No. 22-30333

In the United States Court of Appeals for the Fifth Circuit

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.

On Appeal from the U.S. District Court,
Middle District of Louisiana, No. 3:22-cv-00211
Consolidated with 3:22-cv-00214

EMERGENCY MOTION TO STAY PENDING APPEAL

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CERTIFICATE OF INTERESTED PERSONS

Fifth Cir. Case No. 22-30333

The undersigned counsel of record certifies that the following listed persons and entities as descried 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.

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INTRODUCTION

Time and again, the United States Supreme Court has held fast to the principle "(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." *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (citing *Purcell v. Gonzalez*, 549 U. S. 1 (2006) (per curiam)). This is because such injunctions represent "a prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters, among others." *Id.* at 880 (Kavanaugh, J., concurring). "Filing deadlines need to be met," and when a federal court disrupts congressional districts a precious few months before candidate-qualifying deadlines, "candidates cannot be sure what district they need to file for," or even "which district they live in." *Id.* And because "[r]unning elections state-wide is extraordinarily complicated and difficult," requiring "enormous advance preparations by state and local officials," "even heroic efforts likely [will] not be enough to avoid chaos and confusion" when federal courts order substantial changes to congressional voting districts close to an election. *Id.*

Since the Supreme Court decided *Purcell*, this Court,[1] and the Supreme Court,[2] have largely abided by these principles. By enjoining the congressional maps enacted by the Louisiana Legislature—and by waiting over two weeks to do so—the court below transgressed those rules entirely. Not only has it condemned the State's election apparatus to pandemonium, it has done so based on an interpretation of the Voting Rights Act that reduces to a judicially compelled racial gerrymander. *See Shaw v. Reno*, 509 U.S. 630, 657 (1993) ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions.").

Complicating the matter further, mandatory injunctive relief in this Circuit "is particularly disfavored" and awarded only when "the facts and the law *clearly favor the moving party*." *Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976) (emphasis added). Looking at the law and Plaintiffs' evidence, even in the light most favorable to them (which is not the standard here), does not show *any* right to relief, let alone a *clear* one.

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[1] *See, e.g., Tex. Alliance v. Hughs*, 976 F.3d 564, 566–67 (5th Cir. 2020); *Mi Familia Vota v. Abbott*, 834 Fed. App'x 860, 863–64 (5th Cir. 2020); *Veasey v. Abbott*, 830 F.3d 216, 243 (5th Cir. 2016).

[2] *See, e.g., Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Clarno v. People Not Politicians*, 141 S. Ct. 206 (2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020) (per curiam).

The record is certainly not so clear as to completely upend the work of Louisiana's elected representatives in a way that is sure to engender confusion among the electorate and risk catastrophic error. *See* Ex. I ¶¶ 219-220[3] (detailing the special election that was judicially ordered because of incorrect ballots created in the rush after the late release of census data).

And if those reasons for granting a stay were not enough, the State also satisfies the traditional stay factors. At bottom, Louisiana is substantially likely to demonstrate that the district court got Plaintiffs' Section 2 claim tremendously wrong, underscoring why a stay pending appeal is critical.

NATURE OF THE EMERGENCY

On June 6, 2022, the district court below issued a preliminary injunction prohibiting Louisiana officials from conducting the 2022 elections under the State's enacted congressional district map. The district court's order will cause irreparable harm to the State. The governor has called the legislature into special session to consider a

[3] In the interest of consistency and clarity, the pin citations to the exhibits will be, unless otherwise indicated, to the ECF page number and not the page number of the underlying document.

remedial map, imposing significant costs to the State. A change in district boundaries at this late date will also require election officials to adjust district assignments and timely notify voters of those changes, increasing the risk of voter confusion and contravening the *Purcell* doctrine. Finally, if the State is forced to conduct the 2022 elections under a remedial map, it will never have the opportunity to hold the elections under the Legislature's originally enacted map, even if that map is ultimately determined to be lawful on appeal.

Defendants below jointly sought a stay of the district court's ruling in that court. That motion was denied. Pursuant to Fifth Circuit rules, the State contacted the Clerk and contacted Plaintiffs respecting this emergency motion. The State now respectfully requests that the Court grant this motion by **noon** on **Tuesday, June 14, 2022**, as the next day the Legislature will reconvene to consider a remedial map.

STATEMENT OF THE CASE

Upon receiving the results of the 2020 census, Louisiana, like its sister states, began the constitutionally required process of redrawing congressional districts. *See Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). The Legislature's work commenced with an Extraordinary

Session convened on February 1, 2022, and concluded (after a veto and override vote) on March 31, 2022. Although the U.S. Constitution's one-person, one-vote requirement compelled the Legislature to modify several boundaries, the Legislature's plan retained the "core districts as they [were] configured" after the 2010 census to ensure continuity of representation, thereby perpetuating "the traditional boundaries as best as possible" to "keep[] the status quo." Ex. I (ECF 166 ¶¶ 10-14). As enacted, Louisiana's congressional map contains six districts, one of which is majority-Black.

