th Cir. 2022) (motions panel). Further, given that the Legislature had already considered alternative maps with two majority-minority districts—and had the benefit of a variety of illustrative configurations introduced before the preliminary injunction hearing—the motions panel recognized that "the record suggests [the allotted] period *would* suffice." *Id.* (emphasis in original).

On June 13, 2022, the Legislative Intervenors moved again to extend the deadline for their legislative process, and the district court held a hearing and heard witness testimony on the matter. *See* Minute Entry for 6/16/2022 Motions Hearing, *Robinson v. Ardoin*, No. CV 22-211-SDD-SDJ (M.D. La., June 16, 2022), ECF No. 196. The hearing confirmed that the Legislature had failed to diligently pursue committee hearings in the interim, and that there was no obstacle to the Legislature working to enact a remedial plan concurrently with the district court's own process to ensure that a lawful districting plan would be in place if legislative efforts failed. Accordingly, the district court denied the Legislative Intervenors' motion but expressly invited parties on *both sides* of the case to submit a proposed remedial map. *Id.* Defendants—including the Legislative Intervenors—did not submit one.

On June 28, 2022, this Court stayed the preliminary injunction pending its resolution of a parallel Section 2 case out of Alabama. *See Ardoin v. Robinson*, 142 S.

Ct. 2892, 2892 (2022). The stay was vacated on June 26, 2023. *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023). During this pendency, the Legislature did not meaningfully prepare to enact a remedial map.

III. The Legislature dropped its request for additional time to enact a remedial congressional map.

This year, Defendants have not represented in any of their communications with this Court, the Fifth Circuit, or the district court that the Legislature desired additional time to enact a remedial map.

After this Court issued its opinion in *Allen v. Milligan*, 599 U.S. 1 (2023), Defendants submitted letters to this Court on June 8 and June 22, 2023, asking the Court to schedule merits briefing and oral argument. *See* Letter Req. Briefing and Arg. Schedule, *Ardoin v. Robinson*, No. 21-1596 (U.S. June 8, 2023); Resp. Letter of K. Ardoin, *Ardoin v. Robinson*, No. 21-1596 (U.S. June 22, 2023). Neither submission suggested that the stay then still in effect should be extended to permit the Legislature time to enact a new map.

On June 28, 2023, the Fifth Circuit invited party submissions "addressing whether this court should remand the appeal to allow the district court to consider" the *Allen* decision. App. 7a. In response, Defendants requested that the Fifth Circuit vacate the preliminary injunction and direct the district court to conduct a trial on the merits. App. 9a. Defendants offered three reasons for this request: first, they believed the trial court should address intervening authority; second, they argued the preliminary injunction was moot; and third, they advised that remand is "the optimal case-management approach" because the preliminary injunction proceedings "did not

have the benefit of a fulsome record," and additional time would "permit the parties to brief any issues with respect to recent Supreme Court authority." App. 10a–12a. Nothing in this submission reflected a desire to provide the Legislature additional time to enact a remedial map. The Fifth Circuit implicitly denied Defendants' request to vacate and remand, scheduling oral argument on the pending appeal of the preliminary injunction in the ordinary course.

On June 27, 2023, Plaintiffs asked the district court to schedule a status conference to "establish a timeline for resuming the process for establishing the remedial maps, including but not limited to (i) entering a schedule for supplemental briefing and remedial maps; and (ii) setting forth a date for an evidentiary hearing to resume consideration of the maps." App. 4a. In response, Defendants argued that they "oppose restarting the preliminary injunction proceedings because it would only inject unnecessary delay into this matter." App. 23a–24a. Defendants did not suggest that any litigation schedule should preserve time for legislative proceedings. The parties repeated their positions in a telephonic conference with the district court on July 12, 2023. *See* App. 32a.

