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

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Certificate of Interested Persons

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

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

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

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

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

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 Legros; and by the ACLU attorneys Samantha Osaki, Sarah E Brannon, Sophia Lin Lakin, and Tiffany Alora Thomas; and by attorneys Tracie L. Washington; and by John Nelson Adcock.

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

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

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

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

Dated: June 10, 2022

/s/ Richard B. Raile
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Attorney of Record for Appellants Clay Schexnayder and Patrick Page Cortez

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Plaintiffs fail to refute the many reasons a stay pending appeal is warranted. This Reply brief addresses just a few of their failings.

I. Likelihood of Success

Plaintiffs have little prospect of establishing at least the first and third *Gingles* preconditions.

A. The third precondition cannot be met "[i]n areas with substantial crossover voting." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). Plaintiffs accuse Appellants of arguing that "any amount of crossover voting invariably defeats a finding [of] *Gingles* III," *Robinson* Opp. 12, but that is a straw man. The question does not turn on "any" crossover voting but on whether it is sufficiently robust that "a VRA remedy" is unnecessary to ensure equal opportunity. *Covington v. North Carolina*, 316 F.R.D. 117, 168 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

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It is therefore not true that Appellants' argument "would effectively preclude relief" in any case. *Robinson* Opp. 13. Often, high white bloc voting, combined with low minority turnout, necessitates districts above 50% minority VAP. One of Plaintiffs' experts, Dr. Lisa Handley, demonstrated in a leading law review article that, in many regions, districts at or above 50% minority VAP are necessary, but in many regions they are not. Bernard Grofman, Lisa Handley & David Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C. L. Rev. 1384 (2001). That analysis speaks to the correct legal question. From Plaintiffs' experts' reports, it is

undisputed that such an analysis would likely show that 50% BVAP districts are unnecessary to ensure equal Black electoral opportunity. Mot. 10-11.

B. Plaintiffs, however, say the correct legal analysis measures white bloc voting against "the actually enacted plan."[1] *Robinson* Opp. 13; *Gallmon* Opp. 17. But that argument contravenes two Supreme Court decisions and the *Covington* summary affirmance.

In *Bartlett*, the Supreme Court addressed whether Section 2 requires districts below 50% minority VAP and answered in the negative, reasoning that "[i]t is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." 556 U.S. at 16. Stated differently, where voting patterns support effective crossover districts, the third precondition is not met. The Court explained that, in regions where crossover districts can perform, "majority-minority districts would not be required in the first place." *Id.* at 14.[2]

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Likewise, *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which Plaintiffs rely on (*Robinson* Opp. 18), supports Appellants: it invalidated a majority-minority

[1] The clean legal question presented in the brief defeats Plaintiffs' insistence that the clear-error standard applies. *Robinson* Opp. 12; *Galmon* Opp. 5. "This court reviews *de novo* the legal standards the district court applied to determine whether § 2 has been violated." *Fairley v. Hattiesburg*, 584 F.3d 660, 667 (5th Cir. 2009) (cleaned up).

[2] *Bartlett*'s discussion of the third precondition was essential to its holding, and even if it were dictum, it would still command this Court's adherence. *See Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013).

district because voting patterns would support a functioning minority-crossover district. *Id.* at 1471-72. Plaintiffs suggest that, because evidence of crossover voting was drawn from an actual crossover district under the prior decade's plan, this supports their distinction between "hypothetical" and "actual." *Robinson* Opp. 18. Not so. The crossover district in *Cooper* was hypothetical because the prior decade's plan was unconstitutionally malapportioned. The measure in *Cooper* was a hypothetical crossover district that might have replaced the former crossover district, and its "contours" were "nowhere specified." *Robinson* Opp. 16.

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The same is true in *Covington*, which held that majority-minority districts are neither required nor justified under Section 2 unless "the candidate of choice of African-American voters would usually be defeated without a VRA remedy." 316 F.R.D. at 168. Plaintiffs' assertion that it is irrelevant whether "a hypothetical district…with a BVAP below 50% could be drawn that would allow Black voters the opportunity to elect candidates of choice," *Robinson* Opp. 16, stands rejected in *Covington*, which explained that the way to assess legally significant white bloc voting is through "[a] 'district effectiveness analysis" of the type discussed above. 316 F.R.D. at 169 n.46 (relying on another of Plaintiffs' experts, Dr. Lichtman, including for this argument). The court made clear that the problem was that the North Carolina legislature "never made any determination whether majority bloc voting existed at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy." *Id.* at 168.

C. Appellants' theory makes sense; Plaintiffs' does not. In Appellants' view, the question is whether a majority-minority district is necessary. If not, why would Section 2 command it? Plaintiffs' try to sidestep this problem by divorcing liability from remedy. *Robinson* Opp. 16. But liability and remedy under Section 2 "merge," *E. Jefferson Coal. for Leadership & Dev. v. Par. of Jefferson*, 926 F.2d 487, 492 (5th Cir. 1991), because no remedy means no right and vice versa, *Growe v. Emison*, 507 U.S. 25, 41 (1993).

