No. 24-109

In the
Supreme Court of the United States

LOUISIANA,

Appellant,

v.

PHILLIP CALLAIS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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SUPPLEMENTAL BRIEF FOR APPELLEE LOUISIANA SECRETARY OF STATE, NANCY LANDRY

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QUESTION PRESENTED

Whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1995 this Court warned that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Miller v. Johnson,* 515 U.S. 900, 912 (1995). The question presented in this Court's August 1 Order reveals that 30 years after *Miller,* courts are still grappling with the complex interplay between §2 of the Voting Rights Act ("VRA") and the offensive, demeaning, and unconstitutional practice of assigning voters to districting plans based on race.

The position of the Louisiana Secretary of State (hereinafter "the Secretary") is unique. Tasked with administering Louisiana's elections, the Secretary was the only original defendant in both the case below and in the oft-cited *Robinson* case that began in 2022. The Secretary's position here is unique for another reason—the Secretary has taken a consistent position on the Court's August 1, 2025 question since redistricting litigation began earlier this decade—namely that the intentional creation of a second majority-Black congressional district in Louisiana violates the Equal Protection Clause of the Fourteenth Amendment. This is the position the Secretary took in the *Robinson v. Ardoin* litigation, 605 F. Supp. 3d 759, 773 (M.D. La. 2022), the reason the Secretary did not participate in a fulsome defense of S.B. 8 in the trial court below, and the reason the Secretary did not join in the State's Jurisdictional

Statement.[1] Instead, on August 1, 2024, the Secretary filed a Rule 18.2 Notice, noting that she had no interest in the outcome of the appeal in its "current posture."

The current posture of the case is now unquestionably different. The State now "decline[s] to defend S.B. 8" on the "threshold question" presented, arguing that §2 is unconstitutional because it requires states to engage in race-based districting. (Louisiana Opening Suppl. Br. at 1). The Secretary agrees with that position. But the Secretary writes separately[2] to emphasize that, as applied to Louisiana, under 2020 Census data and the facts before this Court, Louisiana cannot constitutionally create a second majority-Black district because of Louisiana's dispersed minority population and the untenable and unyielding tension between §2 and the Equal Protection Clause.

The August 1 Order also apparently changed the position of the Robinson plaintiffs turned intervenors (hereinafter the "Robinson Intervenors"). The Robinson Intervenors now argue in their Opening Supplemental Brief (at 17) that §2 plaintiffs "must

[1] The Secretary joined the Emergency Application for Stay only because the orders for the timing of a remedial phase exceeded the timeline the Secretary needed (May 15, 2024), in order to be able to implement a map. *See* Emergency Stay Application, Docket No. 23A1002, at 5-6, n.1. In fact, at the time the Emergency Stay Application was filed, the only map in the Secretary's system was H.B.1, which would have "caus[ed] the least election administration disruption" if it had been implemented. *Id.*

[2] The Secretary submits this brief on the deadline set for Appellees because that is how the Secretary is classified on the Court docket.

adduce at least one illustrative map that comports with this Court's precedents regarding racial gerrymandering" and (at 16) that *Gingles* I "plays a significant role in limiting remedial redistricting under §2 to circumstances where current conditions show a constitutionally acceptable remedy to a §2 violation." The problem here for the Robinson Intervenors is stark—they took the opposite positions in the original districting litigation in 2022—that the illustrative map requirement of *Gingles* I was just that—illustrative. Specifically, Robinson Intervenors argued that illustrative plans have nothing to do with a remedy, and that the Equal Protection Clause did not apply to illustrative districts. *See supra* Section III(a).

The Middle District of Louisiana in *Robinson* agreed with that argument completely. 605 F. Supp. 3d at 836 (holding that the Equal Protection Clause "is not triggered" for "illustrative maps drawn by demographers for litigation"). If the position Robinson Intervenors take now is truly the correct legal position (notably it was the position espoused by the Secretary in both the Louisiana legislative[3] and congressional redistricting cases in the Middle District this decade), then the *Robinson* opinion was legally wrong, and cannot provide a strong evidentiary basis for using race to create S.B. 8 in 2024. *See Cooper v. Harris,* 581

[3] In addition to the Louisiana State Conference of the NAACP, individual Plaintiffs Dorothy Nairne, Clee Earnest Lowe, and Alice Washington are plaintiffs in both the legislative and congressional redistricting challenges filed in the Middle District of Louisiana. *See* Amended Complaint, *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ (M.D. La. Apr. 4, 2022) (Dkt. No. 14); Complaint, *Robinson v. Ardoin*, No. 3:22-cv-00211-SDD-SDJ (M.D. La. Mar. 30, 2022) (Dkt. No. 1).

U.S. 285, 306 (2017) (North Carolina's belief that it was required to draw majority-Black districts could not be based on a strong basis in evidence because it was a pure error of law).

As has been the Secretary's consistent position, when geography does not support the natural creation of an additional majority-Black district, then one cannot be created. As is the case in Louisiana this decade, the creation of a second majority-Black congressional district by slicing and dicing various communities, sometimes hundreds of miles apart, runs afoul of the Equal Protection Clause of the Fourteenth Amendment. Louisiana's geography, and the racial dispersion of its population throughout the state, simply does not support more than one majority-Black congressional district. Any attempt to achieve a second majority-Black congressional district—whether through the illustrative plans in the original *Robinson* litigation, or by the Legislature through S.B. 8—violates the Equal Protection Clause.

RELEVANT HISTORY TO THE QUESTION PRESENTED

After the 1990 Census, Louisiana enacted a congressional plan with two majority-Black districts. It was invalidated. *Hays v. Louisiana*, 839 F. Supp. 1188, 1209 (W.D. La. 1993), *vacated on other grounds by Louisiana v. Hays*, 512 U.S. 1230 (1994) (mem.). A second plan with two majority-Black districts was drawn. Again, a three-judge court concluded race predominated. *Hays v. Louisiana*, 862 F. Supp. 119, 124-25 (W.D. La. 1996) (holding a second majority-Black district failed because the minority population was too diffused outside of Orleans Parish to support a second majority-Black district) *vacated on other*

grounds by United States v. Hays, 515 U.S. 737 (1995). Heeding that warning, the state did not attempt to add a second majority-Black congressional district following the 2000 and 2010 decennial censuses, leaving the single majority-Black district anchored around Orleans Parish for three decades.

In March 2022, with a statewide Black voting age population ("BVAP") still at approximately 30% (approximately the same as the 1990 census), the Legislature, following the practice since *Hays,* enacted a congressional redistricting plan, H.B. 1, with one majority-Black district anchored in Orleans Parish. *Robinson,* 605 F. Supp. at 768, 851 (Louisiana's approximate BVAP from the 2020 Census is 31.25%); *Hays*, 862 F. Supp. at 124 n.4 (BVAP from the 1990 Census approximately 30%).

Two sets of plaintiffs, later consolidated, filed §2 actions challenging H.B.1 because the plan did not have two majority-Black districts. Complaint, *Robinson v. Ardoin*, 3:22-cv-00211-SDD-SDJ (M.D. La. Mar. 30, 2022) (Dkt. No. 1); Complaint, *Galmon v. Ardoin*, 3:22-cv-00214-SDD-SDJ (M.D. La. Mar. 30, 2022) (Dkt. No. 1). Both sets of plaintiffs noted that Louisiana's BVAP was approximately 31.22% of the population but complained that "Black voters" or "Black residents" only controlled around 17% of the state's congressional districts—figures that are virtually indistinguishable from those in *Hays*. Complaint, *Robinson*, 3:22-cv-00211-SDD-SDJ (Dkt. No. 1 at ¶1); Complaint, *Galmon*, 3:22-cv-00214-SDD-SDJ (Dkt. No. 1 at ¶2).

