No. 23A994

# In the Supreme Court of the United States

PRESS ROBINSON, et al.,
*Applicants,*

*v.*

PHILLIP CALLAIS, et al.,
*Respondents.*

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

# REPLY IN SUPPORT OF APPLICATION FOR STAY


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

## INTRODUCTION

Like the Defendant-Intervenor voters ("Applicants" here), the State of Louisiana and the State and the Secretary of State, in their separate application, throw into stark relief the reasons a stay is critical to protecting Applicants' right to vote in 2024 under a congressional redistricting plan that does not dilute their votes in violation of Section 2 of the Voting Rights Act of 1965 ("VRA"). According to the State's stay application, if the District Court's injunction is not stayed by May 15, 2024, allowing the map struck down by the District Court as a purported racial gerrymander ("SB8") to go into effect, the only alternative map that can feasibly be implemented for the upcoming election is the State's prior map ("HB1"). HB1—which was repealed unconditionally by SB8 and for that reason alone cannot and should not be used in 2024—is, of course, the very map found to violate Section 2 by the district court and the Fifth Circuit in the *Robinson* litigation. Applicants were already compelled to vote under that unlawful map in 2022. It was solely because that irreparable harm had already occurred that the Fifth Circuit vacated the *Robinson* preliminary injunction. In light of Applicants' strong showing that they are likely to succeed on appeal because the District Court applied the wrong legal standard, this Court must not allow that irreparable harm to be repeated in 2024. The Court should grant the Application and issue a stay of the District Court's injunction.

In their response to the application for a stay, as they did in their trial presentation, Respondents attempt to wish away the legal and political contexts in

which SB8 was enacted. Respondents first seek to minimize the significance of the *Robinson* litigation, which they and the District Court concede provided the rationale for the State of Louisiana to redraw its congressional districts in January 2024. Their response suggests that the State just threw in the towel on the day the *Robinson* litigation was filed. But it did no such thing. Rather, it vigorously litigated for two years—through appeals, certiorari petitions, and a writ of mandamus—to prevent, first, a preliminary injunction striking down HB1 as a likely violation of the VRA, and second, the imposition of a remedial map with a second majority-Black congressional district. The District Court here also failed to give due account to the *Robinson* rulings. Rather than see *Robinson* as providing a strong justification for the State's remedial redistricting, the court treated legislators' acknowledgement of the *Robinson* litigation as evidence of unlawful racial gerrymandering. But under this Court's precedents, a factual finding by a federal court based on a comprehensive evidentiary record that the State's redistricting plan is dilutive in violation of Section 2—a finding affirmed by a court of appeals—provides the strongest basis in evidence for the Legislature's creation of a new opportunity district for Black voters. The Respondents' argument boils down to the proposition that the decision to create a new majority-Black district necessarily amounts to racial predominance, a position squarely at odds with this Court's precedent.

Respondents also barely acknowledge the political motivations of the Louisiana Legislature in choosing SB8 over more compact alternatives. They dismiss political considerations as accounting for SB8's unusual configuration because,

insisting that the State could have accomplished those political goals in a more compact plan if it had simply ignored the *Robinson* decisions and declined to create a new majority-Black district. *See* Resp. at 19; App. 427-28. That, of course, would have led to the *Robinson* court stepping in and doing exactly what the State sought to avoid—imposing a map that contained the majority-Black district Section 2 requires without any consideration for the Legislature's political goals. Respondents' willful disregard of these facts and their failure to meaningfully engage with the applicable legal standards cannot overcome Applicants' showing that a stay is warranted.

Whether the Court treats May 15 or early June as the date by which a map must be in place for the 2024 election, the Court should, as it has in similar situations, stay the underlying judicial order and permit the State to proceed with the 2024 election under SB8. Without the 2024 election looming over remedial proceedings, the court below and this Court will have sufficient time to settle on a final resolution of the State's congressional map for subsequent elections. But at this point, for this Court to remain true to its prior rulings in similar circumstances, it should stay judicial intervention with respect to the map to be used in the 2024 election, and allow that election to proceed under the status quo map—SB8.

