UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KENNETH HALL

Plaintiff

Civil Action No. 3:12-cv-657
BAJ/RLB

and

BYRON SHARPER

Intervenor-Plaintiff

v.

STATE OF LOUISIANA, et al.

Defendants

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

When this action was tried in November 2014, the next scheduled election for the Baton Rouge City Court ("City Court") was the 2018 primary. Subsequently, a vacancy for Division "C" in City Court Section 2 ("Division 2C") occurred due to the January 26, 2015, resignation of Judge Alex "Brick" Wall, effective February 20, 2015. *See* Exhibit 1. Governor Jindal has called a special election primary for October 24, 2015, to fill the resulting vacancy; candidate qualifying for the special election is set to run from September 8-10, 2015. *See* Exhibit 2.[1] In the meantime Judge Wall is holding over in office pursuant to an appointment by the Louisiana Supreme Court.

[1] *See* State of Louisiana Executive Department, PROCLAMATION NO. 21 BJ 2015, SPECIAL ELECTION – JUDGE – CITY COURT – CITY OF BATON ROUGE, *available at* http://www.gov.state.la.us/assets/docs/21%20BJ%202015%20Special%20Election%20-%20Judge%20-%20City%20Court-%20City%20of%20Baton%20Rouge.pdf.

See Exhibit 3.[2]

If this Court issues a declaratory judgment finding a Section 2 violation prior to the onset of candidate qualifying for the special election, then the timing of permanent injunctive relief *vis à vis* the special election will be squarely before the Court. However, this Court should act now to enjoin the conduct of candidate qualifying and, should it later become necessary, to enjoin voting for the special election under the current City Court electoral system. If the special election is held under the City's current system, then in the likely event that the Court goes on to find a violation after the special election, equity would require the results of that special election to be set aside and a new election held under a lawful election system. That outcome would be disruptive and could inhibit the Court's ability to fashion effective relief. Accordingly, Plaintiff Kenneth Hall and Intervenor-Plaintiff Byron Sharper ("Plaintiffs") respectfully move this Court for preliminary relief with respect to the scheduled October 24, 2015 special election.

For the reasons discussed below, this Court should issue a preliminary injunction to restrain Defendants from conducting candidate qualifying or (if it becomes necessary) voting for the Division 2C seat on the City Court under the current district arrangement. Plaintiffs submit that the evidence at trial makes it highly likely that they will succeed on the merits of their claim that the current method of electing judges to the City Court dilutes African-American voting strength in violation of Section 2 of the Voting Rights Act of 1965, as amended, 52 U.S.C. § 10301

[2] On May 6, 2015, the Louisiana House Legislature passed two bills that offer competing plans to revise the current electoral system for the Baton Rouge City Court. House Bill 76 would redraw district lines so that three of the five judges would be elected from Election Section 1. *See* Exhibit 4, DIGEST H.B. 76 ENGROSSED, 2015 Reg. Legis. Sess. (La. 2015), *available at* https://www.legis.la.gov/legis/ViewDocument.aspx?d=943270. House Bill 122 would require at-large elections for each of the City Court's five judgeships. *See* Exhibit 5, DIGEST H.B. 122 ENGROSSED, 2015 Reg. Legis. Sess. (La. 2015), *available at* https://www.legis.la.gov/legis/ViewDocument.aspx?d=943275.

("Section 2"), and that the threat of irreparable injury, the balance of harms, and the public interest all weigh in favor of preliminary relief.

II. ARGUMENT

This Court is highly likely to find a violation of Section 2 of the Voting Rights Act, and may do so well in advance of the scheduled September 8 opening of candidate qualifying for the October 24 special election. As discussed below, trial revealed few disputed issues with respect to the critical *Gingles* preconditions, and the totality of the circumstances factors uniformly weigh in the Plaintiffs' favor. If this Court finds a violation of Section 2 sufficiently in advance of the scheduled October special election to allow that election to be conducted pursuant to a permanent remedy, then the issue of whether preliminary relief is required would be obviated.

However, as things stand there is the possibility that—without preliminary relief—the scheduled special election will go forward under the current election system, only to have that system later found to violate federal law. In such situations plaintiffs ordinarily are required to have sought preliminary relief in order to justify shortening an elected official's term and requiring a special election. Accordingly, Plaintiffs respectfully move for preliminary relief to preserve their right to seek to shorten the term of any judge elected under the current system in the October special election and to have the vacancy filled under a lawful election system.

Moreover, the most efficacious way for this Court to vindicate the important federal interests at issue in this case and to minimize potential disruption to the City's election and judicial systems, pending a ruling on the merits, is to enter preliminary relief immediately enjoining candidate qualifying under the present judicial election system. If necessary, the Court could subsequently take the additional step of delaying the scheduled special election until a lawful

permanent system is in place, or alternatively, the Court could order that the special election be conducted as scheduled under a court-ordered interim plan.