The extensive references to the "voluminous" record by the Robinson Intervenors in their Opening Supplemental Brief, (at 1, 3, 38, 49), requires

tempering and context. After filing their complaints, the Middle District gave the consolidated plaintiffs over two additional weeks to file their motions for preliminary injunction and prepare their evidence. *Robinson*, 3:22-cv-00211-SDD-SDJ (Dkt. No. 35). The Middle District gave the defendants fourteen days to respond. *Id.* While this was over three times the number of days originally allotted to the defendants (four days), *see Robinson*, 3:22-cv-00211-SDD-SDJ (Dkt. No. 33), this timeframe hardly led to a "voluminous" record. [4]

The Middle District's rush meant that the defendants had two weeks to respond to two motions for preliminary injunction, find and retain rebuttal experts and ask them to analyze and respond to eight opening reports, and conduct expert and fact discovery. *Robinson*, 3:22-cv-00211-SDD-SDJ (Dkt. Nos. 35, 63). It was apparent from the face of the reports and the testimony that Plaintiffs' experts had been working for months. *See, e.g., Robinson*, 3:22-cv-00211-SDD-SDJ (Dkt. No. 212 at 94:11-14); *Robinson*, 3:22-cv-00211-SDD-SDJ (Dkt. No. 213 at 158:13-25). This was the "voluminous" record before the Middle District in *Robinson* and the Legislature in January 2024. A record built on rushed disadvantage where plaintiffs spent months working, and defendants received days to respond. These "rushed, high-stakes, low-information decisions," *Dep't of Homeland Sec. v. New York,* 140 S. Ct. 599, 600 (2020) (Gorsuch, J.,

[4] The Middle District only allowed defendants the additional ten days after defendants threatened to seek appellate intervention claiming such a timeline violated defendants' due process rights. This context highlights the pressure on the Legislature in the winter of 2024—pass a new map or try a case in front of a court that seemed poised to favor plaintiffs at every turn.

concurring), simply cannot form the basis for a "voluminous record" (or certainly anything but a one-sided one), nor the "intensely local appraisal" required under §2. *Allen v. Milligan*, 599 U.S. 1, 19 (2023).

During the preliminary injunction proceedings, the Secretary took the position that a second majority-Black district could not be drawn in Louisiana because of the dispersed nature of the Black population, and because the plaintiffs' illustrative plans combined Black portions of Baton Rouge and other cities, with distant Delta parishes in the far north of the state, citing the *Hays* decision. *Robinson* 605 F. Supp. 3d at 772-773. More specifically the Secretary argued that the illustrative plans could not satisfy *Gingles* I because they were non-compact racial gerrymanders that obviously ran afoul of the Equal Protection Clause. *Id.*

Testimony from the mapdrawers of plaintiffs' illustrative plans confirmed as much. First, *Galmon* expert Mr. Cooper[5] testified that he used Reock and Polsby-Popper to measure district compactness. *Id.* at 782-83. Cooper further testified that in Louisiana's various cities, the Black population tends to be concentrated in easily definable areas. *Id.* at 784. Cooper used Baton Rouge as an example, noting that the majority of the Black population resided in the northern party of the city. *Id.* Cooper testified that the relative compactness of the Black populations in various cities, made it possible to join *discrete Black*

[5] Appellant State of Louisiana refers to a "Dr. Cooper" in it's Opening Supplemental Brief, p. 43. This is the same individual—demographer William Cooper, who does not have a Ph.D. *Robinson*, 605 F. Supp. 3d at 778.

populations together to achieve majority-minority status. *Id.* (*emphasis added*).

Specifically, Cooper's illustrative districts combined Black portions of Baton Rouge and other cities with high BVAP Delta parishes in the northern part of the state, sometimes over 100 miles apart. *Id.* But even Cooper admitted that there were significant differences in educational attainment, median income, and poverty between the parishes he combined. *Id.* The *Robinson* mapdrawer, Mr. Anthony Fairfax, also testified that he used district compactness measures like Reock, Polsby-Popper and Convex Hull to assess compactness of his virtually identical illustrative plans. *Id.* at 786. He also acknowledged that Baton Rouge was distinguishable from the Delta parishes with respect to educational attainment and income level. *Id.* at 789.

The Secretary and other defendants argued that this combination of discrete Black populations, cracked from their communities and political subdivisions, separated in some instances by over 100 miles, violated the Equal Protection Clause, and that plaintiffs' illustrative plans failed the geographic compactness prong of *Gingles* I. *Id.* at 772-73, 831-39. While the constitutional and statutory infirmities with the plaintiffs illustrative plans was clear on their face, notably, due to the time crunch, the Secretary was unable to obtain an expert to fully assess the compactness of the minority population in the illustrative plans produced by plaintiffs and were forced to continue litigating at a disadvantage.[6]

[6] Multiple tools exist to assess the compactness of the minority populations including visual inspections aided by dot plots,

On June 6, 2022, the Middle District enjoined the Secretary from using H.B. 1 in any election. *Robinson*, 605 F. Supp. 3d at 766-767. Despite acknowledging that minority compactness was a component under the *Gingles* I inquiry, *see id.* at 825-26, the Middle District only analyzed district compactness scores like Reock and Polsby-Popper. *Id.* at 822-23.

The Middle District then ordered the Legislature to draw a new congressional plan with a second majority-Black district within five legislative days—by June 20, 2022. *Robinson v. Ardoin*, 37 F.4th 208, 231-32 (5th Cir. 2022). The June 20 deadline was administratively stayed by the Fifth Circuit, but then the stay was vacated, motions for stay pending appeal on the merits of the preliminary injunction were denied, and the preliminary injunction appeal was expedited by the Fifth Circuit on June 12, 2022. *Id.* at 215. The preliminary injunction order was ultimately stayed by this Court pending the decision in *Allen v. Milligan* on June 28, 2022. *Ardoin v. Robinson,* 142 S. Ct. 2892 (2022) (mem.). After *Allen,* this Court determined that certiorari was improvidently granted, vacated the stay, and remanded the proceedings to the Fifth Circuit for review in the ordinary course on June 26, 2023. *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023) (mem.).

While the preliminary injunction was being reviewed on the merits by the Fifth Circuit, the

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Bethune-Hill v. Virginia State Bd. of Elections, 326 F. Supp. 3d 128, 146 (E.D. Va. 2018) (discussing "dot density" maps), and dispersion techniques that allow communities to be identified and distance easily measured. *See e.g. Kumar v. Frisco Independent School District,* 476 F. Supp. 3d 439, 496-97 (E.D. Tex. 2020).

Middle District scheduled an expedited hearing for October 3-5, 2023, to implement a court-ordered remedial congressional plan, providing "merely five weeks for the state's preparation." *In re Landry*, 83 F.4th 300, 304 (5th Cir. 2023). Because of the pending merits decision, and the defendants lack of opportunity to prepare and respond, the State and the Secretary filed a petition for writ of mandamus with the Fifth Circuit. *Id.* On September 28, 2023, the Fifth Circuit granted the petition in part, and vacated the remedial hearing. *Id.* at 303. In so holding, the court found that "[t]he district court here forsook its duty and placed the state at an intolerable disadvantage legally and tactically." *Id.* at 308.

On November 10, 2023, the Fifth Circuit vacated the preliminary injunction on the merits after finding it was no longer necessary to prevent an irreparable injury and remanded this case for further proceedings. *Robinson v. Ardoin,* 86 F.4th 574, 600-02 (5th Cir. 2023). But even in this opinion, the Fifth Circuit felt the need to provide further restraints on the Middle District's conduct, mandating that it could "conduct no substantive proceedings" until either the completion of legislative action, notice from the legislature that it would not act, or January 15, 2024. *Id.* at 601. The Middle District wasted no time setting a trial for February 5, 2024,[7] at the request of the

[7] Notably during the period between November 10, 2023 and February 5, 2024, previous Secretary of State, Kyle Ardoin, conducted both legislative and statewide elections, which resulted in turnover in key positions in this litigation including the Attorney General, Governor, Secretary of State, Speaker of the Louisiana House, and President *Pro Tempore* of the Louisiana Senate. Moreover, all *Robinson* defendants were engaged in a trial on the merits for the related §2 challenge to

plaintiffs. *Robinson*, 3:22-cv-00211-SDD-SDJ (Dkt. No. 315).