## ARGUMENT

### I. Applicants Have Standing to Appeal

Applicants have standing to appeal the District Court's injunction.[1] The ruling directly impairs their right to an undiluted vote and threatens to force them, once again, to vote for their congressional representatives under a map that violates Section 2 of the Voting Rights Act. Respondents, relying principally on *Hollingsworth v. Perry*, 570 U.S. 693 (2013), erroneously contend that Applicants lack standing to appeal.[2] Resp. at 11-13. Respondents are wrong for three reasons.

First, in this appeal, Applicants assert their own interests in an undiluted vote, not the State's separate interest in upholding the constitutional validity of its legislative enactment. Specifically, Applicants seek to ensure that their votes are not diluted as a result of the invalidation of SB8, which was adopted to remedy a violation of Applicants' rights under Section 2 as a direct result of the *Robinson* litigation. *See* App. 88 ("Any changes to the SB8 map that may result from decisions in this case would directly implicate the relief Movants have sought and secured in *Robinson*.").

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[1] The Court need not resolve Applicants' standing to seek a stay. That is because even if Applicants lacked standing to seek this stay on their own, the State also seeks a stay, and Respondents do not dispute that the State has standing to do so. Where any party has standing, this Court has Article III jurisdiction to decide the appeal. *Cf.*, *e.g.*, *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 471 (5th Cir. 2014) ("It is well settled that once we determine that at least one plaintiff has standing, we need not consider whether the remaining plaintiffs have standing to maintain the suit.").

[2] Respondents also suggest that Applicants' status as permissive intervenors is somehow relevant to the standing question, but they cite no authority for that notion. Even if it were relevant, Respondents and the District Court are wrong that Applicants remained permissive intervenors after the court's reconsideration of its initial intervention order. In the initial order, the court found that Applicants had satisfied three of the four requirements for intervention as of right, but that their interests were adequately represented by the existing parties at the liability phase. App. 170-72. Upon reconsideration, the court found that Applicants had established inadequate representation on the liability issues the court allowed intervention on. App. 256. Thus, on the basis of the court's findings, Applicants were entitled to intervene as of right.

In *Robinson*, the district court found that the VRA demands a map with a second Black-opportunity district and that failure to provide that district dilutes Applicants' votes. *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 766 (M.D. La. 2022) (*"Robinson I"*). Yet the court below struck down the map that the Legislature adopted to remedy that identified and particularized vote dilution, and Respondents have not been coy about their true goal—not to vindicate their right to be free from racial gerrymandering, but to prevent any map that would create a second district in which Black Louisianians have an opportunity to elect candidates of their choice. *See* Resp. at 63-65; App. 76 ("Plaintiffs urge this Court to adopt Illustrative Plan 1[,]" a plan with only one majority-Black district).

Additionally, the District Court conceded that at least one Applicant, Davante Lewis, resides in CD6, the district that was struck down as a racial gerrymander in the court's injunction and that, if upheld on appeal, would provide him and other Black voters their VRA-guaranteed equal opportunity to elect candidates of choice to Congress. App. 406. In such circumstances, private intervenor-defendants have been permitted to pursue an appeal, even when the state has chosen not to. *E.g.*, *Abrams v. Johnson*, 521 U.S. 74, 78 (1997). This case is unlike *Virginia House of Delegates v. Bethune-Hill*, where a single house of the state legislature sought to represent the state in an appeal that the state itself was not a party to. 139 S. Ct. 1945 (2019). Applicants seek to represent their own interests; they do not seek to represent the State, which has simultaneously sought a stay, and therefore, *Va. House of Delegates* has no applicability here.