The same day the Legislature's plan took effect, two separate groups of plaintiffs filed suit. *See Robinson v. Ardoin*, No. 3:22-cv-00211 (M.D. La.); *Galmon v. Ardoin*, No.: 3:22-cv-00214 (M.D. La.). In their collective view, Section 2 of the Voting Rights Act requires Louisiana to create a second majority-Black congressional district. They premised their arguments on the fact that "Louisiana has six congressional districts and a Black population of over 33%." Ex. F (ECF 42-1 at 4).

The district court consolidated the two cases, denied the State's motion to stay the case pending the Supreme Court's disposition in *Merrill v. Milligan*, No. 21-1087 (U.S.), and conducted a quickly

scheduled week-long preliminary-injunction hearing. *See e.g.*, Ex. L. After the parties submitted post-trial briefs and proposed findings of fact and conclusions of law, the district court granted Plaintiffs' motions for a preliminary injunction. *Id.* (ECF No. 173 at 2).

In so doing, the district court concluded that Plaintiffs were likely to satisfy the *Gingles* factors and that, in the absence of a remedial map, they would suffer irreparable harm. *Id.* at 88–105, 141–42. The district court further required that the Louisiana Legislature enact a remedial plan within 14 days. *Id.* at 2. This order subjects the State to significant inconvenience and expense.

Within hours of the district court's preliminary injunction ruling, all Defendants filed respective notices of appeal, Exs. N, O, P, and a joint motion for a stay pending appeal. Now that the district court has declined to stay its preliminary injunction, the State seeks this Court's relief.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's erroneous entry of a preliminary injunction and issue all orders thereto. The Court has the power to grant a stay "as part of [its] traditional equipment for the administration of justice." *Nken v.*

Holder, 556 U.S. 418, 427 (2009) (quotations omitted); *see also* Fed. R. App. P. 8(a).

ARGUMENT

I. THE DISTRICT COURT'S PRELIMINARY INJUNCTION VIOLATES THE *PURCELL* PRINCIPLE.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell*, 549 U.S. at 4 (quoting *Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 231 (1989)). "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5.

Since *Purcell* was decided, this Court has recognized that voter-confusion concerns are magnified "in the apportionment context" and, accordingly, "a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws" when determining whether to "award or withhold immediate relief." *Veasey v. Perry*, 769 F.3d 890, 893 (5th Cir. 2014) (quotation omitted). When in doubt, a court should lean towards granting a stay pending appeal of an injunction affecting apportionment laws if, as here,

the injunction threatens to disrupt a temporally close election cycle. *See id.* at 4–6.

In a case pending before the Supreme Court raising claims legally indistinguishable from those brought by Plaintiffs here—*i.e.*, that Section 2 compels the creation of additional majority-minority districts—the Court reiterated "(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 . . . lower federal courts contravene that principle." *Milligan*, 142 S. Ct. at 879 (Kavanaugh, J., concurring) (citing *Purcell*, 549 U.S. 1). The "bedrock tenet of election law" animated by these points is simple and uncontroversial: "When an election is close at hand, the rules of the road must be clear and settled," because "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* at 880–81.

Applying these principles here should compel this Court to enter the State's requested stay. At the preliminary-injunction hearing, the Louisiana Commissioner of Elections testified that she is "extremely

concerned" about trying to implement a new map this close to the start of the 2022 midterm elections cycle. Ex. M (ECF No. 160-5 at 40:18-41:15). Specifically, she testified that substantial administrative work has already been completed to implement the Enacted Plan, and voters would have to be notified (or re-notified) of any changes. *Id.* at 36:14-38:2, 40:18-41:15.

And redistricting is not the only work pending in her office, which must also implement school board and municipal redistricting plans, complete the voter canvass, conduct a special election, and perform routine maintenance on scanners and voting equipment before July 20. *Id.* at 32:21-34:7. Further, to implement one of Plaintiffs' illustrative plans, the Commissioner would, at a minimum, need to complete the following tasks by July 20: (1) undo the coding of the fifteen parishes already completed for the Enacted plan; (2) code the approximately twenty-five parish changes under an illustrative plan; and (3) timely notify voters and potential candidates of those changes. *Id.* at 36:14-39:18.

None of these tasks is straightforward. All must be completed with limited time and resources. *See id.* at 36:14-39:18, 39:19-40:11. As the Louisiana Elections Commissioner explained to the Court:

> I'm extremely concerned. I'm very concerned because when you push—when you push people to try and get something done quickly and especially people that have not done this process before, the worst thing you can hear from a voter is I'm—I'm looking at my ballot and I don't think it's right, I think I'm in the wrong district or I don't feel like I have the right races.
>
> The other thing is notifying the voters. . . . If we don't notify them in enough time and have [any errors] corrected, it causes confusion across the board, not just confusion for the voters, but also confusion for the elections administrators trying to go back and check and double check that what they have is correct.

