No. 22-30333

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PRESS ROBINSON, et al.,
Plaintiffs-Appellees,

v.

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana,
Defendant-Appellant,

CLAY SCHEXNAYDER, et al.,
Intervenor Defendants-Appellants.

EDWARD GALMON, SR., et al.,
Plaintiffs-Appellees,

v.

KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana,
Defendant-Appellant,

CLAY SCHEXNAYDER, et al.,
Movants-Appellants.

On Appeal from the Middle District of Louisiana
Case Nos. 3:22-cv-211, 3:22-cv-214
The Honorable Shelly D. Dick

Reply in Support of Emergency Motion of Legislative Intervenor Defendants-Appellants Under Circuit Rule 27.3 for a Stay Pending Appeal

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Certificate of Interested Persons

***Robinson, et al. v. Ardoin, et al.*, Case No. 22-30333**

Pursuant to Fifth Cir. R. 28.2.1, 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 disqualifications or recusal.

Intervenor Defendants-Appellants (movants in the present motion): Clay Schexnayder and Patrick Page Cortez, in their official capacities as Speaker of the Louisiana House of Representatives and President of the Louisiana Senate, represented by Baker & Hostetler LLP attorneys Katherine L. McKnight, Richard B. Raile, E. Mark Braden, Michael W. Mengis, Patrick T. Lewis, Erika Dackin Prouty, and Renee M. Knudsen.

Intervenor Defendant-Appellant: State of Louisiana, by and through Attorney General Jeff Landry, represented by Louisiana's Office of the Attorney General attorneys Elizabeth Baker Murrill, Angelique Duhon Freel, Carey T. Jones, Jeffrey Michael Wale, Morgan Brungard, and Shae McPhee; and by Holtzman Vogel Josefiak Torchinsky PLLC attorneys Jason B. Torchinsky, Dallin B. Holt, and Phillip Michael Gordon.

Defendant-Appellant: Kyle Ardoin, in his official capacity as Secretary of State for Louisiana, represented by Shows, Cali & Walsh, LLP attorney John Carroll Walsh; and by Nelson Mullins Riley & Scarborough LLP attorneys

Alyssa Riggins, Cassie Holt, John E. Branch, III, Phillip Strach, and Thomas A. Farr.

Plaintiffs-Appellees: Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, National for the Advancement of Colored People Louisiana State Conference (NAACP), Power Coalition for Equity and Justice, represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP attorneys Adam Savitt, Amitav Chakraborty, Briana Sheridan, Daniel Sinnreich, Jonathan Hurwitz, Robert A. Atkins, Ryan Rizzuto, Yahonnes Cleary; and by the NAACP Legal Defense Fund attorneys Jared Evans, Kathryn C. Sadasivan, Leah C. Aden, Sara Sara Rohani, Stuart C. Naifeh, and Victoria Wenger; and by ACLU of Louisiana attorneys Nora Ahmed, and Stephanie Legros; and by the ACLU attorneys Samantha Osaki, Sarah E Brannon, Sophia Lin Lakin, and Tiffany Alora Thomas; and by attorneys Tracie L. Washington; and by John Nelson Adcock.

Plaintiffs-Appellees: Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard, represented by Elias Law Group LLP attorneys Abha Khanna, Jacob D Shelly, Jonathan Patrick Hawley, Lalitha D. Madduri, and Olivia Sedwick; and by Walters Papillion Thomas Cullens, LLC attorneys Jennifer Wise Moroux, Darrel James Papillion, and Renee' Chabert Crasto.

Movant: Vincent Pierre (Chairman of LLBC), represented by Arthur Ray Thomas of Arthur Thomas & Associates and Ernest L. Johnson, I.

Movant: Louisiana Legislative Black Caucus (LLBC), represented by Stephen M. Irving of Steve Irving LLC and Ernest L. Johnson, I.

Amici: Michael Mislove, Lisa J. Fauci, Robert Lipton, and Nicholas Mattei, represented by Jenner & Block LLP attorneys Alex S. Trepp, Andrew J. Plague, Jessica Ring Amunson, Keri L. Holleb Hotaling, and Sam Hirsch, and Barrasso Usdin Kupperman Freeman & Sarver, LLC attorneys Judy Y. Barrasso and Viviana Helen Aldous.

Dated: June 10, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Attorney of Record for Appellants Clay Schexnayder and Patrick Page Cortez

Table of Contents

Table of Authorities

Cases

Other Authorities

Plaintiffs fail to refute the many reasons a stay pending appeal is warranted. This Reply brief addresses just a few of their failings.

I. Likelihood of Success

Plaintiffs have little prospect of establishing at least the first and third *Gingles* preconditions.

A. The third precondition cannot be met "[i]n areas with substantial crossover voting." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). Plaintiffs accuse Appellants of arguing that "any amount of crossover voting invariably defeats a finding [of] *Gingles* III," *Robinson* Opp. 12, but that is a straw man. The question does not turn on "any" crossover voting but on whether it is sufficiently robust that "a VRA remedy" is unnecessary to ensure equal opportunity. *Covington v. North Carolina*, 316 F.R.D. 117, 168 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017).

It is therefore not true that Appellants' argument "would effectively preclude relief" in any case. *Robinson* Opp. 13. Often, high white bloc voting, combined with low minority turnout, necessitates districts above 50% minority VAP. One of Plaintiffs' experts, Dr. Lisa Handley, demonstrated in a leading law review article that, in many regions, districts at or above 50% minority VAP are necessary, but in many regions they are not. Bernard Grofman, Lisa Handley & David Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C. L. Rev. 1384 (2001). That analysis speaks to the correct legal question. From Plaintiffs' experts' reports, it is

undisputed that such an analysis would likely show that 50% BVAP districts are unnecessary to ensure equal Black electoral opportunity. Mot. 10-11.

B. Plaintiffs, however, say the correct legal analysis measures white bloc voting against "the actually enacted plan."[1] *Robinson* Opp. 13; *Gallmon* Opp. 17. But that argument contravenes two Supreme Court decisions and the *Covington* summary affirmance.

In *Bartlett*, the Supreme Court addressed whether Section 2 requires districts below 50% minority VAP and answered in the negative, reasoning that "[i]t is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate." 556 U.S. at 16. Stated differently, where voting patterns support effective crossover districts, the third precondition is not met. The Court explained that, in regions where crossover districts can perform, "majority-minority districts would not be required in the first place." *Id.* at 14.[2]

Likewise, *Cooper v. Harris*, 137 S. Ct. 1455 (2017), which Plaintiffs rely on (*Robinson* Opp. 18), supports Appellants: it invalidated a majority-minority

[1] The clean legal question presented in the brief defeats Plaintiffs' insistence that the clear-error standard applies. *Robinson* Opp. 12; *Galmon* Opp. 5. "This court reviews *de novo* the legal standards the district court applied to determine whether § 2 has been violated." *Fairley v. Hattiesburg*, 584 F.3d 660, 667 (5th Cir. 2009) (cleaned up).

[2] *Bartlett*'s discussion of the third precondition was essential to its holding, and even if it were dictum, it would still command this Court's adherence. *See Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013).

district because voting patterns would support a functioning minority-crossover district. *Id.* at 1471-72. Plaintiffs suggest that, because evidence of crossover voting was drawn from an actual crossover district under the prior decade's plan, this supports their distinction between "hypothetical" and "actual." *Robinson* Opp. 18. Not so. The crossover district in *Cooper* was hypothetical because the prior decade's plan was unconstitutionally malapportioned. The measure in *Cooper* was a hypothetical crossover district that might have replaced the former crossover district, and its "contours" were "nowhere specified." *Robinson* Opp. 16.

The same is true in *Covington*, which held that majority-minority districts are neither required nor justified under Section 2 unless "the candidate of choice of African-American voters would usually be defeated without a VRA remedy." 316 F.R.D. at 168. Plaintiffs' assertion that it is irrelevant whether "a hypothetical district…with a BVAP below 50% could be drawn that would allow Black voters the opportunity to elect candidates of choice," *Robinson* Opp. 16, stands rejected in *Covington*, which explained that the way to assess legally significant white bloc voting is through "[a] 'district effectiveness analysis" of the type discussed above. 316 F.R.D. at 169 n.46 (relying on another of Plaintiffs' experts, Dr. Lichtman, including for this argument). The court made clear that the problem was that the North Carolina legislature "never made any determination whether majority bloc voting existed at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy." *Id.* at 168.

C. Appellants' theory makes sense; Plaintiffs' does not. In Appellants' view, the question is whether a majority-minority district is necessary. If not, why would Section 2 command it? Plaintiffs' try to sidestep this problem by divorcing liability from remedy. *Robinson* Opp. 16. But liability and remedy under Section 2 "merge," *E. Jefferson Coal. for Leadership & Dev. v. Par. of Jefferson*, 926 F.2d 487, 492 (5th Cir. 1991), because no remedy means no right and vice versa, *Growe v. Emison*, 507 U.S. 25, 41 (1993).

Plaintiffs' theory would render redistricting impossible because, to justify the racial predominance necessary to create majority-minority districts, states must address the *Gingles* preconditions before they enact or use a plan. *See, e.g.*, *Wis. Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1249-50 (2022). Knowing whether white bloc voting is legally significant "under the actually enacted plan" would require future time-travel. *Robinson* Opp. 13. Legislatures must address the *Gingles* preconditions as to "a hypothetical district."[3] *Robinson* Opp. 16. Indeed, the *Galmon* Plaintiffs' assertion that "*defenses* under the Voting Rights Act" demand different legal inquiries from "affirmative Section 2 claims," *Galmon* Opp. 19, would complete this absurdity by creating scenarios where legislatures are forbidden from creating majority-minority districts (as in *Covington* and *Cooper*) that are legally required (as Plaintiffs say is true here).

[3] That point is underscored here, where Plaintiffs' rely solely on superimposed election results—which are hypothetical—on their alternative plans—which are hypothetical. To determine "what the right to vote *ought to be*" everyone concerned (court, litigants, legislatures) must consider the "hypothetical." *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 (2000).

Plaintiffs' theory would also overrule *Bartlett* by compelling states to draw crossover districts. Where crossover voting exists at the levels it does in Louisiana, the inevitable racial predominance of creating majority-minority districts could not be justified due to the fact that the state could have drawn performing crossover districts, as occurred in *Covington* and *Cooper*. But—as Plaintiffs would have it here—where a legislature avoided racial predominance and allowed lines to fall where they may, it would incur Section 2 liability if minority VAP levels fell outside of the functioning crossover-district range. The only way for a redistricting authority to satisfy both the VRA and the Equal Protection Clause would be to draw crossover districts. That would contravene the Supreme Court's "holding that § 2 does not require crossover districts." *Bartlett*, 556 U.S. at 23.

