**No. 22-30333**

In the United States Court of Appeals

for the Fifth Circuit

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PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE, EDWIN RENE SOULE, ALICE WASHINGTON, CLEE EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS, AMBROSE SIMS, NAACP LOUISIANA STATE CONFERENCE, AND POWER COALITION FOR EQUITY AND JUSTICE,
PLAINTIFFS-APPELLEES

*v.*

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

---

EDWARD GALMON, SR., CIARA HART, NORRIS HENDERSON, AND TRAMELLE HOWARD,
PLAINTIFFS-APPELLEES

*v.*

KYLE ARDOIN, SECRETARY OF STATE,
DEFENDANT-APPELLANT

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA (CIV. NO. 22-0211 & CIV. NO. 22-0214)*
*(THE HONORABLE SHELLY D. DICK, C. J.)*

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# ***ROBINSON*** **APPELLEES' RESPONSE IN OPPOSITION TO MOTIONS TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**

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No. 22-30333

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The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of Rule 28.2.1, have an interest in the outcome of this case. These

representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

| Parties | Counsel and Law Firms |
| --- | --- |
| National Association for the Advancement of Colored People Louisiana State Conference<br>**Plaintiff – Appellee**<br>also known as: NAACP | Paul, Weiss, Rifkind, Wharton, & Garrison, L.L.P., Adam P. Savitt, Amitav Chakraborty, Briana Sheridan, Daniel Sinnreich, Jared Evans, Jonathan H. Hurwitz, Robert A. Atkins, Ryan Rizzuto, Yahonnes Cleary |
| Power Coalition for Equity and Justice<br>**Plaintiff – Appellee** | NAACP Legal Defense & Educational Fund, Kathryn. Sadasivan, Leah Aden, Sara Rohani, Stuart Naifeh, Victoria Wenger |
| Alice Washington, Ambrose Sims, Clee Earnest Lowe, Edgar Cage, Davante Lewis, Dorothy Nairne, Edwin Rene Soule, Martha Davis, Press Robinson | ACLU of Louisiana, Nora Ahmed, Stephanie L. Willis |
| | American Civil Liberties Union Foundation, Inc., Samantha Osaki, Sarah Brannon, Sophia Lin Lakin, Tiffany Alora Thomas |
| | Louisiana Justice Institute<br>Tracie Washington |
| | Adcock Law LLC<br>John Nelson Adcock |
| | ACLU of Louisiana, Megan Snider (Former Counsel) |

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| Kyle Ardoin, in his official capacity as Secretarty of State for Louisiana<br>**Defendant – Appellant** | Nelson Mullins Riley & Scarborough LLP, Alyssa M. Riggins, Cassie A. Holt, John E. Branch III, Phillip Strach, Thomas A. Farr<br><br>Shows, Cali & Walsh, L.L.P., John C. Walsh |
| Clay Schexnayder Patrick Page Cortez<br>**Intervenor Defendants – Appellants**<br><br>State of Louisiana by and through Attorney General Jeff Landry **Intervenor Defendant – Appellant** | BakerHostetler L.L.P., Michael W. Mengis, Richard Bryan Raile, E. Mark Braden, Erika Dackin Prouty, Katherine L. McKnight, Patrick T. Lewis Louisiana's Office of the Attorney General, Elizabeth Baker Murrill, Shae McPhee, Morgan Brungard, Angelique Duhon Freel, Carey T. Jones, Jeffrey Michael Wale<br><br>Holtzman Vogel Baran Torchinsky & Josefiak PLLC, Dallin Holt, Jason B. Torchinsky, Phillip Michael Gordon |

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| Vincent Pierre Chairman LLBC<br>**Movant** | Arthur Thomas & Associates, Arthur Ray Thomas<br><br>Earnest L. Johnson I |
| Louisiana Legislative Black Caucus<br>**Movant** | Stephen M. Irving<br><br>Ernest L. Johnson I |
| Lisa J. Fauci<br>Robert Lipton<br>Nicholas Mattei<br>Michael Mislove<br>**Amicus** | Jenner & Block, LLP, Alex S. Trepp, Andrew J. Plague, Jessica Ring Amunson, Keri L. Holleb Hotaling, Sam Hirsch<br><br>Barrasso Usdin Kupperman Freeman & Sarver, L.L.C., Judy Y. Barrasso, Viviana Helen Aldous |

/S/ *John Adcock*
JOHN ADCOCK

*Attorney of Record*
*for Appellees*

JUNE 10, 2022

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## PRELIMINARY STATEMENT

After hearing the testimony of 22 witnesses and reviewing 244 exhibits offered during a five-day in-person evidentiary hearing, and having considered hundreds of pages of briefs, expert reports, and post-hearing proposed findings of fact and conclusions of law, the district court concluded that Louisiana's congressional redistricting map dilutes the votes of the State's Black citizens in violation of Section 2 of the Voting Rights Act of 1965. The district court also found that it is administratively feasible to remedy that violation before Election Day. The district court's 152-page preliminary injunction opinion carefully considered the evidence presented at the hearing, set forth its detailed findings of fact and credibility assessments, and comprehensively analyzed appellants' legal arguments in light of well-established legal standards. Those findings are entitled to substantial deference by this court and can only be disturbed if they are clearly erroneous. *See Dennis Melancon, Inc.* v. *City of New Orleans*, 703 F.3d 262, 267 (5th Cir. 2012).

