UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE, EDWIN RENE SOULE, ALICE WASHINGTON, CLEE EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS, AMBROSE SIMS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ("NAACP") LOUISIANA STATE CONFERENCE, AND POWER COALITION FOR EQUITY AND JUSTICE, *Plaintiffs*, v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana. *Defendant*.	Civil Action No. 3:22-cv-00211-SDD-RLB
EDWARD GALMON, SR., CIARA HART, NORRIS HENDERSON, TRAMELLE HOWARD, *Plaintiffs*, v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana. *Defendant*.	Civil Action No. 3:22-cv-00214-SDD-RLB

***ROBINSON* PLAINTIFFS' OPPOSITION TO**
DEFENDANT'S JOINT MOTION FOR STAY PENDING APPEAL

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Plaintiffs in the *Robinson* matter submit this memorandum in opposition to defendants' joint motion to stay the Court's injunction of June 6, 2022, pending appeal. ECF No. 177.

PRELIMINARY STATEMENT

After hearing the testimony of 22 witnesses and reviewing 244 exhibits offered during a five-day evidentiary hearing, and having considered hundreds of pages of briefs, expert reports, and post-hearing proposed findings of fact and conclusions of law, the Court concluded that plaintiffs are substantially likely to establish that Louisiana's congressional redistricting map violates Section 2 of the Voting Rights Act and that a preliminary injunction is warranted. Defendants' motion barely grapples with the reasoning set forth in the Court's thorough and detailed 152-page preliminary injunction opinion. Instead—based upon arguments that the Court has already considered and rejected—they assert that the Court's rulings are "unlikely to withstand appellate scrutiny." ECF No. 177-1, at 11 ("Mot."). But, as the Court has already held, defendants' arguments are unsupported by existing law. Defendants also disregard the Court's careful findings of fact and credibility determinations, which will be subject to a "clear error" standard of review on appeal. In granting the injunction, the Court properly "appl[ied] the law as it is" and declined defendants' invitation "to speculate or venture into advisory opinions." ECF No. 173 at 84 ("Op."). It should do the same here and deny defendants' motion.

As the Court has also already held, the equities—including considerations related to the *Purcell* principle—do not justify staying the Court's injunction. On the contrary, they powerfully support keeping the injunction in place. As the Court held, "protecting voting rights is quite clearly in the public interest, while allowing elections to proceed under a map that violates federal law most certainly is not." Op. at 142. Defendants' reliance on the Supreme Court's stay in *Merrill* v. *Milligan*, 142 S. Ct. 879 (2022), is misplaced because, as the Court has

noted, Op. at 148, the primary elections in that case were scheduled to begin just a few weeks after the Court's ruling; here, Election Day is five months away. In contrast, defendants wholly ignore the Supreme Court's on-point ruling from less than three months ago in *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 142 S.Ct. 1245, No. 21A471 (2022) (per curiam). There, the Court required the State of Wisconsin to redraw its state legislative maps 139 days before the state's primary—less time than the 150 days until Louisiana's election at issue here—and concluded that its order gave the state "sufficient time" to adopt new maps consistent with the Court's ruling that the state's election calendar. *Id*. at 1248. Defendants' argument also disregards the Court's finding of fact that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." ECF No. 173 at 148. This finding and *Wisconsin Legislature* are fatal to defendants' *Purcell* argument.

The relief defendants seek would effectively permit the State of Louisiana to conduct the 2022 congressional elections using a map that the Court has found to illegally dilute the votes of Louisiana's Black citizens. As plaintiffs' witnesses compellingly testified at the hearing, Louisiana has a centuries' long history of marginalizing and disenfranchising its Black citizens. Defendants seek by this motion to delay justice again and allow that sad history to continue unchanged for yet another election. The Court should say enough—indeed, it has already said so. Defendants' motion should be denied.

ARGUMENT

In evaluating an application to stay its ruling, the Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken* v. *Holder*, 556 U.S. 418, 425–26. The balance of equities and public interest

"merge when the Government is the opposing party." *Id*. at 435. Under each of these criteria, defendants' application fails.

I. Defendants cannot make a strong showing that they are likely to succeed on the merits.

Far from making a "strong showing" that they are likely to succeed on the merits, defendants' motion rests on arguments that the Court has already considered and rejected as inconsistent with governing law or the evidence at the hearing. Nothing in defendants' motion calls into questions the Court's determination that plaintiffs are likely to establish the first and third *Gingles* factors. *Thornburg* v. *Gingles*, 478 U.S. 30, 50–51 (1986). Defendants' motion makes no effort to challenge the Court's conclusions on the second *Gingles* factors or its analysis of the totality of circumstances.

