EAST BATON ROUGE PARISH C-716690
Filed Mar 22, 2022 8:18 AM 24
Deputy Clerk of Court
E-File Received Mar 21, 2022 7:27 PM

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

JAMES BULLMAN, KIRK GREEN, STEPHEN HANDWERK, DARRYL MALEK-WILEY, AMBER ROBINSON, and POOJA PRAZID, Plaintiffs, v. R. KYLE ARDOIN, in his official capacity as Louisiana Secretary of State, Defendant.	Civil Action No. C-716690 Div.: C Sec.: 24

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' EXCEPTIONS

MAY IT PLEASE THE COURT:

Plaintiffs James Bullman, Kirk Green, Stephen Handwerk, Darryl Malek-Wiley, Amber Robinson, and Pooja Prazid, by and through their undersigned counsel, file this memorandum in opposition to the declinatory, dilatory, and peremptory exceptions filed by Defendant Secretary of State R. Kyle Ardoin (the "Secretary").

Last year, the U.S. Census Bureau released the results of the 2020 decennial census, which confirmed that population shifts in Louisiana over the past decade have rendered each of the state's six congressional districts malapportioned. The Legislature commenced its redistricting efforts by adopting criteria and holding public hearings, but it was clear that deadlock was on the horizon: the state's political branches are divided, and while the Governor repeatedly insisted that Louisiana's new congressional map must include *two* districts where Black voters have opportunities to elect their candidates of choice, the Legislature was equally committed to maintaining the status quo. Inevitably, the political branches reached an impasse: during its special redistricting session, the Legislature adopted a congressional map with a single majority-minority district, which the Governor—true to his word—vetoed.

These are the facts as they stand today. The Secretary nonetheless insists that it is simply too early to tell if the political branches will fail to enact a new congressional map. Make no mistake: Louisiana is at an impasse *right now*. The political branches are hopelessly deadlocked, the midterm congressional elections are fast approaching, and the U.S. Supreme Court has made clear that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan" is not only "appropriate"; it is "*specifically encouraged*." *Scott v.*

Germano, 381 U.S. 407, 409 (1965) (per curiam) (emphasis added). That is why Plaintiffs have filed this lawsuit—and why this Court can and must hear it.

Time is of the essence. In Minnesota, Pennsylvania, and Wisconsin—the only other states where, like Louisiana, the branches charged with redistricting are politically divided—state courts have *already* drawn new congressional maps due to impasse. In other words, these courts have provided the same urgent, yet commonplace, relief that Plaintiffs seek here: a declaration that the current congressional map is unconstitutionally malapportioned; an injunction prohibiting its continued use; and a schedule with clear deadlines to ensure that a lawful map is adopted sufficiently in advance of the November election. The Legislature may try to break the current stalemate, but if the political impasse persists past the Court's deadline, then the Court must be prepared to adopt a plan of its own.

The Secretary's exceptions provide no compelling argument to dismiss Plaintiffs' suit. The political branches are at an impasse, the current controversy is live, and this Court—*not* the Louisiana Supreme Court—has the authority in the first instance to provide the necessary judicial backstop to avoid the harms that will follow from the ongoing political deadlock. And the appropriate parties have been named: in redistricting cases, voters in overpopulated districts may sue, and the Secretary must defend.

The Secretary's exceptions should therefore be denied, and the Court should set the gears of judicial redistricting into immediate motion to ensure that Louisiana voters can cast their ballots in constitutional congressional districts this November.

BACKGROUND

On April 26, 2021, the U.S. Secretary of Commerce delivered the results of the 2020 census to the President. *See* Pet. for Injunctive & Declaratory Relief ("Pet.") ¶ 16. The results reported that Louisiana now has a resident population of 4,657,757, an increase of more than 120,000 over the 2010 population figure. *See id.* ¶ 17. On August 12, the U.S. Census Bureau delivered to Louisiana its redistricting file in a legacy format, which allowed the State to tabulate the new population of each political subdivision. *Id.* ¶ 21. These data made clear that the populations of the state's current congressional districts as configured in 2011 (the "2011 plan") vary considerably from the ideal population, with Congressional Districts 1, 3, and 6 significantly overpopulated. *Id.* ¶¶ 22–24. Because of this malapportionment, the 2011 plan violates state and federal law. *Id.* ¶¶ 2, 25. Redrawing of Louisiana's congressional districts is therefore required.

Louisiana law provides that the state's congressional districting plan be enacted through legislation, which must pass both chambers of the Legislature and be signed by the Governor. But the redistricting needed to avoid the injury of unconstitutional malapportionment has confronted a significant obstacle: partisan deadlock. The Republican Party currently controls both chambers of the Legislature, but it lacks the supermajority necessary to override a veto from the Democratic governor. *Id.* ¶¶ 4, 28.