The evidence presented at trial and the circumstances surrounding the special election weigh strongly in favor of preliminary relief. The trial record shows Plaintiffs have a substantial likelihood of succeeding on the merits by satisfying the three *Gingles* pre-conditions and demonstrating a violation of Section 2 through the "totality of the circumstances" inquiry. Along with the strength of Plaintiffs' claims at trial, the circumstances surrounding the upcoming election further demonstrate that there is a substantial threat Plaintiffs will suffer irreparable injury if this Court does not grant an injunction, which outweighs any threatened harm to Defendants. Granting the preliminary injunction is not contrary to the public interest, will not jeopardize judicial administration, and will protect the right to vote against continued irreparable harm.

A. Standard for Preliminary Relief

In 2008 the Supreme Court stated the traditional four-part standard for preliminary relief:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Amoco Production Co. v. Gambell*, 480 U. S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U. S. 305, 311–12 (1982)). Likelihood of success on the merits and irreparable harm are the most important factors of the four-part test. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) ("first two factors of the traditional standard are the most critical" for granting stay, which substantially overlaps with preliminary injunction standards). Indeed, the Supreme Court recently pointed specifically to the importance of success on the merits in the context of a federal district court constructing an interim redistricting plan, where a Section 2 challenge was pending:

> Where a State's plan faces challenges under the Constitution or § 2 of the Voting

> Rights Act, a district court should still be guided by that plan, *except to the extent those legal challenges are shown to have a likelihood of success on the merits*. Plaintiffs seeking a preliminary injunction of a statute must normally demonstrate that they are likely to succeed on the merits of their challenge to that law. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). There is no reason that plaintiffs seeking to defeat the policies behind a State's redistricting legislation should not also have to meet that standard. And because the local district court—here, the District Court for the Western District of Texas—will ultimately decide the merits of claims under § 2 and the Constitution, it is well equipped to apply that familiar standard.

Perry v. Perez, 132 S. Ct. 934, 942 (2012) (emphasis added). *Winter* also identified a lower threshold for irreparable harm (irreparable injury "likely" in the absence of an injunction),[3] than did *Chisom v. Roemer*, 853 F.2d 1186, 1188 (5th Cir. 1988), which required a "substantial likelihood" of irreparable harm.[4]

Winter and *Perry v. Perez* also call into question the Fifth Circuit's reasoning in *Chisom*, which concluded that irreparable harm for purposes of preliminary relief in Section 2 cases is limited to those situations where "the threatened harm would impair the court's ability to grant an effective remedy" should the plaintiffs ultimately prevail. *Chisom*, 853 F.2d at 1189 (quoting Charles A. Wright et al., *Federal Practice and Procedure* § 2948 at 431-34 (1973)). Unlike the panel decision in *Chisom*, the Supreme Court in *Perry v. Perez* did not limit the availability of preliminary relief in a Section 2 case to only those circumstances where a permanent remedy would be impaired absent preliminary relief. *Perry v. Perez*, 132 S. Ct. at 942.

Granting injunctive relief is within the discretion of the district court. *See Winter*, 555 U.S.

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[3] "Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 375 (emphasis in original) (citations omitted).

[4] The *Chisom* panel had presented the four-part test as judging whether plaintiffs had shown: "(1) a substantial likelihood that plaintiff will prevail on the merits; (2) a *substantial* threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant; and (4) that granting the preliminary injunction will not disserve the public interest." *Chisom*, 853 F.2d at 1188 (emphasis added) (citing *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974)).

at 32 (citation omitted). However, the timing of injunctive relief is of particular importance to the exercise of that discretion in cases involving elections, not only in cases of preliminary relief, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006),[5] but also where a court is applying a remedy pursuant to a final judgment. *See Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014).[6]

B. Plaintiffs Are Likely to Succeed on the Merits of Their Section 2 Claim

Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law (Docket No. 546), which are incorporated by reference here, explain in detail why Plaintiffs are highly likely to succeed on their claim that the current method of electing judges to the City Court dilutes African-American voting strength in violation of Section 2. The following discussion summarizes the facts and law demonstrating a violation.

Section 2 prohibits states and political subdivisions from applying any voting practice that denies or abridges the right to vote on account of race, color or membership in a language minority group. 52 U.S.C. § 10301(a)(b). A plaintiff must first satisfy three preconditions to prevail in a Section 2 minority vote dilution case: (1) the minority group is sufficiently large and geographically compact to constitute a majority in an additional single-member district; (2) the minority group is politically cohesive; and (3) the white majority votes sufficiently as a bloc to

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[5] "Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5.