On August 17, 2023, the district court reset the previously scheduled remedial phase hearing for October 3–5, 2023, and ordered the parties to confer and submit a proposed pre-hearing schedule order. App. 33a. Defendants proposed a pre-hearing exchange of supplemental expert reports and briefs and explained that their proposal was "designed to allow the parties to focus their time and resources on supplementing the record on Plaintiffs' joint proposed plan." App. 40a. Defendants previewed that

their "supplementation may include new fact and expert witnesses who were not offered during the very expedited remedial phase proceedings that had been scheduled in 2022," *id.*, but their proposed schedule did not include time for the Legislature to enact a new map, *see* App. 37a, and Defendants did not renew their complaint from June 2022 that the pace of the remedial schedule deprived the Legislature of its own prerogatives.

On August 25, 2023, Defendants moved the district court to cancel the remedial hearing and schedule trial. App. 44a–45a. Because the district court had yet to issue pre-hearing deadlines, Defendants argued there was no longer "enough time for the necessary disclosures and expert reports in advance of the hearing, and if the Court were to conduct it anyway, it would sacrifice the quality of presentations and, by consequence, the quality of any future ruling." App. 52a. Defendants did not express any concern that there was insufficient time for new legislation. The district court denied the motion on August 29, 2023, noting that sufficient time remained to prepare for the remedial hearing because "Defendants elected not to prepare any remedial maps," and witness lists, exhibit lists, and expert reports related to Plaintiffs' proposed map had already been exchanged. App. 63a. The court found that "based on the remaining issues before it, there is adequate time to update the discovery needed in advance of the hearing to take place October 3–5, 2023," and it referred the matter to a magistrate judge for entry of a scheduling order. *Id.* Defendants did not appeal this order.

During a meet-and-confer with Plaintiffs on August 31, and in status conferences held before the magistrate judge on August 31 and September 1, Defendants' only request was for an opportunity to submit expert reports that had not previously been disclosed—they did not raise the prospect of any legislative remedy, and when the magistrate judge indicated that the remedial hearing could be postponed to late October or early November, Defendants did not indicate that they would prefer the postponement. On September 6, Defendants filed proposed deadlines for parties to disclose witnesses, expert reports, exhibit lists, and pre-hearing briefs. App. 65a. The submission did not propose a period for the Legislature to enact a remedy. The district court adopted Defendants' proposal, tweaking it only to provide Plaintiffs with the same opportunity as Defendants to submit supplemental and new expert reports. App. 69a.

On September 15, 2023, 17 days after the district court denied Defendants' motion to cancel the remedial hearing, the State of Louisiana and Secretary Ardoin (collectively, "Petitioners")—but *not* the Legislative Intervenors—petitioned the Fifth Circuit for a writ of mandamus "directing the district court to vacate the currently scheduled preliminary-injunction remedial hearing and to instead set a trial date regarding the Plaintiffs' Section 2 Voting Rights Act challenges to the State of Louisiana's congressional districts." App. 77a. Echoing the exact same arguments they had made to the district court, Petitioners maintained that a remedial hearing would be inappropriate because the preliminary injunction was moot, App. 89a, the State "was prevented from fulsomely defending its case by virtue of the expedited

preliminary-injunction proceedings," App. 92a, and the "changing legal landscape in the wake of *Allen v. Milligan* and *Students for Fair Admissions v. University of North Carolina"* counseled against a remedial hearing, App. 94a. The petition did not raise any concerns on behalf of the Legislature or about the legislative process.

IV. The Fifth Circuit mandamus panel rejected Defendants' arguments but granted relief on an issue that was not before it.

The mandamus panel entered a briefing schedule by a 2-1 vote on September 17, 2023. App. 108a–109a. In dissent, Judge Higginson explained that he would reassign the petition to the merits panel assigned to hear argument on October 6, recognizing that Petitioners' mandamus arguments mirrored those made in their merits appeal. App. 109a. The matter was fully briefed on September 20, but the mandamus panel waited over a week—until September 28—to rule on the matter. By another 2-1 vote, the panel granted the petition in part based on an issue that no party had raised in briefing. App. 112a.