Due to the Middle District's actions, on January 22, 2024, the Legislature enacted Senate Bill 8, which repealed H.B. 1 and re-drew Louisiana's congressional districts to include two majority-Black districts. **J.S.A. 15a.**[8] During the legislative session convened to pass a new map, the legislature attempted to thread the "impossible needle," *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 65 (2024) (Thomas, J., concurring), and balance the risk of impending usurpation of legislative duties posed by the *Robinson* court with the Equal Protection Clause.

Testimony from the Legislature revealed that race was the "driving force" behind the re-draw, and the task to draw two majority-Black districts was made difficult because Louisiana does not "have concentrated populations of certain minorities or populations of white folks in certain areas" because "it is spread throughout the state." **J.S.A. 13a-14a.** The legislative record further revealed that Louisiana only has seven parishes that are majority-Black, and only three of those parishes are contiguous. **J.S.A. 13a-14a.** Legislators noted that this made the process "difficult." **J.S.A. 13a-14a.** But the Legislature succeeded and passed S.B. 8, which retained an altered version of CD2 anchored in Orleans Parish

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Louisiana's legislative districts, also conducted on an expedited basis (all proceedings condensed less than five months). Scheduling Order, *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ (M.D. La. July. 17, 2023) (Dkt. No. 110).

[8] "J.S.A" refers to the appendix to the State's jurisdictional statement, "J.A." refers to the joint appendix, and "R.J.S.A" refers to the jurisdictional statement filed by the Robinson Intervenors.

and drew a new majority-Black district, CD6, stretching from Baton Rouge to Shreveport. **J.S.A. 15a, 48a.** Legislators like Senator Pressly acknowledged the racial component of having two majority-Black districts was the central tenant of S.B. 8 and that all other considerations were secondary. **J.S.A. 20a.**

District 6 of S.B. 8 stretches along the I-49 corridor, bearing a striking resemblance to the district struck down in *Hays*, though ultimately creating a district with a population more dispersed than in *Hays*. **J.S.A. 16a, 66a**. District 6 combines Black population centers from several of Louisiana's urban areas in Baton Rouge, Alexandria, Opelousas, Natchitoches, Mansfield, Stonewall, and Shreveport. **J.S.A. 33a-35a.** Many of these areas, including Shreveport and Natchitoches, were not in any majority-Black district in any illustrative plan presented in *Robinson*. *See Robinson,* 605 F. Supp. 3d at 779-80, 785. District 6 zealously avoided more densely populated white areas, leaving the white portions of those urban areas in neighboring districts. **J.S.A. 26a-27a; 33a-35a; 44a-46a.** Testimony from Legislators further confirmed that these areas had little in common. Senator Pressly, who represents Northwest Louisiana, including portions of Shreveport, testified that he did not believe his district shared communities of interest with either Lafayette or Baton Rouge (all in CD6), because of the difference in geography, different needs in responding to natural disasters, and different educational concerns. **J.S.A. 20a-21a.**

A new group of plaintiffs challenged S.B. 8 claiming that it was a racial gerrymander in violation

of the Equal Protection Clause of the Fourteenth Amendment, and that S.B. 8 intentionally discriminated against voters based on race in violation of the Fourteenth and Fifteenth Amendments. **J.A. 22-65.** Testimony during trial, even from the Robinson Intervenors' own witnesses, showed that the communities in S.B. 8 had never been combined in any previous congressional district, that CD6 intersected four of Louisiana's five public service commission districts, and that Robinson Intervenor's support of S.B. 8 was really just about achieving a second majority-Black district, regardless of its location within the state. **J.S.A. 25a, 35a-36a, 46a-48a.** After conducting a trial on the merits, the panel below struck down S.B. 8 as an unconstitutional racial gerrymander. **J.S.A. 67a.**

These competing district court orders, approximately two years apart, put the Secretary in an impossible and unsustainable election limbo. First, the Secretary was enjoined by the *Robinson* court from conducting congressional elections under a map with a single majority-Black district (H.B. 1), only to have a different court reach a different conclusion when the Legislature attempted to comply with the first court's order (S.B. 8). With deadlines looming for the 2026 congressional elections, the Secretary remains in election limbo with no congressional plan to administer. The people of Louisiana deserve certainty as to their congressional districts. The Secretary respectfully requests that this Court intervene in the election limbo and provide the people of Louisiana the certainty they deserve.

ARGUMENT

I. Use of Race in Redistricting Rests on Odious Racial Stereotypes and is Unconstitutional.

The Secretary agrees with the State's position in its Opening Supplemental Brief that §2, as currently being applied, forces states to use race in redistricting in an unconstitutional way. When the government engages in race-based classifications it "demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Students for Fair Admissions, Inc v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 202 (2023) ("*SFFA*") (quoting *Rice v. Cayetano,* 528 U.S. 495, 517 (2000)). Race-based districting schemes, like the ones required by §2 of the VRA, are below the dignity of the State because it requires the government to engage in stereotyping based on "the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests and will prefer the same candidates at the polls.'" *Miller,* 515 U.S. at 911-12 (citation omitted).

Moreover, §2 requires that this racial stereotyping go on indefinitely, without regard for the fact that Louisiana is a very different place than it was over forty years ago. *Allen*, 599 U.S. at 45 (Kavanaugh, J. concurring); *see also* Louisiana Opening Suppl. Br. at 26-30. This unconstitutionally requires states to consider race in redistricting by perpetuating a system where a state's distant past is always relevant when adjudicating §2 claims. *See Thornburg v. Gingles,* 478 U.S. 30, 36-37 (reciting Senate Factor 1)*;*

Robinson, 605 F. Supp. 3d at 846-48 (analyzing historical data from the late 1800s and cases from 40 years ago). *See also supra* Section III(b).

Simply put, §2 of the VRA requires that "race is a determinative tip" for voters to reside in a specific district, requiring states to pick "winners and losers" for districting purposes "based on the color of their skin." *SFFA*, 600 U.S. at 195, 229. This is unconstitutional. *Id.* at 230. Because the "core purpose" of the Equal Protection Clause is to "do away with all governmentally imposed discrimination based on race," *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984), and because §2 of the VRA requires the government to engage in race-based classifications, §2 is decidedly unconstitutional, and should be struck down in conformity with this Court's opinions striking down race-based classifications systems in the realm of education, marriage, transportation, and public beaches and parks. *See SFFA,* 600 U.S. at 205-206 (collecting cases).

II. Drawing a Second Majority-Black Congressional District in Louisiana Violates the Equal Protection Clause.

a. Louisiana's Geography Does Not Support the Drawing of a Second Majority-Black Congressional District.

In Louisiana this redistricting cycle, the Secretary's position has been consistent—Louisiana's geography, and the racial dispersion of its population throughout the state, does not support more than one majority-Black congressional district. *See, e.g.*

Robinson, 605 F. Supp. 3d at 772-773. Any attempt to do so—whether through the illustrative plans in the original *Robinson* litigation, or by the Legislature through S.B. 8—fails *Gingles* I, fails strict scrutiny, and is an unconstitutional racial gerrymander.

It is undisputed that "Louisiana's Black population is unevenly dispersed geographically when viewed statewide." State App. Br. at 7 (quoting *Robinson,* 605 F. Supp.3d at 826). In fact, only seven of Louisiana's parishes are comprised of majority-Black voting age populations, with only three of them being contiguous. **J.S.A. 13a-14a.** Several of those parishes, especially in the Delta region, have small populations that cannot themselves make up a congressional district alone. Appellee Br. at 10-11. Therefore, Louisiana's geography presents a tough test for plaintiffs to meet under *Gingles* I. It is undisputed that there is a compact Black population in and around Orleans Parish and Baton Rouge. These two regions are a natural fit, as Louisiana's two largest cities, only approximately an hour apart.