Second, Applicants assert a particularized injury to themselves—dilution of their votes—caused by the District Court's injunction, and not an abstract preference for a generally applicable law. Respondents' heavy reliance on *Hollingsworth v. Perry* is therefore misplaced. In *Hollingsworth*, this Court found that proponents of a ballot initiative defining marriage to exclude same-sex unions lacked standing to appeal a decision invalidating the initiative after it was codified into the state constitution. 570 U.S. at 707. The proponents identified no particularized injury to themselves from the appealed judgement other than the invalidation of the constitutional provision they had worked to enact. *Id.* at 706-07. But once the initiative was codified, the proponents' interest in upholding its validity constituted a generalized grievance no different from that of any Californian. *Id.* at 707. Here, in contrast, the injury to Applicants is not the invalidation of SB8 per se, but the imminent threat that *their own votes* will be diluted as a result of the invalidation of SB8.

Third, the injury to Applicants is not speculative because the risk of vote dilution is substantial. Applicants were already forced, in 2022, to vote under a map that the *Robinson* district court and the Fifth Circuit had found likely violated Section 2 by diluting their votes. After this Court remanded the case to the lower courts for resolution "in advance of the 2024 congressional elections," the Legislature adopted SB8 as a direct response. *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023). Now that SB8 has been invalidated, there is an imminent risk that Applicants will again be forced to undergo an election under a congressional redistricting plan that illegally dilutes their votes. Indeed, the State has contended that if the District Court's injunction is

not stayed, the only map that can feasibly be implemented in 2024 is HB1, the very map that was found likely to violate Section 2 in *Robinson*. Even were the District Court to order a different map and were the State feasibly able to implement it without disruption, any decision on a remedy will come too late for Applicants. Should the remedial map fail to remedy the Section 2 violation identified in *Robinson*, any appeal would not be resolved before 2024 elections.

Applicants have standing to bring this appeal.

## II. The District Court Violated Applicants' Due Process Rights by Rushing to a Final Judgment and Failing to Allow Applicants to Develop a Complete Factual Record.

Respondents ask this Court to deny a stay based on what they say they will show in coming remedial proceedings—but failed to show at trial—to rebut the State's strong basis in evidence that it needed to comply with Section 2. Resp. at 41 ("[T]he record *will show* … Plaintiffs *will make the showing*…") (emphasis added). Specifically, Respondents assert their intention to ask the District Court to find—in direct conflict with the findings of the *Robinson* courts—that a second majority-Black district cannot be drawn. *Id.* At the same time, they argue that the District Court should be deprived of the benefit of the extensive evidentiary record in *Robinson* because none of the four legislators who testified at trial—out of the 144 members of the State Legislature—claimed that it informed their decision-making on what the VRA required, and on that basis, the District Court excluded it. *Id.* at 38. All of this only serves to highlight the inadequacy of the District Court's process to develop a sufficient factual record on which to strike down a map when no one disputes that the impetus to create that new map with a second majority-Black district was based

on multiple rulings—from a total of seven federal judges from the Middle District of Louisiana and the Fifth Circuit—finding that HB1 likely violated the VRA.

At the behest of the Respondents, and with no opposition from the Secretary of State, App. 266-67—who was the only defendant in the case at the time and who has steadfastly declined to defend SB8, or even implement it after it was enacted into law—the District Court advanced the trial on the merits and consolidated it with the hearing on Respondents' preliminary injunction. *Id.* at 164. The court took this extraordinary step without input from the Applicants, despite the pendency of Applicants' motion to intervene. *Id.* at 266-67. The court then denied Applicants' motion to deconsolidate the trial from the preliminary injunction despite Respondents' failure to oppose the motion.[3] *Id.* at 289.

The District Court then proceeded to conduct a trial less than a month after it belatedly granted Applicants' motion to intervene. In marked contrast to the *Robinson* proceedings—which, on a motion for a preliminary injunction, unfolded over a five-day hearing involving 21 witnesses and over 200 exhibits, and culminated in a 165-page decision—the District Court here compressed an entire trial into less than three days and on a limited evidentiary record issued a permanent injunction. *See generally id.* at 385-444. It has now set a schedule for briefing on remedy and has invited the parties to submit additional evidence but has declined to allow for