As the Legislature began its redistricting efforts last year,[1] the irresolvable deadlock between the two branches became abundantly clear. The Governor repeatedly stated his intention to "veto bills that I believe suffer from defects in terms of basic fairness." Blake Paterson & James Finn, *Gov. John Bel Edwards Will Veto Congressional Maps That Aren't 'Fair.' What Does That Mean?*, Advocate (Nov. 20, 2021), https://www.theadvocate.com/baton_rouge/news/article_8ace3fc4-4998-11ec-a9ff-2b154a8d9dd4.html. But while the Governor explained that fairness would require the drawing of a second majority-Black congressional district—what he called "a major reworking of the map"—Republican lawmakers instead expressed an adamant preference for only "tweaking around the edges" of the current congressional map and otherwise maintaining the status quo of a single majority-Black district. Melinda Deslatte, *Louisiana Governor Supports 2nd Minority US House District*, AP (Dec. 16, 2021), https://apnews.com/article/coronavirus-pandemic-health-louisiana-legislature-john-bel-edwards-46f6679aafcc1c2c431c78c44c01f503; *see also* Blake Paterson, *Gov. John Bel Edwards Says 'Fair' Congressional Maps Would Include Another Majority-Black District*, Advocate (Dec. 16, 2021), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_64e99736-5ea6-11ec-bea4-2fa9f0b6f8c9.html ("Gov. John Bel Edwards said Thursday it's only fair that two of the state's six congressional districts include a majority of Black voters, suggesting a veto may be on the table if lawmakers don't agree.").

During the Legislature's special redistricting session, the Republican-controlled State Senate and House of Representatives respectively passed Senate Bill 5 and House Bill 1, nearly identical congressional redistricting plans, on February 18, 2022. Pet. ¶¶ 4, 28. Despite the Governor's call for a new congressional map with two majority-minority districts, Black voters comprised a majority of only one district in both Senate Bill 5 and House Bill 1, and were otherwise

[1] Louisiana's redistricting website includes information relating to these efforts, including map details, adopted redistricting criteria, and the schedule of public hearings undertaken by the Legislature. *See Redistricting*, State of La., https://redist.legis.la.gov (last visited Mar. 21, 2022).

held below 33 percent of the population in every other district. *Id.* ¶ 29. Two-and-a-half weeks later, on March 9, the Governor made good on his earlier pledge to veto, explaining that the proposed congressional plans "run[] afoul of federal law" by failing to include a second majority-minority district. *Id.* ¶ 28 (alteration in original).

The political branches have thus reached an impasse, and Louisianans are without a constitutional congressional plan for the upcoming midterm elections. Because of this deadlock, judicial intervention is needed—and needed quickly. The candidate qualifying period, by which time candidates will need to know where they must file to run, is set to begin on July 20, 2022.[2] Before that date, this Court will need to set a calendar, consider proposed districting plans and accompanying briefing from the parties, and undertake the line-drawing process that the political branches will not. In short, to ensure that redistricting is completed in time for the November 2022 elections, it must begin now.

Plaintiffs accordingly brought this action, asking the Court "to declare Louisiana's current congressional district plan unconstitutional, enjoin [the Secretary] from using the current plan in any future election, and implement a new congressional district plan that adheres to the constitutional requirement of one person, one vote should the Legislature and the Governor fail to do so." *Id.* ¶ 1. The Secretary thereafter filed his declinatory, dilatory, and peremptory exceptions, advancing several procedural and substantive objections. *See generally* Mem. in Supp. of Declinatory, Dilatory & Peremptory Exceptions Filed on Behalf of Sec'y of State to Pls.' Pet. for Injunctive & Declaratory Relief ("Mem.").

ARGUMENT

The Secretary raises the declinatory exception of lack of subject matter jurisdiction, the dilatory exception of prematurity, and the peremptory exceptions of no cause of action and no right of action. For the reasons discussed below, none of these exceptions should be sustained.

I. This Court has subject matter jurisdiction.

The Secretary offers a variety of excuses as to why this Court should not hear this case—none of which divests it of jurisdiction.

[2] The dates of the candidate qualifying period and other election deadlines can be found on the Secretary's website. *See 2022 Elections*, La. Sec'y of State, https://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/ElectionsCalendar2022.pdf (last visited Mar. 21, 2022).

This case is justiciable. Plaintiffs currently live in malapportioned districts that will be used in future congressional elections unless a new map is timely adopted, and the political branches are at an impasse. The Secretary's repeated calls for a wait-and-see approach should not be heeded: Louisianans have already waited and seen that the political branches will not cure the malapportionment of the state's congressional districts. Because the Court's intervention can prevent this constitutional harm, the case is not moot. And the Court need not wait any longer to accept jurisdiction to remedy Plaintiffs' injuries.

Furthermore, this Court's exercise of its jurisdiction does not infringe upon any other branch of government. Judicial management of impasse litigation is a common, necessary process that is repeated during every redistricting cycle to ensure equal, undiluted voting power for all citizens. The Legislature and Governor remain free to enact a new congressional plan. But Plaintiffs and other Louisianans cannot afford a delay in the hope of a legislative solution; the Court must act now to remedy Plaintiffs' claims in the likely event the political branches remain deadlocked.

A. The controversy is justiciable because Louisiana's districts are currently malapportioned and judicial intervention is urgently needed to resolve the political impasse.

The Secretary wrongly claims that this Court lacks subject matter jurisdiction because it is not currently known with complete certainty that the political branches will fail to pass a congressional redistricting plan. This argument misses the point—and ignores the relevant legal standard and precedent.