D. This appeal is also likely to succeed on the first precondition. Plaintiffs acknowledge "using a threshold of 50% Black voting age population," *Robinson* Opp. 24, and the Supreme Court in *Cooper* found that this amounts to predominance, 137 S. Ct. at 1468-69. Plaintiffs' reliance on *Bartlett* as an excuse, *Robinson* Opp. 24, forgets that the legislature's reliance on *Bartlett* in *Covington* was *evidence of predominance*. 316 F.R.D. at 130.

Plaintiffs also repeat the district court's odd conclusion that the predominance test does not apply to remedial plans because they are prepared by "private parties," *Robinson* Opp. 24 (citing Op. 116), and this might have merit—except for the detail that Plaintiffs obtained a command from one *government* actor (the court below) to another (the Legislature) "to enact a remedial plan" with "an additional majority-Black congressional district." Op. 2. When

Plaintiffs go to court and demand the government impose a law on the public, they must accept the constitutional limits that constrain the government.

There is also no merit in Plaintiffs' argument that the Court should defer to the district court's findings that race did not predominate. The district court found that race was used "to draw a district exceeding 50% BVAP," Op. 112, and that is what predominance means, regardless of the semantic disputes Plaintiffs try to raise. The racial-predominance standard is a legal standard that must be applied properly. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (remanding for retrial under "the proper standard"). It was not applied properly here.

Factually, it strains credulity to claim that race was not Plaintiffs' predominant, non-negotiable goal. All *six* of Plaintiffs' illustrative plans got their second majority-Black district by combining East Baton Rouge with the Delta Parishes. Dist.Ct.Dkt.160-1, at 127:9-18, 217:24-218:6. Plaintiffs' mapmaking experts admitted they knew of *no other way to draw the map* to yield two majority-Black districts, *id*. 130:1-9, 131:24-132:4, 220:23-221:6, and the *only* historical example they knew of those far-flung populations being drawn together: the 1990s-era gerrymander struck down in *Hays, id*. 139:13-142:2, 222:12-19. The racial design of these districts is clear.

II. The Equities

Legislative Appellants' motion explains why the equities favor—indeed, compel—a stay. Mot. 15-20. Plaintiffs' responses lack merit.

A. Plaintiffs (*Galmon* Opp. 24-25; *Robinson* Opp. 34-35) echo the district court's assertion that, because of statements in prior state-court litigation, "Defendants' argument that they will be irreparably harmed absent a stay is disingenuous." Mot. Ex. C at 2. But as a *matter of law*, irreparable harm follows from an injunction against a state statute. *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 411 (5th Cir. 2020). Plaintiffs do not deny that, without a stay, the enacted plan will not govern the November election, which is *per se* irreparable harm. *See Veasey v. Perry*, 769 F.3d 890, 896 (5th Cir. 2014). Their arguments that the irreparable-harm element is not met are foreclosed. *Galmon* Opp. 22-30.

B. Additionally, the assertions of Legislative Appellants that Plaintiffs regard as incompatible with their *Purcell* argument have no relevance here, and Plaintiffs ignore *their own* assertions in the same litigation, which confirm that *Purcell* bars the injunction below.

To begin with context: in the state-court suit at issue, many of the *Robinson* Plaintiffs, represented by the same lawyers here, brought suit in March 2022 asking a state court to draw a congressional plan to govern 2022 elections because, Plaintiffs alleged, the Legislature and Governor had reached "impasse" and would be unable to pass a new plan in time to conduct 2022's elections. The suit was filed after the Governor vetoed the Legislature's redistricting bills, but before the legislative override. Legislative Appellants intervened and argued the dispute was not ripe because—as of March 25—there remained time for the Legislature to enact a plan to govern the 2022 election. Dist.Ct.Dkt.169-139, at 5-8. Plaintiffs and the court below view that as conceding away *Purcell* in this case,

but assertions made on March 25, 2022, *id.* at 12, regarding "predictions about the *future*," *id.* at 6, do nothing like that.

First, in explaining why an "impasse" had not been reached during March 2022, Legislative Appellants identified certain opportunities the *Legislature* might use to enact a plan in the *near* future—including the March 30 veto-override session and the 2022 Regular Legislative Session to end June 6. *Id.* at 6-7. The arguments, read as a whole, contemplated a timeline where a plan would be in place by late spring or early summer. *Id.* at 6-8. In impasse litigation, legislative passage of a redistricting bill moots the litigation, so there would be no subsequent proceedings. By contrast, in this case, the court's June 6th injunction—issued after a 24-day delay that ran out the clock on the Regular Legislative Session—must now be followed by a remedial process that offers no realistic possibility of a new plan for an unknown quantity of time, and no time for appellate review of liability or remedy prior to the 2022 elections. *See* Mot. 18.

Second, the impasse lawsuit did not implicate the reliance interests at issue here. In the impasse case, a plan had not yet been enacted, so the State's election administrators had not already implemented a plan and educated the public about it. *See* SOS Mot. 14-20. Legislative Appellants certainly did not represent in the impasse case that, if a plan *were* enacted *and implemented*, an injunction calling for a new redistricting process would be proper or feasible.

All that aside, Plaintiffs are employing selective memory, forgetting that those Plaintiffs who participated in the impasse case vigorously disagreed with Legislative Appellants and told the state court that, unless it immediately

fashioned a plan, "[t]here would be no assurance that a properly apportioned map will be in place by the time the candidate qualifying period begins in July 2022, or even by the November election." Ex. D (attached hereto) at 2. Plaintiffs told that court, in March 2022, that "to ensure that redistricting is completed in time for the November 2022 elections, the Court must begin now." Ex. E (attached hereto) at 7. Plaintiffs argued that the July 20, 2022 candidate qualifying period was "rapidly approaching," Ex. D at 1, 10, and that a new plan could not wait until June 6, because the process "would have to be compressed into a matter of days," "make it difficult or even impossible for the Court to seriously consider the issues presented much less for the appellate courts to review any ruling," and "create a serious risk that Plaintiffs and other Louisiana voters will be without a constitutional map when the July 20, 2022 qualifying period arrives, or even before the November election." *Id.* at 6-7. They argued that delay (measured from March 2022) "could result in last-minute decisions that would invariably create uncertainty and confusion for voters and State officials who must manage the election." *Id.* at 2; *see id.* at 9 (contending that waiting until June or July to impose a plan, if even feasible on "such an expedited timeline," would pose "an enormous burden" and "potentially result in last-minute decisions" creating "unnecessary confusion and uncertainty.").

Assertions to that effect in March 2022 are all the more incompatible with their position here because the march of time cuts against them. Thus, if any litigants here "painted a very different picture" in the impasse case "than the one they paint for this Court," Op. 146, it is Plaintiffs.

C. Plaintiffs acknowledge the *Purcell* principle and the Supreme Court's recent stay order, which turned on that principle. *Merrill v. Milligan*, 142 S. Ct. 879 (2022). Plaintiffs' efforts to distinguish *Merrill* only confirm the similarities. They assure the Court that "Election Day will not occur for another five months," *Robinson* Opp. 31, but that just echoes the *Merrill* dissent's complaint that "the primary date is in late May, about four months from now." 142 S. Ct. at 888. The timing here cannot be distinguished: a January injunction was prohibited in *Merrill* as to a May election, so a June injunction here must be prohibited as to a November election.

Plaintiffs erroneously look to *Wisconsin Legislature* to assess *Purcell*, but that case did not even mention *Purcell*. 142 S. Ct. at 1247-51. That is not surprising, since the Court was reviewing the Wisconsin Supreme Court's decision adopting a redistricting plan, and the Supreme Court does not view *Purcell* as shielding lower-court orders from its appellate review on federal questions. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Texas Democratic Party*, 961 F.3d at 412 (articulating this principle).

CONCLUSION

The Court should stay the injunction below pending appeal.

Dated: June 10, 2022

/s/ Richard B. Raile

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Certificate of Compliance

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. ("Rule") 27(d)(2) because it is 2,599 words, excluding the parts that are exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced typeface with serifs.

Dated: June 10, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

Certificate of Service

I hereby certify that on June 10, 2022, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Dated: June 10, 2022

/s/ Richard B. Raile
RICHARD B. RAILE

EXHIBIT D

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

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ("NAACP") LOUISIANA STATE CONFERENCE, POWER COALITION FOR EQUITY AND JUSTICE, DOROTHY NAIRNE, EDWIN RENÉ SOULÉ, ALICE WASHINGTON, AND CLEE EARNEST LOWE, Plaintiffs, v. R. KYLE ARDOIN, in his official capacity as Louisiana Secretary of State, Defendant.	Civil Action No. C-716837 Div.: C Sec.: 25

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO STAY PROCEEDINGS

MAY IT PLEASE THE COURT:

Plaintiffs NAACP Louisiana State Conference (the "Louisiana NAACP"), Power Coalition for Equity and Justice (the "Power Coalition"), Dorothy Nairne, Edwin René Soulé, Alice Washington, and Clee Earnest Lowe, by and through their undersigned counsel, submit this memorandum in opposition to the motion to stay proceedings filed by Defendant Secretary of State R. Kyle Ardoin (the "Secretary").

The current congressional map for the state of Louisiana is unconstitutionally malapportioned, in violation of Article I, Section 2 of the United States Constitution. The Legislature and the Governor have reached an impasse, and are unable to agree on a properly apportioned map. There is no alternative map in place. There is, at best, grave doubt whether the impasse can be overcome, and no clear deadline for the Legislature and the Governor to do so. In the meantime, election deadlines are rapidly approaching; the candidate qualifying period begins on July 20, 2022, and the Open Congressional Primary elections will take place in November. Unless this Court acts, there is no assurance that a properly apportioned map will be in place before these deadlines arrive, if at all.

It is against this backdrop that the Secretary asks this Court for an indefinite stay of these

proceedings. The Secretary's request ignores the factual circumstances facing Louisiana at present, and should be denied.

First, Plaintiffs—and all Louisiana voters—would be gravely prejudiced by a stay of the proceedings. Plaintiffs, along with all Louisiana voters, are currently experiencing the harms of a malapportioned map. Those harms will continue, and indeed be exacerbated, by the issuance of a stay, particularly one of indefinite duration. Resolving the legal issues raised by this action will require detailed submissions by the parties and careful analysis by the Court. All of this takes time. If the Legislature and the Governor fail to agree on a constitutional map, the judicial system would have to make "extremely complex" decisions, Defendant's Memorandum of Law ("Mem") at 4, about an appropriate map on a highly expedited schedule and potentially without fully airing the relevant factual and legal issues. There would be no assurance that a properly apportioned map will be in place by the time the candidate qualifying period begins in July 2022, or even by the November election. At best, a stay could result in last-minute decisions that would invariably create uncertainty and confusion for voters and State officials who must manage the election.