[3] Applicants have appealed these rulings and will fully brief them at the merits phase of this appeal. Respondents opposed Applicants' request to continue the trial to allow adequate discovery and trial time consistent with due process but mounted no opposition to Applicants' alternative request to decouple the trial from the preliminary injunction proceedings. Nevertheless, the District Court denied both requests.

discovery or an evidentiary hearing, *id.* at 1081-82, despite conceding that the trial record was insufficient for it to make findings on the requirements of Section 2. *Id.* at 442-43. And Respondents have indicated they intend to offer new evidence on new contested issues in those remedial proceedings—issues that were not litigated below or in the *Robinson* proceedings. Resp. at 41. Even if there were time for adequate remedial proceedings—and there is not—the process adopted by the court below—again in stark contrast to the *Robinson* court, which at several junctures prior to the enactment of SB8 allowed for robust remedial discovery ahead of an evidentiary remedial hearing, *see, e.g.*, Scheduling Order, *Robinson v. Ardoin*, No. 3:22-cv-211-SDD-SDJ (M.D. La. Apr. 19, 2022), ECF No. 63—is wholly inadequate to ensure the interests of all stakeholders are taken into account and that it can reach an informed conclusion that respects the voting rights not only of Applicants but of Black voters across the state. In light of the stakes of this case, these procedural failings, and the doubt they cast on the soundness of the District Court's decision, Applicants support staying the injunction to ensure that Applicants and others in Louisiana are not *twice* subjected to an election under a map that unlawfully dilutes their votes and denies them the equal opportunity mandated by the VRA. Granting a stay will ensure that the 2024 election, like the 2022 election, proceeds under the map the Legislature chose where there is insufficient time to conduct proceedings consistent with Applicants' due process rights before the coming election.

## III. Applicants Are Likely to Succeed in Their Appeal

### A. Respondents Inappropriately Demand that States Litigate Every VRA Case to Judgment to Avoid Fourteenth Amendment Liability.

Respondents expend much of their brief looking for a difference between the State's "desire to avoid litigation in *Robinson*" and its need to "ensure compliance with the VRA"—ignoring that the State did not, in fact, avoid litigation in *Robinson*. Resp. at 23. On the contrary, in *Robinson*, the State opposed a preliminary injunction motion and when it lost, filed a motion for a stay pending appeal, then successfully pursued a stay from this Court, and on remand, litigated its appeal on the merits at the Fifth Circuit, delayed remedial proceedings through a petition for writ of mandamus, and after losing its appeal, unsuccessfully sought en banc rehearing. *See* Stay Appl. at 11-14 (detailing the *Robinson* litigation's history). It was only after two years of hard-fought litigation, which resulted in multiple rulings telling the State exactly what it needed to do to "ensure compliance with the VRA" that the State chose voluntary compliance with federal law over continued litigation. The State then sought to resolve the *Robinson* litigation and its likely Section 2 violation by enacting a map that accomplished what courts in *Robinson* had told them Section 2 required while also pursuing its own political goals of protecting the seats of certain favored incumbents. *Id.* at 14-17. In other words, the State's desire to avoid further litigation in *Robinson* was not distinct from its obligation to adhere to Section 2; they were one and the same.

But according to Respondents, because the State continued to maintain that HB1 was lawful, it forfeited any breathing room in seeking to comply with what two

federal courts had said it must do to avoid a likely VRA violation. Resp. at 23 ("The State's avid defense of HB1 as VRA compliant [means] [a]ny breathing room . . . was abandoned long ago."). In other words, according to Respondents, unless legislators or their legal advisors subjectively agree with the conclusions of the federal courts that rule against them, they do not have a strong basis in evidence to believe that remedial action is required to avoid VRA liability. *Id.* ("There is no evidence that the Legislature found that there was a VRA violation . . . ."). Because the State insisted that HB1 was lawful even after the *Robinson* rulings—as is common in negotiated resolutions of litigation—Respondents fault it for "shirk[ing] the chance" "to put on a full, actual defense of HB1." *Id.* at 26. Merely to state this argument is to refute it; defendants can, and often do, insist they did nothing wrong and simultaneously take action to remedy a violation of law. The District Court found, and Respondents concede, that the Legislature drew SB8 to comply with the *Robinson* court's ruling. App. 425-26; Resp. at 3-4. Whether they agreed with it or not is immaterial. They were required to comply or face a trial they would likely lose. They chose to comply.