First, there can be no dispute that continued use of the 2011 plan is unconstitutional. Article I, Section 2 of the U.S. Constitution requires congressional districts to be as equivalent in population as possible "to prevent debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). This constitutional mandate is commonly referred to as the "one-person, one-vote" principle. *See, e.g.*, *Gray v. Sanders*, 372 U.S. 368, 381 (1963). The census data released last year make clear that the configuration of Louisiana's congressional districts does not account for the state's current population distribution, violating the "Constitution's plain objective of [] equal representation for equal numbers." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964); *see also* Pet. ¶¶ 20–25; *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001) (three-judge court) ("[A]pportionment schemes become instantly unconstitutional upon the release of new decennial census data." (cleaned up)). The U.S. Census

Bureau revealed that Louisiana's population as of April 2020 had increased by more than 120,000 people as compared to ten years earlier, Pet. ¶ 17, and population shifts have not been uniform across the state. In fact, the data show that there is a greater than *11 percent* population deviation between districts, *id.* ¶ 24—far from the equal representation the U.S. Constitution requires. This ongoing malapportionment under the 2011 plan is the source of Plaintiffs' injury. *See Arrington*, 173 F. Supp. 2d at 859 (distinguishing between justiciable challenge to current apportionment of electoral districts and nonjusticiable challenge to "apportionment scheme the state legislature may enact in the future"). Accordingly, the injury Plaintiffs allege is not "merely hypothetical or abstract," Mem. 5 (quoting *Abbott v. Parker*, 249 So. 2d 908, 918 (La. 1971)); their districts are unconstitutionally malapportioned *right now*. *See Brown v. Ky. Legis. Rsch. Comm'n*, 966 F. Supp. 2d 709, 718 (E.D. Ky. 2013) (per curiam) (three-judge court) (rejecting ripeness argument where "[t]he injury claimed by the Plaintiffs is vote dilution caused by [malapportionment] of the [previous cycle's] legislative districts, which is an injury that is current and on-going").

Second, Plaintiffs are at grave risk of vote dilution as a result of political deadlock. The Legislature's special redistricting session ended with exactly the sort of congressional map—one with a single majority-minority district—that the Governor had repeatedly vowed to veto. That the Legislature *might* override the Governor's veto hardly alleviates Plaintiffs' present injury, especially given that the likelihood of a veto override is exceeding slim: during an historic veto override session last year, the Legislature failed to reverse a single veto, and the Legislature has not overturned *any* gubernatorial vetoes since 1993. Pet. ¶ 27. Moreover, contrary to the Secretary's argument, "it is not necessary to wait until actual injury is sustained before bringing suit." *State v. Rochon*, 2011-0009, p. 9 (La. 10/25/11), 75 So. 3d 876, 883. Instead, as a general matter, "a plaintiff who challenges a statute must demonstrate a *realistic danger* of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (emphasis added).[3] Under Louisiana law, "[i]t is sufficient if a dispute or controversy as to legal rights is shown, which, in the court's opinion, requires judicial determination—that is, in which the court is convinced that by adjudication a useful purpose will be served." *Perschall v. State*, 96-0322, p. 16 (La. 7/1/97), 697 So. 2d 240, 251. Plaintiffs are currently living in malapportioned districts and the political branches *will not* remedy

[3] The Louisiana Supreme Court has noted that "federal decisions on standing and justiciability should be considered persuasive." *La. Associated Gen. Contractors, Inc. v. State ex rel. Div. of Admin.*, 95-2105, p. 7 (La. 3/8/96), 669 So. 2d 1185, 1192 (cleaned up).

their ongoing injury. Plaintiffs are thus in realistic danger of vote dilution, and this Court's adjudication would serve the indisputably useful purpose of remedying that injury. Plaintiffs' claims are therefore ripe for adjudication.[4]

Notably, courts in other states have already started—*and completed*—the judicial redistricting process. Minnesota, Pennsylvania, and Wisconsin are the only states other than Louisiana with politically divided governments where redistricting lies with the political branches. *All three* deadlocked over congressional redistricting, requiring state courts to draw their congressional plans. Recognizing that the judicial redistricting process necessarily takes time, even when expedited, these courts did not drag their feet to see if the political branches would resolve their impasses before initiating judicial proceedings. Indeed, the Minnesota Supreme Court assumed jurisdiction in a lawsuit that alleged legislative deadlock even *before* the release of census data in April 2021. *See Wattson v. Simon*, Nos. A21-0243, A21-0546, 2022 WL 456443, at *1 (Minn. Special Redistricting Panel Feb. 15, 2022). It appointed a special redistricting panel in June of last year, which allowed parties to intervene, issued redistricting principles and plan-submission requirements, collected proposed plans from the parties, and, on February 15 of this year, issued a new congressional map. *See id.* In Pennsylvania, a state court began impasse proceedings in December 2021—*before* the Governor vetoed the legislature's proposed map and despite the fact that the legislature planned to reconvene in January 2022. *See Carter v. Chapman*, No. 7 MM 2022, 2022 WL 702894, at *2–3 (Pa. Feb. 23, 2022). After the Pennsylvania Supreme Court assumed jurisdiction at the request of the petitioners, it appointed a special master to review submissions and adopted one of the submitted plans on February 23. *See id.* at *4–5, *19. And in Wisconsin, voters petitioned the Wisconsin Supreme Court to draw a new congressional map "[s]hortly after the completion of the 2020 decennial census," *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450-OA, 2022 WL 621082, at *1 (Wis. Mar. 1, 2022)—three months before the legislature had even passed the congressional plan that the governor vetoed. "[P]arties submitted

---

[4] While the Fourth Circuit Court of Appeal, in ruling on an earlier impasse lawsuit brought by a similar group of plaintiffs, suggested (without explicitly ruling) that the plaintiffs' claim was premature at that juncture, *see English v. Ardoin*, 2021-0739, p. 6 n.2 (La. App. 4 Cir. 2/2/22); 2022 WL 305363, at *4 n.2, that opinion was issued more than six weeks ago: before the Legislature's special redistricting session and, most critically, before the Governor's veto. Whatever doubts about ripeness that the Court of Appeal might have had then have surely been extinguished by the events of the intervening six weeks, during which the plaintiffs' prediction of political deadlock became a reality.