The panel expressly rejected Petitioners' argument that the preliminary injunction was moot, App. 117a n.4, and ignored Petitioners' invocation of this Court's June 2023 opinions on the Voting Rights Act and affirmative action. But it latched onto Petitioners' complaint that the weakness of their evidentiary showing in the preliminary injunction proceedings was traceable to the district court's allegedly accelerated schedule. The panel reimagined this criticism from the *State* about time to *develop expert reports* as a plea from the *Legislature* for more time to *enact a remedial plan*. App. 119a.

The panel determined that Petitioners were not using mandamus as a substitute for appeal because Defendants had already appealed the preliminary injunction, and a "two-track set of appeals" would somehow "embarrass the federal judiciary." App. 116a. In dissent, Judge Higginson recognized Petitioners had "present[ed] the same issues and request[ed] the same relief" in the pending merits appeal, App. 128a, and noted that Petitioners' arguments had appropriately been rejected where previously considered. The majority, he recognized, was responsible for the very dual-track appellate consideration it criticized, and it did so in a manner entirely outside the proper scope of mandamus. *Id.*

V. Plaintiffs seek emergency relief.

Plaintiffs sought an emergency stay in the Fifth Circuit earlier today, which the mandamus panel denied. App. 131a. Because of the exigencies of a hearing scheduled to commence on Tuesday morning, including travel by counsel and witnesses, Plaintiffs seek immediate resolution to permit the hearing to continue as planned.

ARGUMENT

Applicants warrant a stay pending appeal because there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial

of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). The balance of the equities and relative harm to the parties also favor a stay. *Id.*[2]

This case features exceptional circumstances making immediate relief appropriate, in anticipation of summary reversal or plenary review on the merits. Absent this Court's intervention, the implementation of a lawful congressional districting map in Louisiana—already postponed in 2022—may be denied again in next year's elections. Louisianans, particularly Black Louisianans, will suffer irreparable injury by being forced to vote for a second consecutive election in congressional districts that a federal court has found likely to violate federal law, with no indication by any appellate court that its analysis was mistaken. A lawful interim districting plan must be entered promptly—in accordance with the full and deliberate process that the district court has provided—to ensure the violation does not persist as this case proceeds to final judgment on the merits.

I. This Court is likely to vacate the mandamus ruling.

The order below suffers at least three fatal flaws that make vacatur likely. The mandamus panel ordered relief that was not requested by any party, encroached the

[2] The All Writs Act, 28 U.S.C. § 1651(a), also empowers this Court to grant injunctive relief as necessary to preserve its appellate jurisdiction. *See, e.g.*, *U.S. Alkali Export Ass'n v. United States*, 325 U.S. 196, 201–02 (1945). Because the Fifth Circuit's decision is appealable only to this Court by writ of certiorari, 28 U.S.C. § 1254(1), the requested stay pending appeal would be "in aid of [this Court's] jurisdiction[]," § 1651(a), and "cannot be obtained in any other form or from any other court," Sup. Ct. R. 20.1.

district court's prerogative to manage its own docket, and impermissibly substituted a writ for the regular appellate process.

A. The Legislature has not requested additional time to enact a remedial congressional map.

The writ entered below is premised on a glaring factual mistake, presupposing that the Legislature desires additional time to enact a remedial plan when, in fact, it does not. The mandamus panel's observations are disconnected from the facts of this case. The panel remarked that the district court provided "merely five weeks" for the State to finalize its criticism of Plaintiffs' proposed remedy, App. 115a, ignoring that Plaintiffs had submitted their proposed remedial plan a year earlier and, as counsel for Defendants conveyed in a status conference, Defendants' experts had been preparing rebuttal reports all the while. The panel noted that "[n]o mention was made about the state legislature's entitlement to attempt to conform the districts to the court's preliminary injunction determinations," *id.*—due, of course, to the fact that no Defendant had expressed any concern about the Legislature's ability to pursue its prerogatives if it so desired. The panel observed that in parallel Section 2 litigation in Alabama, defendants "never contended that its defense was unduly truncated," App. 118a, again ignoring the mirror fact here that the Legislature has not complained since June 2022 that the judicial schedule would truncate its legislative process. And while the panel seemed to scold the district court for providing the Legislature only 14 days to enact a remedy in advance of the court taking up the task,

the panel made clear that it "express[ed] no opinion" about the "propriety of that timetable," and thus did not base its order on the 2022 schedule. App. 119a.