Second, denying the stay imposes no harm upon the Secretary. The Secretary is still free to seek appellate review of this Court's rulings, and a continuation of proceedings in this Court does not affect that submission. Any expense borne by the Secretary in litigating this action is vastly outweighed by the assurance, if the case proceeds, that voters will be protected against an unconstitutionally malapportioned map. Likewise, the Legislature is free to continue its efforts to overcome the existing impasse and to enact a bill providing for a lawfully apportioned map that complies with the Constitution and the Voting Rights Act. Nothing this Court does will interrupt that process.

Third, a stay would impose an enormous burden upon this Court and the appellate courts. Should the Legislature fail to enact a constitutional map, the Court will be forced to assume the burden of having to rush through the process it has already begun on a truncated schedule, potentially without a full factual record or full discussion by the parties of the relevant legal issues.

Finally, the schedule requested by Plaintiffs is reasonable and consistent with the timeline of proceedings in similar actions in other states this year, including Wisconsin, Minnesota, and Pennsylvania.

The Secretary's motion should be denied.

BACKGROUND

Article I, § 2 of the U.S. Constitution requires that congressional representatives be chosen "by the People of the several States," which the Supreme Court has long held means that "as nearly as is practicable[,] one [person]'s vote in a congressional election is to be worth as much as another's." *Wesberry* v. *Sanders*, 376 U.S. 1, 8 (1964). The Legislature, therefore, must guarantee virtually identically sized congressional districts. *See Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983). The Louisiana Legislature is responsible, in the first instance, for drawing congressional districts that comply with federal and state law.

District plans are passed through the Legislature as ordinary legislation, and are subject to veto by the Governor, which the Legislature may override by a vote of two-thirds of the elected membership of each house. When a new districting plan is adopted, it has the effect of repealing or superseding any prior districting plan in effect for the same unit of government (here, Louisiana's congressional delegation). *See, e.g.*, 2011 La. Sess. Law Serv. 1st Ex. Sess. Act 2 (H.B. 6) (repealing previous congressional districts). If no plan is adopted, the prior plan remains on the statute books until it is repealed or amended through the legislative process or, in the case of redistricting, a new map is adopted through the judicial process. *See* La. Stat. Ann. § 18:1276.1.

On April 14, 2011, Louisiana enacted a congressional district map using 2010 census data that drew districts that were nearly equal in population. The 2020 census revealed that Louisiana's population had grown nearly 125,000 people from a decade ago, Fairfax Aff. at ¶ 23, but that this growth was distributed unevenly across Louisiana's existing congressional districts. As a result, the congressional map as drawn in 2011 is now grossly malapportioned. *See* Plaintiffs' Opposition to Defendant's Exceptions (Opp. to Exceptions), Fairfax Aff. at ¶¶ 24-25, 27.

The legislative redistricting process in Louisiana began in June of 2021 with the issuance of guidance governing the criteria to be used in developing redistricting plans for Congress and other levels of government for which the State Legislature is responsible. In February 2022, and after a series of public roadshow hearings, the Legislature convened a Special Session to consider redistricting proposals and enact a plan. On February 18, 2022, the Legislature passed both H.B. 1 and S.B. 5, bills adopting a proposed Louisiana Congressional redistricting plan that included only a single majority-Black Congressional district within the six-district map. The Louisiana House of Representatives voted 62-27 in favor of H.B. 1 and 64-31 in favor of S.B. 5. The number of votes in the House in favor of the bills did not clear the 70 vote threshold required

to override a gubernatorial veto. The Louisiana Senate voted 27-10 to approve H.B. 1 and 26-9 to approve S.B. 5.

On March 9, Governor Edwards vetoed both H.B. 1 and S.B. 5, stating that the map "is not fair to the people of Louisiana and does not meet the standards set forth in the federal Voting Rights Act." Opp. to Exceptions, Adcock Aff. Ex. 2, 3. The Governor made clear that he will veto proposed maps that do not comply with Section 2, telling Louisiana legislators that "[t]his injustice cannot continue." Opp. to Exceptions, Adcock Aff. Ex. 2.

The Secretary speculates—without evidence—that this political impasse may be overcome, although that has not occurred in the three weeks following the Governor's veto. For example, the Secretary asserts that there are "many opportunities for the Legislature to redistrict congressional seats," and points out that there are multiple bills pending in the Legislature addressing congressional redistricting. Mem. at 2. But the bills the Secretary references contain maps that are identical to maps contained in bills that either the Legislature rejected or the Governor has already vetoed. *See* S.B. 306, H.B. 712, and H.B. 608. And the Secretary offers no evidence that the Legislature is prepared to adopt a bill that the Governor will not veto, or that there are sufficient votes to override the Governor's veto. Moreover, the extensive evidence submitted by NAACP Plaintiffs in their prior filings in this case demonstrate that the political branches are unlikely to break this impasse. In any event, there is an impasse now, and no assurance whether or when it will be broken.

On March 15, 2022, Plaintiffs brought this action asking the Court to "[d]eclare that the current configuration of Louisiana's congressional districts under La. Rev. Stat. 18:1276.1 violates Article I, Section 2 of the U.S. Constitution" and "[e]nter preliminary and permanent injunctions requiring the State to conduct the 2022 congressional election in accordance with a redistricting map that complies with the U.S. Constitution and Section 2 of the Voting Rights Act." Petition for Declaratory and Injunctive Relief at 21 ("Petition").

The Secretary thereafter filed his Declinatory, Dilatory, and Peremptory Exceptions on March 22, 2022, advancing several procedural and substantive objections, to which the Plaintiffs responded on March 23, 2022. On Thursday, March 24, 2022, the Secretary filed a motion to stay all proceedings before this Court pending "the conclusion of the legislative session for adopting the new congressional maps" and until the appellate court reviews the Secretary's exceptions, assuming this Court denies them. The Court heard argument on the Secretary's exceptions on

Friday, March 25, 2022.

Plaintiffs have submitted a proposed schedule for the litigation of Plaintiffs' claims. Under that proposed schedule, following written submissions, the Court will hold a hearing during the week of May 9, 2022, and the parties will submit proposed findings of fact and conclusions of law on May 20, 2022. Thus, under that schedule, the Court will not rule on the merits of Plaintiffs' claims earlier than late May, or in approximately two months. A ruling by the Court in early June, approximately two weeks of the last written submission, would leave less than two months for any appellate proceedings to occur before the beginning of the candidate qualifying period on July 20, 2022.

ARGUMENT

The power to stay proceedings is "incidental to the power inherent in every court to control the disposition of [ ] its docket." *Transamerica Ins. Co.* v. *Whitney Nat. Bank of New Orleans*, 251 La. 800, 809 (1968) (quoting *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936)). The decision of whether to exercise this power, however, calls for "the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.*; *see also Taylor* v. *Zibilich*, 508 So. 2d 840, 843 (La. Ct. App. 1987) (noting that appellate courts have the power to "stay lower court proceedings when the interests of justice so require"). "A stay is issued for the benefit of the court rather than the benefit of the litigants." *M.P.G. Const., Inc.* v. *Dep't of Transp. & Dev., State of La.*, 2003-0164, 878 So. 2d 624, 630 (La. App. 1 Cir. 4/2/04). "A stay is not a matter of right" but one "of judicial discretion." *Div. of Admin.* v. *Dep't of Civ. Serv.*, 345 So. 2d 67, 69 (La. Ct. App. 1976) (quoting *Scripps-Howard Radio* v. *F.C.C.*, 316 U.S. 4, 10 (1942)). "The propriety of [a stay] is dependent upon the circumstances of the particular case." *Id.* at 10-11.

The circumstances of this case strongly counsel against a stay. A stay would gravely prejudice Plaintiffs and other Louisiana voters. It would also impose extraordinary burdens on this Court and the appellate courts if, as seems highly likely, the Legislature is unable to overcome the current impasse. By contrast, denying a stay and allowing this case to proceed will neither prejudice the Secretary nor interfere with any efforts by the Legislature to overcome the existing impasse.

I. Plaintiffs Will Be Gravely Prejudiced If This Action is Stayed

There will grave prejudice to Plaintiffs and the voters of Louisiana if the Secretary's request is granted. The harm that Plaintiffs allege is not hypothetical. It is already occurring.

Louisiana's congressional districts are unconstitutionally malapportioned right now. *See Brown* v. *Ky. Legis. Rsch. Comm'n*, 966 F. Supp. 2d 709, 718 (E.D. Ky. 2013) (per curiam) (three-judge court) (noting that "[t]he injury claimed by the Plaintiffs is vote dilution caused by [malapportionment] of the [previous cycle's] legislative districts, which is an injury that is current and on-going"). Given the current impasse and the absence of a constitutional and lawful district map, a stay will unduly delay a ruling on Plaintiffs' claims if, as seems likely, the Legislature and the Governor cannot overcome the current impasse. Plaintiffs and other Louisiana voters are harmed and will continue to be harmed by the uncertainty that will ensue if the July 2022 qualifying period—the time by which candidates will need to know where they must file in order to run—arrives and the state is left without a constitutional map.

The process by which the Court must craft new maps if the impasse continues is time-consuming, and the complexity of redistricting proceedings about which the Secretary warns strongly militates *against* a stay. *See* Mem. at 3-4. The parties will need time to prepare and submit their arguments and any proposed maps to the Court. The Court must then carefully evaluate and weigh competing considerations and order such relief as it deems proper. In other states, such as Wisconsin, Minnesota, and Pennsylvania, this process has taken weeks or months. *See Johnson* v. *Wis. Elections Comm'n*, No. 2021AP1450-OA, WEC Letter Brief (Wis. Oct. 6, 2021); *Wattson* v. *Simon*, Nos. A21-0243, A21-0546, Rescheduling Order at 3 (Minn. Special Redistricting Panel Oct. 26, 2021); *Carter* v. *Degraffenreid*, No. 132 MD 2021, State Respondents' Brief in Support of Preliminary Objections to Petitioners' Petition for Review at 5 (Sept. 16, 2021); *Carter* v. *Chapman*, No. 7 MM 2022, 2022 WL 702894, at *2–3 (Pa. Feb. 23, 2022). Contrary to the Secretary's assertion, a stay would not "preserv[e] the existing status of the litigants." Mem. at 3. Instead, a stay would prejudice Plaintiffs and Louisiana voters by unnecessarily using up weeks or months of the limited time before the election process commences, with no assurance that the legislative impasse will be overcome.

If the case is stayed until the end of Louisiana's regular session—which convened on March 14, 2022 and may be ongoing through June 6, 2022—and there is no map in place as the July 2022 qualifying period approaches, this process would have to be compressed into a matter of days. La. Const. Art. III, § 2(A)(3)(a). Such an outcome would make it difficult or even impossible for the Court to seriously consider the issues presented much less for the appellate courts to review any ruling by this Court. And it would create a serious risk that Plaintiffs and

other Louisiana voters will be without a constitutional map when the July 20, 2022 qualifying period arrives, or even before the November election.