Respondents also argue that because the Fifth Circuit had "emphasized that 'the State put all their eggs' in one basket" and had "determined that the Supreme Court's decision in *Allen v. Milligan* 'largely rejected' the 'State's initial approach,'" Resp. at 25 (citing *Robinson v. Ardoin*, 37 F.4th 208, 217 (5th Cir. 2022) ("*Robinson II*") and *Robinson v. Ardoin*, 86 F.4th 574, 592 (5th Cir. 2023) ("*Robinson III*")), the State was obligated, before taking action to comply with Section 2, to put its eggs in a different basket and to try a new approach at a trial. But litigation strategy has

nothing to do with whether the state has a strong basis to believe a Section 2 remedy is required. And entirely missing from the Respondents selective quotation of *Robinson* is that the basket in which the State put all its eggs in *Robinson* was the "racial gerrymandering" basket and the approach rejected in *Milligan* was the State's argument that complying with Section 2 would necessarily require racial gerrymandering. *Robinson III*, 86 F.4th at 592. Both the district court and the Fifth Circuit merits panel rejected that argument, concluding that a reasonably configured additional majority-Black district could be drawn without race predominating and that, in any event, the VRA provided a compelling interest justifying race-based remedial districting. *Robinson I*, 605 F. Supp. 3d 759, 839 (M.D. La. 2022); *Robinson III*, 86 F.4th at 593-95. And because it had no other basket, the State conceded and chose compliance with the VRA over continuing to press racial gerrymandering arguments that had been rejected.

Respondents further contend that because the rulings in *Robinson* were on a preliminary injunction, where the district court found—based on the robust evidentiary record from the preliminary injunction hearing[4] and under the applicable preliminary injunction standard—that the *Robinson* plaintiffs had satisfied the *Gingles* standard and were "likely" to succeed on the merits of their Section 2 claim, the Legislature was not entitled to rely on the court's findings. Resp. at 24-25. That

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[4] Respondents characterize the Western District's 60-page opinion as "lengthy" and "exhaustive[,]" Resp. at 20, and based on a "comprehensive" record, *id.* at 5-6, where the court considered thirteen witnesses and 110 exhibits. The Chief Judge of the Middle District wrote a 152-page Ruling and Order after a five-day evidentiary hearing involving twenty-one witnesses and over 200 exhibits. *See generally Robinson I*, 605 F. Supp. 3d at 768-69; *see also* App. 338.

assertion, unsupported by any legal authority, rings hollow. Nothing in this Court's jurisprudence requires a state to fight to the bitter end before taking remedial action in the face of a likely Section 2 violation. Nor has this Court ever held that a state faced with an adverse judicial finding of VRA liability must conduct its own independent analysis of whether the court was correct. Indeed, this Court has recognized a State's strong basis in evidence to draw Section 2 districts without any litigation at all. The strong basis in evidence standard "does not demand that a State's actions actually be necessary to achieve a compelling state interest in order to be constitutionally valid," and states may have good reason to consider race to remedy a VRA violation "even if a court does not find that the actions were necessary for statutory compliance." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015) (cleaned up). In *Bethune-Hill*, for example, the Court found a sufficiently strong basis in evidence for drawing a district with a 55 percent Black voting age population based on demographic data, election results, and the legislature's "informed bipartisan consensus" that such a district was required to avoid VRA liability. *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 194-95 (2017). And when litigation has occurred, this Court has not required the state to await a final judgment before taking remedial action. *See*, *e.g.*, *Abbott v. Perez*, 585 U.S. 579, 594-603 (2018). These precedents allow states to make a good faith effort based on reasonably available information—whether derived from the "preliminary" findings of a court or its own inquiry—to determine what the VRA requires without thereby being liable for racial gerrymandering.