Defendants now ask this Court, by three separate emergency motions, to stay the district court's ruling and allow the State to

conduct the 2022 congressional elections based upon a redistricting plan that the district court held to be illegal. Their motions rest in large part on asking this Court to disregard the district court's findings of fact, ignoring or mischaracterizing the district court's legal analysis and the evidentiary record, and urging arguments that are contrary to binding case law. On the record, there is no basis for allowing the State to conduct the coming election in likely violation of federal law and the rights of the State's Black voters.

***Gingles III***. The legislative intervenors assert that the district court erred in concluding that plaintiffs established, as required by *Thornburg* v. *Gingles*, 478 U.S. 30, 50–51 (1986), that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidates." *Id.* at 51. The intervenors assert that plaintiffs' "experts admitted their own analyses show its predicates do not exist," and that plaintiffs "failed to prove, or even address, this element." ECF No. 18 at 2, 8. Not so. The district court found, based on the testimony of plaintiffs' highly qualified voting experts, "that White voters consistently bloc vote to defeat the candidates of choice of Black voters." Sec. Mot. Ex. 16 ("Op.") 124. That conclusion was

undisputed: not one of the nine expert witnesses that defendants called at the hearing testified to the contrary. In reaching that conclusion, the district court properly focused on the ability of Black voters to elect their candidates of choice in the actual congressional districts at issue—not on speculation by defendants about unspecified hypothetical districts that the Legislature did not enact into law.

***Gingles I***. No more persuasive are defendants' assertions that plaintiffs' illustrative congressional districting maps, presented to satisfy their burden under *Gingles* to show that it is possible to "create[e] more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice," *LULAC* v. *Perry*, 548 U.S. 399, 430 (2006) (plurality op.) (citing *Gingles*, 478 U.S. at 50–51) were predominantly driven by race and thus constitute unlawful racial gerrymanders. Concerns about racial gerrymandering do not apply to illustrative plans offered to establish a Section 2 violation. *Clark* v. *Calhoun Cty.*, 88 F.3d 1393, 1406-07 (5th Cir. 1996). Even if they did, the district court found that "[t]here is *no factual evidence* that race predominated in the creation of the illustrative maps in this case." Op. 116 (emphasis in original).

Contrary to the intervenors' unsupported assertion that plaintiffs' illustrative plans "link[] distinct locations on the basis of race," Leg. Int. Mot. at 12 (internal quotation and citation omitted), the district court found as a fact that plaintiffs' maps respect existing communities of interest and otherwise comply with traditional redistricting principles and the State Legislature's own redistricting guidelines. Op. 103.[1]

***Equities and Purcell***. As the district court correctly held, the equities favor a preliminary injunction because "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. 142. Defendants' reliance on the Supreme Court's stay in *Merrill* v. *Milligan*, 142 S. Ct. 879 (2022), is misplaced because, as the district court noted, the primary elections in that case were scheduled to begin just a few weeks after the Court's ruling. Op. 148. Here, Election Day is five months away. In contrast to their misplaced reliance on *Merrill*, defendants do not even mention the Supreme Court's on-point ruling in *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, 142 S.Ct. 1245, No. 21A471 (2022) (per curiam), on which the district court heavily

[1] No appellant disputes that plaintiffs have satisfied Gingles II.

relied. *See* Op. 148. 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. *Wisconsin Elections Comm'n*, 142 S.Ct. at 1248. The Court concluded that its order gave the state "sufficient time" to adopt new maps consistent with the Court's ruling and the state's election calendar. *Id.* Defendants' argument also disregards the district court's finding, based on the testimony of the state's senior elections administrator and the Governor's chief counsel, that "a remedial congressional plan can be implemented in advance of the 2022 elections without excessive difficulty or risk of voter confusion." Op. 148. This finding and *Wisconsin Legislature* are fatal to defendants' *Purcell* argument on these motions.

## BACKGROUND

Factual History

The 2020 U.S. Census confirmed that Louisiana is home to the second-highest percentage of Black citizens in the country. Black Louisianians represent approximately 31.2% of the State's voting age population. Sec. Mot. Ex. 6 at 4. The 2020 census also shows that

Louisiana's population growth over the last decade was driven entirely by growth in minority populations. Sec. Mot. Ex. 1 at 15, Table 1.

Following the delivery of the 2020 census results in April 2021, Op. 3, the Legislature conducted public hearings across the State to solicit the views of the State's citizens about redistricting. Numerous speakers urged the Legislature to enact a plan incorporating two Congressional districts in which the Black voters had an opportunity to elect their candidates of choice. Op. 129-130. Voting rights advocates, including some of the plaintiffs, provided detailed submissions to the Legislature demonstrating that such a plan was required by the Voting Rights Act. Op. 21. Legislators submitted multiple bills providing for congressional redistricting plans with two majority Black districts and that complied with respecting traditional districting principles and the standards established by the Legislature's Joint Rule 21 regarding congressional redistricting. Sec. Mot. Ex. 1 at 24-27; Trial Ex. PR-82.

On February 18, 2022, the Legislature passed two substantially identical bills adopting congressional plans with only a single majority Black district, and five districts with large white majorities. Op. 4. On March 9, 2022, the Governor vetoed both bills, expressing his "firm

belief" that the enacted plan "violates Section 2 of the Voting Rights Act" and "disregard[s] the shifting demographics of the state." Sec. Mot. Ex. 6 at 5-6.