[6] "[I]n the apportionment context, the Supreme Court has instructed that, '[i]n awarding or withholding immediate relief, a court is entitled to and *should* consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon equitable principles.' [] Accordingly, 'under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid.'" *Veasey v. Perry*, 769 F.3d at 893 (quoting and adding emphasis to *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)) (internal citations omitted). The *Veasey v. Perry* panel analogized applications for stays of permanent injunction issued after final judgment to requests for preliminary injunctions. *Id*. at 892-94.

enable it usually to defeat the minority's preferred candidates. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). If the preconditions are satisfied, plaintiffs must then prove they suffer a diminished opportunity as compared to other members of the electorate to participate in the political process, taking into account the "totality of the circumstances".[7] This analysis is guided by the non-exhaustive list of factors contained in the Senate Judiciary Committee Report for the 1982 amendments to the Voting Rights Act. *Gingles*, 478 U.S. at 36-38, 43-45; *see also Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 667, 672-73 (5th Cir. 2009).

The Baton Rouge City Court is composed of five judges elected to six-year terms. Pre-Trial Order (Docket No. 359) at ¶¶ 191, 209 [hereinafter "Pre-Trial Order"].[8] Two judges are elected from Election Section 1 (Divisions "B" and "D"), and three judges are elected from Election Section 2 (Divisions "A", "C", and "E"). *Id.* at ¶¶ 205, 207.[9] The current districting scheme for the City Court was enacted, via Act 609, in 1993 to provide African Americans the opportunity to elect candidates of choice roughly proportional to their city population at that time (about 40%). Pre-trial Order at ¶¶ 200-04; 8/5/14 Tr. at 192-94 (Guidry).[10] The population demographics of the City of Baton Rouge have shifted since 1993. The 2010 Census showed that African Americans comprise a majority of both the total population and the voting-age population

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[7] A violation of Section 2 does not require the Court to make a finding of intentional discrimination. *Gingles*, 478 U.S. at 74.

[8] The most recent City Court election was in 2012, and the next regularly-scheduled City Court election will occur in 2018. Pre-Trial Order at ¶ 211.

[9] Each judgeship is elected from a separate division, often called a numbered-post or "place" system. Pls. Ex. 60 at ¶ 5. In order to win election to the City Court, a judicial candidate must win a majority of the votes cast in the contest; if no candidate wins a majority, the top two vote-getters advance to a run-off election. Pre-trial Order at ¶ 213.

[10] The Baton Rouge City Court election sections have remained unchanged since 1993 despite numerous efforts from members of Baton Rouge's African-American community. Since 2000, when African Americans became the majority of Baton Rouge's total population, bills were introduced in the state legislature to create a more equitable method of electing City Court judges in 2001 (*see* Joint Exs. 8-9), 2004 (*see* Joint Exs. 4.5, 10; 8/4/14 Tr. at 246-47 (White), 284-88 (Jackson)), 2006 (*see* Joint Exs. 4.4, 11; 8/4/14 Tr. at 234 (Johnson)), 2013 (*see* Joint Ex. 13), and 2014 (*see* Joint Ex. 15). To date, however, these legislative efforts have each been unsuccessful.

of the City of Baton Rouge.[11] The 2010 Census showed that African Americans comprise 75 percent of the total population and 70 percent of the voting-age population in Election Section 1, while in Election Section 2 whites comprise 51 percent of the total population and 55 percent of the voting-age population. Defs. Ex. 1.2 at ¶ 87. Since the current districting scheme was created, Election Section 1 has consistently elected African-American judges and Election Section 2 has consistently elected white judges. Pre-trial Order at ¶¶ 206, 208.

Regarding the *Gingles* preconditions, there is a notable absence of serious disputes. To satisfy the first *Gingles* precondition in the Fifth Circuit, "plaintiffs typically have been required to propose hypothetical redistricting schemes and present them to the district court in the form of illustrative plans." *Fairley*, 584 F.3d at 669. Plaintiffs' expert Nancy Jensen provided two illustrative districting plans that create an additional majority-black single-member district. 8/5/14 Tr. at 117-19, 129-35, 139, 142 (Jensen); 8/6/14 Tr. at 24 (Engstrom); 11/17/14 Tr. at 151-53 (Engstrom); Pls. Exs. 60 at ¶¶ 7-9, 62, 64-65. Defendants have offered no basis to seriously dispute that these alternative plans satisfy the first *Gingles* precondition.[12]

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[11] Specifically, the 2010 Census shows the City of Baton Rouge had a total population of 229,493, of whom 54.5% are black alone, 39.4% are white alone, and 6.1% report a different racial/ethnic descent, Pls. Ex. 147 at 02039; Baton Rouge's voting-age population is 177,987, of whom 78,216 (43.9%) are white alone and 89,085 (50.1%) are black alone. Defs. Ex. 185 at 003067.