The demand Respondents place on the Louisiana Legislature—that it subjectively find, based on its own full-blown statistical, demographic, and social and historical analysis, that the VRA requires it to engage in race-conscious districting or that it be compelled by a final judgment from a federal court to do so—would require expert consultants to be involved in every redistricting decision, magnifying the burden on states (not to mention local jurisdictions) of an already complex process, and yet would do little to reduce the likelihood of redistricting decisions to be resolved through litigation. Throwing out the "good reasons" standard and further enmeshing the federal courts in redistricting matters will do little to advance the goal of reducing "the role of race in the electoral process." *Allen v. Milligan*, 599 U.S. 1, 30 (2023). This Court should decline Respondents' efforts to remake the law.

### B. No Additional Pre-enactment Analysis Was Required Where the *Robinson* Court Had Already Found the *Gingles* Standard Satisfied.

Respondents next contend that the District Court's injunction was proper because the State—faced with the ruling in *Robinson*, upheld on appeal, finding that the plaintiffs had satisfied the *Gingles* preconditions and proven likely vote dilution in the totality of the circumstances—failed to perform its own redundant "pre-enactment analysis of the *Gingles* factors" before enacting a remedial redistricting plan. Resp. at 27-30. Here, unlike in *Cooper*, on which Respondents rely for this proposition, the State had good reason to believe that "a [§ 2] plaintiff could establish the *Gingles* preconditions" in a Louisiana congressional plan with only a single majority-Black district, *Cooper v. Harris*, 581 U.S. 285, 304 (2017)—because a § 2 plaintiff *had already done so* in *Robinson*. In such circumstances, no purpose would

be served by requiring the state to conduct its own analysis based on the same demographic data and voting patterns to prove to itself what had already been proven in court.[5]

Respondents next turn to *LULAC* to argue that while the *Robinson* plaintiffs may have presented sufficient evidence to establish vote dilution in the area connecting Baton Rouge to Louisiana's Delta Parishes, that did not justify the State's creation of a remedial district connecting Baton Rouge to Natchitoches and Shreveport. Resp. at 28-29 (citing *LULAC v. Perry*, 548 U.S. 399 (2006)), 33-34. There are two problems with this argument. First, Respondents are simply incorrect about what the record in *Robinson* showed. The evidence in *Robinson* demonstrated racially polarized voting patterns in Northwest Louisiana as well as the Delta. The *Robinson* plaintiffs' expert, Dr. Lisa Handley, analyzed voting patterns and Black candidate success rates in Congressional Districts 4, 5, and 6, which cover the territory included in SB8's District 6, and found voting to be highly polarized with the result that Black-preferred candidates in all of those districts were universally defeated. *See Robinson I*, 605 F. Supp. 3d at 800-04. In addition, as Applicants demonstrated below, a compact map that connected these regions had been introduced in the legislative session in which HB1 was enacted, but it paired two of the incumbents the

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[5] Puzzlingly, Respondents assert that VRA compliance was a "post hoc justification" for SB8, Resp. at 26—as if the *Robinson* litigation had never happened and the Legislature, out of the blue, chose to engage in congressional districting for the second time in two years to create a new majority-Black district, and only after the fact concocted a VRA-compliance story to justify its actions. But that narrative is inconsistent with the facts and inconsistent with the evidence on which the District Court based its racial predominance findings—which showed that legislators were acting in direct response to the losses in *Robinson*. App. 425-26.

Legislature sought to protect in SB8. 4/9 Tr. 403:23-404:21, ECF No. 185. Together, that evidence provided the State with a basis for concluding that there was vote dilution in Northwest Louisiana.

Second, although the State had evidence of vote dilution in both the Delta and Northwest Louisiana, there was no evidence that two majority-Black districts could be created that would accommodate voters in both regions. "[W]hen the racial group in each area had a § 2 right and both could not be accommodated," the VRA allows "the State to use one majority-minority district to compensate for the absence of another." *LULAC*, 548 U.S. at 429; *id.* at 429-30 (if the inclusion of one group of voters in a majority-minority district would necessitate the exclusion of others, "then the State cannot be faulted for its choice").