The mandamus panel further admitted that "[i]f this were ordinary litigation, this court would be most unlikely to intervene in a remedial proceeding for a preliminary injunction." App. 121a. The full weight of the order rested entirely on the false notion that the Legislature needed additional time in summer and fall 2023 to enact a remedial congressional map, when nobody—and certainly not the Legislature itself—had ever suggested such a thing.

B. Mandamus is not appropriate to micromanage the district court's docket.

This case involves an appellate court granting the extraordinary remedy of mandamus relief for a completely spurious reason: to better manage the district court's docket by vacating the district court's preliminary injunction hearing scheduled to begin on October 3. App. 112a. This is not an acceptable use of mandamus under any settled law.

Mandamus relief is a "drastic and extraordinary remed[y] . . . reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. at 259–60. "Only a showing of 'exceptional circumstances amounting to a judicial usurpation of power' or 'a clear abuse of discretion' will justify granting a mandamus petition." *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 350 (5th Cir. 2017) (quoting *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004)); *see also Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) ("The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful

exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so."). When a district court "acted within its jurisdiction as a district court[and] no action or omission on its part has thwarted or tends to thwart appellate review of the ruling," mandamus is not appropriate. *Roche*, 319 U.S. at 26. Moreover, the party seeking mandamus relief has "the burden of showing that its right to issuance of the writ is 'clear and indisputable.'" *Will v. United States*, 389 U.S. 90, 96 (1967) (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)).

Here, the challenged district court's action is among the most ordinary and discretionary acts a court can take: scheduling a hearing based on its docket. There is a "power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, 254–55 (1936). In exercising this judgment, "an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183–84 (1952). The district court soundly exercised its discretion in scheduling the remedial hearing for October 3–5, 2023. As discussed, the parties had fully prepared for a previous iteration of this hearing that was postponed in June 2022, and, after proceedings resumed this year, the hearing was rescheduled with ample forewarning and after multiple party contributions about the appropriate pacing. Indeed, the district court adopted the set

of prehearing deadlines *proposed by Defendants*. App. 68a–69a. These deadlines went unchallenged.

The district court's provision of 11 weeks' notice of the October 3 hearing was reasonable, and whether parties should have received somewhat more notice is neither an "exceptional circumstance[] amounting to a judicial usurpation of power" nor a "clear abuse of discretion" that justifies mandamus relief. *In re Depuy Orthopaedics*, 870 F.3d at 350 (quoting *Cheney*, 542 U.S. at 380). Likewise, Defendants' right to reschedule a preliminary injunction hearing is not "clear and indisputable," as this posture requires. *Will*, 389 U.S. at 96 (citation omitted). Indeed, such a "right" is lacking altogether.

This case is analogous to *Roche*, where the Court concluded that the Ninth Circuit improperly granted mandamus relief to correct a district court's alleged error in performing a discretionary act squarely within its jurisdiction: striking pleas in abatement to a criminal indictment. 319 U.S. at 25. The Court reasoned that because that case "involve[d] no question of the jurisdiction of the district court," nor did it "involve a refusal by the district court to adjudicate issues properly presented to it," mandamus was inappropriate. *Id.* at 26–27. As the Court held, "the district court acted within its jurisdiction as a federal court to decide issues properly brought before it. Its decision, even if erroneous . . . involved no abuse of judicial power, and any error which it may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment and by this Court by writ of certiorari." *Id.* at 27. The same rationale applies here: the mandamus panel

improperly granted the writ when the district court had plainly acted within its jurisdiction in scheduling a hearing on the preliminary injunction, and any error the district court may have committed would be reviewable on appeal.