But, as history and the present situation reveal, to create a second majority-Black district from Louisiana's remaining dispersed Black population a mapdrawer must focus primarily on race, to pull out enclaves of Black voters in portions of a city or parish and connect them with enclaves of Black voters in other cities or parishes, sometimes hundreds of miles away, with no examination of commonality other than their race. *See Hays*, 862 F. Supp. at 124-25; *Robinson*, 605 F. Supp. 3d at 782-84 (*Galmon* expert Cooper explaining how he took compact Black populations out of Baton Rouge and paired them with compact Black populations in other localities,

sometimes hundreds of miles away); **R.J.S.A 423a-24a** (Senator Womack admitting communities of interest were not considered in drafting S.B. 8); **J.S.A 26a-30a; 32a-35a; J.A. 181-82, 253-54** (expert testimony regarding how S.B. 8's District 6 picked up enclaves of Black population centers from over half a dozen different areas and avoided densely populated white areas in between to create a 250-mile-long district). This clearly violates the Equal Protection Clause because the second majority-Black district is based on a combination of disparate Black communities with nothing in common other than their race. *Miller*, 515 U.S. at 919-20.

This Court has "flatly rejected" that states should "be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines." *Allen,* 599 U.S. at 43-44 (Kavanaugh, J., concurring) (collecting cases). The root problem here is that the *Robinson* court did just that. By ignoring this Court's mandate that "[t]he first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) ("*LULAC*") (citation omitted), and focusing solely on district compactness, the *Robinson* court erroneously applied *Gingles* I and left the Legislature in an untenable position. Properly applied, this Court's precedent shows that it is impossible to draw a second majority-Black congressional district in Louisiana without forcing geographically dispersed Black voters into bizarre looking districts that have no regard for municipal or parish lines.

This Court has been presented with, but never approved, winding districts that force far-flung Black populations together to create a new majority-Black district like District 6 in S.B. 8. In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court struck down Georgia's third majority-Black district (CD11) which was drawn for the purpose of obtaining DOJ Preclearance. *Id.* at 907-08. Georgia's CD11 stretched 260 miles across rural counties and narrow swamp corridors to connect via oddly shaped appendages four dense Black populations from four widely spaced urban centers (Atlanta, Augusta, Savannah, and Macon), splitting eight counties and five municipalities along the way. *Id.* at 907-10. This Court affirmed that it was "obvious" from the district's shape and the relevant racial demographics that Georgia's CD11 was a deliberate attempt to bring Black population into the district. *Id.* at 917. The Court found Georgia's CD11 unconstitutional and held that assigning voters on the basis of race meant that Georgia engaged "in the offensive and demeaning assumption that voters of a particular race, because of their race 'think alike, share the same political interests and will prefer the same candidates at the polls." *Id.* at 911-12 (citation omitted).

One year later in *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"), this Court held that North Carolina's CD12, drawn with the purpose to create a second majority-Black district to obtain DOJ Preclearance was an unconstitutional racial gerrymander. *Id.* at 901-02. Notably, CD12 was 160 miles long, and ran along a highway in a "snake-like fashion through tobacco country, financial centers, and manufacturing areas until it gobbled up enough enclaves of [B]lack neighborhoods" to reach majority

status. *Id.* at 903 (*quoting Shaw v. Reno, "Shaw I",* 509 U.S. 630, 635-36 (1993)). This Court struck down CD12 as an unconstitutional racial gerrymander because it was clear that CD12 was drawn by stringing together geographically disparate groups based on race where there was not otherwise a geographically compact minority population. *Id.* at 906.

Even more compelling, the Court found this was the case even though the district was drawn as a remedy to the DOJ's preclearance objections, because "laws that classify citizens on the basis of race are constitutionally suspect . . . whether or not the reason for the racial classification is benign or the purpose remedial." *Id.* at 904-905. Moreover, the *Shaw II* court warned that any additional majority-Black district drawn for remedial purposes under §2 must be narrowly tailored to the area of the violation. *Id.* at 917. In this aspect too, *Shaw II* is on all-fours with the scenario before this Court as S.B.8's CD6 looks nothing like the illustrative plans considered by the Middle District, and includes areas like Shreveport and Natchitoches, undeniably outside of consideration in *Robinson*. *See* **J.S.A. 33a-35a;** *Robinson,* 605 F. Supp. 3d at 779-80, 785.

That same term, this Court in *Bush v. Vera*, 517 U.S. 952 (1996), applied the same principles to Texas' congressional districts. Specifically, this Court struck down several congressional districts as racial gerrymanders, including CD30 that had a compact Black population in South Dallas, but reached out into seven different segments extending to the north and west, crossing two county lines, to grab other small predominately Black communities, while excluding

close by white neighborhoods of Highland and University Park. *Id.* at 965-966. Notably, CD30 was 25 miles wide and 30 miles long. *Id.* at 966

S.B. 8 fares the same or worse than the challenged districts before the Court in 1995 and 1996. Like North Carolina's CD12, District 6 follows a highway to pick up enclaves of Black neighborhoods along the way. **J.S.A. 48a**; *Shaw II*, 517 U.S. at 903. (quoting *Shaw I*, 509 U.S. at 635-36). But here, District 6 is nearly 100 miles longer than the *Shaw II* racial gerrymander that ran along I-95. *Id*. District 6, like CD30 in *Bush v. Vera*, begins in urban Baton Rouge, but then sprawls out to pick up enclaves of Black voters, deliberately excluding white neighborhoods, in a winding district that's over 200 miles longer than the one at issue in *Bush*. **J.S.A. 26a-30a.** And finally, *Miller*'s telling of a 260-mile district that scooped up enclaves of Black voters from four different urban areas connected by a thin rural strip of swampland, could have been written today about District 6. In fact, District 6 in S.B. 8, while approximately the same length as Georgia's CD11, actually splits more municipalities than the district at issue in *Miller*, 515 U.S. at 908; **J.A. 370**. Just like North Carolina, Texas, and Georgia in the 1990's, there is simply not a geographically compact minority population to support another majority-Black district in Louisiana. Upholding the configuration of District 6 would effectively overrule the racial gerrymandering pillars of *Shaw, Miller,* and *Bush.*

b. If Illustrative Districts Cannot Be Drawn Without Violating This Court's Jurisprudence on Racial Gerrymandering, Then §2 Cannot Apply.

The first prong of *Gingles* requires a compact minority population that can make up more than 50% of a reasonably configured district. *Allen*, 599 U.S. at 18. This is, of course, in conflict with the Framers' race blind Constitution. *SFFA*, 600 U.S. at 270, 280. Historically, or even today, there may be regions where, either due to district size (like a school district), or residential living patterns, a minority group may naturally be a majority in a reasonably configured district. As this Court already held, "the Constitution does not place an *affirmative* obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority." *Easley v. Cromartie,* 532 U.S. 234, 249 (2001) (emphasis in original). Instead, as explained in *Cromartie*, the federal Constitution imposes an obligation that such districts cannot be created for predominately racial motivations. *Id.* As the district size gets larger (e.g., to the size of a congressional district), crafting majority-Black districts where race does not predominate becomes significantly more difficult to achieve organically.

While *Gingles* I originally existed largely to prevent a state from cracking existing compact minority communities into several districts, *see e.g. Clark v. Calhoun County,* 88 F.3d 1393, 1395, 1408 (5th Cir. 1996); *Bone Shirt v. Hazeltine,* 461 F.3d 1011, 1018-19 (8th Cir. 2006), that is not the way it is used today. In the wake of party realignment and

Shelby County v. Holder, 570 U.S. 529 (2013), special interest groups this decade have looked to fill the void by attempting to perform a preclearance-like function. When these groups don't see the "max-Black" plan, *Miller,* 515 U.S. at 907, they prefer,[9] they rush to court creating emergencies where defendants are always on the back foot procedurally, and obtain injunctions on one sided records, with illustrative districts that instead of protecting communities, divides them on purely racial lines to achieve majority-Black districts. Then, §2 plaintiffs argue, as Robinson Intervenors did below, that their illustrative plans are exempt from constitutional scrutiny. *See infra* Section III (a).