***Gingles* I**. The Court correctly found that the six illustrative maps presented by plaintiffs' experts established that, consistent with traditional redistricting principles, the Black population of Louisiana is sufficiently large and geographically compact to constitute a majority in two reasonably compact congressional districts. Op. at 4–7. Defendants barely contested the testimony of plaintiffs' experts on this issue. None of defendants' experts testified that plaintiffs' illustrative maps were not majority-Black under the "any part Black" standard expressly approved in *Georgia* v. *Ashcroft*, 539 U.S. 461 (2003), or that the maps were not reasonably compact both visually and using standard and well-accepted compactness measures.

Defendants' argument that plaintiffs' illustrative maps "qualify as racial gerrymanders," because they link "distinct locations" on the basis of race, Mot. at 4, ignores the Court's factual findings and mischaracterizes settled law. *First*, the Court found, based on the testimony and written reports of the plaintiffs' experts and lay witnesses and its assessment of their credibility, that "Plaintiffs made a strong showing that their maps respect [communities of

interest] and even unite communities of interest that are not drawn together in the enacted map." Op. at 103. For example, the Court credited Mr. Fairfax's testimony "that he used census places and landmark areas to gauge how often his maps split communities of interest, as well as socioeconomic data and roadshow testimony from community members for insight into local ideas about communities of interest." Op. at 101. In contrast, defendants offered no testimony at the hearing about communities of interest. As the Court noted, this is "a glaring omission, given that Joint Rule 21 requires communities of interest to be prioritized over and above preservation of political subdivisions. Op. at 101. The Court further found that plaintiffs' *Gingles* I experts "both offered persuasive testimony regarding how they balanced all of the relevant principles, including the Legislature's Joint Rule 21, without letting any one of the criteria dominate their drawing process." *Id*. at 106. The Court concomitantly found that race was not the predominant factor in creating plaintiffs' illustrative maps. On the contrary, the Court found that "[t]here is *no factual evidence* that race predominated in the creation of the illustrative maps in this case." Op. at 116 (emphasis in original). As the Court explained:

> Defendants' purported evidence of racial predomination amounts to nothing more than their misconstruing any mention of race by Plaintiffs' expert witnesses as evidence of racial predomination.

Id.

Second, the Court correctly held, under the Fifth Circuit's decision in *Clark* and other binding precedent, that the mapmaker's motivation in preparing an illustrative map is irrelevant to whether *Gingles* I is satisfied. Op. at 112 (citing *Clark v. Calhoun Cty.*, 88 F.3d 1393, 1406–07 (5th Cir. 1996)). As the court held in *Clark*, the Supreme Court's Fourteenth Amendment racial gerrymandering decisions in *Bush* v. *Vera*, 517 U.S. 952 (1996), and *Shaw* v. *Hunt*, 517 U.S. 899 (1996)

> support our conclusion that *Miller*'s emphasis on purpose does not apply to the first *Gingles* precondition. In neither case did the Court suggest that a district drawn for predominantly racial reasons would necessarily fail the *Gingles* test. To the contrary, the first *Gingles* factor is an inquiry into causation that necessarily classifies voters by their race.

Clark, 88 F. 3d at 1406–07. Unlike the cases on which defendants principally rely, plaintiffs assert no claim here based upon racial gerrymandering. Defendants' argument also improperly conflates the requirements applicable to illustrative and remedial maps under Section 2, as explained in plaintiffs' post-hearing brief. *See* ECF No. 161 at 8–9.

Finally, as the Court also explained, defendants' reliance on the *Hays* decisions, Mot. at 6, is equally inapposite. As the Court held, the illustrative maps in this case are demonstrably more compact and consistent with traditional redistricting principles than the maps at issue in that case. Op. at 110. As the Court also concluded, "*Hays*, decided on census data and demographics 30 years ago," does not justify "freez[ing] Louisiana's congressional maps in perpetuity." *Id.*

***Gingles* III**. The Court was also correct in ruling that plaintiffs satisfied their burden to establish the third *Gingles* factor—namely, that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidates." *Gingles*, 478 U.S. at 51.