proposed maps, briefs, and expert reports," and the court adopted a new congressional map on March 1. *Id.* at *2.[5]

Just as in these other states, the partisan divide between Louisiana's legislature and governor will prevent adoption of a new congressional districting plan ahead of the 2022 congressional elections—as evidenced by the veto that has already occurred. *See* Pet. ¶¶ 28–29. And just as in those states, judicial intervention is needed to ensure that political impasse does not result in the dilution of Plaintiffs' and other citizens' voting rights. This Court does not need to wait any longer. The fact that the political branches *could* prevent Plaintiffs' ongoing injury is "irrelevant" because Plaintiffs have "realistically allege[d] actual, imminent harm" stemming from political impasse and the malapportionment harm that will continue as a result. *Arrington*, 173 F. Supp. 2d at 862. Nor *should* this Court wait; indeed, the U.S. Supreme Court has cautioned against undue restraint in these cases that might end in constitutional violations, explaining that

> [w]hile a court sitting as a court of equity might be justified in temporarily refraining from the issuance of injunctive relief in an apportionment case in order to allow for resort to an available political remedy . . . , individual constitutional rights cannot be deprived, or denied judicial effectuation, because of the existence of a nonjudicial remedy through which relief against the alleged malapportionment, which the individual voters seek, *might* be achieved.

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964) (emphasis added). There is also practical value to the Court's immediate intervention. In denying a request for a stay of a malapportionment lawsuit during the last redistricting cycle, a three-judge court in Kentucky explained the need for proactive case management:

> The Court remains hopeful, but time is short for all. . . . [T]hough the Plaintiffs do not seek and the Court does not intend to provide relief that obstructs the legislature, *actions must be taken now* to prepare for the possibility that the state institutions will be unable to fulfill their duty in a timely manner. . . .
>
> [I]f the legislature were to fail in passing constitutional legislative districts and the Court were not prepared to do so, the fundamental voting rights of both the Plaintiffs and the general public would be severely threatened.

Brown v. Kentucky, Nos. 13-cv-68 DJB-GFVT-WOB, 13-cv-25 DJB-GFVT-WOB, 2013 WL 3280003, at *4 (E.D. Ky. June 27, 2013) (three-judge court) (emphasis added).

In short, Plaintiffs' claims are not only ripe for adjudication—they require this Court's immediate attention.

---

[5] Similarly, during the 2010 redistricting cycle, in a majority of states with divided governments—including Colorado, Minnesota, Mississippi, Nevada, New Mexico, and New York—courts were required to draw congressional maps, legislative maps, or both.

B. Plaintiffs will be forced to vote using Louisiana's currently unconstitutional congressional map if a new plan is not timely enacted.

The Secretary wrongly claims that this Court should ignore Louisiana's unconstitutional congressional map and the dilution of Plaintiffs' votes because no one has "propose[d] to utilize [the] current congressional districts drawn in 2011 to hold the regular congressional elections in 2022." Mem. 6. But that is exactly what state law requires the Secretary to do in the event the political branches fail to timely adopt a new congressional redistricting plan.

Louisiana law provides that the state "shall be divided into six congressional districts," and that those "districts *shall be composed as follows*." La. R.S. 18:1276.1 (emphasis added). The statute then lists the composition of the six districts as enacted in the 2011 plan following the 2010 census. *See id.* The 2011 plan is thus explicitly prescribed by law, since "[u]nder well-established rules of interpretation, the word 'shall' excludes the possibility of being 'optional' or even subject to 'discretion,' but instead 'shall' means imperative, of similar effect and import with the word 'must.'" *La. Fed'n of Tchrs. v. State*, 2013-0120, p. 26 (La. 5/7/13), 118 So. 3d 1033, 1051 (cleaned up). Unless a new plan is timely adopted, the Secretary *has no choice* but to use the 2011 plan in the next election.[6]

Armed with his incorrect belief that he could choose not to carry out elections under the 2011 plan, the Secretary suggests that this matter "is not of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" by relying on cases involving permissive statutes that afforded state actors discretion over whether to apply the law. Mem. 11–12; *see also Am. Waste & Pollution Control Co. v. St. Martin Par. Police Jury*, 627 So. 2d 158, 163 (La. 1993) (finding action involving discretionary zoning statute "premature because a *permissive* statute must be rendered operative or threatened to be rendered operative prior to being challenged" (emphasis added)); *La. Fed'n of Tchrs. v. State*, 2011-2226, p. 6 (La. 7/2/12), 94 So. 3d 760, 764

---

[6] The Secretary's lack of discretion in this regard is further demonstrated by federal law. "Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected . . . from the districts then prescribed by the law of such State" if, as here, "there is no change in the number of Representatives," 2 U.S.C. § 2a(c). In other words, unless Louisiana is redistricted in the manner provided by law—which is to say, either through a legislative enactment or judicial intervention—then its congressional representatives must be elected from the districts currently prescribed by state law—which is to say, the 2011 plan. While the advent of the one-person, one-vote principle has rendered this federal statutory provision unconstitutional, *see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 811–12 (2015), it nonetheless underscores that there is no automatic or fail-safe method of redistricting other than judicial intervention, and thus that the Secretary would have no choice but to use the 2011 plan if both the political branches and the judiciary fail to act.