Thus, the State did not draw SB8 based on "generalizations," Resp. at 30, but based on the record in *Robinson* and the Attorney General's advice that it was unlikely to be overcome at trial. *Robinson* had already found each of the *Gingles* preconditions satisfied and found that in the totality of the circumstances, Black Louisianians did not have an equal opportunity to participate in the political process and elect candidates of their choice. Unlike *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022), where neither the state nor any court had found a likely VRA violation, here, the *Robinson* court already had. The State thus had a strong basis to conclude that § 2 required remedial action, and it was permissible to choose SB8 over other more compact options to accomplish its political goals. *See Bush v. Vera*, 517 U.S. 952, 994 (1996) (plurality) (state's "districting plan will be deemed narrowly

tailored" if it creates "a district that substantially addresses the potential liability and does not deviate substantially from a hypothetical court-drawn § 2 district *for predominantly racial reasons*") (emphasis added); *id.* at 999 (Kennedy, J., concurring) ("States are not prevented from taking into account race-neutral factors in drawing permissible majority-minority districts," and "[d]istricts not drawn for impermissible reasons or according to impermissible criteria may take any shape, even a bizarre one.").

### C. The District Court Applied an Incorrect Legal Standard in Assessing Racial Predominance.

Respondents spend much of their opposition reciting the evidence and arguing that this Court must defer to the District Court's factual findings. *See, e.g.*, Resp. at 13-14 (arguing that this Court may not disturb the District Court's findings on racial predominance as long as those findings are plausible). But errors of law are subject to de novo review, and Applicants' principal argument is that the District Court erred as a matter of law when it assumed that evidence that the Legislature intentionally created a majority-Black district to comply with the VRA, without more, was sufficient to establish racial predominance. As this Court has made clear, it is not. *See Easley v. Cromartie,* 532 U.S. 234, 241-42 (2001); *Vera,* 517 U.S. at 958, 962. That erroneous understanding of the law infected the District Court's view of all of the evidence of racial predominance it considered, both direct and indirect.

Respondents do not argue the contrary nor do they even address this Court's precedent on the topic. *See*, *e.g.*, *Vera*, 517 U.S. at 962 ("the decision to create a majority-minority district" is not "objectionable in and of itself"); *see also DeWitt v.*

*Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd* 515 U.S. 1170 (1995) (declining to apply strict scrutiny to an intentionally created majority-minority district absent evidence of racial predominance). Rather, they simply offer the generalized observation that "race neutrality is the driving force of the Equal Protection Clause." Resp. at 20 (citing *Bartlett v. Strickland*, 556 U.S. 1, 21-22 (2009) (plurality)). But as this Court made clear as recently as 2023, intentionally creating a majority-minority district to satisfy Section 2 does not automatically lead to unlawful racial gerrymandering. *See Milligan*, 599 U.S. at 34-35 & n.7. The District Court's conclusion that race predominated in SB8 based on its application of a contrary rule constituted an error of law warranting reversal and a stay.

**IV. The Equities Favor a Stay**

Beyond the merits, a stay is required here for a more fundamental reason, which is that there simply is not time for fair consideration of these issues and to have a remedial process with initial appellate review that will ensure Black voters rights are not again violated in the 2024 elections. Respondents have failed to show that the merits are "entirely clearcut in [their] favor," *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring) (granting stay prior to commencement of remedial proceedings), and consistency of judicial decision making requires a stay here just as stays were granted in numerous other cases where voters challenged discriminatory maps and courts issued rulings within months of the next election. *See Ardoin v. Robinson*, 142 S. Ct. 2892 (2022) (granting stay amid ongoing remedial proceedings); Order, *S.C. State Conf. of the NAACP v. Alexander*, No. 3:21-cv-03302-MGL-TJH-RMG (D.S.C. Mar. 28, 2024), ECF No. 523 (postponing injunction to

commence after the 2024 election). It cannot be that successful redistricting challenges brought by Black voters must be stayed while courts ensure the law and the facts have been faithfully applied, even where that means an unlawful map remains in place through an election, but in redistricting challenges brought by "non-African American" voters, federal courts can impose dramatic last minute changes to congressional maps created by the state legislature without an adequate opportunity for this Court's review.