Shortly after the Governor's veto, plaintiffs in these consolidated cases commenced actions in state court against the Secretary of State alleging that the 2010 map in place at the time was malapportioned, and that the state government appeared to be at an impasse. *Bullman, et al v. R. Kyle Ardoin*, No. C-716690, 2022 WL 769848 (19th Judicial Dist. Ct.); *NAACP Louisiana State Conference et al v. Ardoin*, No. C-716837 19th Judicial Dist. Ct.). The Secretary, together with the legislative intervenors and the Attorney General, argued that the actions were premature because the legislative process had not run its course, and accordingly that they should be dismissed. The legislative intervenors specifically argued that there was no need for the state court to address the plaintiffs' claims at that juncture because Louisiana's "election calendar is one of the latest in the nation," "the candidate qualification period could be moved back, if necessary, . . . without impacting voters," and "the election deadlines that actually impact voters do not occur until October 2022." Op. 146.

On March 30, 2022, the Legislature overrode the Governor's veto, *id.* at 5—the first successful veto override in over a quarter century. Sec. Mot. Ex. 6 at 6. Every Black legislator in both houses voted against the override. *Id.*

As the district court found, the enacted plan dilutes Black voters' influence by "packing" them into one district (CD 2) and "cracking" them among the State's five remaining districts. These district lines, coupled with bloc voting by Black voters for their candidates of choice and high levels of white bloc voting against candidates preferred by Black voters, dilute the ability of the State's Black voters to elect their candidates of choice. The State's history dramatically illustrates the point. State voters have elected only four Black members of Congress since Reconstruction—all from majority Black districts. Sec. Mot. Ex. 6 at 19. No majority white congressional district has ever elected a Black representative in the State's history. Louisiana has not had a Black Governor or Lieutenant Governor since Reconstruction. It has never had a Black U.S. Senator, Secretary of State, or Attorney General. Black people are persistently underrepresented at every level and in every branch of the State's government. Sec. Mot. Ex. 12 at 84-85.

**Procedural History**

Plaintiffs commenced these actions against the Secretary of State the same day that the plan became law. They alleged that the plan violated Section 2 of the Voting Rights Act, 52. U.S.C. § 10301, and sought preliminary and permanent injunctive relief and the adoption of a congressional redistricting plan that included two districts in which Black voters would have an opportunity to elect candidates of their choice. Sec. Mot. Ex. 1. Thereafter, the Legislative Intervenors, the Attorney General, and the Legislative Black Caucus were granted leave to intervene. Sec. Mot. Ex. 16 at 5.

At a status conference on April 13, the Court set a putative hearing date on a motion for preliminary injunction on April 25, 2022. ECF No. 33. At the insistence of the Secretary and the Legislative and State intervenors that the original schedule did not provide adequate time for them to prepare, the court subsequently adjourned the hearing by 2 weeks, to May 9. Sec. Mot. Ex. 16 at 6; ECF No. 35. On April 15, 2022, plaintiffs moved for a preliminary injunction.

Over the course of the five day hearings, the court reviewed 244 exhibits and heard testimony from 22 witnesses, including 15 expert

witnesses and seven fact witnesses. *See generally* Sec. Mot. Ex. 18-24. At the conclusion of the hearing on May 13, the court set a deadline of May 18, 2022, for post-trial briefs and proposed findings of fact and conclusions of law. The parties submitted post-hearing briefs and proposed findings of fact and conclusions of law on May 18, 2022.

On June 6, 2022, two and one half weeks after the parties' post-hearing submissions, the court issued a 152-page Ruling and Order granting plaintiffs' motion for a preliminary injunction. The court held that plaintiffs were substantially likely to prevail on the merits of their claim under Section 2 and that there was sufficient time before the election to enact a new redistricting plan compliant with the VRA. *See generally* Op. The court further found that plaintiffs will suffer irreparable harm through the dilution of their votes absent injunctive relief. *Id.* at 149. The court provided the Legislature with an opportunity to enact a new map compliant with Section 2 by June 20, 2022, and stated that if the Legislature was unable to pass a remedial plan by that date "the Court will issue additional orders to enact a remedial plan compliant with the laws and Constitution of the United States." *Id.* at 2, 152.

In accordance with the court's order, on June 7, 2022, the Governor called for an extraordinary session of the Legislature to run from June 15 to 20 to consider a new congressional redistricting plan. *See* Gov. Edwards Issues Call for Special Session, Office of the Governor (Jun. 7, 2022), https://gov.louisiana.gov/index.cfm/newsroom/detail/3703.

## ARGUMENT

### I. The District Court's Finding that White Bloc Voting Results in the Usual Defeat of Black-Preferred Candidates Is Supported by Overwhelming and Unrebutted Evidence and is Consistent with Applicable Precedent.

The third *Gingles* precondition requires Section 2 plaintiffs to show "legally significant" white bloc voting by demonstrating 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. Here, the district court found, based on an extensive review of the record, that plaintiffs were substantially likely to satisfy this standard. The court made no error in finding ample evidence that in the plan drawn by the legislature, white voters would have, almost without exception, defeated the candidate preferred by Black voters in every Louisiana congressional district that does not have a majority-Black voting age population. Op. 123. One of plaintiffs' experts, Dr. Handley

found, based on an analysis of recompiled election results, that the Black-preferred candidate was defeated by white voters in every district except CD2 in every one of the 15 statewide elections she analyzed, as well as in all six congressional elections she reviewed that occurred in districts other than CD2. *Id.* at 58-59, 123; Trial Exs. PR-12, PR-87. Dr. Palmer found similar results, Sec. Mot. Ex. 16 at 123; Trial Ex. GX-2, while Appellants offered no contrary evidence. Based on this robust record, the court concluded that, unlike in *Covington*, "white voters consistently bloc vote to defeat the candidates of choice of Black voters," and that Appellees had therefore satisfied the third *Gingles* precondition. Op. 124, 127 (citing *Covington* v. *North Carolina*, 315 F.R.D. 117, 167 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017)). This factual finding cannot be overturned absent clear error. *See Dennis Melancon, Inc.*, 703 F.3d at 267.