Id. at 40:12-41:15.

Despite this testimony, the district court concluded that the implementation of a new congressional map was "realistically attainable well before the 2022 November elections." Ex. L (ECF 173 at 142–44). The district court determined, based upon the time it took the Secretary to notify voters of their new districts under the enacted map, that the administrative burdens of complying with a preliminary injunction "would not be a heroic undertaking." *Id.* at 144. Further, the court discounted the significance of the June 20 nominating petition deadline

because it found most candidates have historically paid the filing fee. *Id.* at 145.

That conclusion is wrong. Given the havoc that the injunction will inflict on Louisiana as the State barrels toward the 2022 midterm elections, *Purcell* alone justifies a stay. Indeed, the Supreme Court has issued *Purcell* stays after expressing "no opinion" on the merits, *see Purcell*, 549 U.S. at 5; after noting that plaintiffs had "a fair prospect of success," *see Milligan*, 142 S. Ct. at 881 n.2 (Kavanaugh, J., concurring); and after concluding that a challenged law was "invalid," *see Reynolds v. Sims*, 377 U.S. 533, 585 (1964). In each of those instances, the electoral tumult, notwithstanding the ultimate outcome on the merits, was enough for the Court to pump the judicial brakes to safeguard orderly elections.

II. A STAY IS WARRANTED UNDER THE TRADITIONAL FACTORS.

A stay is also warranted based on the traditional stay considerations. When deciding whether to grant a stay pending appeal, this Court weighs the four factors set out in *Nken v. Holder*, 556 U.S. 418 (2009). *See Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (per curiam). "Most critical" are (1) whether the plaintiff "has made a strong showing that he is likely to succeed on the merits," and (2) whether he

will be "irreparably injured absent a stay." *Nken*, 556 U.S. at 426. The third and fourth *Nken* criteria—(3) "whether issuance of the stay will substantially injure" Plaintiffs and (4) "where the public interest lies," *id.* at 426, 434—also factor into the analysis.

The Supreme Court has intimated that enjoining the use of a redistricting map in a congressional-election year augments the plaintiffs' burden in securing an injunction. Specifically, plaintiffs must show four things: (1) "the underlying merits are entirely clearcut in [their] favor"; (2) they "would suffer irreparable harm absent the injunction"; (3) they did not "unduly delay[] bringing the complaint to court"; and (4) "the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). In other words, even if *Purcell* stops short of barring the district court's preliminary injunction outright, the principles supporting the *Purcell* doctrine nonetheless ratchet up the showing necessary for "a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Id.*

It bears reiterating that the Supreme Court has already found it appropriate to grant a stay in a case raising legal claims materially indistinguishable from those here. In *Milligan*, the Court currently has before it the "question . . . whether a second majority-minority congressional district (out of seven total districts in Alabama) is required by the Voting Rights Act and not prohibited by the Equal Protection Clause." *Id.* Because "the Court's case law in this area is notoriously unclear and confusing," *id.*,[4] and consequently, "the underlying merits" are, "at a minimum, not clearcut in favor of the plaintiffs"—"[a]nd in any event, the plaintiffs ha[d] not established that the changes are feasible without significant cost, confusion, or hardship"—the Court found that a stay was abundantly warranted. *Id.* at 881–82. This Court should follow the Supreme Court's lead in *Milligan* here.

A. Because Plaintiffs cannot satisfy any of the *Gingles* criteria, the State is substantially likely to succeed on the merits.

Until the Supreme Court says otherwise,[5] a plaintiff raising a vote-dilution claim under Section 2 of the Voting Rights Act[6] must satisfy each

[4] *See also Merrill*, 142 S. Ct. at 883 (Roberts, C.J., dissenting) (noting that there is "considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim").

[5] It is not a foregone conclusion that the *Gingles* criteria will remain the standard

of the three preconditions set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Those criteria ask whether (1) "the minority group [can] demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group . . . is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50–51. If—and only if—Plaintiffs satisfy all three preconditions they are then tasked with demonstrating, "under the totality of the circumstances," that they do not possess the same opportunities to participate in the political process and elect representatives of their choice." *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (hereinafter *LULAC, Council*).

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courts use to assess Section 2 claims. The Supreme Court is scheduled to resolve *Milligan* next term, a case addressing vote-dilution claims under Section 2. *See Merrill v. Milligan*, No. 21-1086 (Mar. 21, 2022) (amending question presented to ask "[w]hether the State of Alabama's 2021 redistricting plan for its seven seats in the United States House of Representatives violated section 2 of the Voting Rights Act, 52 U.S.C. § 10301"). This provides yet another independent reason to stay the district court's preliminary injunction.