But this ignores, as Robinson Intervenors acknowledge today, that §2 itself is intended to be remedial. Thus, in creating a system whereby plaintiffs can do what the State cannot—racially gerrymander—states like Louisiana are afforded no breathing room, because if they adopt the exact plan put forth by §2 plaintiffs, the State will rightfully be sued for violations of the Equal Protection Clause. This reveals the constant, and unconstitutional consideration of race that Robinson Intervenors want this Court to continue to engage in, where their mapdrawers can draw racial gerrymanders and escape strict scrutiny.[10]

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[9] Notably the three primary legal entities that brought redistricting litigation in Louisiana this decade, the Elias Law Firm, the ACLU, and the NAACP Legal Defense Fund, have filed approximately twenty §2 lawsuits. None of these lawsuits appear to be against redistricting authorities or legislatures controlled by Democrats.

[10] Indeed, when asked in the trial below whether he consciously drew his illustrative districts in the *Robinson* litigation at right around 50% BVAP because that is what *Gingles* required,

But this does not have to be the case. As this Court already held in *Shaw II,* when there is lack of a geographically compact minority group, there "has neither been a wrong nor can be a remedy" meaning that §2 simply does not apply. 517 U.S. at 916 (citation omitted). This makes perfect sense. Where there is an existing and sufficiently large compact minority population, such that a district drawn without a focus on, or even regard for, race would still result in a majority-Black district, then *Gingles* I can be met. If one is not drawn, this could be evidence of intentional cracking of the Black population, giving rise to a potential racial gerrymandering challenge. *See, e.g. Clark,* 88 F.3d at 1395, 1408. The inverse would also be true. Where there is not a large compact Black population, because the population is not majority Black, one would not expect a majority-minority district in the area to be drawn without hyper-fixation on race.

As seen in Louisiana this decade, and from DOJ pressure in Georgia and North Carolina in the 1990's, districts drawn in an otherwise non-majority-Black area require a hyper-fixation on race to reach majority-minority status. There is nothing organic about the appearance of District 6 in S.B. 8 or in the appearances of the districts in *Shaw II* or *Miller*. Rather, those districts cracked Black voters out of their larger communities and stitched them together with other Black voters cracked out of their

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Robinson expert, Mr. Fairfax, responded "No. No. That would be using a racial target." **J.A. 301**. But examination of the actual transcript from the *Robinson* preliminary injunction hearing showed Fairfax had drawn his illustrative districts around 50% BVAP because "it satisfied that first precondition." **J.A. 302**.

communities to create majority-minority districts in areas where, if *Gingles* I jurisprudence was properly applied, the first criterion of §2 would not have been met.

It is because of this importance of the compact minority population both to the *Gingles* I and Equal Protection Clause analyses that several circuits, in conformity with a common sense reading of racial gerrymandering cases and the text of *Gingles* I, require §2 plaintiffs to "offer[ ] a satisfactory remedial plan." *Rose v. Sec'y, State of Georgia*, 87 F.4th 469, 475 (11th Cir. 2023) (citing *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.2d 1282, 1302 (11th Cir. 2020)). This is because "inquiries into remedy and liability" in these instances "cannot be separated." *Wright,* 979 F.3d at 1302; *see also Sanchez v. Colorado*, 97 F.3d 1303, 1311 (10th Cir. 1996) (examining *Gingles* I and noting that if the minority group is small and dispersed, no single member district could be created to remedy its grievance); *Bone Shirt*, 461 F.3d at 1025 (Gruender, J., concurring) (citing to the conclusion in *Sanchez* that the Court under the *Gingles* I inquiry must look at whether it's possible to "fashion a permissible remedy"). Notably, as these circuits acknowledge, a "satisfactory remedial plan" cannot be a plan that a legislative body couldn't enact because of constitutional or other infirmities. *Sanchez,* 97 F.3d at 1311-13; *Cousin v. Sundquist*, 145 F.3d 818, 829 (6th Cir. 1998) (holding that race-conscious remedies tend to entrench the very practices and stereotypes the Equal Protection Clause is set against, creating a situation where justice would not remain color blind

(citing *Nipper v. Smith,* 39 F.3d 1494, 1546 (11th Cir. 1994)).

In these four circuits—the Sixth, Eighth, Tenth, and Eleventh—district courts are therefore required to examine whether illustrative districts proposed by §2 plaintiffs would violate the Equal Protection Clause. This makes sense for a number of reasons. First, it gives the state (or the court) the option of ultimately using the plaintiffs' illustrative plans without the risk of a racial gerrymandering lawsuit by other groups. Second, given that a state in any remedial proceeding after a §2 liability finding cannot stray too far from the area at issue, *Shaw II,* 517 U.S. at 917, it provides the state a basis for any remedial district by further understanding the area under consideration for remediation.

Unfortunately for Louisianans, the Middle District did not follow this logic, instead expressly holding that illustrative districts were exempt from Equal Protection Clause considerations. *Robinson*, 605 F. Supp. 3d at 838. As such, the Middle District did not look at whether the combination of numerous separate Black communities into a single district posed a constitutional issue. This put Louisiana in its current predicament where, because *Robinson* plaintiffs' plans were not scrutinized under the Equal Protection Clause as an appropriate remedy, any new plan with a second majority-Black district passed by the Legislature, like S.B. 8, was subject to racial gerrymandering challenges.[11]

[11] Because *Gingles* I illustrative plans should be required to meet the standards of the Equal Protection Clause, it is appropriate

c. *Gingles I* Properly Applied Requires Courts to Consider Compactness of the Minority Population, not Merely District Compactness Scores.

Even if this Court were to find that a plaintiff's illustrative maps under *Gingles* I do not need to pass constitutional muster or prove a viable remedy, this Court should reinforce that existing jurisprudence requires that courts evaluating *Gingles* I must examine the compactness of the minority group, not just district compactness scores. A proper *Gingles* I inquiry should identify the compact minority group itself such that any state during a remedial process could draw a district respecting that group.

Here, Louisiana's remedial task was made more difficult by the Middle District's failure to conduct a proper *Gingles* I inquiry into the compactness of the minority population itself, despite clear mandates from this Court that the *Gingles* I compactness inquiry refers to the compactness of the minority population. *LULAC,* 548 U.S. at 433; *Bush,* 517 U.S. at 996-97 (1966) (Kennedy, J. concurring). Instead, the Middle District equated district compactness scores like Reock and Polsby-Popper to measuring the compactness of the minority population, reasoning that any minority group in a compact district must be compact. *Robinson*, 605 F. Supp. 3d at 822-23, 826. This circular logic fails for several reasons.

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for a three-judge panel to be appointed pursuant to 28 U.S.C. §2284, to ensure consistent adjudication of these claims, and to avoid the potential scenario before the Court today where there are competing district court findings—one by a panel and another by a single judge.

First, district compactness or perimeter measures say nothing about the compactness of the population itself. *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 Mich. L. Rev. 483, 554-55 (1993). The Reock score used by the Middle District "measures the ratio of the district area to the area of the minimum circumscribing circle." *Id.* at 554. This means that "a circular district is perfectly compact" while a square district is "relatively compact", but a "long, narrow district or one with fingers or other extensions is less compact because it takes a large circle to enclose the entire district." *Id.* The Polsby-Popper measure also utilized by the Middle District measures the perimeter of the district by relating the length of the district perimeter to the area the district includes, and like Reock, "a circle is the baseline against which districts are compared" by looking at the ratio of the district area to the area of a circle with the same perimeter. *Id.* at 555.[12]

Under the Middle District's theory, a circular district could have a nearly perfect compactness score regardless of whether its diameter is 10 miles or 300 miles, and if the district itself has a good compactness score, it must pass *Gingles* I. But this cannot be so. This nearly perfect compactness score tells the court nothing about the compactness of the population within the circular district. *Id.* at 554-57. It is easy to

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[12] These measures were discussed in *LULAC,* 548 U.S. at 454, n.2 (2006) (Stevens, J., concurring in part and dissenting in part), as the "perimeter-to-area score" (now known as the Polsby-Popper score) and the "smallest circle score" (now known as the Reock score).

imagine a compact population, including a compact minority population, in the circular district with a 10-mile diameter. This district could easily be focused on an urban area like Baton Rouge or New Orleans. It is significantly harder to fathom a compact population, much less a cohesive and compact minority population, with a district diameter of 300 miles (for example in Louisiana nearly the distance between New Orleans and Shreveport).