In this case, the Secretary of State has said that she needs a congressional map by May 15, 2024, to ensure a "disruption-free" election. App. 1089-90. To be clear, there will be no congressional map available to the Secretary by that date other than SB8 or HB1. The Legislature cannot adopt a new map by that deadline, *see* App. 1084-85 (showing that the Louisiana constitution requires certain procedures to be followed for bills to be introduced in regular session and arguing that introducing a congressional redistricting challenge would lead to legal liability for the Legislature), or interrupt other legislative priorities, *see id.* at 1085-86 (outlining the proposed constitutional convention which would be necessarily disrupted for any congressional map to be proposed, debated, and enacted by the deadline), and the District Court will not impose a new map before June 4, 2024.

Accordingly, ignoring the Secretary's May 15 deadline risks imperiling Applicants' right to vote in the upcoming congressional elections under a map that does not unlawfully dilute their votes. If the Secretary is correct that the only feasible option after May 15 is HB1, then, absent a stay, Applicants will be forced to vote

under the same map that diluted their votes in 2022 and that both the Middle District and Fifth Circuit agreed likely violated Section 2. And even if the Secretary is wrong, and there is some additional latitude to implement a map ordered on June 4, that timeline will not permit pre-implementation appellate review of the map should it fail to include the second Black-opportunity district the *Robinson* rulings have found to be required, and that the Legislature sought to provide in SB8. Respondents have made clear their intention to seek a map that does not include such a district and to oppose any that do. *See* Resp. at 1-2, 41. And the District Court has shown a willingness to disregard the decisions of the *Robinson* courts without evidentiary basis. There is thus a substantial risk that a court-ordered remedial map will conflict with the findings of another federal district court, twice approved by the Fifth Circuit. In these circumstances, ensuring sufficient time for appellate review of any map ordered by the District Court is critical to ensure that a split decision of the court below does not override the unanimous view of seven federal judges in *Robinson*.

Respondents contend that the harm of voting under a map the panel majority found to be a racial gerrymander outweighs *Robinson* Applicants' harm of voting under a map that seven judges in *Robinson* found likely unlawfully diluted their votes. *See* Resp. at 59. But if SB8 was necessary to remedy a Section 2 violation, it doesn't violate anyone's rights, because strict scrutiny would be satisfied. In any event, this Court at this stage need not resolve whose harm is greater. The fact that Applicants have already suffered irreparable harm in one election under an unlawful map and that there is insufficient time to resolve any tension between the VRA and

the Equal Protection Clause here before the 2024 election, are reason enough to prevent further irreparable harm to Applicants here. What's sauce for the goose is sauce for the gander. Just as this Court deemed a stay necessary to maintain the legislative status quo in 2022, despite findings of a likely Section 2 violation, so a stay is necessary here to maintain the legislative status quo in 2024, despite findings of an Equal Protection violation. In both instances, the dispute over Louisiana's map is not likely to be resolved in time for the next election, and a stay is therefore warranted.

Moreover, in contrast to Applicants, who have testified both as plaintiffs in the *Robinson* proceedings and as intervenors below about the real and concrete harms they suffer from having unresponsive political representation, not a single Respondent testified at trial or sat for a deposition. Respondents can point to nothing in the record about the impact of the racial gerrymandering harm they allegedly suffer, because they did not bother to show up at their own trial. Indeed, although the import of their legal claim is that they were assigned to districts on the basis of race, they have declined to reveal their own racial identities. The abstract and undelineated harms asserted by Respondents pale in comparison to the real and concrete harms that the Applicants have already suffered and will continue to suffer if the injunction is not stayed.

## CONCLUSION

For the foregoing reasons, *Robinson* Applicants' request for a stay of the District Court's injunction pending resolution of their appeal should be granted.

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Respectfully submitted,

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