[6] Note that whether a private right of action exists to enforce Section 2 remains "an open question" never decided by the Supreme Court. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct 2321, 2350 (Gorsuch, J., concurring). This question is currently before the Eighth Circuit in a case on appeal, *see Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 22-1395, and is preserved on appeal here, *see* ECF No. 166 at 131–32.

Although Plaintiffs cannot satisfy any of the *Gingles* preconditions, their deficiencies are most obvious with regard to preconditions one and three.

***Gingles* Precondition 1.** The first hurdle Plaintiffs need to clear is demonstrating that the relevant minority group is "'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district." *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017) (quoting *Gingles*, 478 U.S. at 50). While this precondition "specifically contemplates the creation of hypothetical districts," *Magnolia Bar Ass'n, Inc. v. Lee*, 994 F.2d 1143, 1151 (5th Cir. 1993), Plaintiffs have not carried their burden if their proposed plan links "distinct locations" based primarily on race, *Sensley v. Albritton*, 385 F.3d 591, 597 (5th Cir. 2004). In other words, racial predominance in the illustrative map drawing process is impermissible because (1) such predominance is evidence of a lack of compactness of the minority population, *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 433

(2006) (hereinafter, *LULAC*), and (2) the constitution abhors racial consideration in redistricting, *see Cooper*, 137 S. Ct. at 1468–69.[7]

Despite the district court's insistence that there is "*no factual evidence*" of racial predomination, Ex. L (ECF 173 at 116) (emphasis in original), there can be no doubt that racial considerations predominated in the creation of Plaintiffs' exemplar maps. Stated bluntly, their maps were drawn "to segregate the races." *Shaw I*, 509 U.S. at 642; *see* Ex. I (ECF No. 166 ¶¶ 303–12) (Defendants' Expert Mr. Bryan concluding that the illustrative plans he reviewed were drawn to divide black and white populations). Defendants' expert Dr. Blunt generated ten-thousand computer simulated redistricting plans without using race as a factor, and not one of them resulted in *any* majority-minority congressional districts (let alone the two that Plaintiffs argue the Voting Rights Act compels). *Id.* ¶¶ 237–42.

To produce exemplar maps with two majority-Black districts, Plaintiffs contorted each step in the process. *First*, they declined to use the U.S. Department of Justice's definition of "Black" when calculating

[7] Racial predominance occurs when (1) a mapmaker "purposefully established a racial target," such as that "African-Americans should make up no less than a majority of the voting-age population," and (2) the racial target "had a direct and significant impact" on the district's "configuration." *Cooper*, 137 S. Ct. at 1468–69.

the Black Voting Age Population (BVAP), which includes the "sum of the Census responders identifying as 'Black o[r] African American alone' and 'Two Races: White; Black or African American'" but "does not include Hispanic individuals that may identify as black, nor multiracial individuals identifying as a combination of races other than 'White' and 'Black or African American.'" *Pope v. Cnty. of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2014 U.S. Dist. LEXIS 10023, at *7–8 n.3 (N.D.N.Y. Jan. 28, 2014). Instead, Plaintiffs opted to use "Any Part Black," which includes persons who may be 1/7th Black and who also self-identify as both Black and Hispanic.

Second, Plaintiffs offered exemplar maps with districts that exceeded the 50 percent BVAP threshold by a razor-thin margin and with surgical precision. The BVAP percentage for the *Robinson* Plaintiffs' majority-Black illustrative districts are as follows: 50.16 percent, 50.04 percent, 50.65 percent, 50.04 percent, 50.16 percent, and 51.63 percent. For the *Galmon* Plaintiffs, they are 50.96 percent and 52.05 percent.

And *third*, Plaintiffs had to demote traditional redistricting criteria and elevate race to create two majority-Black congressional districts. By "reach[ing] out to grab small and apparently isolated minority

communities," *LULAC*, 548 U.S. at 433, Plaintiffs obliterated any argument that their majority-Black exemplar districts are reasonably compact. Defendants' demographic expert showed numerous examples of how Plaintiffs' map drawers intentionally segregated cities by race.