This is exactly why district compactness measures, while helpful in evaluating whether there are oddly shaped district appendages that might signal a mapdrawer is attempting to pick up discrete populations of Black voters like in *Miller* or *Shaw II,* cannot make up the entirety of the *Gingles* I analysis. They tell courts nothing about the people who reside in those districts, the communities they live in, what is important to those communities, and whether the combined communities share a larger sense of identity or concerns. A district compactness score is not going to explain that certain parishes have shared educational concerns, or that certain parishes in Louisiana need to spend more on hurricane preparedness than others, **R.J.S.A. 434a-435a**; **J.S.A. 60a-64a**, but a focus on the population itself will.

As it stood on the record before them, the Legislature was required to draw a second majority-Black district without the benefit of any court findings on where it needed to be drawn in Louisiana. Instead, the Middle District modeled for the Legislature (erroneously) that so long as a new majority-Black district itself could be compact, it was legally

acceptable and required under *Gingles* I to combine far-flung minority populations with nothing in common but race. S.B. 8 complied with the Middle District's mandates and includes District 6, drawn without regard for minority population compactness, that combines disparate Black populations from all over the state, without regard for what, if anything else, they have in common other than race. S.B. 8, drawn on such a misapprehension of the law cannot stand. *See Cooper*, 581 U.S. at 306 (declining to approve districts drawn with a purpose that is a legal mistake).

III. If Robinson Intervenors' New Legal Positions Are Correct, *Robinson* was Wrongly Decided and the Legislature Lacked a Good Faith Basis to Draw a Second Majority-Black District.

In an absolute about-face, Robinson Intervenors now adopt many of the positions the Secretary consistently argued throughout the *Robinson* litigation. But if Robinson Intervenors are correct, Louisiana has a *Cooper* problem, because districts drawn on errors of law cannot withstand Equal Protection Clause scrutiny. *See* 581 U.S. at 306.[13]

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[13] The Secretary suspects that Robinson Intervenors will try to classify this as a collateral attack on the Middle District's opinion. Not so. In order to justify race-based districting, the Legislature was required to have "a strong basis in evidence" that §2 required its action. *Cooper,* 581 U.S. at 293-94 *citing Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 278 (2015). As such, a discussion of the evidence before the Legislature and their belief about what §2 legally required is relevant to evaluate the "strong basis." *Id.* at 278, 304, 306. It is

a. Remedial Requirements of *Gingles I.*

After three years of litigation across numerous cases, Robinson Intervenors finally concede, as the Secretary argued in 2022 and argues above, *see supra* Section II(b), that "§2 plaintiffs must adduce at least one illustrative map that comports with this Court's precedents regarding racial gerrymanders." (Robinson Intervenors' Opening Suppl. Br. at 18.) As noted above, the need for this requirement is axiomatic. Otherwise, *Gingles* I mapdrawers can do what the State cannot—racially gerrymander districts.

While the Secretary appreciates the Robinson Intervenors' position today, the reason this case remains before the Court is because Robinson Intervenors took the *exact opposite* position in the *Robinson* litigation. *See e.g.* Robinson Pls.' Post-Hearing Br., *Robinson v. Ardoin*, No. 3:22-cv-211-SDD-SDJ (M.D. La. May 20, 2022) (Dkt. No. 163 at 10-11) (arguing that defendants wrongfully conflated illustrative maps and remedial maps under §2); Robinson Pls.' Suppl. Appellees Br., *Robinson v. Ardoin*, No. 22-30333 (5th Cir. Sept. 6, 2023) (Dkt. No. 297 at 36-38, 40-42) (arguing that defendants' reliance on racial gerrymandering cases like *Miller* was misplaced, and that *Shaw's* racial predominance framework was unnecessary under *Gingles* I). *See also* Pls. Mem. In Support of Mtn. to Exclude Proposed Expert Testimony, *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ (M.D. La. Oct. 16, 2023) (Dkt. No.

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without question that the Legislature strongly considered the Middle Districts opinion and legal analysis in enacting S.B. 8 with it's second majority-Black district. *See e.g.* **J.A. 117, 157-158; R.J.S.A 47a.**

156-1 at 14-18) (arguing racial predominance analysis of illustrative plans is irrelevant to §2 claims), *granted in part by Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ, 2023 WL 7388850, at *3 (M.D. La. Nov. 8, 2023) (noting there is no Equal Protection Clause analysis required under *Gingles* I).

Thus, it is precisely because Robinson Intervenors argued, and the Middle District agreed, that the illustrative districts did *not* have to comport with racial gerrymandering requirements that the same parties are before this Court today. Because Robinson Intervenors' illustrative plans were erroneously allowed to do what they now claim they cannot—force "geographically dispersed minority voters into unusually shaped districts without concern for traditional districting criteria," Robinson Intervenors' Opening Suppl. Br. at 18 (citing *Allen,* 599 U.S. at 43 (Kavanaugh, J., concurring))—the Legislature had no appropriate remedial baseline from which it could enact a second majority-Black district without engaging in unconstitutional racial gerrymandering. The Legislature thought, and was under court order to comply, that it should combine geographically dispersed minority groups into the unusually shaped District 6, without regard for traditional districting criteria like respect for political subdivisions. In sum, if the about-face in the Robinson Intervenors' Supplemental Opening Brief is legally correct, then the Middle District's opinion was undoubtedly wrong, leading to a Legislature "whose raison d'être is a legal mistake." *Cooper*, 581 U.S. at 306.[14]

[14] The Secretary suspects that in reply the Robinson Intervenors will rush to attempt to harmonize their polar opposite positions by claiming, as they do on page 18 of their Opening Supplemental

b. Proportionality.

Despite now claiming, that "*Gingles* I does not require drawing a majority-minority district solely based on the percentage of the total population that the minority group comprises[,]" (Robinson Intervenors' Opening Suppl. Br. at 18), Robinson Intervenors again sang a different tune in the original *Robinson* litigation. Notably the first two paragraphs of their complaint exclusively focus on proportionality. *See* Complaint, *Robinson v. Ardoin*, No. 3:22-cv-211-SDD-SDJ (M.D. La. Mar. 30, 2022) (Dkt. No. 1 at 1) ("Even though Louisianians who identify as any part Black constitute 31.2% of the state's voting age population, Black Voters control only around 17% of the state's congressional districts."); *Id.* at 2) ("The State's denial to Black Louisianians of an equal opportunity to have their voices heard is illustrated by the fact that, whereas approximately one out of three voting age residents of Louisiana is Black, Black voters have an opportunity to elect the candidate of their choice in just one out of six congressional districts. This Court must step in and remedy this clear violation of the Voting Rights Act of 1965.").

Brief, that their illustrative plan offered "an additional opportunity district…that better respects race-neutral redistricting criteria than the enacted plan." This fails for several reasons. First, none of the Robinson Intervenors' illustrative plans were race neutral. Second, plaintiffs in *Robinson* never argued for an "opportunity district," only a majority-Black district. Third, it is well established that a §2 district "may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts endless beauty contests." *Bush,* 517 U.S. at 977. Some groups may argue they could draw a *better* map on certain criteria than the State's map, but "better" is not a constitutional test.

This focus continued into their Motion for Preliminary Injunction, which highlighted that "Plaintiffs are likely to succeed on the merits of their claim that the 2022 congressional map violates Section 2 of the Voting Rights Act because it fails to include two districts in which Black voters have an opportunity to elect their candidate of choice. Louisiana's population is nearly one-third Black, and the Black population is sufficiently geographically compact to create an additional majority-Black district." Pls. Mtn. for Prelimin. Inj., *Robinson v. Ardoin*, No. 22-211-SDD-SDJ (M.D. La. Apr. 15, 2022) (Dkt. No. 41 at 2).