Mischaracterizing the case law, the evidence, and the district court's findings, the Appellants argue, incorrectly, that the existence of limited white crossover voting in parts of the state conclusively establishes that white bloc voting is not "legally significant" and overcomes Appellees' *Gingles* III showing. Leg.Mot. at 8-12. Appellants' contention that the existence of any amount of 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.[2] As the district court concluded, that is not the law. Op. 123-24. On the contrary, *Gingles* held that "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 31 (emphasis added). This standard recognizes that the existence of some white crossover voting can coexist with "legally significant" white bloc voting. *See id.* at 58-59 (finding legally significant white bloc voting where crossover voting was as high as 50%); *see also Teague* v. *Attala County*, 92 F.3d 283, 291-92 (5th Cir. 1996); *Westwego Citizens for Better Gov't* v. *City of Westwego*, 946 F.2d 1109, 1118-20 (5th Cir. 1991); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1249 (5th Cir. 1988) (all finding a Section 2 violation despite evidence of crossover voting). The question *Gingles* III poses is thus not whether any crossover voting exists but whether, under the actually enacted plan, white bloc voting usually results in the defeat of the minority-preferred candidate.

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[2] The AG's contention that "Plaintiffs must prove that *extreme* white bloc voting renders a majority-minority district the only way to ensure that a minority community has an equal opportunity to elect the candidate of that community's choice" is also unsupported by any citation and is contrary to the law. AG Mot. at 25 (emphasis in original).

The precedents Appellants rely on only emphasize this point. For example, *Covington*, on which Appellants principally rely (*see* Leg. Mot. at 9-12), recognizes that the touchstone under the third *Gingles* precondition is whether the "majority [group] votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate." *Covington*, 316 F.R.D. at 167. The district court found that standard easily satisfied here, because Appellees' evidence showed that Black-preferred candidates would usually be defeated in the enacted districts other than CD2. By contrast, in *Covington*, "in thirty-three out of the fifty-three elections studied, African-American and non-African-American voters preferred the same candidate. . . . That is, in thirty-three of the elections, a majority of non-African-American voters preferred the African-American voters' candidate of choice." *Covington*, 316 F.R.D. at 170-71. Likewise, in *Abrams*, the district court correctly found a lack of "legally significant" bloc voting not because of the existence of crossover voting per se, but because, due to the composition of the district at issue, Black-preferred candidates were winning elections with support from white voters despite high levels of racially polarized voting ("RPV"). *Abrams* v. *Johnson*, 521 U.S. 74, 92 (1997). Here, by contrast, Black preferred candidates are not winning and, "if no remedial district [is] drawn," *Covington*, 316 F.R.D. at 168, will not

win. Accordingly, the district court did not clearly err in finding legally significant white bloc voting.

Contrary to Appellants' assertions, Leg. Mot. at 11-12, the district 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. 123–24. However, crossover voting defeats *Gingles* III only where there is evidence that minority voters could *in fact* elect their candidates of choice in the districts that have actually been drawn in which they are not the majority. *See*, *e.g.*, *Cooper* v. *Harris*, 137 S. Ct. 1455, 1471-72 (2017). Here, the district court credited the uncontested 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," and thus, it was insufficient to overcome Appellees' *Gingles* III showing. Op. 126.[3]

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[3] Appellants take out of context the district court's comment that "white crossover voting was inherently included in the analysis performed by Dr. Palmer and Dr. Handley" to argue that the court "failed to ask the correct legal question." Leg. Mot. at 11-12. In fact, the court's complete conclusion was that, even after taking crossover voting into account, Black-preferred candidates were still consistently defeated by white voters voting as a bloc. Op. 126. That is exactly the question *Gingles* III asks, and the district court's findings on that question are not clearly erroneous and are therefore entitled to deference. *Dennis Melancon, Inc.*, 703 F.3d at 267.

Appellants point to testimony from Appellees' experts indicating that a hypothetical district (the contours of which Appellants nowhere specified) with a BVAP below 50% could be drawn that would allow Black voters the opportunity to elect candidates of the choice and argue that this hypothetical possibility means that Appellees cannot, as a matter of law, establish the third *Gingles* precondition.[4] In essence, Appellants' argument amounts to an assertion that if they could have satisfied their VRA obligations by drawing a crossover district, they cannot be liable for a violation of the VRA even when they choose not to draw that district and even if all of the *Gingles* preconditions are satisfied. However, Appellants identify no case holding that the possibility of a purely hypothetical plan that includes an opportunity district in which the minority voting age population is below 50% vitiates *Gingles* III. On the contrary, the law is clear that appropriate plan to analyze for purposes of *Gingles* III is the plan that is being challenged, not the illustrative plan or a hypothetical plan that could