(finding challenge to statutory school district waiver scheme nonjusticiable because no waiver had been requested and Board of Education retained discretion over whether to grant waiver at issue). The statute requiring use of the existing districts, by contrast, is not permissive, and neither the Secretary nor anyone else has discretion to simply disregard the 2011 plan. *See* La. R.S. 18:1276.1. When the political branches fail to enact a new plan, as they have in Louisiana to date, the Secretary has no choice but to carry out congressional elections under an indisputably malapportioned map—unless the Court steps in.

For similar reasons, the Secretary's suggestion that the current action is moot misses the mark. *See* Mem. 6–8. Far from asking the Secretary to "follow the law that is already in place," *id.* at 7, Plaintiffs actually seek the opposite relief: an order *preventing* the Secretary from following the currently operative 2011 plan. *See* La. R.S. 18:1276.1; Pet. 8.

Both the Secretary's mootness *and* ripeness arguments rely on the same flawed premise: that the malapportionment of Louisiana's congressional districts will somehow resolve itself without judicial intervention—*even if the political branches deadlock*—and thus there is no injury for the Court to remedy at this time. *See* Mem. 6–7 (suggesting that "the objective Plaintiffs seek has been accomplished by operation of law" simply because "the Constitution and laws command that the State redistrict"). But that is not the case. There are only two possible avenues for congressional redistricting in Louisiana: either a new plan is enacted through legislation or a new plan is adopted through judicial intervention. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 33 (1993). *That's it*. Either the political branches will act, or this Court will act; because the political branches have not, this Court must.

C. This Court's exercise of its jurisdiction does not usurp the other branches' powers to enact a congressional redistricting plan.

Contrary to the Secretary's claims, Plaintiffs do not ask the Court to "usurp the powers expressly granted to the Legislature by both the U.S. and Louisiana Constitutions." Mem. 10. Instead, they ask this Court to implement its own congressional plan *only* "if the political branches fail to enact a plan." Pet. 9. This request is necessary, appropriate, and consistent with state and federal law.

As the Secretary acknowledges, redistricting is "unique." Mem. 8. It is the rare lawmaking activity that is *required* by the U.S. Constitution, which makes it unlike discretionary legislative matters such as naming highways or regulating insurance. Those elective issues are necessarily reserved for the political branches alone because the Legislature's failure to name a segment of the

state's transportation infrastructure or regulate insurance audits does not violate any law—and thus could not inflict any legal injury. In stark contrast, a state's failure to fulfill its redistricting obligation unconstitutionally dilutes its citizens' right to vote and impairs their freedom of association. *See* Pet. ¶¶ 33–43. The judiciary's assigned role is to enjoin and redress precisely these sorts of injuries. *See* La. Const. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

This case does not present any dispute over which institution is responsible in the first instance for congressional redistricting in Louisiana—Plaintiffs and the Secretary agree that task is the Legislature's. *Compare* Pet. ¶ 26, *with* Mem. 9. Instead, the question is how the rights of Louisiana voters will be remedied now that the Legislature has failed to enact a new congressional plan. The Secretary seems to suggest that the Legislature could decline to redraw its congressional districts after census data is published, and voters in overpopulated districts would be helpless until the Legislature changes its mind. *See* Mem. 10 (arguing, without qualification, that "this Court lacks jurisdiction to intercede in redistricting congressional election districts"). Such a scenario would be unconscionable, which is why courts have squarely rejected it. *See Wesberry*, 376 U.S. at 7 (holding, in congressional apportionment case, that "[t]he right to vote is too important in our free society to be stripped of judicial protection" on political question grounds). Where congressional districts are malapportioned—whether because of legislative action *or* inaction—the law "embraces action by state and federal courts." *Branch v. Smith*, 538 U.S. 254, 272 (2003) (plurality opinion).

None of the requests that Plaintiffs make in their prayer for relief exceeds this Court's institutional power. *See* Pet. 8–9. Courts routinely enter declaratory judgments and grant injunctive relief. *See* La. C.C.P. arts. 1871, 3601(A). Merely establishing a litigation schedule is an ordinary—and, given the strict election calendar here, essential—judicial function. *Cf. Konrad v. Jefferson Par. Council*, 520 So. 2d 393, 397 (La. 1988) (recognizing that courts have power "to do all things reasonably necessary for the exercise of their functions as courts"). And judicial adoption of election maps is a necessary remedy when state legislatures fail to satisfy their constitutional redistricting duties. As the U.S. Supreme Court has explained,

> [l]egislative bodies should not leave their reapportionment tasks to the [] courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the "unwelcome obligation" of the [] court to devise and impose a reapportionment plan pending later legislative action.

Wise v. Lipscomb, 437 U.S. 535, 540 (1978) (citation omitted) (quoting *Connor v. Finch*, 431 U.S. 407, 415 (1977)).

Significantly, judicial adoption of congressional maps does *not* violate the Elections Clause of the U.S. Constitution, as the Secretary claims. *See* Mem. 8–9. Although the Elections Clause provides that "[t]he Times, Places, and Manner of holding Elections for Senator and Representatives, shall be prescribed in each State by the Legislature thereof," U.S. Const. art. I, § 4, cl. 1, the U.S. Supreme Court has recognized and "*specifically encouraged*" state courts to formulate valid redistricting plans when political branches fail to do so. *Scott*, 381 U.S. at 409 (emphasis added). As Justice Scalia explained when writing for a unanimous court in *Growe*, "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged," and therefore congressional reapportionment may be conducted "through [a state's] legislative *or* judicial branch." 507 U.S. at 33 (quoting *Scott*, 381 U.S. at 409); *see also Wesberry*, 376 U.S. at 6 ("[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws . . . from the power of courts to protect the constitutional rights of individuals from legislative destructions."). Consistent with *Growe*, state courts regularly find stale congressional plans to be malapportioned and adopt remedial plans, the Elections Clause notwithstanding. *See supra* Section I.A (describing this cycle's impasse proceedings in Minnesota, Pennsylvania, and Wisconsin).[7] Disrupting this practice, as the Secretary proposes, would not only upend decades of precedent—it would foreclose state courts' ability to remedy violations of the fundamental right to vote when state legislatures cannot or will not do so.