Therefore, it is clear that despite their disclaimers today, Robinson Intervenors were fixated on proportionality in the *Robinson* litigation, which transferred into the Middle District's finding on liability that Black Louisianans make up 31.25% of the voting age population but comprise a majority in only 17% of Louisiana's congressional districts. *Robinson,* 605 F. Supp. 3d at 851. Because of this hyper-fixation, plaintiffs' experts in *Robinson* drew illustrative districts to achieve proportionality through this second majority-Black district without regard for the fact that Louisiana's geography simply does not support the creation of such a district without combining far-flung and discrete Black populations hundreds of miles apart. *See supra* section II(a).

c. Second and Third *Gingles* Preconditions.

Robinson Intervenors now claim, at page 20 of their Opening Supplemental Brief, that "in places where voting is no longer racially polarized, either because the minority group does not vote cohesively or

because there is sufficient crossover voting for their candidates of choice to have a fair opportunity to be elected, courts reject §2 claims." This is nearly identical to what defendants argued to the Middle District that "white bloc voting…is low enough (and crossover voting is high enough) to permit Black voters to elect their preferred candidates without 50% BVAP districts." *Robinson,* 605 F. Supp. 3d at 775.

A mere three years ago, the Robinson Intervenors took a different stance, arguing against defendants' position in their post- hearing brief that "[d]efendants have focused heavily on the extent to which white crossover voters are necessary to provide Black voters an opportunity to elect their preferred candidates. . . . But that also has no bearing on the *Gingles* inquiry." *Robinson v. Ardoin*, No. 3:22-cv-211-SDD-SDJ (M.D. La. May 20, 2022) (Dkt. No. 163 at 11); *see also* Pls.-Appellees' Br., *Robinson v. Ardoin*, No. 22-30333 (5th Cir. June 28, 2023) (Dkt. No. 241 at 77-83) (arguing that *Cooper v. Harris*, 581 U.S. 285 (2017), *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), and *Bartlett v. Strickland,* 566 U.S. 1 (2009) are inapposite and criticizing defendants' arguments that white bloc voting is not legally significant if a district with less than 50% could reliably elect Black-preferred candidates with the support of white crossover voting).

The evidence unquestionably before the Middle District in 2022 revealed that there is significant crossover voting in Louisiana. *Robinson,* 605 F. Supp.3d at 800. Notably plaintiffs' expert Dr. Palmer admitted that "on account of White crossover voting, it could be possible for CD2 and CD5 to be drawn at

below 50% BVAP and still elect Black-preferred candidates." *Id. See also Robinson v. Ardoin*, No. 3:22-cv-211-SDD-SDJ (Dkt. No. 213 at 157:18-158:11). Plaintiffs' expert Dr. Handley also testified that there was a "relatively high amount of White crossover voting" in the areas of enacted CD2 (which notably included portions of Baton Rouge found in the illustrative plans in *Robinson* and S.B. 8's District 6). *Robinson,* 605 F. Supp.3d at 803. Legislative expert Dr. Lewis agreed with Drs. Palmer and Handley, noting that the plaintiffs' illustrative districts could still provide Black voters an opportunity to elect the candidate of their choice at below 50% BVAP, which he attributed to crossover voting. *Id* at 805-06. Notably the Middle District discredited the analysis because it was based on a single election—all Dr. Lewis had time to examine in the two weeks allotted to defendants.[15] *Id.*

Given the importance of Baton Rouge as an anchor in the Legislature's original majority-Black district (CD2), *Robinson*, 605 F. Supp. 3d at 768, and as an anchor in all of plaintiffs' illustrative plans in *Robinson*, *see id.* at 779-80, 784, especially probative are the findings of the Secretary's expert Dr. Solanky. Due to time constraints, Dr. Solanky chose to analyze the key parish at issue here—East Baton Rouge Parish, which provided a significant percentage of Black voters in all of plaintiffs' illustrative plans and

[15] Remarkably, in the parallel state legislative districting case *Nairne v. Ardoin*, 715 F. Supp. 3d 808, 871 (M.D. La. 2024), the same Middle District court credited one of plaintiffs' experts, Dr. Marvin P. King, Jr., despite the fact that he also performed an EI analysis on only a single election.

did so again in District 6 of S.B. 8. *Id.* at 806.[16] Dr. Solanky concluded that "East Baton Rouge votes more strongly in favor of the minority preferred candidate than other parishes" in plaintiffs' illustrative districts, noting that even though there were 13% more white voters who participated in the 2020 election in East Baton Rouge Parish, President Biden carried the parish by 13%—a clear indication that white voters did not vote as a bloc to defeat the black preferred candidate. *Robinson,* 605 F. Supp. 3d at 806.

Despite acknowledging that the *Covington* court, in an opinion affirmed by this Court, 316 F.R.D. 117, 167-68, 170 (M.D.N.C. 2016), *aff'd*, 581 U.S. 1015 (2017), looked at this exact issue under *Gingles* III—whether districts drawn below 50% BVAP can still perform for Black voters as evidence that white crossover voting was present, thereby undermining a finding of legally significant racially polarized voting—the Middle District found that "Drs. Solanky and Lewis do not move the needle" because of their limited analysis. *Robinson*, 605 F. Supp. 3d at 842-44. Of course, the Middle District gave no consideration to the fact that Drs. Solanky and Lewis were given days to complete expert work, in contrast to the months afforded the other side.

Regardless of the significant time constraints, defendants presented credible evidence in *Robinson*,

[16] As explained on pages 10 and 11 of Appellees' brief, East Baton Rouge Parish comprised of approximately 37% of the BVAP of the Robinson Illustrative Plan offered as S.B. 4. *See also* **R.J.S.A. 660a-686a**. East Baton Rouge Parish makes up an even larger percentage of the BVAP of CD6 of S.B.8 at, approximately 41.8%.

and the plaintiffs' experts agreed, that districts with less than 50% BVAP gave Black voters an opportunity to elect their candidate of choice in Louisiana. 605 F. Supp. 3d at 800, 804-06. Again, if this is the standard of *Gingles* II and III—that in areas where a 50% BVAP district is not needed because of white crossover voting—then *Gingles* II and III cannot be met in Louisiana and the Middle District's opinion in *Robinson* (and therefore the Legislature's understanding of the same) was clearly wrong. *See e.g. Bartlett v. Strickland,* 556 U.S. 1, 24 (2009) (holding that the third *Gingles* precondition cannot be shown "[i]n areas with substantial crossover voting"); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) ("in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters.")(citation omitted).

This is especially true of East Baton Rouge Parish, where no expert meaningfully rebutted Dr. Solanky's findings based on the 2020 elections that white voters were not voting to defeat the Black-preferred candidate of choice. Because East Baton Rouge Parish is the undisputed linchpin of any potential second majority-Black district in Louisiana, "downplay[ing] the significance of a longtime pattern of white crossover voting in the area that would form the core" of the second district would rest "not on a strong basis in evidence, but instead on a pure error of law." *Cooper,* 581 U.S. at 304-06.[17]

[17] In *Cooper*, 581 U.S. at 300-03, this Court upheld a three-judge panel's finding that the inclusion of the urban areas of Durham County (which had white crossover voting) in North Carolina's

d. Liability Based on Current Census Data.

In an attempt to grapple with the lack of temporal limitations on §2 and the constitutional concerns that presents, Robinson Intervenors, in their Opening Supplemental Brief, argue that despite the clearly "permanent" race-based justifications Congress allegedly authorized in §2, that "the need for remedy must be reevaluated at least every ten years." Robinson Intervenors Supplemental Brief. at 5, 13. Indeed, Robinson Intervenors argue that "[w]here new elections or census data show that a remedy is no longer viable or necessary, §2 cannot (and does not) justify race-based redistricting in perpetuity based on past violations," and that under the totality of the circumstances inquiry, courts must "ensure that any consideration of race for remedial redistricting is tied to current conditions." *Id.* at 20-21.