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[4] Appellants' assertion that Dr. Handley "concede[d] that the success of the Black preferred candidates in [in the illustrative plans] occurs only with white cooperation" is false. First, Dr. Handley was referring to crossover voting in elections that occurred in the prior enacted districts, not in any illustrative district. And more importantly, Dr. Handley said nothing whatsoever about crossover votes being required for the Black preferred candidate to win. She merely acknowledged that crossover voting occurred in CD2, the lone existing majority-Black district.

have been drawn. *See, e.g.*, *League of United Latin Am. Citizens v. Abbott*, No. 3:21-CV-259, 2022 WL 1631301, at *15 (W.D. Tex. May 23, 2022) ("the third precondition must be established for the challenged district[s]") (citing *Cooper*, 137 S. Ct. at 1470; *LULAC*, 548 U.S. at 427; *Growe*, 507 U.S. at 40) (emphasis added). In *Cooper*, for example, the Supreme Court found that the third *Gingles* precondition could not be met because Black voters were *already* electing their candidates of choice in the existing districts with despite comprising less than 50% pf the black voting age population. 137 S. Ct. at 1465-66, 1471-72.[5] Accordingly, as the court held here, "[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" showing that white bloc voting usually results in the defeat of Black-preferred candidates. Op. 126.[6]

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[5] In addition, in the testimony Appellants cite, Dr. Handley stated that an opportunity district with a BVAP below 50% could possibly be drawn in the area of CD2, where the Legislative Appellants themselves have asserted that the VRA requires a district with over 50% BVAP.

[6] For the same reason, the amicus brief filed by the Tulane and LSU math and science professors is irrelevant to the question whether *Gingles* III has been satisfied. It proposes a hypothetical remedy that would create two crossover districts, but has no bearing on whether white bloc voting is sufficient to usually defeat Black-preferred candidates in the plan actually enacted by the legislature. The district court found that it is, and this Court should defer to that finding.

Appellants next argue, citing *Covington*, that "white bloc voting becomes legally significant only if it 'exist[s] at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy.'" Leg. Mot. at 9. To this restatement of the standard announced by the Supreme Court in *Gingles*, the Appellants attempt to add a new requirement: that a "VRA remedy is a 50% minority voting-age population … district." *Id.* In so doing, they conflate the requirements for VRA liability with the scope of a possible VRA remedy, a distinction explained by the Supreme Court in *Cooper*. The *Cooper* court explained that while *Bartlett* had held that a Section 2 does not *require* a crossover district (and thus, a crossover district cannot be used to establish liability), it may nevertheless be *satisfied* by one. *See Cooper*, 137 S. Ct. at 1461 (citing *Bartlett*, 556 U.S. at 13 (2009)). In other words, to show that Section 2 has been violated, a plaintiff must demonstrate that a reasonably compact district can be drawn in which the minority voting age population exceeds 50% (*Gingles* I), and that without a remedy, the candidates in support of whom the minority group votes cohesively (*Gingles* II) will usually be defeated (*Gingles* III). *Cooper* does not change that standard. Nor does it stand for the proposition that Section 2 liability does not lie when a hypothetical district could be (but has not been) drawn where Black

voters are able to elect candidates of choice as a result of some crossover voting. Instead, it merely makes clear that once a Section 2 violation is established, the minority voting age population of the remedial district need not exceed 50% if a crossover district can be created that provides minority voters the ability to elect their preferred candidates.

The nature of any remedial plan is not at issue on these motions. Having found that "if no remedial district [is] drawn," *Covington*, 316 F.R.D. at 168, white bloc voting will continue to prevent Black-preferred candidates from being elected outside of CD2, the district court gave the legislature the first opportunity to craft a remedial plan that complies with Section 2. Op. 152. Under *Cooper*, the legislature is free to develop a plan, taking account of crossover voting, in which Black voters have the opportunity to elect their candidates of choice.

The AG contends that legally significant bloc voting does not exist where RPV can be explained by party affiliation. To the extent party preference is relevant to the Section 2 inquiry, it comes in in the analysis of the "totality of the circumstances," not in the assessment of racially polarized voting under *Gingles* II and III. *Teague*, 92 F.3d at 292 ("A defendant may try to rebut plaintiff's claim of vote dilution via evidence of objective, nonracial factors under the totality of the circumstances standard.") (cleaned up). Here, in analyzing the totality of the

circumstances, the court credited Appellees' evidence that race explained party alignment rather than the other way around. *See* Op. 128. Appellees have failed to carry their burden to rebut Appellees' showing that legally significant white bloc voting exists and that, in the totality of the circumstances, Black voters have less opportunity than others to participate in the political process and elect candidates of choice. The district court's findings on this issue are well supported and this Court should not disturb them.

In making this argument, the AG ignores that the district court rejected the expert evidence on which it is based. Specifically, the court found that "Dr. Alford's opinions [that party rather than race better explains RPV in Louisiana] border on ipse dixit," and were "unsupported by meaningful substantive analysis and [were] not the result of commonly accepted methodology in the field." *Id.* at 121. The court credited "Dr. Palmer's well-accepted ecological inference analysis [which] demonstrated that [contrary to Dr. Alford's opinion] Black voters support Black candidates more often in a statistically observable way." *Id.*

Moreover, the AG is wrong on the law. In *Gingles*, the Supreme Court plurality made clear that "[i]t is the difference between the choices made by blacks and whites—not the reasons for that

difference—that results in blacks having less opportunity than whites to elect their preferred representatives." 478 U.S. at 63. That holding is consistent with the purpose of the Voting Rights Act and the *Gingles* doctrine—to give minority voters the same opportunity as white voters to elect the candidates they believe are most likely to further their interests and address their concerns. Moreover, it is error to place the burden on Section 2 plaintiffs to disprove that factors other than race account for RPV, *see Teague*, 92 F.3d at 290, as the AG suggests, see AG Mot. at 27. On the contrary, once Appellees had demonstrated the existence of RPV, it was Appellants' burden to rebut that showing. The district court found Appellants' evidence insufficient to carry that burden. Op. 121.