[12] Defendants' criticisms of Jensen's plan are either irrelevant to determining the first *Gingles* prong or unsupported by the evidence. Specifically, Defendants articulated the following criticisms: Jensen erred in relying on the DOJ Section 5 guidance; Jensen did not properly apply Section 5's retrogression analysis; Jensen should have used the existing city court plan as a benchmark; Jensen failed to use state redistricting principles for judicial elections; race predominated among Jensen's redistricting principles; Jensen's plans did not show a factual or legal possibility of creating a third-minority district. *See* Defs.' Proposed Finding of Facts and Conclusions of Law Filed on Behalf of the State of Louisiana, the Governor, and the Attorney General at ¶¶ 97-128 (Docket No. 550-1); Def. Baton Rouge City Parish's Proposed Finding of Facts Conclusions of Law ¶¶ 88-235 (Docket No. 549-1). The majority of Defendants' counterarguments are inapplicable to determining the first *Gingles* prong which does not require that plaintiff's plan apply retrogression analysis, use the existing plan as a benchmark, or forego a predominant consideration of race. *See Fairley*, 584 F.3d at 669-72 (affirming the district court's analysis of the first *Gingles* prong which does not consider the various collateral concerns Defendants articulate). Defendants' claim that Jensen's plan did not sufficiently illustrate a third minority-district is not supported by any reference to the record and, indeed, the allegation is disproved by submitted evidence. *See* 11/17/14 Tr. at 151-53 (Engstrom); Pls. Ex. 60 at ¶¶ 7-9.

The second and third *Gingles* preconditions require the court to draw conclusions from the relevant pool of elections to assess the extent and the consequences of racially polarized voting. Courts first look to the results of relevant "endogenous" contests. *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir. 1993). In its discretion, the court may also consider exogenous elections that it finds probative. *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502-03 (5th Cir. 1987).[13] The seven relevant biracial judicial contests analyzed by both parties' experts constitute a sufficient pool of elections for this Court to draw conclusions about racially-polarized voting. *See Magnolia Bar Ass'n*, 994 F.2d at 1148-50 (finding the results of two endogenous contests sufficient to make examination of exogenous contests unnecessary in determining third *Gingles* precondition); *see also* 11/19/14 Tr. at 53 (Defendants' expert declined to dispute contention that the seven biracial judicial contests were a sufficient pool of elections).[14]

Both parties' experts testified at trial that African-American voters were cohesive in each of the seven biracial judicial contests that they analyzed.[15] Both parties' experts also testified at trial white bloc voting defeated "the combined strength of minority support plus white 'crossover' votes" in each endogenous contest and in three of the four exogenous contests.[16] *Gingles*, 478 U.S. at 56. Plaintiffs therefore have a substantial likelihood of prevailing on both the second and third *Gingles* preconditions.

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[13] There is no minimum number of contests that a district court must consider before finding that the second and third *Gingles* preconditions have been satisfied. *See Citizens for a Better Gretna*, 834 F.2d at 503 (upholding a finding of racially-polarized voting based upon four contests: two endogenous and two exogenous).

[14] While the parties disagreed about whether any weight should be given to the nine exogenous non-judicial elections analyzed by Dr. Weber, the seven agreed-upon judicial elections are sufficient to sustain Plaintiffs' burden for preliminary relief by demonstrating a substantial likelihood of success on the merits.

[15] *See* 11/17/14 Tr. at 141-44 (Engstrom); 11/19/14 Tr. at 48-52, 58 (Weber); Defs. Ex. 1 at 95 (Table 19).

[16] 11/19/14 Tr. at 81 (Weber: "Turning first to the City Court elections, cohesion for African-Americans, racial polarization, consequential results -- vote dilution."). In addition, the African-American candidate of choice was defeated in each of the judicial elections analyzed, and failed to win a majority of the vote within Section 2 in three of the four exogenous judicial contests. Pls. Ex. 59 at ¶¶ 18, 20, 22-23; Pls. Exs. 158-161; Defs. Ex. 1.2 ¶¶ 63, 69, 75, 78, 84.

For purposes of preliminary relief, the strong evidence that Plaintiffs have satisfied the *Gingles* preconditions normally would demonstrate likelihood of success on the merits: "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances." *Clark v. Calhoun Cnty., Miss.*, 21 F.3d 92, 97 (5th Cir. 1994) (quoting *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993)).

Nonetheless, Plaintiffs presented persuasive evidence at trial with respect to each of the Senate Factors, which largely went undisputed, and on balance weighs strongly in favor of Plaintiffs. The two most important factors in the totality of the circumstances analysis are "whether the electorate is racially polarized" (Senate Factor 2) and "whether, under the challenged electoral practice, the minority group has been able to elect candidates of its choice" (Senate Factor 7). *Westwego Citizens for a Better Gov't v. City of Westwego,* 946 F.2d 1109, 1122 (5th Cir. 1991) (citing *Gingles*, 478 U.S. at 48 n.15). If those factors are present, "the other factors . . . are supportive of, but *not essential to*, [the] claim." *Gingles*, 478 U.S. at 48 n.15 (emphasis in original). In light of the evidence concerning minority cohesion and racially polarized voting discussed above, these two factors are well-established.