Having been assigned the redistricting responsibility in the first instance, the Legislature may not default on its constitutional duty and then claim the branch responsible for redressing

[7] For other examples from recent redistricting cycles, see generally, e.g., *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. Special Redistricting Panel 2012); *Guy v. Miller*, No. 11 OC 00042 1B (Nev. Dist. Ct. Oct. 27, 2011); *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. Dist. Ct. Dec. 29, 2011); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002); *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Special Redistricting Panel Mar. 19, 2002); *Jepsen v. Vigil-Giron*, No. D-0101-2001 02177 (N.M. Dist. Ct. Jan. 2, 2002); *Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002); *Perrin v. Kitzhaber*, No. 0107-07021 (Or. Cir. Ct. Oct. 26, 2001).

constitutional injuries is powerless to do anything. *That* would warp the separation of powers. As the Louisiana Supreme Court has recognized, "from its inception the Louisiana judiciary had an important role in the formulation of law and done far more than merely apply statutory provisions." *Unwired Telecom Corp. v. Parish of Calcasieu*, 2003-0732, p. 18 (La. 1/19/05), 903 So. 2d 392, 405. The relief that Plaintiffs request is entirely consistent with this role.[8]

D. This Court can draw Louisiana's new congressional map.

As a last-ditch effort to avoid adjudication by this Court, the Secretary suggests that only the Louisiana Supreme Court has jurisdiction over congressional impasse cases, *see* Mem. 10—a baseless argument premised on a brazen misreading of the constitutional provision at issue.

Article III, Section 6 of the Louisiana Constitution—unambiguously titled "Legislative Reapportionment; Reapportionment by Supreme Court; Procedure"—requires "the legislature [to] reapportion the representation *in each house* as equally as practicable on the basis of population shown by the census." La. Const. art. III, § 6(A) (emphasis added). By its plain language, this provision applies only to *legislative* redistricting, not *congressional* redistricting; no authority in this state has ever claimed otherwise. Accordingly, the provision's conferral of remedial authority to the Louisiana Supreme Court—"[i]f the legislature fails to reapportion . . . , the supreme court, upon petition of any elector, shall reapportion the representation *in each house*," *id.* art. III, § 6(B) (emphasis added)—has no relevance to this action, and certainly does not deprive this Court of jurisdiction over Plaintiffs' congressional malapportionment claims. *Cf.* La. Const. art. V, § 16(A) ("Except as otherwise authorized by this constitution . . . a district court shall have original jurisdiction of all civil and criminal matters.").

Although the Secretary's argument on this issue is brief, it is strikingly mendacious. In opposing a previous congressional impasse suit brought by a similar group of plaintiffs in Orleans Parish, the Secretary asserted that "[t]he Nineteenth Judicial District" in "East Baton Rouge is the proper *and exclusive* venue for the plaintiffs' actions." Memorandum in Support of Exceptions on Behalf of the Secretary of State at 5–8, *English v. Ardoin*, No. 2021-03538 (La. Civ. Dist. Ct. May 24, 2021) (emphasis added) (attached as Ex. 1). He repeated the same argument in response to the plaintiffs' amended petition, *see* Declinatory & Peremptory Exceptions on Behalf of the Secretary

---

[8] Moreover, unlike the plaintiffs in *Hoag v. State*, 2004-0857 (La. 12/1/04), 889 So. 2d 1019, who sought a writ of mandamus to compel the Legislature to appropriate certain funds, Plaintiffs here are not requesting that the Court order the Legislature to do anything. The Secretary's reliance on that case, *see* Mem. 9, is thus unpersuasive.

of State to Plaintiffs' First Amended & Supplemental Petition for Injunctive & Declaratory Relief at 1, *Berni v. Ardoin*, No. 2021-03538 (La. Civ. Dist. Ct. Sept. 8, 2021) ("East Baton Rouge Parish [] is *the only permissible venue* for this suit" (emphasis added)) (attached as Ex. 2), and in filings before the Fourth Circuit Court of Appeal, *see* Secretary of State's Original Application for Supervisory Writs to the Honorable Sidney H. Cates, IV, District Judge at 20–24, *English v. Ardoin*, No. 2021-C-0739 (La. Ct. App. Dec. 28, 2021) ("[T]he proper venue is the Nineteenth Judicial District in East Baton Rouge Parish.") (attached as Ex. 3), and the Louisiana Supreme Court, *see* Defendant-Applicant's Application for Supervisory Writ or, in the Alternative, Writ of Mandamus at 17–19, *English v. Ardoin*, No. 2022-CD-219 (La. Feb. 1, 2022) (same) (attached as Ex. 4). In response to this argument, the Court of Appeal agreed with the Secretary that "venue in this matter is only proper in East Baton Rouge Parish." *English v. Ardoin*, 2021-0739, p. 6 (La. App. 4 Cir. 2/2/22); 2022 WL 305363, at *4. At no point in these earlier proceedings did the Secretary ever suggest that the Louisiana Supreme Court retained exclusive jurisdiction over congressional impasse cases; indeed, he invited each court to transfer the matter *to this Court*. And the Court of Appeal certainly gave no indication, in ruling that this Court was the proper venue for the plaintiffs' claims, that Article III, Section 6 or any other constitutional or statutory provision simultaneously deprived this Court of jurisdiction. This novel argument from the Secretary is, ultimately, a disingenuous effort to delay these proceedings and prevent this Court from granting Plaintiffs the relief to which they are entitled under the Louisiana and U.S. Constitutions.