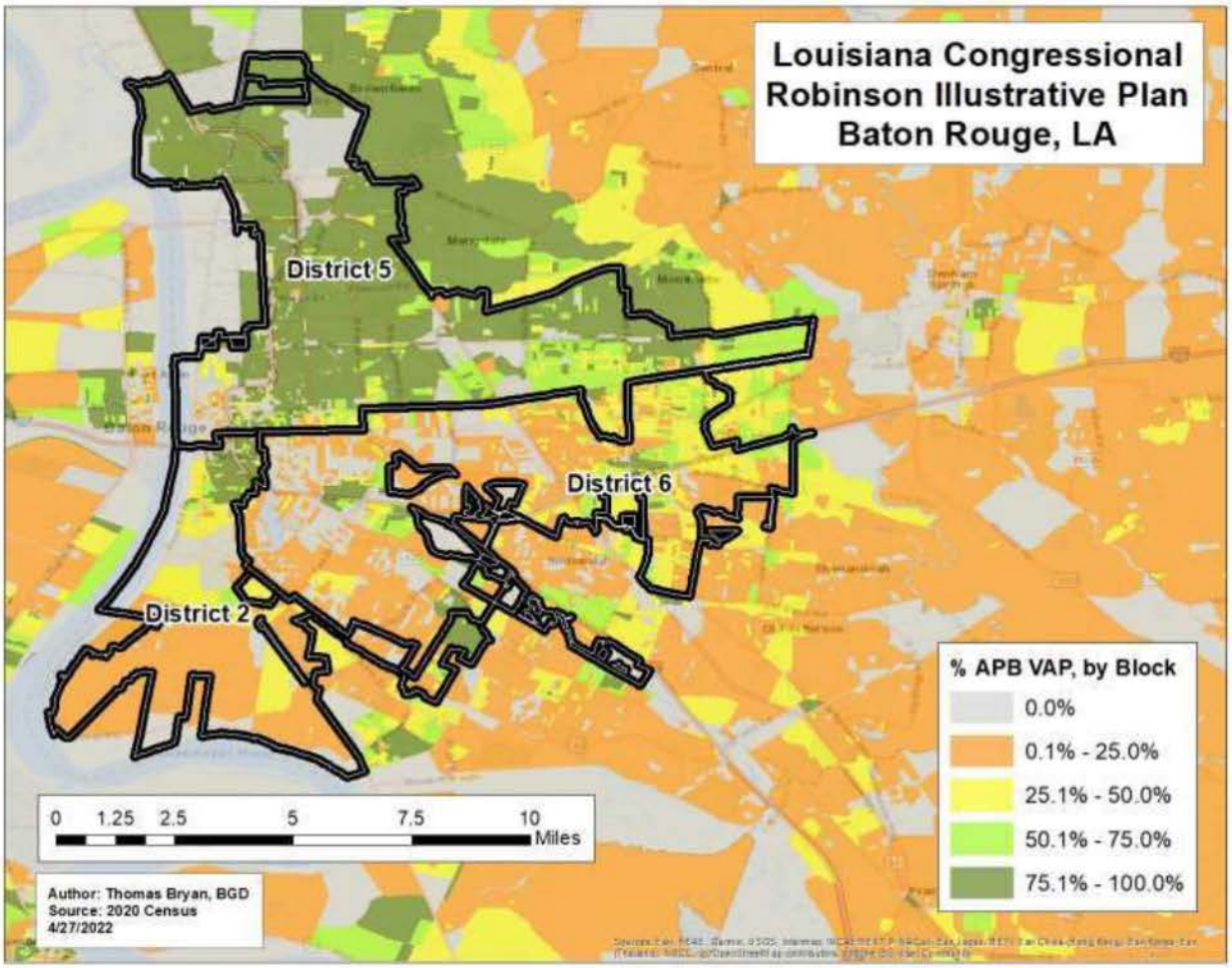

Figure 1: Ex. R (ECF 169-7 at 83).

The line drawn through the middle shows the division between the new proposed majority-minority District 5 in the north and Districts 2

and 6 in the south.[8] It is obvious simply by looking that District 5 goes only so far into Baton Rouge to pick up the majority black voting age population ("BVAP") census blocks (shaded in green). The only other district in this map to get any significant black population is District 2, which is also a majority-minority district and extends to the New Orleans area where it gets the remainder of its BVAP. The same scenario is

[8] Note: these maps only show the division in the city population, not the remainder of the parish.

repeated throughout Plaintiffs' proposed maps. Ex. R (ECF 169-7 at 83–102); *see also* Figures 2 and 3.