If the Legislature is able to overcome present odds and pass a properly apportioned map in time, then the harm to Plaintiffs may be limited or reversed. But "individual constitutional rights cannot be deprived" merely because "a nonjudicial remedy" to correct malapportionment "*might* be achieved." *Lucas* v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736 (1964) (emphasis added). This Court's involvement is required to ensure that the rights of Plaintiffs—and indeed, all Louisiana voters—are protected.

II. There is No Prejudice to the Secretary if This Action Proceeds

By contrast, there is no prejudice to the Secretary if this action proceeds, and the Secretary has identified none in his stay motion. On the contrary, the Secretary stands to benefit from the assurance that this Court will protect against the possibility of a malapportioned map, so that the Secretary may carry out his constitutional duties unimpeded. If the Secretary appeals from a decision by this Court ruling on the Secretary's exceptions, *see* Defendant's Motion for Stay ("Mot") at 1, appellate proceedings can continue while the case moves forward in this Court. And any labor or expense that the Secretary claims to worry about, *see* Mem. at 3-4, is far outweighed by the importance of ensuring that a properly apportioned map is in place well before Louisiana voters go to the polls. Surely the dictates of democracy and the guarantee that Louisianans are able to vote for candidates of their choice for properly apportioned congressional districts are worth that expenditure.

Nor does the continuance of this action disrupt the legislative process. The legislators are free to try to pass a properly apportioned map, and may take any actions—holding hearings, introducing bills, engaging in debate—that they see fit to achieve that end. Nothing that this Court decides to do will interfere with that process.

Rather, this Court must take appropriate steps—which, here, include denying the Secretary's motion for stay—to move forward with this case as it has done so far. The next notable date on the state election calendar in 2022 is the candidate qualifying period, set to take place between July 20 and July 22 of this year. The schedule proposed by Plaintiffs contemplates motions practice and a court hearing over the next two months, and the Court will not be in a position to rule in this action until at least late May. It is possible, as the Secretary speculates, that the Legislature may be able to resolve its impasse with the Governor and pass a constitutionally

compliant map during that time. But that possibility is no reason for this Court to delay its own processes and defer consideration of the merits until a later date.

The Secretary argues that "a stay is warranted here until the Legislature indicates it will not reapportion or redistrict Louisiana's Congressional Districts." *See* Mot. at 3. The Secretary cites no authority that such an express "indicat[ion]" by the Legislature is required, and to do nothing and wait for a clear statement to that effect is unrealistic and unnecessary. There is an impasse now, and Plaintiffs have presented ample evidence to this Court that the legislative standstill is likely continue.

III. The Court Has the Authority to Proceed With This Action, And It is To The Benefit of the Court to Do So

Contrary to the Secretary's contentions otherwise, *see* Mem. at 3, this Court has the authority to proceed with this action. "[S]tate courts have a significant role in redistricting." *Growe* v. *Emison*, 507 U.S. 25, 33 (1993) (citing *Scott* v. *Germano*, 381 U.S. 407, 409 (1965)). "Requir[ing] valid reapportionment" and "formulat[ing] a valid redistricting plan" are therefore within the "power of the judiciary of a State." *Id.* The state courts are even "specifically encouraged" to formulate valid redistricting plans when political branches fail to do so. *Scott*, 381 U.S. at 409. That failure is evident here, as the Legislature and the Governor have reached an impasse with respect to the passage of valid redistricting legislation.

This Court is therefore empowered to proceed on the schedule proposed by Plaintiffs in order to provide relief through the implementation of a proper map. *See State* v. *Lanclos*, 980 So. 2d 643, 651 (La. 2008) ("[C]ourts have the power . . . to do all things reasonably necessary for the exercise of their functions as courts.") (quoting *Konrad* v. *Jefferson Par. Council*, 520 So. 2d 393, 397 (La. 1988)). The Secretary asserts that redistricting "belongs to the Legislature and the Governor" and not to the courts. Mem. at 3. But, as shown in Plaintiff's response to the Secretary's exceptions, it is the proper role and duty of the judiciary to adopt constitutional and lawful congressional districts when the Legislature and the Governor are unable or unwilling to do so. Opp. to Exceptions, at 8, 10-11.

Here, it is in the benefit of both this Court—and the appellate courts, if necessary—to allow proceedings to continue in a timely fashion, so that the judicial branch may have adequate time to evaluate the parties' arguments and engage in its careful analysis on a full factual record and with the benefit of comprehensive briefing.

If this Court issues a stay, the Court will be forced to begin this process again in June or July. Even assuming it would be feasible to craft judicial relief on such an expedited timeline, attempting to do so will pose an enormous burden to the Court, as it will have to scramble over the course of a few days to complete a task that similarly situated courts in other states have taken weeks or months to complete. It would also impose similar burdens on the appellate courts, and potentially result in last-minute decisions regarding the election that would create unnecessary confusion and uncertainty. Such an outcome would leave the Court, the parties, and the voters of Louisiana worse off.

IV. Adhering to the Plaintiffs' Proposed Schedule Is Consistent with Proceedings in Other States

According to the schedule set forth by Plaintiffs, briefing on alternative district plans and the associated proceedings—including oral argument and the submissions of conclusions of facts and law—would be complete two months ahead of the beginning of Louisiana's candidate qualifying period on July 20, 2022. The Secretary argues that issuing such a scheduling order is "not appropriate." *See* Stay Mot. at 2. But in this redistricting cycle alone, state courts in Minnesota, Wisconsin, and Pennsylvania, for example, have issued analogous scheduling orders in analogous suits brought to correct malapportionment in the face of a legislative impasse.

In Wisconsin, for example, the Wisconsin Election Commission required that congressional maps be in place by March 1, 2022, in order to prepare for candidates to collect signatures to support their candidacy ahead of the June 1, 2022, statutory deadline for nominations. *See Johnson* v. *Wis. Elections Comm'n*, No. 2021AP1450-OA, WEC Letter Brief (Wis. Oct. 6, 2021). In a challenge resulting from political deadlock in the redistricting process, the court ordered that proposed redistricting plans be submitted by December 15, 2021, with a possibility for a hearing on or around January 18, 2022, in order to implement a remedial map before the deadline a month and a half later. *See Johnson* v. *Wis. Elections Comm'n*, No. 2021AP1450-OA, Scheduling Order at 2 (Wis. Nov. 17, 2021). In Minnesota, the statutory deadline for redistricting plans to be implemented for this election cycle was February 15, 2022. *See* Minn. Stat. § 204B.14. The court in a similar impasse suit ordered that proposed redistricting plans be submitted by December 17, 2021, and oral argument held on January 4, 2022, over a month ahead of the statutory deadline. *Wattson* v. *Simon*, Nos. A21-0243, A21-0546, Rescheduling Order at 3 (Minn. Special Redistricting Panel Oct. 26, 2021). Finally, in Pennsylvania, the Department of State had represented that district maps must be in place by January 24, 2022, ahead of the February 15,

2022 deadline for candidates' nomination papers. *See Carter* v. *Degraffenreid*, No. 132 MD 2021, State Respondents' Brief in Support of Preliminary Objections to Petitioners' Petition for Review at 5 (Sept. 16, 2021); 25 P.S. § 2868. In a similar impasse suit, the court ordered that proposed redistricting plans be submitted by January 24, 2022, with an evidentiary hearing scheduled for January 27-28, 2022. *Carter* v. *Chapman*, No. 7 MM 2022, 2022 WL 702894, at *2-3 (Pa. Feb. 23, 2022).

As in Wisconsin, Minnesota, and Pennsylvania, Plaintiffs' proposed schedule provides the Court a reasonable period—a number of weeks—to issue its decision after full briefing and a hearing on parties' proposed maps. In order to provide this Court with reasonable lead time to issue its decision in time for the rapidly approaching candidate qualifying period beginning July 20, 2022, proceedings should commence swiftly. Issuing a stay would risk placing this Court on a much more accelerated track—out of step with the schedules of other courts—once the appellate court issues its decision on the exceptions. The Secretary does not propose any alternative schedule in the event that a stay is denied. The Court should therefore deny the stay and enter Plaintiffs' proposed schedule.

CONCLUSION

For the foregoing reasons, the Secretary's motion for a stay of proceedings in this action should be denied

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been sent via electronic mail to all known counsel of record on this 30rd Day of March, 2022.

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EXHIBIT E

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

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ("NAACP") LOUISIANA STATE CONFERENCE, POWER COALITION FOR EQUITY AND JUSTICE, DOROTHY NAIRNE, EDWIN RENE SOULE, ALICE WASHINGTON, AND CLEE EARNEST LOWE, Plaintiffs, v. R. KYLE ARDOIN, in his official capacity as Louisiana Secretary of State, Defendant.	Civil Action No. C-716837 Div.: C Sec.: 25

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S EXCEPTIONS

MAY IT PLEASE THE COURT:

Plaintiffs NAACP Louisiana State Conference (the "Louisiana NAACP"), Power Coalition for Equity and Justice (the "Power Coalition"), Dorothy Nairne, Edwin René Soulé, Alice Washington, and Clee Earnest Lowe, by and through their undersigned counsel, file this memorandum in opposition to the declinatory, dilatory, and peremptory exceptions filed by Defendant Secretary of State R. Kyle Ardoin (the "Secretary").

The 2020 census confirmed that Louisiana has experienced significant shifts in population and residence over the past decade. These changes have rendered the state's current 2011 congressional map unconstitutionally malapportioned, in violation of Article I, Section 2 of the United States Constitution. The Secretary concedes that the State's current congressional map is unconstitutionally malapportioned. The Secretary further acknowledges in his exceptions that "The State is Barred from Using 2011 Districts for the 2022 Congressional Elections," and argues that an order enjoining him from conducting the 2022 congressional elections based on the 2011 district map "would merely direct [him] to follow the law that is already in place." *See* Memorandum in Support of Exceptions ("Mem.") 6-7.

But there is no alternative congressional map in place and no realistic prospect for any such

map to be adopted before the November elections, unless this Court acts. Over the last year, the political branches of government have had the opportunity to rectify this state of affairs and implement a new congressional map. The Legislature held public hearings on redistricting ("roadshows") and began its First Extraordinary Session (the "Special Session") on February 3 of this year. Mem. 3. The Special Session concluded on February 18, 2022. During the roadshows and the Special Session, the Legislature received consistent feedback that compliance with Section 2 of the Voting Rights Act of 1965 required the Legislature to pass a congressional map that includes two districts in which Black voters are able to elect candidates of their choice.