II. This matter is not premature and Plaintiffs have stated a cause of action.

The Secretary asserts that Plaintiffs' action is premature and unripe, *see* Mem. 10, and that they fail to state a cause of action because their claims are "academic, theoretical, or based on a contingency which may or may not arise," *id.* at 11–13. These arguments essentially rehash his justiciability argument. For the sake of efficiency, Plaintiffs will briefly summarize their arguments instead of repeating in full the myriad reasons why the Secretary's views on ripeness are misguided.

The general rule "is that an exception of no cause of action must be overruled unless the allegations of the petition exclude every reasonable hypothesis other than the premise upon which the defense is based; that is, unless plaintiff has no cause of action under any evidence admissible under the pleadings." *Haskins v. Clary*, 346 So. 2d 193, 195 (La. 1977). For the purpose of determining the validity of the peremptory exception of no cause of action, "all well-pleaded

allegations of fact are accepted as true, and if the allegations set forth a cause of action as to any part of the demand, the exception must be overruled." *Id.* at 194. "Liberal rules of pleading prevail in Louisiana and each pleading should be so construed as to do substantial justice." La. C.C.P. art. 865. Whenever "it can reasonably do so, [a] court should maintain a petition so as to afford the litigant an opportunity to present his evidence." *Haskins*, 346 So. 2d at 194–95. The Secretary bears the burden of proving prematurity. *See Williamson v. Hosp. Serv. Dist. No. 1*, 04-05l, p. 4 (La. 12/1/04), 888 So. 2d 782, 785.

As discussed at length above—and as pleaded in Plaintiffs' petition—Louisiana's congressional districts are unconstitutionally malapportioned, the Legislature and Governor have reached an irreversible impasse, and this Court must step in to undertake congressional redistricting. Plaintiffs' malapportionment injury must be redressed long before November so that candidates can prepare their campaigns and meet deadlines and other Louisianians, including Plaintiffs, can evaluate their options and associate with like-minded voters. Unless and until the Legislature enacts a lawful map, this Court must prepare to do so. Contrary to the Secretary's representations, Plaintiffs' petition is consistent with the ordinary course of redistricting litigation, and this Court has the power to provide the relief that Plaintiffs seek. Both the law and the facts as Plaintiffs have alleged them support this action; Plaintiffs have thus pleaded a cognizable cause of action, and one that is not premature.

III. Plaintiffs have stated a right of action.

Appropriate parties have been named in this suit: Plaintiffs have standing because they are injured by the current malapportionment of their congressional districts, and relief may be had against the Secretary in his capacity as Louisiana's chief election officer.

A. Plaintiffs have a real and actual interest in the matter asserted.

The Secretary wrongly asserts that Plaintiffs lack the kind of real and actual interest required by the Louisiana Code of Civil Procedure. *See* Mem. 13–15. To the contrary, Plaintiffs—who reside in overpopulated districts—have standing to bring this action.

Under Louisiana law, "an action can be brought only by a person having a real and actual interest which he asserts." La. C.C.P. art. 681. Courts—including the U.S. Supreme Court—have routinely concluded that voters in overpopulated districts possess a particularized injury, distinct from the general public, that conveys standing to bring suit. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 206–08 (1962) (holding that voters in overpopulated legislative districts have standing to sue); *Gill*

v. Whitford, 138 S. Ct. 1916, 1929–31 (2018) (similar); *see also Bradix v. Advance Stores Co.*, 2017-0166, pp. 4–5 (La. App. 4 Cir. 8/16/17); 226 So. 3d 523, 528 (noting that "federal cases regarding Article III standing . . . . can be persuasive" when considering Louisiana's standing requirement). Plaintiffs here, like the plaintiffs in previous malapportionment cases, "assert[] a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." *Baker*, 369 U.S. at 208 (cleaned up). Because Plaintiffs seek to safeguard their personal voting power against constitutional deprivation, they have asserted a "real and actual interest" in this action.[9]

The Secretary also suggests that the harms Plaintiffs allege are speculative, but this is simply another reiteration of his justiciability argument. And the primary case on which he relies, *Soileau v. Wal-Mart Stores, Inc.*, 2019-0040 (La. 6/26/19); 285 So. 3d 420, is readily distinguishable. There, the plaintiff's claim for relief was explicitly foreclosed by a statute providing that "presentation and filing of the petition . . . shall be premature unless" certain predicate circumstances existed. *Id.* at p. 3; 285 So. 3d at 423 (quoting La. R.S. 23:1314(A)). Here, by contrast, there is no analogous statute at play. Additionally, unlike the allegations in *Soileau*, the risks of impasse and malapportionment here are neither hypothetical nor abstract: the political branches have deadlocked, and the only alternative is judicial intervention.