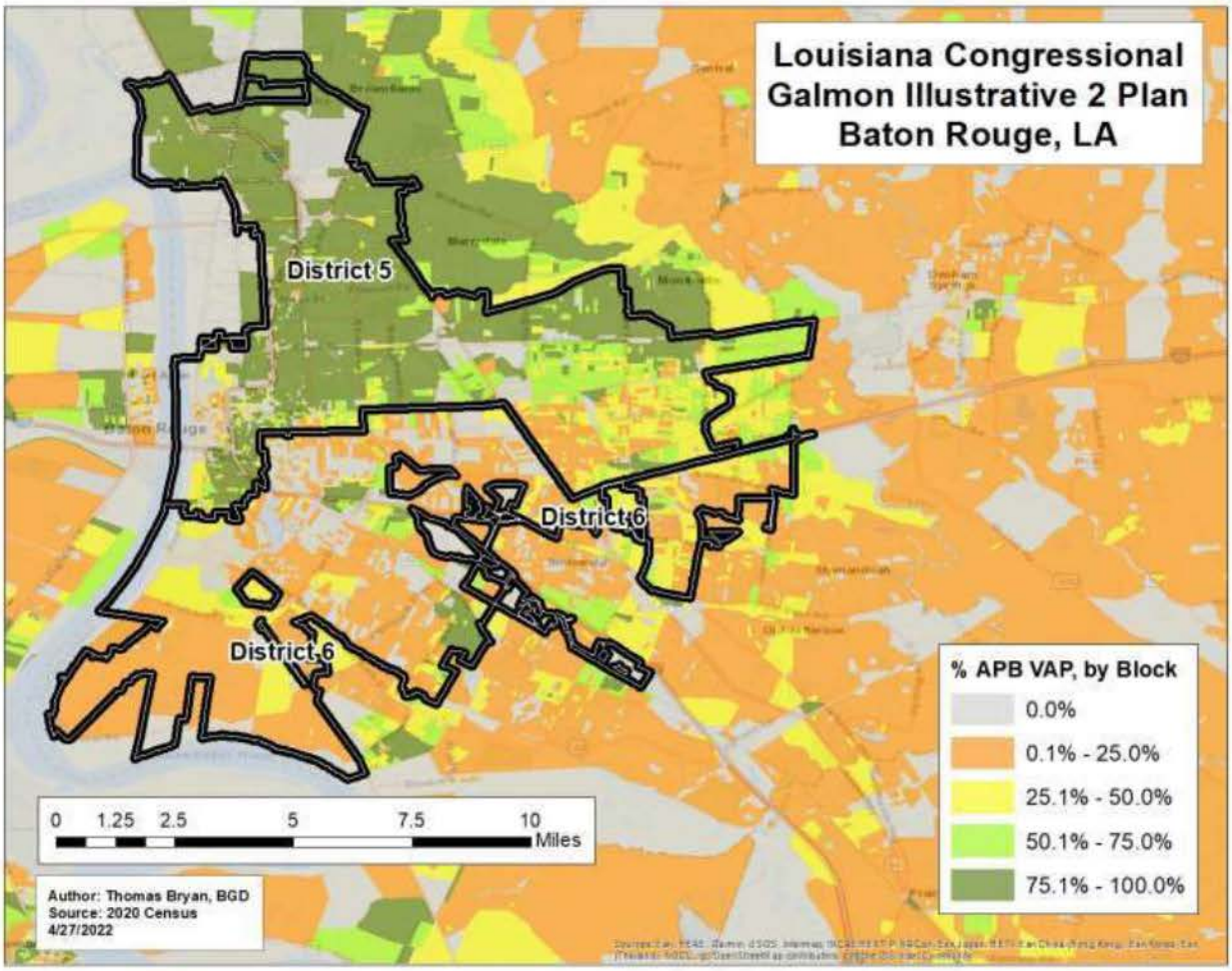

Figure 2: Ex. R (ECF 169-7 at 85).