Contrary to defendants' assertions, Mot. at 7, the Court expressly considered whether there was "legally significant" white bloc voting sufficient to satisfy *Gingles* III, and recognized that "high levels" of white crossover voting could undermine a finding of legally significant polarized voting. Op. at 123–24. The Court correctly found, however, that no evidence was presented in this case of sufficiently "high levels" of white crossover voting to defeat plaintiffs' showing that white bloc voting usually results in the defeat of Black-preferred candidates. *Id.* at 126. On the contrary, the Court found that plaintiffs' experts, Drs. Palmer and

Handley, "amassed detailed data, and arrived at the same conclusion: that White voters consistently bloc vote to defeat the candidates of choice of Black voters." *Id*. at 124. The Court further credited the testimony by Drs. Palmer and Handley that white crossover voting was "insufficient to swing the election for the Black-preferred candidate in any of the contests they examined." *Id*. at 126.

The Court properly rejected defendants' arguments about crossover voting as unsupported by the evidence. As the Court noted, "[i]f there is evidence of a successful crossover district in Louisiana, neither side has presented it." *Id.* at 127. Thus, the Court concluded, "[t]he fact that Plaintiffs' experts agreed, hypothetically, that a sub-50% BVAP district *could* perform under unspecified circumstances, is not sufficient to overcome the conclusions reached by their robust statistical analysis." *Id.* at 126. In contrast, the Court found the testimony of defendants' experts on crossover voting "unreliable" and "unsupported by sufficient data." *Id.* at 125–26. The Court found that Dr. Solanky's testimony was "unreliable because it was based on his analysis of one exogenous election and limited to one parish." *Id*. at 125. Similarly, it found that Dr. Lewis's "hypothetical based on limited data [involving a single presidential election was] not helpful." *Id.* at 125–26. These findings are strongly supported by the evidentiary record, and defendants offer no basis to conclude that they were clear error.

Defendants' apparent contention that the mere existence of white crossover voting precludes satisfying *Gingles* III, Mot. at 7–8, fundamentally misconstrues the significance of crossover voting under settled law and was rejected by the Court. *Id.* at 124-25. As set forth in plaintiffs' post-hearing brief, the extent of white crossover voting "has no bearing on the *Gingles* inquiry." ECF No. 161 at 9. To determine whether *Gingles* III has been established, the Court must instead assess whether "white voters engage in bloc voting at levels sufficient to

regularly defeat Black-preferred candidates in the area where the new illustrative district would be drawn." *Id.* at 9 (citing *Thornburg* v. *Gingles*, 478 U.S. 30, 51 (1986)). Defendants' reliance on *Bartlett* v. *Strickland*, 556 U.S. 1 (2009), to attempt to undermine the significance of the Court's findings is misplaced. Contrary to Defendants' assertion, the Court in *Bartlett* nowhere states that plaintiffs "*cannot*" establish *Gingles* III "[i]n areas with substantial crossover voting." Mot. at 7 (quoting *Bartlett* v. *Strickland*, 556 U.S. 1, 24 (2009) (emphasis added)). To the contrary, the question posed by *Bartlett* is whether crossover voting in the districts that actually exist is sufficient to overcome *Gingles* III. 556 U.S. at 24. *Bartlett* does not stand for the proposition that Section 2 liability does not lie when a hypothetical district could be (but has not been) drawn in which crossover voting was sufficient to overcome *Gingles* III. Defendants' contention that the existence of any white crossover voting invariably defeats a finding that *Gingles* III is satisfied is contrary to the plain language of *Gingles* itself and would effectively preclude relief under Section 2 in virtually all cases. As the Court concluded, that is not the law. Op. at 123–24.

II. The balance of equities and other *Nken* factors weigh against a stay.

This Court correctly held that plaintiffs "will suffer an irreparable harm if voting takes place in the 2022 Louisiana congressional elections based on a redistricting plan that violates federal law." Op. at 141. As the Court explained,

> [v]oting is a fundamental political right, because it is preservative of all rights. Once the election occurs, there can be no do-overs and no redress for voters whose rights were violated, and votes diluted by the challenged plan.