This message was echoed by the Governor in multiple public statements. However, the Legislature chose ultimately to pass a congressional map that contained one district in which Black voters can elect their preferred candidates, which the Governor promptly vetoed on March 9. The facts set forth in Plaintiff's Petition show that, in all likelihood, the Legislature will not reach the number of votes needed to overcome the Governor's veto. The redistricting process has therefore reached an impasse, and the Secretary has offered no evidence to show that there is any chance the impasse will be overcome. The Secretary's accusation that the issues presented by the petition are "speculative, conjectural, and theoretical" is backwards. The petition shows that the legislative redistricting process is at an impasse *now*, and presents substantial evidence that the impasse will continue; the only thing that is speculative is the Secretary's evidence-free assertion that the impasse may somehow be overcome.

Timely intervention by this Court is needed to implement a congressional district map that satisfies the constitutional requirement of one-person, one-vote and the requirements of the Voting Rights Act, and to do so sufficiently in advance of the coming election. Intervention is needed so that potential candidates for the elections this November can determine the configuration of the state's congressional districts in order to prepare and file for a run. Voters—and the organizations that work to educate and engage them—will likewise need time to learn the candidates' positions in order to participate effectively in the political process.

The Secretary's exceptions are likewise without merit. The Secretary's argument that, under the State's Constitution, this dispute must be heard in the first instance by the Supreme Court is unsupported by any case law and is contrary to the plain language of the Constitutional provision on which he relies, which on its face applies only to reapportionment of "each house" of the *State* legislature, not to districting for the U.S. Congress. The Secretary's argument is also squarely

contrary to the position he consistently took in similar litigation just last year involving congressional redistricting for the 2022 election that the "proper and exclusive venue" for such disputes was this Court. The Secretary's contention that voters in overpopulated districts such as the individual plaintiffs here lack standing to challenge congressional malapportionment, and that the State's courts lack authority to enforce federal constitutional and statutory requirements involving redistricting have been squarely rejected by multiple decisions of the U.S. Supreme Court. As discussed below, the Secretary's other contentions are equally meritless and should be rejected.

The right to vote on an equal basis is fundamental in Louisiana and beyond. This action is brought to protect that right, and to ensure that the voters of this state are able to cast equally weighted ballots this year for the congressional candidates of their choice. The Secretary's exceptions demonstrate no reason for this Court to dismiss the instant action. In light of the political impasse, the Court possesses the authority to order the relief that Plaintiffs seek and that Louisianans deserve. The exceptions should be denied, and the Court should take steps to ensure that a properly apportioned map is implemented as soon as practicable.

BACKGROUND

I. It is Undisputed that Louisiana's Existing Congressional Plan is Malapportioned.

In Louisiana, when a new districting plan is adopted, it has the effect of repealing or superseding any prior districting plan in effect for the same unit of government (relevant here, Louisiana's congressional districts). *See, e.g.*, 2011 La. Sess. Law Serv. 1st Ex. Sess. Act 2 (H.B. 6) (repealing previous congressional districts). If no plan is adopted, the prior plan remains statutorily in force until it is repealed or amended through the legislative process. The congressional plan currently on the statute books in Louisiana is the plan that was last drawn after the 2010 census, which was signed into law on April 14, 2011. *See id.*; *see also* La. Stat. Ann. § 18:1276.1. In 2020, the U.S. Census Bureau conducted the decennial census required by Article I, Section 2 of the U.S. Constitution. On April 26, 2021, the U.S. Secretary of Commerce delivered the results of the 2020 census to the President. As a result of the 2020 census, Louisiana has again been apportioned six congressional districts for the next decade, as it has since 2000.

According to the 2020 census count, Louisiana's resident population has grown to 4,657,757, an increase of nearly 125,000 people from a decade ago. Fairfax Aff. at ¶ 23. But population growth has been uneven across Louisiana's existing congressional districts over the

past decade. Fairfax Aff. at ¶ 24-25. Some districts grew much faster than others and two districts lost population. *Id.* 2020 Census data evidenced population shifts since 2010 which resulted in the underpopulation of Louisiana Congressional Districts 2, 4, and 5 and the overpopulation of Louisiana Congressional Districts 1, 3, and 6. *Id.* As a result, the congressional map, as drawn in 2011, is now grossly malapportioned. Fairfax Aff. at ¶ 27. Currently, the maximum population deviation between Louisiana's Congressional districts is 11 percent. Fairfax Aff. at ¶ 24. This corresponds to a population deviation among the current congressional districts of 88,120 people. *Id.*

The Secretary concedes that the current congressional district maps are unconstitutionally malapportioned. He admits that "the Constitution and laws command that the state redistrict for the 2022 elections" and that using the 2011 districts for the 2022 elections is not even "legally possible." Mem. 7. Thus, he acknowledges, "The State is Barred from Using 2011 Districts for the 2022 Congressional Elections." *Id.*

II. Louisiana's Governor and Legislature Have Reached an Impasse with Respect to the 2020 Congressional Redistricting Process.

The redistricting process in Louisiana began in June of 2021 with the issuance of guidance governing the criteria to be used in developing redistricting plans for Congress and other levels of government for which the State Legislature is responsible. The guidance, embodied in Joint Rule 21 of the Louisiana Legislature, requires that each redistricting plan submitted for consideration by the Legislature comply with the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment to the U.S. Constitution; Section 2 of the Voting Rights Act of 1965, as amended; and all other applicable federal and state laws. Adcock Aff., Ex. 1.

From late October 2021 through January 2022, the Louisiana House Committee on House and Governmental Affairs and the Senate Committee on Senate and Governmental Affairs held a series of joint public meetings (commonly called "roadshows") across the State during which Louisianans could make suggestions and recommendations regarding the redistricting process and the new maps. Adcock Aff. Ex. 4.

Following the conclusion of the roadshows, the Legislature convened the Special Session to consider redistricting proposals and enact a plan. The first congressional maps were pre-filed by legislators on January 31, 2022, in advance of the Special Session. On February 18, 2022, the Legislature passed both H.B. 1 and S.B. 5, bills adopting a proposed Louisiana Congressional redistricting plan creating a single majority-Black Congressional district within the six-district

map. The House and Senate bills would have created identical congressional maps. The Louisiana House of Representatives voted 62-27 in favor of H.B. 1 and 64-31 in favor of S.B. 5. The Louisiana Senate voted 27-10 to approve H.B. 1 and 26-9 to approve S.B. 5.

On March 9, Governor John Bel Edwards vetoed both H.B. 1 and S.B. 5, stating that the map "is not fair to the people of Louisiana and does not meet the standards set forth in the federal Voting Rights Act." Adcock Aff. Ex. 2, 3. Governor Edwards' veto statement explained that in failing to enact a congressional map that complies with the Voting Rights Act, the Legislature "disregarded the shifting demographics of the state" particularly the increase in the Black voting age population by 4.4% since the 2010 census, resulting in a 2020 Black voting age population of 31.2%, almost one third of the state of Louisiana. Adcock Aff. Ex. 2, 3. The Governor made clear that he will veto proposed maps that do not comply with Section 2, telling Louisiana legislators that "[t]his injustice cannot continue." Adcock Aff. Ex. 2.

The facts as alleged in Plaintiffs' Petition show that the current impasse is unlikely to be resolved by a veto override or otherwise. The Louisiana Constitution requires "two-thirds of the elected members of each house" to override a gubernatorial veto of duly passed legislation. La. Const. Art. 3 § 18(c). Neither H.B. 1 nor S.B. 5 passed with more than 70 votes in the House, the number of votes required for the Legislature to override Governor Edwards' veto. Veto override votes are extremely rare in Louisiana. The last successful veto override occurred in 1993, and state law makes it difficult to convene a veto session during a Regular Session of the Louisiana Legislature, which is currently ongoing. Senior members of the legislative majority have questioned whether there are sufficient votes to override the Governor's veto of H.B. 1 and S.B. 6. Representative John Stefanski, Chairman of the House and Governmental Affairs Committee, admitted that the Louisiana House of Representatives will likely not muster the necessary 70 votes to override the Governor's veto. Adcock Aff. Ex. 9 (Rep. Stefanski admitting that "[i]t's part of the process . . . we'll see" about whether a veto can be accomplished because there are likely only 68 out of the 70 requisite House votes). The Legislature and the Governor have reached an impasse with respect to adopting a congressional redistricting plan.

There is little likelihood that the impasse can be resolved. Legislative leaders have made clear that the Legislature will not adopt a Congressional map that will comply with the Governor's stated requirements. Sharon Hewitt, Chairman of the Senate and Governmental Affairs Committee, on March 9, 2022, issued a tweet stating "I am disappointed in the Governor's decision

to veto the congressional map & am confident the map the legislature passed meets the requirements of the Voting Rights Act." Adcock Aff. Ex. 8. And following the veto, the Legislative leaders immediately started the process of attempting to enact maps exactly like those vetoed by the Governor. Adcock Aff. Ex. 7. H.B. 609 was submitted as proposed legislation pre-filed on Mar. 4, 2022 by Rep. John Stefanski, Chairman of the House and Governmental Affairs Committee. *Id.* The map in this bill, like the map vetoed by Governor Edwards, creates a single, majority-Black congressional district. *Id.*

The organizational plaintiffs, who have been intimately involved in the legislative redistricting process, have expressed the same views as these legislators. Louisiana NAACP President Michael W. McClanahan believes it is highly unlikely that the Legislature will pass a new Congressional map that the Governor will sign. McClanahan Aff. at ¶ 11 (""[B]ased on my experience engaging with Senator Hewitt, I believe it is highly unlikely that she will allow a map that the Governor will sign pass out of her committee. Other legislative leaders have also alluded to the fact that the body will not pass a map that the Governor will sign."). Likewise, based on her personal experience and role as President and Chief Executive Officer of Power Coalition, Plaintiff Shelton has serious doubt that the Legislature will pass a new congressional map that the Governor will sign. Shelton Aff. at ¶ 19 ("I have serious doubt that the Legislature will pass a new congressional map that the Governor will sign, based on my experience engaging with members of the Legislature. During the current legislative session, the Chairman of the House and Governmental Affairs Committee re-introduced a bill containing the same map as the one that Governor Edwards has already vetoed. Based both on my experience participating in the roadshows and special sessions and on the public reluctance of legislators to come to an agreement, it is highly unlikely the Legislature will pass a new map that the Governor will not veto.").

The political branches have therefore reached an impasse, and the evidence shows that they are unlikely to break it. Louisianans are thus without a constitutional congressional plan for the upcoming midterm elections. Because of this deadlock, judicial intervention is needed—and needed quickly. The candidate qualifying period, by which time candidates will need to know where they must file to run, is set to begin on July 20, 2022.[1] Before that date, this Court will need

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

to set a calendar, consider proposed districting plans and accompanying briefing and evidence from the parties, and undertake the line-drawing process that the political branches have proven unable to complete. The deadline for the Legislature to decide whether to have a special session to vote on a veto override is Friday, March 25; the end of the current regular session is June 7. This Court should not wait until a later date to begin the process of considering appropriate congressional district maps. Further delay would only provide this court less time than is already available to address the absence of a constitutional congressional district map. In short, to ensure that redistricting is completed in time for the November 2022 elections, the Court must begin now.