Finally, the Appellants argue that the district court improperly shifted the burden to them to prove the lack of white bloc voting. Leg. Mot. at 12. The district court in fact did nothing of the kind. It found that Appellees had offered "hard evidence" demonstrating that "*Gingles* III is met even by the high standard imposed in Covington," and that Appellants had failed to offer any substantial evidence in rebuttal. Op. 127. Finding a failure to rebut a plaintiffs strong evidentiary showing does not constitute improperly shifting the burden.

Appellees have failed to carry their burden on these motions to rebut Appellees' showing that legally significant white bloc voting exists and that, in the totality of the circumstances, Black voters have less opportunity than others to participate in the political process and elect candidates of choice. The district court's findings on this issue are well supported and this Court should not disturb them.

## II. Plaintiffs Showed It Is Possible to Create an Additional Reasonably Compact District With a Sufficiently Large Black Population to Elect Candidates of Its Choice

The first prong of *Gingles* requires "a party asserting § 2 liability [to] show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Bartlett*, 556 U.S. at 19-20. *Gingles* I also requires Section 2 plaintiffs demonstrate the compactness of the minority population. *LULAC*, 548 U.S. at 433. As the district court correctly noted, "[w]hile no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." Op. 18-19.

The court correctly concluded that plaintiffs satisfied their *Gingles* I burden. The court 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, majority Black congressional districts. Op. 4-7. Again, this evidence is undisputed. None of defendants' experts testified that plaintiffs' illustrative maps were not majority Black under the methodology approved by the Supreme Court 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' argue that plaintiffs' illustrative maps "qualify as racial gerrymanders," because they link "distinct locations" on the basis of race. AG Mot. at 15. But defendants mischaracterize settled law and disregard the district court's meticulous factual findings when they argue that "racial predominance in the illustrative map … is evidence of a lack of compactness of the minority population," because "if the minority community was sufficiently compact, then there would be no need for race to predominate in the drawing of the illustrative plans," AG Mot. at 23. The district court considered these hollow claims and found no evidence to support defendants' claim that race was the predominant consideration of plaintiffs' mapmakers in drawing the illustrative plans. Instead, the court found, plaintiffs' illustrative plans adhered to traditional and the state's own redistricting criteria as well or better than the State's enacted plan. Op. 105-06.

*First*, by faulting Appellants for using a threshold of 50% Black voting age population in drawing their illustrative districts, defendants ignore that this threshold was established by the Supreme Court: For purposes of satisfying the first Gingles precondition, the minority voting age population of an illustrative district must be "greater than 50 percent." *Bartlett*, 556 U.S. at 20 (2009).

*Second,* defendants mischaracterize settled law. The racial predominance standard the Supreme Court extended to redistricting schemes in *Shaw v. Reno* under the Equal Protection Clause of the Fourteenth Amendment does not apply to *Gingles* I illustrative maps because the Equal Protection Clause is only implicated where there is state action. *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) ("The Equal Protection Clause prohibits *a State*, without sufficient justification, from separat[ing] its citizens into different voting districts on the basis of race." (emphasis added) (cleaned up)). As the district court found, the "Defendants' insistence that illustrative maps drawn by experts for private parties are subject to Equal Protection scrutiny is legally imprecise and incorrect." Op. 116.

Defendants also improperly conflate the requirements applicable to illustrative and remedial maps under Section 2, claiming that *LULAC* erased any distinction between those two categories of maps.

But there is little reason to assess the constitutionality of a § 2 plaintiff's illustrative districts before the remedial phase because, as explained above, defendants need not remedy a § 2 violation with a plaintiff's proposed single-member district or any other single-member or majority-minority district. *See, e.g., Baltimore Cnty. Branch of NAACP v. Baltimore County*, No. 21-cv-03232-LKG, 2022 WL 888419, at *4 (D. Md. Mar. 25, 2022) (approving remedial plan with reconfigured district where Black voters would not constitute numerical majority but would still "have an opportunity to elect a representative of their choice"); *Cooper*, 174 S. Ct. at 1461; *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971); *Barnett v. City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998) (Posner, C.J.) ("The plaintiff is not required to propose an alternative map that is 'final' in the 'final offer' arbitration sense, . . . the fine-tuning of the alternative can be left to the remedial stage of the litigation.").

The other cases on which defendants rely likewise did not alter this standard. In *Abbott* v. *Perez*, 138 S. Ct. 2305 (2018), the Supreme Court invalidated a lower court's decision to "defer[] a final decision on the § 2 issue and advise[] the plaintiffs to consider [it] at the remedial phase of the case" because, as the *Abbott* court pointed out, the lower Court's erred in deferring part of the Section 2 liability inquiry to the

remedial phase based on speculation that the plaintiff might succeed on its § 2 claim. *Abbott*, 138 S. Ct. at 2333. As the district court noted, "[t]his is no more than a recognition of the hornbook legal principle that liability must be decided before a remedy can be ordered." Op. 114. Likewise, in *Anne Harding v. County of Dallas, Texas*, the Fifth Circuit did not hold generally that liability and remedy are collapsed into one inquiry but only "that it was inappropriate to move to the remedy phase without a clear showing of liability." Op. 115, n. 313; 948 F.3d 302, 310 (5th Cir. 2020).