It is beyond dispute that the State of Louisiana and the City of Baton Rouge have a long history of voting-related official discrimination, as well as discrimination in education and employment that touch upon the right to vote and to participate equally in the political process (Senate Factors 1, 5).[17] The City Court's numbered-post system and the majority-vote requirement

[17] *See Chisom v. Jindal*, 890 F. Supp. 2d 696, 715 (E.D. La. 2012) (demonstrating how State sought to avoid the clear dictates of a federal consent decree so as to prevent an African-American Supreme Court Justice from being elevated to Chief Justice); *see also Scott v. Schedler*, 2013 WL 264603, at *18 (E.D. La. Jan. 23, 2013) (finding Louisiana failed to comply with public assistance agency voter registration requirements under the National Voter Registration Act (NVRA), a failure that disproportionately impacts minorities due to the socioeconomic factors that

for each Section tend to enhance the opportunity for voting discrimination where African-American voters are submerged within majority-white electorates (Senate Factor 3). Significant disparities remain between the respective socioeconomic positions of African Americans and non-African Americans in Baton Rouge, and African-American participation in politics is comparatively depressed (Senate Factor 5).[18] This Court also heard compelling testimony concerning racial campaign appeals in recent judicial elections (Senate Factor 6).[19]

Since 1993 every judge elected from Election Section 2 (the most relevant jurisdiction for the present case) has been white, and all African-American candidates who have run in Election Section 2 have been unsuccessful (Senate Factor 7).[20] Since 1993, every African-American judge in Baton Rouge has been elected from a majority-black district.[21] In majority-white districts, African-American judicial candidates have been uniformly defeated.[22] Unrebutted trial testimony

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characterize Baton Rouge), *aff'd in part, vacated in part* No. 13-30185, 2014 WL 5801354 (5th Cir. Nov. 5, 2014); *Clark v. Edwards*, 725 F. Supp. 285, 288-95, *supplemented sub nom. Clark v. Roemer*, 777 F. Supp. 471 (M.D. La. 1991); 8/4/14 Tr. at 25-26 (discussing taking judicial notice of the findings in *Clark v. Roemer*); 11/17/14 Tr. at 52-62 (Cassimere); Pls. Ex. 66 at 00955-59.

[18] *See* Pls. Exs. 16-18; Defs. Ex. 1 at 21 (Table 2); *see also* Pls.' Post-Trial Proposed Findings of Fact and Conclusions of Law (Docket No. 546) at ¶¶ 97-100.

[19] These racial campaign appeals have taken several forms, including white candidates prominently placing images (in at least one instance darkened) of their opponents on their own campaign materials and calling a sitting appellate judge an "affirmative action Democrat." 8/5/14 Tr. at 186-87. Trial testimony from Judge Guidry, Judge Trudy White, and Tiffany Foxworth demonstrated that racial campaign appeals designed to highlight, if not to disparage, the racial identity of African-American candidates appeared in three of the four biracial judicial elections in 2012. *See* 8/4/14 Tr. at 273-74, 277 (White); 8/5/14 Tr. at 46-47, 51-55 (Foxworth); 8/5/14 Tr. at 185-89 (Guidry). Such troubling racial campaign appeals occurred in the recent Supreme Court election. *See* 8/5/14 Tr. at 186-87 (Guidry). In addition to these overtures highlighting Guidry's race, Judge Hughes sent targeted campaign materials to parts of the district that linked Judge Guidry to African-American Chief Justice Bernette Johnson of the Louisiana Supreme Court (and included their pictures) and expressed the need to elect Judge Hughes to prevent Chief Justice Johnson from exercising power, which was particularly racially-charged given the recent circumstances of her ascension to Chief Justice, 8/5/14 Tr. at 187-89; Judge Hughes ran a television commercial that prominently featured President Obama, noting that Obama would not appoint Judge Hughes, but the people could elect him, *id.* at 186-87.

[20] *See* 11/17/14 Tr. at 68-69 (Cassimere); 11/18/14 Tr. at 177-78 (Beychok).

[21] *Id.*

[22] *Id.*

showed that no African-American judge presently serving in Louisiana has been elected from a majority-white district.[23]

The remaining Senate Factors also cut in Plaintiffs' favor. There was testimony that in one of the few areas in which the City Court acts as a body—setting the rates for court fees and fines—the City Court as a whole was not responsive to concerns that the rates were excessive with respect to the African-American community.[24] Regarding the tenuousness of the current system, the Defendants presented little or no evidence to justify the current district arrangement at trial, and there appeared to be general agreement that the current system should be changed.[25]

Finally, the current district configuration does not provide "substantial proportionality" between the City's African-American population and their opportunity to elect candidates of their choice to the City Court. *See Johnson v. Degrandy*, 512 U.S. 997, 1013-14 n.11 (1994). By providing for three of five judges (60%) to be elected from majority-white Section 2 and two judges (40%) from majority-black Section 1, the current arrangement is not consistent with the African-American share of the citywide population.