Plaintiffs' theory would render redistricting impossible because, to justify the racial predominance necessary to create majority-minority districts, states must address the *Gingles* preconditions before they enact or use a plan. *See, e.g.*, *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249-50 (2022). Knowing whether white bloc voting is legally significant "under the actually enacted plan" would require future time-travel. *Robinson* Opp. 13. Legislatures must address the *Gingles* preconditions as to "a hypothetical district."[3] *Robinson* Opp. 16. Indeed, the *Galmon* Plaintiffs' assertion that "*defenses* under the Voting Rights Act" demand different legal inquiries from "affirmative Section 2 claims," *Galmon* Opp. 19, would complete this absurdity by creating scenarios where legislatures are forbidden from creating majority-minority districts (as in *Covington* and *Cooper*) that are legally required (as Plaintiffs say is true here).

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[3] That point is underscored here, where Plaintiffs' rely solely on superimposed election results—which are hypothetical—on their alternative plans—which are hypothetical. To determine "what the right to vote *ought to be*" everyone concerned (court, litigants, legislatures) must consider the "hypothetical." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000).

Plaintiffs' theory would also overrule *Bartlett* by compelling states to draw crossover districts. Where crossover voting exists at the levels it does in Louisiana, the inevitable racial predominance of creating majority-minority districts could not be justified due to the fact that the state could have drawn performing crossover districts, as occurred in *Covington* and *Cooper*. But—as Plaintiffs would have it here—where a legislature avoided racial predominance and allowed lines to fall where they may, it would incur Section 2 liability if minority VAP levels fell outside of the functioning crossover-district range. The only way for a redistricting authority to satisfy both the VRA and the Equal Protection Clause would be to draw crossover districts. That would contravene the Supreme Court's "holding that § 2 does not require crossover districts." *Bartlett*, 556 U.S. at 23.

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D. This appeal is also likely to succeed on the first precondition. Plaintiffs acknowledge "using a threshold of 50% Black voting age population," *Robinson* Opp. 24, and the Supreme Court in *Cooper* found that this amounts to predominance, 137 S. Ct. at 1468-69. Plaintiffs' reliance on *Bartlett* as an excuse, *Robinson* Opp. 24, forgets that the legislature's reliance on *Bartlett* in *Covington* was *evidence of predominance*. 316 F.R.D. at 130.

Plaintiffs also repeat the district court's odd conclusion that the predominance test does not apply to remedial plans because they are prepared by "private parties," *Robinson* Opp. 24 (citing Op. 116), and this might have merit—except for the detail that Plaintiffs obtained a command from one *government* actor (the court below) to another (the Legislature) "to enact a remedial plan" with "an additional majority-Black congressional district." Op. 2. When

Plaintiffs go to court and demand the government impose a law on the public, they must accept the constitutional limits that constrain the government.

There is also no merit in Plaintiffs' argument that the Court should defer to the district court's findings that race did not predominate. The district court found that race was used "to draw a district exceeding 50% BVAP," Op. 112, and that is what predominance means, regardless of the semantic disputes Plaintiffs try to raise. The racial-predominance standard is a legal standard that must be applied properly. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (remanding for retrial under "the proper standard"). It was not applied properly here.

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Factually, it strains credulity to claim that race was not Plaintiffs' predominant, non-negotiable goal. All *six* of Plaintiffs' illustrative plans got their second majority-Black district by combining East Baton Rouge with the Delta Parishes. Dist.Ct.Dkt.160-1, at 127:9-18, 217:24-218:6. Plaintiffs' mapmaking experts admitted they knew of *no other way to draw the map* to yield two majority-Black districts, *id*. 130:1-9, 131:24-132:4, 220:23-221:6, and the *only* historical example they knew of those far-flung populations being drawn together: the 1990s-era gerrymander struck down in *Hays, id*. 139:13-142:2, 222:12-19. The racial design of these districts is clear.

II. The Equities

Legislative Appellants' motion explains why the equities favor—indeed, compel—a stay. Mot. 15-20. Plaintiffs' responses lack merit.

A. Plaintiffs (*Galmon* Opp. 24-25; *Robinson* Opp. 34-35) echo the district court's assertion that, because of statements in prior state-court litigation, "Defendants' argument that they will be irreparably harmed absent a stay is disingenuous." Mot. Ex. C at 2. But as a *matter of law*, irreparable harm follows from an injunction against a state statute. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020). Plaintiffs do not deny that, without a stay, the enacted plan will not govern the November election, which is *per se* irreparable harm. *See Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014). Their arguments that the irreparable-harm element is not met are foreclosed. *Galmon* Opp. 22-30.

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B. Additionally, the assertions of Legislative Appellants that Plaintiffs regard as incompatible with their *Purcell* argument have no relevance here, and Plaintiffs ignore *their own* assertions in the same litigation, which confirm that *Purcell* bars the injunction below.