III. Procedural Background

On March 15, 2022, Plaintiffs brought this action asking the Court to"[d]eclare that the current configuration of Louisiana's congressional districts under La. Rev. Stat. 18:1276.1 violates Article I, Section 2 of the U.S. Constitution" and "[e]nter preliminary and permanent injunctions requiring the State to conduct the 2022 congressional election in accordance with a redistricting map that complies with the U.S. Constitution and Section 2 of the Voting Rights Act." Petition for Declaratory and Injunctive Relief at 21 ("Petition"). The Secretary thereafter filed his Declinatory, Dilatory, and Peremptory Exceptions on March 22, 2022, advancing several procedural and substantive objections.

ARGUMENT

I. The Court Has Subject Matter Jurisdiction

a. Plaintiffs' Claims Are Justiciable

The Secretary argues that there is no justiciable controversy because Plaintiffs' claims are "speculative, conjectural, and theoretical." Mem. 4. This is wrong. Article I, Section 2 of the U.S. Constitution requires that congressional districts "achieve population equality as nearly as is practicable." *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983) (internal quotation marks omitted). That the State's current districting plan is unconstitutionally malapportioned has been clear since at least as early as the 2020 Census results were delivered on April 26, 2021. The Secretary himself admits that "the Constitution and laws command that the state redistrict for the 2022 elections." Mem. 7. And while Louisiana law confers the power to redistrict upon the Legislature in the first instance, that process is now at an impasse. The Legislature convened an Extraordinary Legislative Session for redistricting that ended unsuccessfully in a veto. It is now clear that the veto will not be overridden, and the Secretary offers only speculation that the current impasse will somehow be overcome in time for the next election cycle.

The Secretary wrongly argues that this Court lacks subject matter jurisdiction because it is not currently known with *certainty* that the political branches will fail to pass a congressional redistricting plan. But that argument is backwards. The injury Plaintiffs allege is not "merely hypothetical or abstract," Mem. 6 (quoting *Abbott* v. *Parker*, 249 So. 2d 908, 918 (La. 1971)); their districts are unconstitutionally malapportioned right now. *See Brown* v. *Ky. Legis. Rsch. Comm'n*, 966 F. Supp. 2d 709, 718 (E.D. Ky. 2013) (per curiam) (three-judge court) (rejecting ripeness argument where "[t]he injury claimed by the Plaintiffs is vote dilution caused by [malapportionment] of the [previous cycle's] legislative districts, which is an injury that is current and on-going").

As it stands, Louisiana law provides Secretary of State Kyle Ardoin with no lawful and constitutional district map to conduct the coming elections. La. Rev. Stat. § 18:1276.1. And yet, the Secretary asks this Court not to intervene and indeed for the judiciary to do nothing, despite the rapidly approaching candidate qualifying period occurring between July 20 and July 22, 2022, and the upcoming Open Congressional Primary in November. Non-action by this Court would leave Plaintiffs subject to ongoing constitutional violations and at imminent risk of vote dilution in the upcoming Open Congressional election. This outcome is not allowed by the U.S. Primary, and, as the U.S. Supreme Court has stated, it is appropriate and the function of the judicial branch of state government to ensure a properly apportioned map in the event of impasse.

Other harms to Plaintiffs and other Louisianians are already occurring as a result of the State's malapportioned congressional districts. Even before an election is conducted under the State's malapportioned plan, Plaintiffs and other Louisiana voters are harmed because they do not know whether their current representatives will be eligible to run in their congressional districts in the upcoming election or whether these representatives can be held accountable at election time for their policy positions and their conduct while in office. They are harmed because they cannot identify the proper persons to whom they can effectively communicate their concerns because those individuals may or may not be accountable to them in the next election. And they are harmed because they have no prospect of finding out any of this information in time to plan for the upcoming election.

b. The Claim Is Not Moot Because Elections Will Be Conducted Pursuant to an Unconstitutional Congressional Map Absent Judicial Action.

The Secretary argues that the case is moot because Plaintiffs seek to "declare and enjoin the defendant from doing something" he already could not do—conduct elections with a

malapportioned map. Mem. 8. As the Secretary reads the Petition, Plaintiffs do not allege that the State has even considered "the idea of using 2011 election districts" or that it is even "legally possible" for the Secretary to enforce the 2011 districts. Mem. 7. But this is exactly what Plaintiffs allege: "[I]n light of the impasse, this Court must act," and "[i]f this Court does not act, the 2022 election will be held using the malapportioned 2011 congressional maps." *See* Pet. ¶ 61. State law thus provides no congressional map for the Secretary to conduct the next election other than the 2011 maps in the event the political branches fail to timely adopt a new congressional redistricting plan. Plaintiffs request that the Court prevent this from happening.

Louisiana law provides that the state "*shall* be divided into six congressional districts," and that those "districts *shall* be composed as follows." La. R.S. 18:1276.1 (emphasis added). The statute then describes the composition of the six districts as enacted in the 2011 plan following the 2010 census. *See id.* The statute, therefore, empowers the Secretary only to carry out elections pursuant to these districts, not to exercise discretion in refashioning districts. *See La. Fed'n of Tchrs.* v. *State*, 2013-0120, p. 26 (La. 5/7/13), 118 So. 3d 1033, 1051 ("Under well-established rules of interpretation, the word 'shall' excludes the possibility of being 'optional' or even subject to 'discretion,' but instead 'shall' means imperative, of similar effect and import with the word 'must.'"). The Secretary, whose "duties are ministerial," has no authority himself to draw new maps. Mem. 15. Indeed, the Secretary concedes in his Exceptions that he has no role in redistricting. *Id.* If the state court found the case to be moot, then, there would be *no* institution that could provide a remedy to Plaintiffs. *See* La. Const. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.").

In essence, the Secretary's mootness argument relies on the flawed premise that the malapportionment of Louisiana's congressional districts will somehow resolve itself without judicial intervention. *See* Mem. 7 (suggesting that "the objective Plaintiffs seek has been accomplished by operation of law" simply because "the Constitution and laws command that the State redistrict"). But that is not the case. There are only two possible avenues for congressional redistricting in Louisiana: either a new plan is enacted through legislation or a new plan is adopted through judicial intervention. *See, e.g., Growe* v. *Emison*, 507 U.S. 25, 33 (1993). Because the political branches have not enacted a new plan, this Court must do so.

None of the cases the Secretary relies upon indicates that a claim to enjoin the State from a mandatory, but unlawful, action is moot merely because the state agrees that the action is unlawful. Those cases all involve laws that—unlike the districting laws here—confer discretion on state actors. Mem. 12–13; *see also Am. Waste & Pollution Control Co.* v. *St. Martin Par. Police Jury*, 627 So. 2d 158, 163 (La. 1993) (finding action involving discretionary zoning statute "premature because a permissive statute must be rendered operative or threatened to be rendered operative prior to being challenged"); *La. Fed'n of Tchrs.* v. *State*, 2011-2226, p. 6 (La. 7/2/12), 94 So. 3d 760, 764. (finding challenge to statutory school district waiver scheme nonjusticiable because no waiver had been requested and Board of Education retained discretion over whether to grant waiver at issue). Here, by contrast, the statute requiring use of the existing districts does not confer discretion on the Secretary to redraw the current unconstitutional map. *See* La. R.S. 18:1276.1. When the political branches fail to enact a new plan, as they have in Louisiana to date, the Secretary has no map under which to carry out the congressional elections in conformity with the Constitution unless the Court steps in.

c. This Court's Exercise of Its Jurisdiction Does Not Usurp the Authority of the Legislature.

The Secretary argues that Plaintiffs' claims amount to "usurpation" of "the powers expressly granted to the Legislature by both the U.S. and Louisiana Constitutions." Mem. 9–10. But here there is nothing to usurp: the Legislature has not acted and Plaintiffs' claims are premised on this inaction. Pet. ¶ 61. Plaintiffs do not ask the Court to force the Legislature to do anything; no claims are asserted against any legislative officials, and Plaintiffs request that the *Court* implement a lawful map, not that the Court direct the Legislature to do so. The Secretary acknowledges that he has no authority to engage in map drawing, and provides no explanation for how the State is to refashion its maps in the event that the normal legislative process breaks down. Plaintiffs' claims are, thus, necessary, appropriate, and properly brought before the Court for adjudication.

This is not a circumstance where the Legislature has merely failed to enact laws pursuant to its general discretionary power, where, in most instances, it does not thereby violate individual rights and no judicial redress is available. Instead, the state legislative process has fallen short of its obligations under the U.S. Constitution by failing to adopt a congressional redistricting plan, and thus has violated Plaintiffs' Constitutional right to an equally weighted vote. *See* Pet. ¶¶ 31–41. The judiciary's assigned role is to enjoin and redress precisely these sorts of injuries. *See* La.

Const. art. I, § 22 ("All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights."); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.").

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

The Secretary contends that the Elections Clause of the U.S. Constitution—which confers power to the State over federal elections—bars the judicial adoption of congressional maps, even to remedy a legislative impasse. The Secretary argues that Plaintiffs' requested judicial relief is foreclosed because the "Times, Places and Manner of holding Elections for Senators and Representatives" must be "prescribed in each State *by the Legislature* thereof." Art. I, §4, cl. 1 (emphasis added); Mem. 9–10. But the Secretary cites no case so interpreting the Elections Clause, and Plaintiffs are aware of none. In any event, the Election Clause does not render congressional district plans immune from challenge under federal law. Under the plain text of the clause, the power of the Legislature is subject to restrictions imposed by federal statute. *See* Art. I, §4, cl. 1 (specifying that "the Congress may at any time by Law make or alter such [federal election] Regulations"). Furthermore, the Supreme Court's Elections Clause cases have long "reflect[ed] the [] understanding" that the Clause is "not [] a source of power . . . to evade important

constitutional restraints." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 834-35 (1995) (emphasis added). A unanimous Supreme Court has recognized that "requir[ing] valid reapportionment" and "formulat[ing] a valid redistricting plan" are within the "power of the judiciary of a State." 507 U.S. at 33 (quoting *Scott*, 381 U.S. at 409); *see also Wesberry,* 376 U.S. at 6. The state courts are even "specifically encouraged" to formulate valid redistricting plans when political branches fail to do so. *Scott*, 381 U.S. at 409 (emphasis added).