C. Conducting the Election Under the Current System Will Cause Irreparable Harm

Voting is "a fundamental political right, because it is preservative of all rights." *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356,

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[23] *Id.*

[24] 8/4/14 Tr. at 249, 278-79 (White).

[25] Defendants presented no justification for the current method of election and there appeared to be near-universal agreement that the current system should be changed, with the only remaining disagreement centered upon *how* to modify the system. *See, e.g.*, Joint Exs. 3.1, 3.2, 4.1, 4.4, 4.5, 14, 15 (House Bill 1151, which would have changed the method of election, passed unanimously in 2014, although disagreements arose in the Senate as to the details of modification); *see also* 11/17/14 Tr. at 243 (Ponti) (unable to name a single legislator that supported the current method of election).

370 (1886)). Indeed, "[o]ther rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

The loss of equal access to the ballot is not compensable by damages and irreparable harm occurs when a party has no adequate remedy at law, typically because its injuries cannot be fully compensated through an award of damages. *Deerfield Med. Ctr. v. City of Deerfield*, 661 F.2d 328, 338 (5th Cir. 1981). Once the opportunity for equal participation in an election has been denied, there is no way to fully remedy the wrong.

Plaintiffs do not seek monetary damages and a remedy can only be effectuated through declaratory and injunctive relief. Accordingly, if the special election is permitted to go forward under the current district boundaries, Plaintiffs will suffer irreparable harm because they will be forced to choose between participating in an electoral process that violates federal law, or to forego meaningful participation altogether.

As discussed above, it is unclear whether the holding in *Chisom v. Roemer*—that a Section 2 violation does not *per se* constitute irreparable injury—remains good law after *Winter* and *Perez v. Perry*. It is not necessary to decide that point, however, because there is the prospect of irreparable injury in this case even under the *Chisom* standard. *See Chisom*, 853 F.2d at 1188-89 (federal court should find irreparable harm if "the threatened harm would impair the court's ability to grant an effective remedy" (internal quotation and citation omitted)). That is to say, under the present circumstances there are specific reasons to find that allowing the special election to proceed under the current system would jeopardize the Court's ability to later institute a full and effective remedy, should Plaintiffs ultimately prevail.

It is true that this Court could invalidate the results of the special election *post hoc* and order a new special election under a revised election system that complies with federal law. That

would not necessarily represent a full and effective remedy, however, because if the winning candidate in the special election is not the African-American-preferred candidate, that candidate would be in the position to benefit as a *de facto* incumbent, if not an actual incumbent, in future elections, a result which cannot be undone by court order. *See, e.g.*, *Gingles*, 478 U.S. at 57, 60-61 (recognizing that incumbency may confer a beneficial advantage to a candidate and constitutes a "special circumstance"). Invalidating an election also runs the risk of causing needless delay by prompting intervention applications and collateral appeals by the winning candidate, seeking to undermine the Court's judgment to protect his or her ill-gotten electoral gains. *See Garza v. County of Los Angeles*, 918 F.2d 763, 776-77 (9th Cir. 1990).

On the other hand, if a black-preferred candidate does win the special election, the circumstances inevitably would call into question whether the field of candidates had been strategically restricted so as to provide a counterexample to the existing pattern. *See* 11/17/14 Tr. at 63-66, 93-94 (Cassimere) (African-American judicial candidates were uncharacteristically successful while *Clark* litigation was pending); *Gingles*, 478 U.S. at 75-76 (recognizing that pendency of Section 2 litigation may work "a one-time advantage for black candidates in the form of unusual organized political support by white leaders concerned to forestall single-member districting"). Though the record is closed, that decision itself could prompt appeals seeking to reopen the record.

Accordingly, this Court can best institute an effective remedy by enjoining the qualification of candidates until a decision is rendered and a remedy is implemented, and if it later becomes necessary, by also postponing the special election. Without such an injunction, irreparable harm is likely to occur.

D. The Balance of the Equities Weighs in Favor of the Plaintiffs

As discussed above, the potential harm to the Plaintiffs is great absent preliminary relief, because once the opportunity to participate fully in the electoral process is lost for a certain election, it cannot be regained. Conversely, the timing and particular circumstances of the Division 2C special election make the burden of the requested preliminary relief on Defendants minor at most. Unquestionably there is an interest in the orderly and consistent operation of the State's electoral machinery, as well as an interest in preventing the City Court from going without a full complement of judges. However, neither of those important interests would be undermined by the preliminary relief sought by Plaintiffs.