C. Mandamus may not be used as a substitute for appeal.

It is settled law that mandamus "is not a substitute for an appeal." *In re Depuy Orthopaedics*, 870 F.3d at 350 (internal quotation marks omitted) (quoting *In re Chesson*, 897 F.2d 156, 159 (5th Cir. 1990)); *see also Roche*, 319 U.S. at 26 (mandamus "may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute"). Yet that is precisely what Defendants accomplished below. Defendants asked the district court to cancel the remedial hearing on the exact same bases that they repeated in their mandamus petition. Rather than appeal the district court's denial of their request, on an interlocutory basis or after a final judgment, Defendants inappropriately short-circuited the regular process by seeking writ relief.

The mandamus panel, in turn, dismissed the availability of ordinary appellate review as a mere "paper right," worrying that the appellate process would "embarrass the federal judiciary," "create uncertainty for the state," and result in "legal chaos" if Defendants were forced to play by the rules. App. 116a–117a. But these concerns are not part of the mandamus standard. Judges may not manufacture extraordinary conditions to apply the extraordinary relief of mandamus simply by speculating about potential negative consequences resulting from ordinary appellate review. If that were the case, then *any* interlocutory order could form the basis for mandamus relief. *See Bankers Life & Cas. Co.*, 346 U.S. at 382–83 (holding mandamus was not

appropriate remedy to set aside court's order of severance and transfer because, if it were, "then every interlocutory order which is wrong" could be the subject of mandamus, and "[t]he office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction.").

II. Declining to stay inflicts irreparable harm, and the balance of equities weighs in favor of a stay.

Issuing a stay will not substantially injure the parties, will prevent irreparable harm, and will serve the public interest. *See Nken v. Holder*, 556 U.S. 418, 426 (2009).

A. Issuing the stay does not substantially injure the parties.

The parties have now fully prepared for this remedial hearing *twice*. Before the remedial hearing originally set for June 29, 2022, as the district court explained, "[t]he preparation necessary . . . was essentially complete." App. 63a. "The Plaintiffs disclosed proposed remedial maps, witnesses and exhibits were disclosed; expert reports were disclosed; and Defendants deposed Plaintiffs' identified experts." *Id.* After this Court vacated its stay on June 26, 2023, the district court provided 11-weeks' notice of the rescheduled hearing. The parties remain on pace for the October 3 start date. Defendants disclosed their anticipated fact witnesses and served all four of their desired expert reports by September 15, 2023, and their only remaining substantive responsibility is to submit a prehearing brief today. Plaintiffs are also prepared to abide by the district court's schedule. And even if Defendants desired

additional preparation, the burdens of litigation do not constitute irreparable injury. *See F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980).

Nor is the Legislature, which has been provided with ample opportunities to enact a remedial map, harmed by a stay. In June 2022, the Legislature had 14 days to enact a remedial plan—a reasonable timeline given that the legislative process would take, at most, 10 of the 14 days provided. *Robinson*, No. 22-211-SDD-SDJ, 2022 WL 2092551, at *1. The Fifth Circuit motions panel agreed that the time provided was sufficient, recognizing that the Legislature had the benefit of several illustrative configurations and had already considered alternative maps with two majority-minority districts. *Robinson*, 37 F.4th at 232. Since the remedial proceedings resumed in July 2023, the Legislature has not moved to enact a remedial map, nor have Defendants represented in any communications that the Legislature desired additional time to enact a remedial map. App. 7a, 23a–29a, 37a.

Moreover, holding the remedial hearing does not preclude the Legislature from enacting a remedial map. The remedial hearing merely permits the district court's consideration—and, if necessary, interim adoption—of a party-proposed remedy, and that process can run concurrently with legislative efforts. *See Norelli v. Sec'y of State*, 175 N.H. 186, 204, 292 A.3d 458, 471 (2022) (per curiam) (concluding court will "take the necessary steps to formulate a district plan that complies with all applicable laws in order to protect the fundamental rights" of voters, while reiterating that "the legislature is not precluded from enacting a legally valid congressional district plan

at any time"). Moving forward with the remedial hearing does not deprive the Legislature of the opportunity to enact a map should it choose to act.