It is not only encouraged that state courts adopt lawful election maps when legislatures fail to do so, it is commonplace. Just this year, state courts in Wisconsin, Minnesota and Pennsylvania requested that parties submit proposed redistricting maps when it became clear that deadlock in the political branches would prevent the respective state legislatures from doing so. *See Johnson* v. *Wis. Elections Comm'n*, No. 2021AP1450-OA, 2022 WL 621082, at *1 (Wis. Mar. 1, 2022);[2] *Wattson* v. *Simon*, Nos. A21-0243, A21-0546, 2022 WL 456443, at *1 (Minn. Special Redistricting Panel Feb. 15, 2022); *Carter* v. *Chapman*, No. 7 MM 2022, 2022 WL 702894, at *2–3 (Pa. Feb. 23, 2022). A holding that this practice violates the Elections Clause would upend decades of precedent and foreclose state courts from carrying out one of their core functions, remedying violations of the state and federal constitutions.

In short, nothing the Plaintiffs request exceeds this Court's institutional power. *See* Pet. 21–22. Courts routinely enter declaratory judgments and grants injunctive relief. *See* La. C.C.P. arts. 1871, 3601(A). And judicial adoption of election maps is a necessary and ordinary remedy when state legislatures fail to satisfy their constitutional redistricting duties. As the U.S. Supreme Court has explained,

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

Wise v. *Lipscomb*, 437 U.S. 535, 540 (1978) (citation omitted) (quoting *Connor* v. *Finch*, 431 U.S. 407, 415 (1977)). In any event, the Court plainly can and should set a schedule for addressing the

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[2] On March 23, 2022, the U.S> Supreme Court denied the application for a stay or writ of certiorari filed by intervenors seeking reversal of the Wisconsin Supreme Court's congressional maps. Order Denying Application for Stay, *Grothman* v. *Wisconsin Elections Comm'n*, No. 21A490 (S. Ct. Mar. 23, 2022). The same day, the U.S> Supreme Court granted and reversed a similar petition from the legislation related to the state legislative districts. *Wisconsin Legislature* v. *Wisconsin Elections Comm'n*, No. 21A471 (S. Ct. Mar. 23, 2022). In reversing the Wisconsin Supreme Court's implemented map on other grounds, the U.S. Supreme Court said nothing to contest the state courts' power to correct malapportionment in congressional districts.

issues presented by the petition, in accordance with its inherent power to establish a schedule for litigation before it. *Cf. Konrad* v. *Jefferson Par. Council*, 520 So. 2d 393, 397 (La. 1988) (recognizing that courts have power "to do all things reasonably necessary for the exercise of their functions as courts").

d. This Court Is the Proper Venue for Hearing This Matter Because La. Const art III, § 6 Does Not Apply to Congressional Districting.

The Secretary asserts that Article III, Section 6 of the Louisiana State Constitution, La. Const. art. III, § 6, requires this matter to proceed originally before the Louisiana Supreme Court. Mem. 10. This argument is meritless and ignores the plain language of the Louisiana Constitution. Per its clear and unambiguous language, Article III, Section 6 governs *only* the process for addressing claims arising from an impasse as to the State Legislature maps. Article III of the Louisiana Constitution concerns the "Legislative Branch" of the State of Louisiana, and deals exclusively with the establishment, powers, operation, reapportionment, and other matters concerning the two houses of the State Legislature. Section 6 of Article III is titled "Legislative Reapportionment: Reapportionment by the Supreme Court; Procedure," and concerns how the houses of the State Legislature are to be reapportioned, and what happens "[i]f the legislature fails to reapportion as required," namely, that "the supreme court, upon petition of any elector, shall reapportion the representation in each house" of the State Legislature. There is no mention in Article III, Section 6—or any other provision of the Louisiana Constitution—of the process for reappointment of the federal congressional districts or how an impasse in that process is to be addressed. Without specific guidance otherwise, this Court has original judication over this matter. *See* La. Const. art. V, § 16(A) ("Except as otherwise authorized by this constitution . . . a district court shall have original jurisdiction of all civil and criminal matters.").

The Secretary provides no support for his position that Article III, Section 6 applies to this case. He contends that Section 6 applies to reapportionment "*in each house*," and suggests that the phrase includes Congress. There are two houses within the Louisiana State Legislature (the House and the Senate) but the U.S. Congress is not one of them. This language is clearly a reference to the reapportionment of the State Legislative Districts for the House and the Senate. That Section 6 is located in Article III of the Constitution, the focus of which is the legislative branch of the state government, underscores that its subject is reapportionment for the State Legislature, not the U.S. Congress.

Moreover, the Secretary's argument that this Court lacks jurisdiction in this matter is squarely at odds with the position he previously took in similar litigation. In *English v. Ardoin*, No. 2021-03538 (La. Civ. Dist. Ct. May 24, 2021), which was pending in civil district court in Orleans Parish until its dismissal on February 2, 2022, the Secretary consistently argued that the Nineteenth Judicial District in "East Baton Rouge is the proper and exclusive venue" for plaintiffs to seek a remedy in the face of an impasse. *See* Memorandum in Support of Exceptions on Behalf of the Secretary of State at 5–8, *English v. Ardoin*, No. 2021-03538 (La. Civ. Dist. Ct. May 24, 2021); Declinatory & Peremptory Exceptions on Behalf of the Secretary of State to Plaintiffs' First Amended & Supplemental Petition for Injunctive & Declaratory Relief at 1, *Berni v. Ardoin*, No. 2021-03538 (La. Civ. Dist. Ct. Sept. 8, 2021); Secretary of State's Original Application for Supervisory Writs to the Honorable Sidney H. Cates, IV, District Judge at 20–24, *English v. Ardoin*, No. 2021-C-0739 (La. Ct. App. Dec. 28, 2021). Throughout those proceedings, the Secretary never asserted that claims arising from an impasse of the congressional maps should be raised originally before the Louisiana State Supreme Court.

The Court of Appeal agreed with the Secretary's original position that litigation arising from an impasse of the congressional maps should proceed before the district court in Baton Rouge. And in addressing the question of the proper forum to purse claims arising from impasse in the congressional redistricting process, the Louisiana 4th Circuit Court of Appeal gave no indication that such claims should be brought directly before the Louisiana Supreme Court. The Court of Appeal held that "venue in this matter is *only* proper in East Baton Rouge Parish." *English* v. *Ardoin*, 2021-0739, p. 6, 2022 WL 305363, at *4 (La. App. 4th Cir. 2/2/22) (emphasis added). Plaintiffs followed the ruling of the Court of Appeal and filed this matter before this Court, which has jurisdiction over this matter.

II. This Dispute Is Not Premature

The Secretary also asserts that Plaintiffs' action is premature and unripe, Mem. 11. To the extent these arguments repackage their same ripeness arguments against justiciability, they are addressed above. *See supra*, Section I. But to the extent the Secretary argues the claims are premature even accepting justiciability, this position is plainly wrong.

As noted, state courts in Minnesota, Wisconsin and Pennsylvania have already intervened to ensure a properly apportioned map will be in place for upcoming elections when the political branches of state government reached partisan impasses that prevented the implementation, as a

matter of state law, of a properly apportioned redistricting plan. These courts did not wait until the eve of a Congressional election to identify and ensure a remedy for malapportionment. *See, e.g., Hunter* v. *Bostelmann*, Nos. 21-cv-512, 21-cv-534, 2021 WL 4206654 (W.D. Wis. Aug. 13, 2021). In Minnesota, for example, the state Supreme Court intervened after the Minnesota Legislature adjourned its regular session on May 17, 2021, but while the Legislature was in a special session during which it could still theoretically pass a lawful redistricting plan. The state Supreme Court in that case found that while "[f]uture legislative activity on redistricting is a possibility, . . . there are significant duties and responsibilities in the work required for redistricting." *Wattson et al., v. Simon*, Nos. A21-0243, A21-0546 (Minn. June 30, 2021) (staying proceedings in the lower court). Because the Legislature had not at that point enacted redistricting legislation, it was timely that "the judicial branch . . . fulfill its proper role in assuring that valid redistricting plans are in place for the state legislative and congressional elections in 2022." *Id.*

Although the political branches of state government, including in Louisiana, are often charged in the first instance with adopting new redistricting plans, the U.S. Supreme Court has long recognized that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in [impasse] cases has been specifically encouraged." *Growe*, 507 U.S. at 33 (quoting *Scott* v. *Germano*, 381 U.S. 407, 409 (1965)); *Growe*, 507 U.S. at 35 ("*Germano* requires only that the state agencies adopt a constitutional plan "within ample time . . . to be utilized in the [upcoming] election,") (citing 381 U.S. at 409).

This Court should not delay crafting a redistricting plan to remedy the current plan's unconstitutional malapportionment. That there is an outside chance that the impasse is resolved—a possibility belied by over 25 years without a single veto override—is "irrelevant" because Plaintiffs have "realistically allege[d] actual, imminent harm." *Arrington,* 173 F. Supp. 2d at 862. The U.S. Supreme Court has cautioned against undue restraint in these cases that might end in constitutional violations, explaining that "individual constitutional rights cannot be deprived" merely because "a nonjudicial remedy" to correct malapportionment "*might* be achieved." *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 736 (1964) (emphasis added).

III. Plaintiffs Have Stated a Cause of Action

The Secretary's contention that Plaintiffs have not stated a cause of action is disproven by the actual allegations in the Petition and the standard for pleading in this state. "Liberal rules of

pleading prevail in Louisiana and each pleading should be so construed as to do substantial justice.." *Haskins* v. *Clary*, 346 So. 2d 193, 195 (La. 1977); *see also* La. C.C.P. art. 865. "Every reasonable interpretation must be accorded its language in favor of maintaining the sufficiency of the petition and affording the litigant an opportunity to present his evidence." *Burdis* v. *Lafourche Par. Police Jury*, 542 So. 2d 117, 116 (La. App. 1 Cir. 1989).

"[W]ell-pleaded allegations of fact are accepted as true, and if the allegations set forth a cause of action as to any part of the demand, the exception must be overruled." *Haskins*, 346 So. 2d at 194. Indeed, "an exception of no cause of action must be overruled unless the allegations of the petition exclude every reasonable hypothesis other than the premise upon which the defense is based; that is, unless plaintiff has no cause of action under any evidence admissible under the pleadings." *Teche Planting, Inc.* v. *Teche Sugar Co.*, 583 So. 2d 148 (La. App. 1 Cir. 1991) (citing *Haskins*, 346 So. 2d at 195).

The allegations in the Petition clear this liberal pleading threshold with ease. Among other things, Plaintiffs allege: (i) that there is an impasse between the executive and legislative branches of the Louisiana government, Pet. ¶¶ 3–4, 11, 42-61, 91; (ii) that there is no reasonable likelihood that the Legislature will override the Governor's veto, *id.* ¶¶ 60–61; (iii) that the Legislature will not adopt a congressional plan that the Governor will sign, *id.* ¶ 60; and (iv) that the current maps are unconstitutionally malapportioned and must be remedied, *id.* ¶¶ 5–7, 37–41. Plaintiffs have therefore sufficiently stated a cause of action.