To begin with, injunctive relief with respect to candidate qualifying need not delay the current schedule for the Division 2C special election, which sets the primary for the last week of October 2015, and the general election runoff (if needed) in November. Nearly five months remain before the scheduled primary, which provides sufficient time for this Court to issue preliminary relief to put candidate qualifying on hold, then issue its merits decision and complete remedial proceedings in time to use a legal plan for the October special election. The Legislature would have a reasonable opportunity to adopt a remedial plan consistent with federal law, given that the issue has repeatedly been before the Legislature.[26]

If the Legislature fails to adopt a timely and proper remedy after a finding of a violation, the Court could then formulate an appropriate court-ordered remedy that keeps the October election date, either through remedial proceedings, or by ordering that the special election go

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[26] An extended period of study or legislative deliberation is not required: the testimony at trial proved that the Legislature is well aware of what is needed to fix the problem with the City's election system, but to date it simply has chosen not to do so. 8/4/14 Tr. at 234 (Johnson); *id.* at 246-47, 255-56 (White); *id.* at 284-88 (Jackson); 8/5/14 Tr. at 261-64, 275-76, 279 (Williams); 11/17/14 Tr. at 227-30, 243-44 (Ponti).

forward (on either a permanent or interim basis) under one of the plans already before the Court.[27] Thus, an immediate preliminary injunction to halt candidate qualifying need not necessarily delay the impending special election.

Furthermore, by making clear that the special election will not be held under current election boundaries, an immediate preliminary injunction to halt candidate qualifying would actually facilitate the ability to conduct the special election under a lawful election system using the current October 24 election date, because it would negate the risk that an injunction issued near an election deadline will create uncertainty or confusion among voters, candidates, or election officials. If circumstances develop that require the special election to be postponed, the requested preliminary relief minimizes the extent to which candidates, voters, or election officials might rely to their detriment on the current election boundaries and special election schedule.

Second, enjoining candidate qualifying (or for that matter delaying the October 24 special election) would not harm judicial administration by and within the City Court. Louisiana's Constitution provides a specific mechanism to preserve continuity within the City Court until a special election can be held under a legally sound system. Article V § 22 of Louisiana's Constitution addresses the temporary posting of judicial vacancies, providing that until a vacancy in a judicial office is filled "the supreme court shall appoint a person meeting the qualifications for

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[27] This Court already has everything before it needed to issue a court-ordered plan, but in its discretion, the Court in lieu of adopting a final remedy for the October election could assume the "unwelcome obligation" of imposing a temporary set of electoral boundaries for the Division 2C special election. *Ramos v. Koebig*, 638 F.2d 838, 842-45 (5th Cir. 1981) (citing *Connor v. Finch*, 431 U.S. 407, 415 (1977)). In *Reynolds v. Sims*, the Supreme Court found the district court had "acted in a most proper and commendable manner" by giving the legislature three months to fashion an appropriate remedy and then, upon finding the legislature's plan constitutionally infirm, ordering its own temporary court-ordered plan four months prior to the general election. The Supreme Court praised this outcome as taking place within "a time sufficiently early to permit the holding of the elections." *Reynolds*, 377 U.S. at 586. Because this case is far simpler than the statewide redistricting at issue in *Reynolds*, it would not require the same four-month timetable to develop a just court-ordered plan.

the office . . . to serve at its pleasure. The appointee shall be ineligible as a candidate at the election to fill the vacancy . . . .” La. Const. Art. V. § 22(B). In fact, the Louisiana Supreme Court already has invoked this power by appointing Judge Wall to serve on a temporary basis for six months beyond his scheduled retirement date of February 20, 2015—subject to further renewal—until a special election is held to fill the Division 2C vacancy. *See* Exhibit 3.

In addition, Plaintiffs are only seeking preliminary relief with respect to a special election, rather than a regularly scheduled election. As discussed below, in *Chisom* the court was concerned with the potential for disrupting the Louisiana Supreme Court’s regular election process. *See Chisom*, 853 F.2d at 1190-92. That concern is not present in the context of a special election, and minimizing the number of special elections is a positive objective.[28]

Nor would Defendants necessarily incur any extra expenses as a result of enjoining candidate qualifying or, if necessary, rescheduling the special election. A special election can be coordinated with other regularly scheduled election dates. *See, e.g., Smith v. Paris*, 386 F.2d 979 (5th Cir. 1967) (*per curiam*) (shortening terms of officials elected under discriminatory at-large scheme so that new elections would coincide with next regularly scheduled elections).

The instant motion is timely, and no substantial hardship or prejudice to Defendants will flow from the issuance of the requested relief.[29] The Defendants have been on notice since 2012

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[28] If this Court denies an injunction and Plaintiffs ultimately prevail on the merits, the Court would then face the need to set aside the results of the upcoming special election and order a new special election. *See Hamer v. Campbell*, 358 F.2d 215, 221-22 (5th Cir. 1966) (voiding prior election and ordering a new special election when prior election had racially discriminated against African-American voters in violation of the Constitution and plaintiffs had sought and lost their motion to preliminarily enjoin the election); *see also Tucker v. Burford*, 603 F. Supp. 276, 277-78 (N.D. Miss. 1985) (“Courts often require plaintiffs to seek pre-election judicial relief as a prerequisite to voiding an election and ordering a special election due to constitutional violations.” (citations omitted)).