B. The Secretary is the appropriate defendant.

Although the Secretary claims that he is not assigned a substantive role in the redistricting process, *see* Mem. 15, there can be no question that he is an appropriate defendant in redistricting

[9] The Secretary, incidentally, overplays his hand by suggesting that a "special interest which is separate and distinct from the interest of the public at large" is required of plaintiffs in all cases. Mem. 14 (quoting *All. for Affordable Energy v. Council of City of New Orleans*, 96-0700, p. 6 (La. 7/2/96); 677 So. 2d 424, 428). The Louisiana Supreme Court has specified that "[w]ithout a showing of some special interest in the performance sought *of a public board, officer or commission* which is separate and distinct from the interest of the public at large, plaintiff will not be permitted to proceed." *League of Women Voters of New Orleans v. City of New Orleans*, 381 So. 2d 441, 447 (La. 1980) (emphasis added); *accord All. for Affordable Energy*, 96-0700, p. 6; 677 So. 2d at 428 (distinguishing between "plaintiffs [] seeking to compel [] defendants to perform certain functions," who must "show that they had some special interest which is separate and distinct from the general public," and "a citizen seeking to *restrain* unlawful action by a public entity," who "is not required to demonstrate a special or particular interest distinct from the public at large" (cleaned up)). Here, Plaintiffs are not seeking to compel performance from the Secretary or any other state official; instead, they seek to *enjoin* the Secretary from implementing Louisiana's current congressional map. They seek affirmative relief only from this Court, not "a public board, officer or commission." Accordingly, even though Plaintiffs have both a real and actual interest *and* a special interest distinct from the general public, it is not clear that the latter would even be required in this case.

litigation. The Secretary is, after all, the "chief election officer in the state." La. R.S. 18:421. And courts have denied the efforts of previous Secretaries of State to avoid participation in suits like this one.

In *Hall v. Louisiana*, for example, the court found former Secretary of State Tom Schedler to be the proper defendant in a redistricting lawsuit because (1) the Secretary enforces election plans, (2) no case law exists suggesting the Secretary is not the proper defendant in such cases, (3) the Secretary is often the defendant in voting rights cases, and (4) the Secretary would be forced to comply with and be involved in enforcing any injunctive relief. *See* 974 F. Supp. 2d 978, 993 (M.D. La. 2013). The Secretary must surely be familiar with this line of precedent; his own effort to dismiss a redistricting complaint on similar grounds was denied less than three years ago. *See Johnson v. Ardoin*, No. CV 18-625-SDD-EWD, 2019 WL 2329319, at *3 (M.D. La. May 31, 2019) (finding Secretary to be proper defendant in redistricting action and noting that other courts have concluded similarly in voting rights cases). The Secretary is thus responsible for defending this action.[10]

CONCLUSION

"No right is more precious in a free country than that of having a voice in the election of those who make the laws." *Wesberry*, 376 U.S. at 17. Consistent with this constitutional dictate and the one-person, one-vote principle, courts regularly intervene to ensure that congressional maps are properly redistricted—particularly where, as here, divided government has resulted in political impasse.

Faced with this commonplace request for judicial relief, the Secretary tries to portray Plaintiffs' case as an unwarranted intrusion into the ambit of the political branches. But none of the exceptions raised by the Secretary changes the fact that Plaintiffs are entitled to relief. The state's congressional districts are malapportioned, the political branches have deadlocked, and this Court's immediate intervention is needed to ensure that a new map is timely adopted and that Plaintiffs' votes are not diluted. The course of action Plaintiffs seek in the face of impasse is not only prudent, but amply supported by both precedent and state law. This matter is ripe for

[10] Outside of Louisiana, courts routinely adjudicate redistricting cases where secretaries of state are named as defendants. *See, e.g.*, *Growe*, 507 U.S. at 27; *White v. Weiser*, 412 U.S. 783, 786 (1973); *Kirkpatrick*, 394 U.S. at 528; *see also supra* Section I.A (discussing recent impasse litigation in Minnesota and Pennsylvania where secretaries of state were named defendants).

adjudication and readily justiciable, and the Court should proceed to ensure that Louisiana has a lawful congressional map in place in advance of the upcoming midterm elections.

For the foregoing reasons, the Secretary's exceptions should be denied.

Dated: March 21, 2022

Respectfully submitted,

/s/ Darrel J. Papillion
Darrel J. Papillion (Bar Roll No. 23243)
Renee Chabert Crasto (Bar Roll No. 31657)
Jennifer Wise Moroux (Bar Roll No. 31368)
WALTERS, PAPILLION, THOMAS, CULLENS, LLC
12345 Perkins Road, Building One
Baton Rouge, Louisiana 70810
Phone: (225) 236-3636
Fax: (225) 236-3650
Email: papillion@lawbr.net
Email: crasto@lawbr.net
Email: jmoroux@lawbr.net

ELIAS LAW GROUP LLP

Abha Khanna*
Jonathan P. Hawley*
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Phone: (206) 656-0177
Fax: (206) 656-0180
Email: akhanna@elias.law
Email: jhawley@elias.law

Lalitha D. Madduri**
Olivia N. Sedwick*
Jacob D. Shelly*
10 G Street NE, Suite 600
Washington, D.C. 20002
Phone: (202) 968-4518
Fax: (202) 968-4498
Email: lmadduri@elias.law
Email: osedwick@elias.law
Email: jshelly@elias.law

**Pro hac vice* application submitted
***Pro hac vice* application forthcoming

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been sent via electronic mail to all known counsel of record on this 21st day of March, 2022.

/s/ Darrel J. Papillion
Darrel J. Papillion