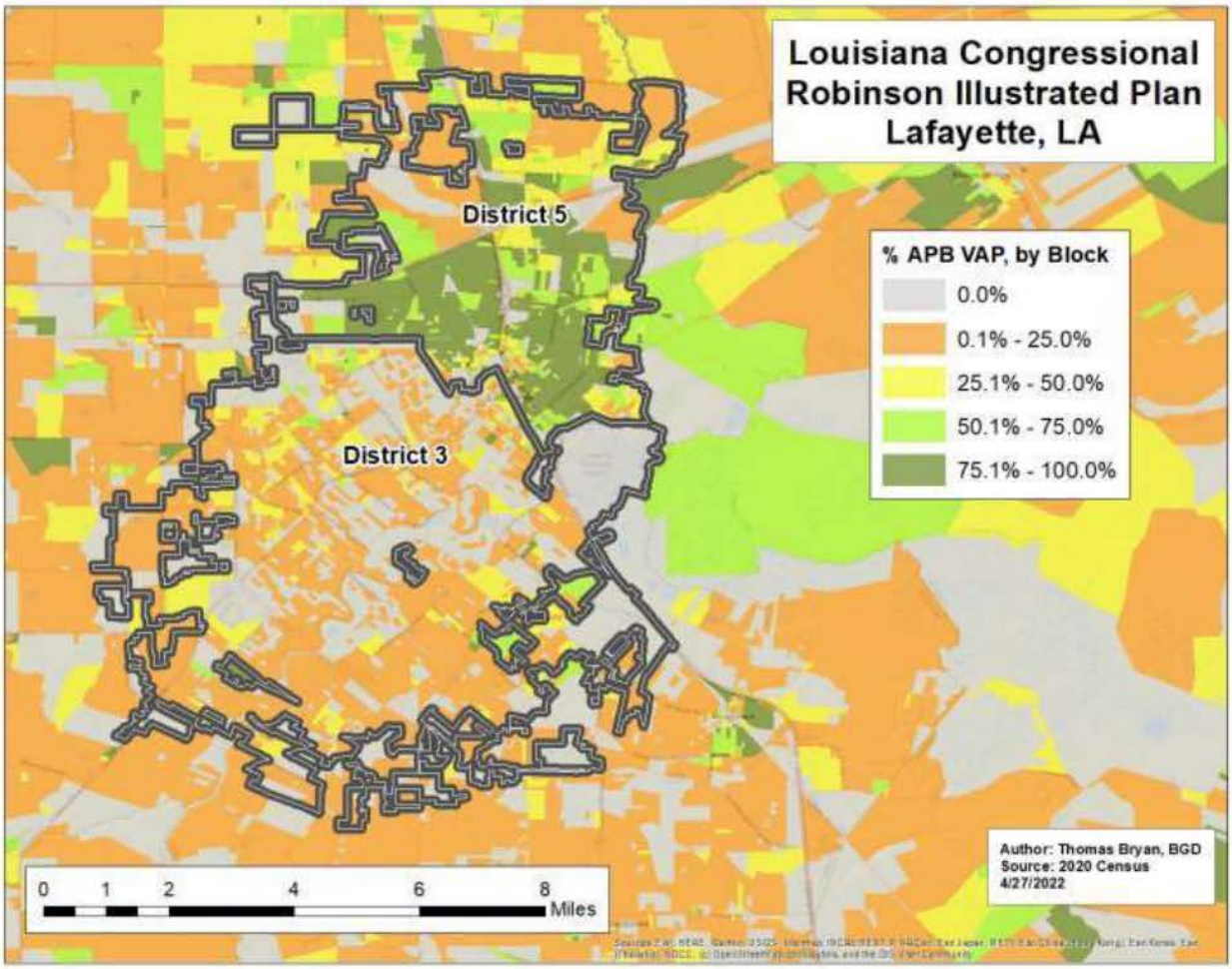

Figure 3: Ex. R (ECF 169-7 at 91).

Louisiana's spatial analytics expert offered a mileage chart that showed the distance between the center of the Black populations in communities across Louisiana. Ex. I (ECF No. 166 ¶ 332) (showing the large distance between two minority population centers "as the crow flies"); *see also id.* ¶ 95 (testimony of Plaintiff witness who testified, in sum, that it would take almost four-and-a-half hours to get from Baton

Rouge to Lake Providence, which lies at the northern end of Plaintiffs' illustrative plans in the delta region).

Lest the Court have any residual doubt that Plaintiffs' exemplar maps used race as the predominant consideration, the testimony of their map-drawers resolves the question:

> Q. During your map drawing process did you ever draw a one majority minority district?
>
> A. I did not because I was specifically asked to draw two by the plaintiffs.

5/9 Tr. 123:1–4.

The district court, as well as Plaintiffs' experts, further erred by looking at the compactness of the *district* rather than the compactness of the *minority population*, *see, e.g.,* Ex. L (ECF No. 173 at 27) (relying upon metrics that measure the *district's* compactness), which is what Section 2 requires. *LULAC*, 548 U.S. at 433 ("The first *Gingles* condition refers to the compactness of the minority population, not the compactness of the contested district.") (quotation omitted). The use of racial predominance shown in Plaintiffs' illustrative plans is, at minimum, evidence that the racial community is not sufficiently compact to constitute a second majority district. *See id.* (noting that "no precise rule has emerged

governing § 2 compactness, the inquiry should take into account traditional districting principles[.]" (quotations omitted)). Needless to say, racial gerrymandering is *not* a traditional districting principle. If the minority community was sufficiently compact, then there would be no need for race to predominate in the drawing of the illustrative plans. To that end, because race predominated the illustrative plans, Plaintiffs have not shown that the minority community is sufficiently compact.

In any event, illustrative plans that bear the hallmark of racial gerrymandering should not be permissible for a finding of Section 2 liability. *Clark v. Calhoun County*, 88 F.3d 1393 (5th Cir. 1996) no longer controls as subsequent Supreme Court and Fifth Circuit precedent has determined that the legal fiction employed by *Clark*—that the liability and remedial inquiries are separate—is flawed and that those inquiries are actually the same. *See Harding v. Cnty. of Dallas*, 948 F.3d 302, 310 (5th Cir. 2020)[9] (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018)); *see also LULAC*, 548 U.S. at 433; *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302–03 (11th Cir. 2020) ("[A] district

[9] It is important to note that *Clark* says nothing regarding predominance with respect to the analysis of the compactness inquiry of *Gingles* one.

court's remedial proceedings bear directly on and are inextricably bound up in its liability findings.").