[29] As a general matter, courts decline to enjoin elections if the plaintiffs have waited until the eleventh hour to file their lawsuits and requests for injunctive relief. *See, i.e., Chisom v. Roemer*, 853 F.2d 1186 (5th Cir. 1988); *Watkins v. Mabus*, 771 F. Supp. 789 (S.D. Miss. 1991) (three-judge court) (plaintiffs’ motion to enjoin the election was not filed until approximately one month before the election), *aff’d in part, vacated in part on other grounds*, 502 U.S.

that Plaintiffs sought to enjoin the Baton Rouge City Court's election system by bringing a claim under Section 2. Any inconvenience to Defendants is outweighed by the irreparable harm that would result from conducting another election under the current electoral boundaries.

E. The Public Interest Weighs in Favor of Granting Immediate Injunctive Relief

The public interest also favors injunctive relief. The right to vote is a "precious" and "fundamental" right and other rights risk becoming illusory when the right to vote is undermined. *See Harper*, 383 U.S. at 670; *Wesberry*, 376 U.S. at 17. Plaintiffs seek to enforce Congress's mandate that minority voters "have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Westwego Citizens for a Better Gov't*, 946 F.2d at 1120.

Granting a preliminary injunction would advance the vital public interest of ensuring that the Division 2C special election and subsequent elections proceed under a lawful electoral system that provides African Americans an equal opportunity to elect candidates of their choice.

In addition, any potential candidate who is contemplating running in the special election has an interest in avoiding the unnecessary expenditure of time and resources that would result if the special election is allowed to go forward for some additional months under the current electoral boundaries, only to be replaced midstream by a revised set of boundaries. Immediate injunctive relief, based upon the well-founded likelihood of success on the merits, will minimize any misplaced expectation that the current electoral boundaries will remain in effect. Similarly, election officials will benefit from removing uncertainty as to the status of the current electoral boundaries. The apparent absence of support for the current boundaries and the widespread

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954; *Tucker*, 603 F. Supp. 276, 277 (N.D. Miss. 1985) (same)). In the instant case, Plaintiffs moved for injunctive relief well in advance of both the candidate qualifying and election dates.

recognition that the present system needs to be changed, as discussed above, further underscores that an injunction at this juncture would serve the public interest.

This case is readily distinguishable from *Chisom*, in which the Fifth Circuit concluded that a preliminary injunction of the 1988 election for the First District seat on the Louisiana Supreme Court was not in the public interest. 853 F.2d at 1189-92. *Chisom* identified three underlying concerns, none of which is present here. First, *Chisom* dealt with an injunction issued against the conduct of a regularly-scheduled election, and the court reasoned that delaying a regularly-scheduled election would undermine a sense of administrative and judicial "stability." *Id.* at 1190. The instant motion by contrast concerns a special election, which by definition is neither predictable nor routine. Second, *Chisom* cited uncertainty as to who would fill the First Supreme Court seat between the expiration of then-Justice Calagero's term and a special election. *Id.* at 1190-91. If Justice Calagero continued to serve, the *Chisom* panel feared that it could cloud the legitimacy of future court decisions, the rules surrounding judicial tenure, and the rules surrounding judicial re-election. *Id.* None of these legal complications is present here. Judge Wall is not seeking re-election in the Division 2C special election, and Louisiana's Constitution provides a clear procedure for temporarily appointing an interim judge, which already has been invoked.[30] Third, *Chisom* expressed concern about how long the voters of the First District might have to go without being able to vote for a Justice, given that a trial on the merits had not yet been held, and that the legislature would need to receive reasonable time to fashion a remedy. *Id.* at

[30] The Fifth Circuit also expressed concern that an injunction might have a negative effect on the Supreme Court's collegial decision-making. *Chisom*, 853 F.2d at 1190-91. In contrast, on the Baton Rouge City Court, the judges decide cases alone with the one minor exception of setting court fees. *See* 8/4/14 Tr. at 249, 278-79 (White) (describing collegial decisions regarding court fees).

1191-92. Here, trial on the merits has been concluded for six months.[31] Thus, this case does not present *Chisom*'s countervailing public interest concerns.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enjoin the Defendants from qualifying candidates for the vacant seat on the Baton Rouge City Court pending disposition of Plaintiffs' claims that the current method of electing judges to the Baton Rouge City Court violates the Voting Rights Act, and for such further relief as is required to preserve this Court's jurisdiction and to protect the Plaintiffs' rights and the federal interest against voting discrimination.

Respectfully submitted,

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[31] At the time of the *Chisom* injunction decision there was a threshold legal question of whether Section 2 applies to judicial elections, but that is no longer the case. *See Chisom v. Roemer*, 501 U.S. 380 (1991).