*Third,* the district court found, based on the testimony and written reports of the plaintiffs' experts and lay witnesses and its assessment of their credibility, that plaintiffs' *Gingles* I experts "both offered persuasive testimony regarding how they balanced all of the relevant [traditional redistricting] principles, including the Legislature's Joint Rule 21, without letting any one of the criteria dominate their drawing process" and 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. 103, 106. The defendants' hollow appeals to *LULAC* and reiteration of the standard that "a district that combines two far-flung segments of a racial group with disparate interests" is belied by

the evidence admitted in this case. Here, plaintiffs proffered, and the district court credited, significant testimony demonstrating that, unlike in *LULAC*, the communities joined in plaintiffs' illustrative district 5 share characteristics, needs, and interests, which are reflected in the lay testimony presented at the preliminary injunction hearing and publicly available socio-economic data relied upon by plaintiffs' experts in drawing the illustrative plans.

For example, the court credited the testimony of Mr. Fairfax, one of plaintiffs' experts, "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. 101. The court also found Mr. Fairfax considered "socioeconomic data extensively in deciding where to draw his lines." Op. 117; Op. 34 ("He … used the mapping software's capabilities to overlay data onto his proposed districts related to, for example, median household income, educational attainment, food stamp percentage, poverty level, percentage of renter households, and community resilience estimates. This information led him to conclude that areas in Ouachita Parish, Rapides Parish, Evangeline Parish, Baton Rouge, and Lafayette could be appropriately grouped together. For example, by overlaying data related to the

percentage of the population with no high school education in a given area, it was easy to see that the areas shaded red and orange in the map below, indicative of more people with no high school education, followed a pattern that "clearly define[d] the boundaries of District 5").

The district court also considered testimony from lay witnesses who spoke to the shared interests, history, and connections between East Baton Rouge Parish and two areas included together with it in plaintiffs' illustrative CD 5. Op. 37 ("Tyson testified, explaining that the strong historical connection between East Baton Rouge and the Delta parishes makes combining them in the same congressional district natural. Tyson testified that he and other Black people in Baton Rouge have strong ties to the Delta region through faith, family, and culture."); *Id.* at 39-40 ("The enacted map pairs St. Landry with Shreveport, which Cravins says disenfranchises Black voters, noting that to his recollection, congresspeople from North Louisiana have typically not visited or taken an interest in St. Landry Parish.... Overall, Cravins testified, the illustrative maps prepared by William Cooper, which link St. Landry with Lafayette and Baton Rouge, would allow St. Landry to maintain connections with the centers of influence that are important to making their voice heard.").

The court found, based on her assessments of the demeanor and credibility of plaintiffs' map-drawing experts and the substance of the illustrative maps they presented, 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. 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.* In contrast, the court noted, 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." *Id.* at 101.

Defendants' attempts to appeal to the irrelevant testimony of their experts should also be given little weight, as it was given in the district court. As the district court found, "Dr. Blunt agreed that the simulations do not provide a valid comparison if traditional redistricting principles are not part of the constraints" *Id.* at 47. Accordingly, the district court considered the evidence presented by Dr. Blunt but gave his opinions "little weight" because "the simulations he

ran did not incorporate the traditional principles of redistricting required by law." *Id.* at 95. And Dr. Murray stated on cross-examination "that he had no basis to disagree with the opinions offered by any of Plaintiffs' experts," and "that he has no opinion on whether two majority-minority districts can be drawn consistent with traditional redistricting principles." *Id.* at 50. Moreover, as the plaintiffs proved and the district court found "Plaintiffs' plans outperformed the enacted plan on every relevant [redistricting] criteria." *Id.*

## III. The *Purcell* Principle Does Not Require a Stay

The district court was correct to distinguish *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006). The Supreme Court in *Milligan* v. *Merrill* stayed an injunction issued by a three-judge panel of the Eleventh Circuit, which would have enjoined Alabama's 2021 U.S. Congressional districting plan as a violation of Section 2 of the Voting Rights Act, on February 7, 2022. *Merrill* v. *Milligan*, 595 U.S. ____ (2022). The application for a stay or injunctive relief was presented to Justice Thomas and granted. Justice Kavanaugh, with whom Justice Alito joined, wrote a concurrence in the grant of the applications for stays to explain the majority's vote. *Id.* (Kavanaugh, J., concurring). Justice Kavanaugh explained that, contrary to the principal dissent's criticism, "[t]he stay order does not make or signal any change to voting rights law. The stay

order is not a ruling on the merits, but instead simply stays the district court's injunction pending a ruling on the merit." *Id.* The stay instead was meant to effectuate existing "election-law precedents, which establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Id.* (citing *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (*per curiam*).