This Court has previously held on at least two occasions that race should not be the predominant motive for a Section 2 remedy. *Washington v. Tensas Par. Sch. Bd.,* 819 F.2d 609, 612 (5th Cir. 1987); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1161 (5th Cir. 1981). And this Court and the Supreme Court have held that "[c]ourts cannot find § 2 violations on the basis of *uncertainty*." *Harding*, 948 F.3d at 310 (emphasis in original). If Plaintiffs were compelled to use illustrative plans where race predominated, then it is at the very least *uncertain* that a remedial plan can be drawn that does not violate the Fourteenth Amendment. Therefore, at a minimum, the merits are not "entirely clearcut" in favor of Plaintiffs. *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

***Gingles* Precondition 3.** The third *Gingles* precondition requires Plaintiffs to show that the "amount of white bloc voting . . . can generally 'minimize or cancel' black voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 56 (citations omitted). "In areas with substantial crossover voting," *Bartlett v. Strickland*, 556 U.S. 1, 24

(2009), which arises when a Black-preferred candidate can prevail "without a VRA remedy," *Covington v. North Carolina*, 316 F.R.D. 117, 168 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017), this precondition remains unsatisfied. "[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (quoting *Gingles*, 478 U.S. at 49 n.15).

Plaintiffs' polarized voting experts both defined polarized voting as existing where "black voters and white voters voted differently." Ex. I (ECF 166 ¶ 464). Specifically, they testified that polarized voting occurs when "black voters and white voters would have elected different candidates if they had voted separately." *Id.* That, however, is not the standard. The Supreme Court has made clear 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.

This Plaintiffs cannot do. Indeed, when pressed, one of Plaintiffs' experts testified that meaningful white crossover voting exists and that at least two congressional districts (CD2 and CD5) could be drawn with

a BVAP below 50 percent, but that would nonetheless enable the Black community in those districts to elect the candidate of their choice. *Id.* ¶ 466. Another expert testified that a district around 40 percent BVAP could perform. *Id.* And an amicus brief submitted by LSU and Tulane University mathematics and computer-science professors included an analysis of nineteen elections, which demonstrated that districts of about 42 percent BVAP afford an equal minority electoral opportunity. Ex. Q (ECF 97 at 30, 34, 41–43).

The preliminary-injunction record shows that "partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens," which means there is no "legally significant" racially polarized voting under the third *Gingles* precondition. *LULAC, Council*, 999 F.2d at 850; *see also* Ex. I (ECF No. 166 ¶¶ 323–27). "The Voting Rights Act," naturally, "does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.'" *Id.* at 854 (quoting *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992)). Defendants' expert testified that, while "voting may be correlated with race[,] . . . the differential response of voters of different races to the race of the

candidate is not the cause." Ex. I (ECF 166 ¶ 475). Instead, he found that the polarization seen in the data is a result of Democratic party allegiance and not race. *Id.* ¶¶ 475-–76.

In other words, Plaintiffs have not carried their burden of demonstrating "legally significant" bloc voting for purposes of *Gingles* precondition 3. *See LULAC, Council*, 999 F.2d at 850. This, in turn, renders meritless—rather than "entirely clearcut" in their favor, *Milligan*, 142 S. Ct. at 881 (Kavanaugh, J., concurring)—their Section 2 claim.

B. The State of Louisiana (and its citizens) will suffer irreparable injury without a stay of the district court's preliminary injunction.

"When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws." *Veasey*, 769 F.3d at 895 (quoting *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013)). Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) (alteration in original) (quoting *New Motor Vehicle Bd. of Cal.*

v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Given the principles underlying the *Purcell* doctrine (discussed *supra* at 7–13), the severity of the injury that the district court's injunction will inflict is stupendous.

C. The equities tilt heavily in favor of entry of a stay.

"When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws. "And as to 'where the public interest lies, when 'the State is the appealing party, its interest and harm merge with that of the public.'" *Richardson v. Hughs*, 978 F.3d 220, 243 (5th Cir. 2020) (internal citation omitted) (first quoting *Nken*, 556 U.S. at 426, then quoting *Veasey*, 870 F.3d at 391). If this Court ultimately determines that Section 2 of the Voting Rights Act does *not* require the creation of a gerrymandered second majority-Black district, Louisiana's entire electorate will suffer irreversible harm when they next cast their ballots for their congressional representatives.

CONCLUSION

For these reasons, the State requests that the Court stay the district court's preliminary injunction pending appeal.

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CERTIFICATE OF SERVICE

On June 9, 2022, this document was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) and required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned and is free of viruses.

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CERTIFICATE OF COMPLIANCE WITH THE FEDERAL AND LOCAL RULES

This motion complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,150 words, excluding the parts of the motion exempted by rule and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word (the same program used to calculate the word count). This motion also complies with the requirement to contact all other parties under Fifth Circuit Rule 27.4 because the State contacted the other parties, and they indicated that they will file oppositions.

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