The problem again here is that the Legislature based their need to draw a second majority-Black district on the Middle District's opinion in *Robinson*, **R.J.S.A. 176a-177a**, which either largely examined historical data, found that historical effects were not present today, or that the weight of the evidence against Louisiana was minimal. Specifically, as to Senate Factor 3, the Middle District noted that the only evidence presented by the plaintiffs that "the state…has used… voting practices or procedures that may enhance the opportunity for discrimination against the minority group" was Louisiana's open

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CD1 was not a permissible §2 district because the white crossover voting negated the state's evidence of *Gingles* III (effective white bloc voting). Here, East Baton Rouge Parish is the same as Durham County in *Cooper*, where white crossover voting dooms *Gingles* III.

primary system, pointing to three runoffs where a Black candidate lost, which the court found unpersuasive. *Robinson*, 605 F. Supp. 3d at 848. As to Senate Factor 5, the extent to which members of the minority group bears the effects of discrimination today and in turn hinders their ability to effectively participate in the political process, the Middle District expressly found that the plaintiffs presented no specific evidence that alleged disparities manifest themselves in political participation outcomes.[18] *Id.* at 849.

In reviewing the evidence presented by plaintiffs on Senate Factor 6, which was largely over a decade old, and primarily from the early 1990s, the Middle District conceded that "the persuasive weight of the evidence is minimal" and found the factor "weighs neither for nor against Plaintiffs." *Id.* at 849-50. In doing so the Middle District found that David Duke won three statewide elections in Louisiana. *Id.* As noted by the State in their Opening Supplemental Brief (at 28-29), this is demonstrably false, and the supposed expert citation for this premise does not support this fabrication. Finally, under Senate Factor 8, the Middle District found that there was no evidence of a current significant lack of responsiveness on the part of elected officials to the

[18] Notably, despite finding that the plaintiffs utterly failed to meet their burden under either Senate Factor 3 or Senate Factor 5, the Middle District in *Robinson* inexplicably found the factors "neutral" instead of favoring defendants. *Robinson*, 605 F. Supp. 3d at 848-49. The Middle District likewise made no finding as to Senate Factor 4 regarding candidate slating, noting that there is no slating process in Louisiana, instead of finding that in favor of defendants. *Id.*

particularized needs of the members of the minority group. *Robinson*, 605 F. Supp. 3d at 850.

Weighing these findings based on lack of current evidence and against the Senate Factors found to favor Plaintiffs, like history (Senate Factor 1), and proportionality (which Robinson Intervenors now disclaim should be the basis of §2 liability), it is clear that current conditions do not support continued remedial liability in Louisiana. Notably to make these findings the Middle District focused on long ago "*history*" (emphasis in original) in examining Senate Factor 1 including data from 1896, 1910, and 1948 as well as cases dating back to 1983 and 1988, and compliance with a pre-clearance scheme no longer in place. *See Robinson,* 605 F. Supp. 3d at 846-48. This is precisely why §2's lack of temporal limitations poses a constitutional problem because states like Louisiana who have made great strides to shed their past cannot escape liability despite significant progress.

This is especially true when considered in conjunction with the 2020 Census data, which clearly reveals that Louisiana's geography simply does not support the creation of a second majority-Black district without the combination of numerous discrete Black populations dispersed throughout the state over a hundred miles apart. *See supra* Section II(a).

IV. If the Court Cannot Articulate a Test for "How Much Race is Too Much" Then This Issue is Non-Justiciable.

Robinson Intervenors argue in their Opening Supplemental Brief, at page 10, that "some consideration of race may be needed to cure racial

discrimination in redistricting." But how much consideration is too much?

In the event that this Court declines to strike down §2 as unconstitutional either facially or as applied to Louisiana, or the Court declines to apply Equal Protection principles to *Gingles* I, then the Court must definitively answer "the determinative question: '[h]ow much is too much?'" with regard to considerations of race by mapdrawers. *Rucho v. Common Cause,* 588 U.S. 684, 707 (2019).

As recounted in Louisiana's Opening Supplemental Brief and above (*see supra* Sections I and II) attempting to comply with conflicting jurisprudence on racial gerrymandering and §2 has left Louisiana without breathing room, and according to two separate courts, in violation of both the statutory principles of §2 and the Equal Protection Clause. If the standard for invoking the VRA to justify race-based districting is really intended to "give[] States breathing room to adopt reasonable compliance measures[,]" *Cooper*, 581 U.S. at 293 (quotation omitted), then a judicially discoverable and manageable standard for states to comply with both the VRA and Equal Protection Clause is required. Otherwise "results from one gerrymandering case to the next [will] likely be disparate and inconsistent." *Rucho*, 588 U.S. at 707-08 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 308 (2004) (Kennedy, J., concurring)).

The same questions posed to this Court in *Rucho,* are present today. In many instances one could substitute the word "race" for "party" and be factually faced with the same scenarios facing Louisiana today.

For example, "should a court 'reverse gerrymander' other parts of a State to counteract 'natural gerrymandering caused, for example, by the urban concentration of one [race]?" *Rucho,* 588 U.S. at 707-08. That exact question is present before the Court here—is the Louisiana Legislature, at the behest of a federal district court, required to gerrymander districts because its Black population, while approximately a third of the total population, is concentrated in one area of the state, and dispersed throughout the rest, in order to reach "fairness" or proportionality?

Consider another question: "[i]f compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria?" *Rucho,* 588 U.S. at 707. Here again, the Legislature was forced to deviate from the traditional districting criteria of minimizing political subdivision splits to enact S.B. 8 in order to draw the second majority-Black district. Is that permissible? What about the Legislature's choice to prioritize certain incumbents over others in its quest to draw a second majority-Black district as required by the Middle District? *Id.* at 708.

In *Rucho,* this Court determined there was no justiciable answer to these questions, and in doing so specifically rejected that racial gerrymandering cases could provide a baseline for partisan gerrymandering claims, reasoning that racial gerrymandering claims ask "for the elimination of a racial classification," but "[a] partisan gerrymandering claim cannot ask for the

elimination of partisanship." *Id.* at 709-10. However, the *Rucho* Court did not contemplate the current dilemma—if racial gerrymandering claims ask for the elimination of racial classifications, what happens when §2 still requires them?

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 197, 177 (1803). This is especially true in the redistricting realm, where states retain broad autonomy, but must heed to federal law. *See Shelby County*, 570 U.S. at 542-43. As such, it is incumbent upon this Court to answer the question: "[a]t what point do[] permissible [racial considerations] become unconstitutional? *Rucho,* 588 U.S. at 707. Unless the Court can answer that question, the question of "how much race is too much" is a nonjusticiable political question.

V. Election Deadline Implications.

Time is of the essence to resolve the important question posed by the August 1 Order. When the State and the Secretary originally sought a *Purcell*-related emergency stay from this Court on May 10, 2024, the Secretary required a map by May 15, 2024, to meet the deadlines associated with the November 2024 congressional jungle primary.[19] However, as noted in the Secretary's March 21, 2025, letter, a new state law moved the U.S. House elections from an open primary to a closed party primary system beginning in 2026.

[19] The specifics of those deadlines can be found at pages 17-18 of the State and the Secretary's Joint Emergency Application for Stay Pending Appeal in Docket No. 23A1002.

Under current law, the party primary election is scheduled for April 18, 2026.

Because of Louisiana's unique election laws, administration of elections begins well-ahead of the scheduled election day. The following deadlines are scheduled to occur in early 2026 based on current law:

- Qualifying Dates are January 14, 2026-January 16, 2026.
- Ballots for military or overseas voters must be mailed by March 4, 2026.
- All voter registration must be complete by March 28, 2026.
- Early Voting begins on April 4, 2026, and ends on April 11, 2026.
- The deadline for non-military or overseas voters to request a mail-in ballot is April 14, 2026, and all such ballots must be received by the Parish Registrar by April 17, 2026.

The Secretary acknowledges the weighty questions in front of this Court. However, due to Louisiana's new election scheme, the Secretary respectfully asks that this Court rule as soon as possible—ideally in December or early January, so that the Secretary can administer the election, and if this Court affirms the decision below, program a new congressional plan for the 2026 elections.

CONCLUSION

The judgment of the panel below should be affirmed because drawing a second majority-Black congressional district in Louisiana violates the Equal Protection Clause.

Respectfully Submitted,

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