Id. (internal quotations and citations omitted). The Court's ruling follows the consistent holdings of federal courts throughout the country that restrictions on voting rights constitute irreparable harm. *See, e.g.*, *League of Women Voters of N. Carolina* v. *North Carolina*, 769 F.3d 224, 247–48 (4th Cir. 2014) (collecting cases). In particular, vote dilution in violation of Section 2 of the

VRA "irreparably injures the plaintiffs' right to vote and to have an equal opportunity to participate in the political process." *Patino* v. *City of Pasadena*, 229 F. Supp. 3d 582, 590 (S.D. Tex. 2017); *Casarez* v. *Val Verde Cty.*, 957 F. Supp. 847, 865 (W.D. Tex. 1997) (holding that violation of local election laws and the Voting Rights Act was "a harm monetary damages cannot address").

The irreparable harm to plaintiffs and to Black voters across Louisiana from conducting an election using a districting map that illegally dilutes their votes far outweighs any administrative burden on the defendants from having to adopt and implement a legal map. Defendants' assertion that "'[p]lacing a bureaucratic strain on a state agency'" justifies allowing the State to dilute the votes of its Black citizens, Mot. at 9 (quoting Op. at 145), is not the law, nor should it be. On the contrary, as the courts have repeatedly held, "mere administrative inconvenience . . . in redistricting simply cannot justify denial of Plaintiffs' fundamental rights." *Johnson* v. *Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996); *see also Bethune-Hill* v. *Virginia State Board of Elections*, No. 3:14-CV-852, 2018 WL 11393922, at *1 (E.D. Va. Aug. 30, 2018) ("[T]he risk that a stay wholly would deprive the plaintiffs of a remedy significantly outweighs the inconvenience and any other detriments that the intervenors may experience in re-drawing the districts."). In any event, defendants' argument ignores the Court's express finding that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." Op. at 148.

Defendants argue that the injunction should be stayed because, they contend, the Court "order[ed] the Legislature to enact a racial gerrymander" and "requir[ed] the State to conduct elections under a racial gerrymander in November in all events." Mot. at 9. The Court's injunction does nothing of the kind. To begin with, as discussed above, the Court properly

concluded that none of the plaintiffs' illustrative maps is a racial gerrymander. And, in any event, the Court did not order the Legislature to adopt any of those maps. On the contrary, it properly respects the role of the Legislature in redistricting by giving it an opportunity in the first instance to adopt a map that complies with Section 2. And, if the Legislature determines not to adopt a new map, the Court order provides for further proceedings to consider an appropriate remedial map. The proposition implicit in defendants' argument—that *any* congressional map with two districts that afford Black voters the opportunity to elect their candidates of choice, is a racial gerrymander—is unsupported by anything in the record and is contrary to settled law.

Defendants' reliance on the principle in *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) that "federal courts ordinarily should not enjoin a state's election laws in the period close to an election," *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring) (citing 549 U.S. 1 (2006)) (quoted in Mot. at 3), is misplaced. Louisiana is not "close to an election." Election Day will not for another five months. As the Court found, there is ample time for the State to adopt and implement a congressional map that complies with the Voting Rights Act. Op. at 148.

The Supreme Court's recent decision in *Wisconsin Legislature* is on point. The Court there, in a decision rendered less than five months before the relevant primary election, overturned a redistricting map adopted by the State Supreme Court and remanded to that Court to adopt a new map. The Court expressly concluded that in so doing it gave the State Supreme Court "sufficient time to adopt maps consistent with the timetable" for the primary. *Wis. Legislature* v. *Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam). As this Court noted, the amount of time before the Louisiana election is *more* than the amount of time between the Supreme Court's ruling in *Wisconsin Legislature* and the relevant primary in that case. Op. at 148. For similar reasons, defendants' reliance on *Milligan* is misplaced. Mot. at 1 (citing

Merrill v. *Milligan*, 142 S. Ct. 879, 881 (2022)). As Justice Kavanaugh indicated in his concurring opinion, the primary elections in Alabama at issue there were scheduled to begin only seven weeks from the Court's ruling, *id*. at 879, far less than the five months available here. *See* Op. at 148.