To begin with context: in the state-court suit at issue, many of the *Robinson* Plaintiffs, represented by the same lawyers here, brought suit in March 2022 asking a state court to draw a congressional plan to govern 2022 elections because, Plaintiffs alleged, the Legislature and Governor had reached "impasse" and would be unable to pass a new plan in time to conduct 2022's elections. The suit was filed after the Governor vetoed the Legislature's redistricting bills, but before the legislative override. Legislative Appellants intervened and argued the dispute was not ripe because—as of March 25—there remained time for the Legislature to enact a plan to govern the 2022 election. Dist.Ct.Dkt.169-139, at 5-8. Plaintiffs and the court below view that as conceding away *Purcell* in this case,

but assertions made on March 25, 2022, *id.* at 12, regarding "predictions about the *future*," *id.* at 6, do nothing like that.

First, in explaining why an "impasse" had not been reached during March 2022, Legislative Appellants identified certain opportunities the *Legislature* might use to enact a plan in the *near* future—including the March 30 veto-override session and the 2022 Regular Legislative Session to end June 6. *Id.* at 6-7. The arguments, read as a whole, contemplated a timeline where a plan would be in place by late spring or early summer. *Id.* at 6-8. In impasse litigation, legislative passage of a redistricting bill moots the litigation, so there would be no subsequent proceedings. By contrast, in this case, the court's June 6th injunction—issued after a 24-day delay that ran out the clock on the Regular Legislative Session—must now be followed by a remedial process that offers no realistic possibility of a new plan for an unknown quantity of time, and no time for appellate review of liability or remedy prior to the 2022 elections. *See* Mot. 18.

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Second, the impasse lawsuit did not implicate the reliance interests at issue here. In the impasse case, a plan had not yet been enacted, so the State's election administrators had not already implemented a plan and educated the public about it. *See* SOS Mot. 14-20. Legislative Appellants certainly did not represent in the impasse case that, if a plan *were* enacted *and implemented*, an injunction calling for a new redistricting process would be proper or feasible.

All that aside, Plaintiffs are employing selective memory, forgetting that those Plaintiffs who participated in the impasse case vigorously disagreed with Legislative Appellants and told the state court that, unless it immediately

fashioned a plan, "[t]here would be no assurance that a properly apportioned map will be in place by the time the candidate qualifying period begins in July 2022, or even by the November election." Ex. D (attached hereto) at 2. Plaintiffs told that court, in March 2022, that "to ensure that redistricting is completed in time for the November 2022 elections, the Court must begin now." Ex. E (attached hereto) at 7. Plaintiffs argued that the July 20, 2022 candidate qualifying period was "rapidly approaching," Ex. D at 1, 10, and that a new plan could not wait until June 6, because the process "would have to be compressed into a matter of days," "make it difficult or even impossible for the Court to seriously consider the issues presented much less for the appellate courts to review any ruling," and "create a serious risk that Plaintiffs and other Louisiana voters will be without a constitutional map when the July 20, 2022 qualifying period arrives, or even before the November election." *Id.* at 6-7. They argued that delay (measured from March 2022) "could result in last-minute decisions that would invariably create uncertainty and confusion for voters and State officials who must manage the election." *Id.* at 2; *see id.* at 9 (contending that waiting until June or July to impose a plan, if even feasible on "such an expedited timeline," would pose "an enormous burden" and "potentially result in last-minute decisions" creating "unnecessary confusion and uncertainty.").

Assertions to that effect in March 2022 are all the more incompatible with their position here because the march of time cuts against them. Thus, if any litigants here "painted a very different picture" in the impasse case "than the one they paint for this Court," Op. 146, it is Plaintiffs.

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C. Plaintiffs acknowledge the *Purcell* principle and the Supreme Court's recent stay order, which turned on that principle. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Plaintiffs' efforts to distinguish *Merrill* only confirm the similarities. They assure the Court that "Election Day will not occur for another five months," *Robinson* Opp. 31, but that just echoes the *Merrill* dissent's complaint that "the primary date is in late May, about four months from now." 142 S. Ct. at 888. The timing here cannot be distinguished: a January injunction was prohibited in *Merrill* as to a May election, so a June injunction here must be prohibited as to a November election.

Plaintiffs erroneously look to *Wisconsin Legislature* to assess *Purcell*, but that case did not even mention *Purcell*. 142 S. Ct. at 1247-51. That is not surprising, since the Court was reviewing the Wisconsin Supreme Court's decision adopting a redistricting plan, and the Supreme Court does not view *Purcell* as shielding lower-court orders from its appellate review on federal questions. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Texas Democratic Party*, 961 F.3d at 412 (articulating this principle).

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CONCLUSION

The Court should stay the injunction below pending appeal.

Dated: June 10, 2022

/s/ Richard B. Raile

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Certificate of Compliance

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. ("Rule") 27(d)(2) because it is 2,599 words, excluding the parts that are exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced typeface with serifs.

Dated: June 10, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

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Certificate of Service

I hereby certify that on June 10, 2022, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Dated: June 10, 2022

/s/ Richard B. Raile
RICHARD B. RAILE