Nor is this a case where it would be difficult or impossible to "reverse the harm" absent a stay. *Hollingsworth*, 558 U.S. at 195. Nothing would prevent Defendants from appealing determinations of the remedial hearing in the ordinary course,[3] and adopting a remedial map at the preliminary-injunction stage does not preclude a trial on the merits—in fact, in a letter to the mandamus panel, the district court expressly contemplated a merits trial incorporating evidence from the injunction hearings. App. 110a–111a ("[S]hould this matter proceed to a trial on the merits . . . . the evidence adduced at the injunction hearings is admissible at trial and becomes part of the trial record along with any new evidence admitted at trial."). Ignoring this, the mandamus panel expressed concern that following normal appellate procedures would "embarrass the federal judiciary and thwart rational procedures" because appealing the liability determinations and the remedial map determinations would "create uncertainty for the state" and result in "legal chaos," App. 116a–117a, but these concerns assume too much. The Fifth Circuit panel not only assumes that both determinations will be decided on conflicting timelines but also that there will likely be conflicting determinations and that these conflicts are too close to the 2024 elections to be decided in time. App. 117a ("The likelihood of conflicting courts'

[3] *See* [Proposed] Scheduling Order, *Milligan v. Allen*, No. 2:21-cv-1530-AMM (N.D. Ala., Jan. 5, 2023), ECF No. 156-1 (order recognizing parties' agreement to continue remedial phase of preliminary injunction); Corrected Notice of Appeal of Order Granting Prelim. Inj., *Milligan v. Allen*, No. 2:21-cv-1530-AMM (N.D. Ala., Sept. 6, 2023) ECF No. 281 (notice of appeal of remedial-phase order in ordinary course).

scheduling and determinations will create uncertainty for the state and, more important, the candidates and electorate who may be placed into new congressional districts."). This speculation is not grounded in evidence and does not provide a valid basis for mandamus.

B. Issuing the stay would prevent irreparable harm and serve the public interest.

Louisiana's map was found likely to violate Section 2 on June 6, 2022. Plaintiffs—and Louisianians—have waited sixteen months for a redistricting plan to remedy that violation. While there is no irreparable harm to continuing to the remedial hearing, continuing to forego relief to address the Section 2 violation harms all Louisianians. *Robinson*, 605 F. Supp. 3d at 852 (concluding that "protecting voting rights is quite clearly in the public interest, while allowing elections to proceed under a map that violates federal law most certainly is not"). A stay is in the public interest.

The mandamus panel recognized that the anticipated court-ordered redistricting plan will likely be appealed to the Fifth Circuit and then to the Supreme Court and that the appeals process would "persist well into the 2024 election year." App. 117a. If the remedial hearing moves forward on October 3–5, 2023, the case remains on track for trial by spring 2024, which eliminates concerns about ensuring final relief sufficiently in advance of the 2024 elections. In 2022, both the district court and the Fifth Circuit rejected Defendants' arguments that an injunction entered in June was too close to the election. *See Robinson*, 605 F. Supp. 3d at 856; *Robinson*, 37 F.4th at 228.

But certainty of resolution in time for the 2024 elections disappears if the remedial hearing is postponed indefinitely, pending the Louisiana Legislature's actions and the district court's availability, and Louisianians are in danger of voting in another election using a map that has already been found to be unlawfully drawn. Indeed, Defendants have delayed implementation of a compliant congressional map and then argued that it was too late to implement a remedial map before the midterm elections, citing the *Purcell* principle. *See Robinson*, 37 F.4th at 228. This Court should issue the stay to prevent the irreparable harm of Louisianians voting in yet another election under maps that violate federal law.

CONCLUSION

Applicants respectfully request that the Court stay the writ of mandamus and accompanying mandate.

Respectfully submitted,

/s/ *Abha Khanna*
Abha Khanna
Counsel of Record
ELIAS LAW GROUP LLP
1700 Seventh Avenue,
Suite 2100
Seattle, Washington 98101
(206) 656-0177
AKhanna@elias.law

Jacob D. Shelly
Daniel Cohen
Qizhou Ge
ELIAS LAW GROUP LLP
250 Massachusetts Ave, NW
Suite 400
Washington, D.C. 20001
(202) 968-4490

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