As the Court also noted, defendants' contention that there is insufficient time to adopt and implement a new map before Election Day is squarely contrary to the representations the Legislative Intervenors and the Attorney General made to the state court in the prior impasse case that "there remains several months on Louisiana's election calendar to complete the [redistricting] process." Op. at 145–46 (quoting GX 32, at 8). Defendants try to harmonize that and similar statements they made to the state court with their current position by asserting that the statements were made in March 2022 and that "in an impasse case, there is no need to adjudicate liability, meaning that judicial map-drawing can occur immediately." Mot. at 10. But no "judicial map-drawing" was underway when defendants made those representations to the state court. To the contrary, plaintiffs made those representations in support of their argument that the plaintiffs' claims in those cases were *too early* (in their words, "unripe" and "nonjusticiable") and that the state court need not take up any challenge to 2022 redistricting until some unspecified time after the legislative session that ended on June 6 was complete. GX 32 at 5–8. Now, in this case—commenced the same day after the Legislature's veto override vote—defendants argue that plaintiffs' challenge is *too late*. The Court properly concluded that these squarely inconsistent positions cast doubt on the "credibility" of defendants' position. Op. at 145.

The factors Justice Kavanaugh identified in his concurrence in *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring) (cited in Mot. at 3–4), likewise do not justify a stay. As the

Court's opinion exhaustively demonstrates, the underlying merits overwhelmingly favor plaintiffs, and plaintiffs will suffer irreparable harm absent an injunction. Nor have plaintiffs "unduly delayed bringing the complaint to court." *Merrill*, 142 S. Ct. at 881; on the contrary, they plaintiffs filed their complaints *the same day* that the challenged maps were enacted. By contrast, it was defendants who repeatedly sought to delay this litigation, successfully urging the Court to adjourn the hearing date it originally set; then unsuccessfully moving three weeks later for a stay of the proceedings; and now seeking a stay of the Court's order. And they did so although, as the Court noted in its Opinion, they had been on notice for at least six months that a congressional map with only one majority-Black district would become the subject of litigation. Op. at 126 n. 350. Finally, as noted, the Court found that redrawing the State's congressional map is feasible without significant cost, confusion, or hardship. Op. at 144-145.

Finally, defendants' argument that the Court's injunction should be stayed because the fourteen days it allows the Legislature to adopt new maps is insufficient, Mot. 11–12, is a non sequitur. If the schedule the Court adopted gives the Legislature too little time, the appropriate remedy would be for defendants to seek additional time to develop a new redistricting plan. It would not be to stay the injunction altogether. That defendants have not asked for more time, or any other relief that would address their accusation that the timeline the Court imposed is "unworkable," Mot. at 11, illustrates that this is a red herring. In any event, as the Court concluded, the fourteen-day period it adopted is consistent with precedent, *see* Op. at 149 n. 443 (citing cases), and is ample time in light of the numerous maps already made available—from the redistricting process through this litigation—for the Legislature to consider.

In any event, defendants' contention that it cannot act before the Court's June 20 deadline in light of the notice period required for an Extraordinary Session and the bill-reading

requirement before a law may be enacted is unpersuasive. Mot. at 11–12. The governor has already called an Extraordinary Session, and thus, the process under way. Moreover, the Legislature has been on notice that the Court's decision would issue during or shortly after the ordinary session. The Legislature could have scheduled a special session to convene immediately after the ordinary session in anticipation of the Court's ruling. At the very least, members of the Legislature could have set out a plan for preparatory work that could be completed before the start of any special session. In any event, the Legislature will not be operating on a blank slate. It has considered proposed bills in the prior sessions, including two districts that would afford Black voters the opportunity to elect their candidates of choice.

Defendants' reliance on the three-readings rule is similarly unavailing. Article 3 of the Louisiana Constitution specifies that, on each reading, a "bill shall be read at least by title" (emphasis added) meaning that a bill can evolve and change over a three-day period so long as its titles do not. La. Const. art. 3, § 15(D). In any event, the requirements for seven days' notice of an Extraordinary Session and three bill reading require a total of only ten days, less than the fourteen days allowed by the Court's injunction.

CONCLUSION

Plaintiffs commenced this action the very same day that the State's map became law, and plaintiffs and the Court acted with extraordinary diligence and expedition on plaintiffs' motions for a preliminary injunction. Defendants' contention that it is still too late for the Court to afford plaintiffs relief amounts to saying that, as a matter of law, the State gets a free pass to violate the Voting Rights Act for at least one election cycle. That is not the law. For that and the other reasons set forth above, defendants' motion for a stay pending appeal—which would, in effect, allow the State to conduct the 2022 congressional elections using a map that illegally dilutes the votes of its Black citizens—should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have electronically filed a copy of the foregoing with the Clerk of Court using the CM/ECF system which provides electronic notice of filing to all counsel of record, on this 8th Day of June, 2022.

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