Here, Louisiana is not "close to an election." *Id.* Election Day will not occur for another five months. As the district court found, there is ample time for the State to adopt and implement a congressional map that complies with the Voting Rights Act. Op. 148.[7]

The district court's order lies squarely outside the outer limits of *Purcell* set by the Supreme Court in *Wis. Legislature* v. *Wis. Elections Comm'n.*, 142 S. Ct. 1245 (2022) (per curiam). There, the Wisconsin governor and legislature reached an impasse in the redistricting process,

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[7] On May 24, 2022, a district court sitting in the Fifth Circuit denied a motion seeking a stay in a similar matter based on the Supreme Court's merits decision in *Merrill v. Milligan*. *See* May 24, 2022 Order, *United States of America* v. *Galveston County*, Case 3:22-cv-00093, (S.D.TX)(Doc. 28). That court allowed the case to proceed, choosing not to "speculate" whether the Supreme Court will alter the standard; and noted that there was no precedent for staying on-going litigation before the court "simply because a higher court may substantially change its own precedent." *Id.* at 1–2. This Court should similarly not grant a stay based on speculation about future changes in the standard.

leading the Wisconsin Supreme Court to adopt a new map of state legislative districts. *Id.* at 1247. On appeal, in an order entered approximately five months before the coming primary election, the Supreme Court required the State to redraw its maps. The Court concluded that its order gave the State "sufficient time to adopt maps consistent with the timetable" for the primary. *Id.* at 1248 (2022) (per curiam).

*Wisconsin* should be dispositive here. As the district court noted, the amount of time before the Louisiana election is *more* than that between the Supreme Court's ruling in *Wisconsin Legislature* and the Wisconsin primary. Op. 148 (Louisiana does not conduct separate primaries before the November election.) For similar reasons, defendants' reliance on *Milligan* is misplaced. AG Mot. at 12-13 (citing *Merrill*, 142 S. Ct. at 881); Leg. Mot. at 17. The primary elections in Alabama at issue were scheduled to begin four months from the district court's ruling, *id.* at 879; here the district court's decision was issued more than five months before Election Day. *See* Op. 148.

Defendants contest the district court's factual finding that adopting and implementing a new congressional district map would be "realistically attainable well before the 2022 November elections." AG Mot. at 10 (citing ECF 173 at 142–44). But they do not come close to

establishing, as they must, that the district court committed clear error. That an election administrator was "extremely concerned" about timely implementation does not—without more—defeat the court's finding, particularly in light of fact that, as the district court noted, the administrator "did not provide any specific reasons why this task cannot be completed in sufficient time for November elections." Op. 144. Defendants point to the administrator's testimony regarding the State's computerized voter registration system, AG Mot. 19, but the administrator simply described how the program worked; neither the administrator nor defendants gave any indication of why it would be burdensome to change district plans in that system. *Id.*

In contrast, the district court had ample evidence that the few inconveniences described by the administrator did not amount to real burden. In particular, the same election administrator testified that her office "was able to update their records and send out mailings to all impacted voters in less than three weeks" after the Legislature overrode Governor Edwards's veto. Op. 145. The district court rightly found—and defendants provide no reason to doubt—that five months was ample time to make the corresponding updates after a remedial map is enacted by the Legislature or district court. *Id.* In addition, defendants' contention that there is insufficient time to enact a new

map ignores the district court's invitation to them to request additional time, and its statement that it would look favorably on such a request. In light of the district court's statement, defendants' complaint about the amount of time available to enact a new map rings hollow.

As the district court also noted, defendants' contention that there is insufficient time to adopt and implement a new map before Election Day is also 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. 145–46 (quoting Trial Ex. 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 impasse litigation is a "different animal." Leg. Mot. at 19 n.2. But no judicial map-drawing was underway when defendants made those representations to the state court. To the contrary, defendants 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. Trial Ex. 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 district court properly concluded that defendants cannot have it both ways. Op. 145.

The factors Justice Kavanaugh identified in his concurrence in *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), also do not justify a stay. As the district court's opinion demonstrates, the underlying merits overwhelmingly favor plaintiffs, and plaintiffs will suffer irreparable harm absent an injunction from the dilution of their votes.

Nor have plaintiffs "unduly delayed bringing the complaint to court." *Merrill*, 142 S. Ct. at 881. On the contrary, as noted, 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, first successfully urging the court to adjourn the hearing date it originally set by 2 weeks; then unsuccessfully moving three weeks later for a stay of the proceedings; and now seeking a stay of the district court's order. Defendants' repeated complaints that the district court took over 20 days from the close of the hearing to issue its opinion is overstated, because it ignores the need for the court to consider the parties' hundreds of pages of post-hearing submissions, and ignores that the hearing was adjourned at defendants' request. More fundamentally, defendants' complaint about the timing of the Court's

order are hollow in view of the fact that, as the district court noted in its Opinion, defendants had been on notice for at least six months before enacting the challenged plan that a congressional map with only one majority-Black district would become the subject of litigation. Op. 126 n. 350.

## CONCLUSION

This Court should deny defendants' motion.

Respectfully submitted,

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JUNE 10, 2022

## CERTIFICATE OF SERVICE

I, John Adcock, a member of the Bar of this Court and counsel for appellees certify that, on June 10, 2022, a copy of Appellees' Response in Opposition to Appellant's Motion to Stay Preliminary Injunction was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/S/ *John Adcock*
JOHN ADCOCK

**CERTIFICATE OF COMPLIANCE**
**WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, John Adcock, a member of the Bar of this Court and counsel for appellees certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.3, that the Appellees' Response in Opposition to Appellant's Motion to Stay Preliminary Injunction is proportionately spaced, has a typeface of 14 points or more, and contains 7798 words.

/S/ *John Adcock*
JOHN ADCOCK

JUNE 10, 2022