None of the arguments urged by the Secretary compel a different result. The Secretary cannot dispute that an impasse exists, and he alleges no facts to support his speculation that it will be overcome, *see* Mem. 13. Such speculation cannot overcome the well-pleaded allegations of fact in the Petition detailing otherwise. The Petition also contains extensive allegations of the harm Plaintiffs are incurring and will continue to incur if relief is not granted, *see* Pet. ¶¶ 12-26, 62-65, 93-94, despite the Secretary's failure to notice them. Mem. 13.

Likewise, Plaintiffs' allegations that the 2022 elections will be held under the malapportioned 2011 map are not speculative, and the Secretary's objection to the contrary is belied by the Petition and Louisiana law. *See* Pet. ¶ 61 ("[T]he plan adopted in 2011 . . . *remains in force* . . . If this Court does not act, the 2022 election *will be held* using the malapportioned 2011 congressional maps.") (emphasis added). Indeed, as the Secretary concedes, he lacks authority to redraw the 2011 congressional map if no new plan is adopted or imposed. Mem. 15,

17; *see also* La. Stat. Ann. § 18:1276.1; La. R.S. 18:421 ("The secretary of state is the chief election officer of the state.").

Furthermore, the Secretary's objection to the allegations regarding Section 2 of the Voting Rights Act, *see* Mem. 14, is inapposite for a simple reason: Petitioners do not ask this Court to address whether the 2011 maps violate the Voting Rights Act; there is no need to grapple with that issue at this stage of the case, because those maps are patently malapportioned and consequently unconstitutional and unlawful, as even the Secretary concedes. Although the allegations span over 20 paragraphs in the Petition and detail the ways in which a single majority-Black district in Louisiana would be violative of Section 2, this background information is provided as factual and legal context for the Court about the reasons behind the Governor's veto and low likelihood that the impasse will be overcome. Pet. ¶¶ 8-10, 66-86. The allegations may ultimately assist the Court in fashioning a remedy, but they are not a bar to the advancement of this action at this pleading stage. In any event, even if this Court were to construe Plaintiffs' petition as asserting a cause of action under the Voting Rights Act—which it should not—Plaintiffs more than meet the "[l]iberal rules of pleading" that "prevail in Louisiana." *Haskins*, 346 So. 2d at 194. Whenever "it can reasonably do so, [a] court should maintain a petition so as to afford the litigant an opportunity to present his evidence." *Id.* at 194–95. That opportunity should be afforded here.

IV. Plaintiffs Have Stated a Right of Action

a. Plaintiffs Have a Real and Actual Interest in the Matter Asserted

In Louisiana, actions "can be brought only by a person having a real and actual interest which he asserts." *See* La. C.C.P. art. 681. "The party raising the exception of no right of action bears the burden of proof." *Three Rivers Commons Condo. Ass'n* v. *Grodner*, 220 So.3d 776, 780 (La. App. 1 Cir. 5/10/17). The Secretary has failed to carry that burden here. A real and actual interest is plainly present in cases of constitutional malapportionment. *See, e.g.*, *Gill* v. *Whitford*, 138 S. Ct. 1916, 1930–31 (2018) (noting that that "injuries giving rise to those [malapportionment] claims were individual and personal in nature because the claims were brought by voters who alleged facts showing disadvantage to themselves as individuals.") (internal citations and alterations omitted).

Voters in overpopulated districts, including Plaintiffs, are subject to a particularized injury that is distinct from the general public. *Id.* at 1929 ("[V]oters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage."

(internal citation omitted)); *see also Baker* v. *Carr*, 369 U.S. 186, 208 (1962) (finding that voters in the malapportionment context possess "a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law" (internal citations and alterations omitted)). This injury to Plaintiffs—and the concomitant need to preserve Plaintiffs' voting power—confers the real and actual interest required to bring suit.

The Secretary cites to *Soileau* v. *Wal-Mart Stores, Inc.*, in support of his position that the claims here are "about things that may or may not occur." Mem. 16-17 (citing 285 So.3d 420, 425 (La. 6/26/19)). But the factual circumstances in *Soileau*, which involved a dispute about a workers' compensation claim, are markedly different than the status of the action before this Court. The plaintiff in *Soileau* was unable to meet the statutory dictates of La. R.S. 23:1314, which required a showing that she had not been furnished with the proper medical attention by her pharmacy. *Soileau*, 285 So.3d at 424. Plaintiff was unable to allege that her pharmacy had done so. By contrast, Plaintiffs here have pled extensive fact allegations demonstrating that there is a very real impasse between the executive and legislative branches of Louisiana's government, and real and actual harm to them as a result. The only remedy is judicial intervention.

b. Plaintiffs Louisiana NAACP and Power Coalition for Equity and Justice Have Standing

The Secretary next mistakenly asserts that Plaintiffs Louisiana NAACP and Power Coalition lack associational standing and therefore do have not have an interest in bringing this action. An association has standing if (i) the association's members would otherwise have standing to sue in their own right; (ii) the interests the association seeks to protect are germane to its purpose; and (iii) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Louisiana Hotel-Motel Ass'n, Inc.* v. *E. Baton Rouge Par.*, 385 So. 2d 1193, 1197 (La. 1980) (citing *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977)). As an initial matter, the Court need not address this issue, because the presence in this case of individual voters with standing is sufficient to confer jurisdiction. *See Bruneau* v. *Edwards*, 517 So. 2d 818, 822 (La. App. 1st Cir. 1987) ("Although there are numerous plaintiffs with varying interests, the determination that the legislators have a right of action, pretermits the necessity of discussing the other plaintiffs capacity to litigate this suit.") (citing *Bowsher* v. *Synar*, 478 U.S. 714, 721 (1986)).

In any event, however, Louisiana NAACP and Power Coalition comfortably meet all three

of these criteria—indeed, courts have recognized the standing of the Louisiana NAACP itself in prior redistricting cases. *First*, both organizations have extensive operations in Louisiana and are composed of members who would have standing to bring this action in their own right. *See* Pet. ¶¶ 14-17. This includes members who are registered voters in overpopulated districts. *Id.*; *see also* Shelton Aff. ¶ 8 (I reside in Congressional District 6. [Power Coalition]'s member organizations have members who live in some of the overpopulated congressional districts"); McClanahan Aff. ¶¶ 4-5 "([Louisiana NAACP] members live and are registered voters in nearly every parish in Louisiana, including in Congressional Districts 1, 3, and 6 as draw in 2011."). These members will be harmed by the lack of a lawful Congressional map, as they will not be able to communicate with or contribute financially to candidates for Congress until the districts are correctly apportioned. Pet. ¶ 21.

Second, the interests that the Louisiana NAACP and Power Coalition seek to protect in this action are germane to their respective organizational purposes. The Louisiana NAACP seeks to ensure "the protection of voting rights and equitable political representation and eliminat[e] racial discrimination in the democratic process." *Id.* ¶ 12; McClanahan Aff. ¶ 2. The mission of Power Coalition is to "organize, educate, and turn out voters" in Louisiana. Pet. ¶ 16; Shelton Aff. ¶ 7. Both organizations engage in extensive voter outreach, engagement, and education initiatives. *Id.* Pet. ¶¶ 12-18. A properly apportioned map is germane to these purposes. *See Louisiana State Conf. of Nat'l Ass'n for Advancement of Colored People* v. *Louisiana*, 490 F. Supp. 3d 982, 1012 (M.D. La. 2020) ("The interests the Louisiana NAACP seeks to protect are clearly germane to the organization's purpose, as Plaintiffs allege that its two central goals . . . are to eliminate racial discrimination in the democratic process, and to enforce federal laws and constitutional provisions securing voting rights.") (internal citation and alterations omitted); *Hancock Cty. Bd. of Sup'rs* v. *Ruhr*, 487 F. App'x 189, 197 (5th Cir. 2012)) ("[M]aintaining proportional districts, protecting the strength of votes, and safeguarding the fairness of elections are surely germane to the NAACP's expansive mission.").

Third, neither the claim sought or the relief requested requires the participation of the organizations' individual members, given the sufficiency of each organization's standing and the participation of additional individual plaintiffs in this action. *See Ramsey River Rd. Prop. Owners Ass'n, Inc.* v. *Reeves*, 396 So. 2d 873, 875 (La. 1981) (finding that the third factor was met, even if "individual members, singly or as multiple plaintiffs, could have pursued this litigation."); *Ruhr*,

487 F. App'x at 197-98 (finding the third factor met and noting that the "court would not need individualized information about NAACP members" in order to grant the requested relief).[3] The Secretary's objection that the associations "have no right to vote," Mem. 18, is irrelevant to the associational standing analysis and has no basis in the law. The organizational plaintiffs therefore have the standing required to bring this action.

c. The Secretary of State Is the Proper Defendant

Finally, the Secretary argues that he is not the appropriate defendant in this suit because he "has no appreciable role in redistricting Congress." Mem. 17. This bold assertion runs directly contrary to the Secretary's role as "the chief election officer of the state." LA Const. art. 4, § 7; La. R.S. 18:421. As alleged in the Petition, the Secretary "is responsible for preparing and certifying the ballots for all elections, including elections for the U.S. House of Representatives, certifying all election returns, and administering the election laws." Pet. ¶ 26. The Secretary of State also qualifies candidates for the U.S. House of Representatives. *Id.*; La. R.S. 18:452, 18:462.

Courts in Louisiana have consistently recognized the Secretary as a proper defendant in cases involving redistricting. *See Louisiana State Conf. of Nat'l Ass'n for Advancement of Colored People* v. *Louisiana*, 490 F. Supp. 3d 982, 1030 (M.D. La. 2020); *Johnson* v. *Ardoin*, 2019 WL 2329319, at *3 (M.D. La. May 31, 2019); *Terrebonne Par. N.A.A.C.P.* v. *Jindal*, 2014 WL 3586549, at *4 (M.D. La. July 21, 2014); *Hall* v. *Louisiana*, 974 F. Supp. 2d 978, 992-93 (M.D. La. 2013). As the court noted in *Hall*, "it cannot be said that [the Secretary] would not be required to comply with the orders of this Court in this matter, or that he would not be involved in providing, implementing, and/or enforcing whatever injunctive or prospective relief may be granted to [Plaintiffs]." *Hall*, 974 F. Supp. 2d at 993; *see also Louisiana State Conf. of Nat'l Ass'n for Advancement of Colored People*, 490 F. Supp. 3d at 1028 ("[S]tate officials may be sued in their official capacities when they have the power to enforce, defend, or apply the law in question.") (internal citation omitted).

The Secretary is not being asked to assume the responsibilities of the Legislature or draft his own maps. Rather, he must comply with and enforce the relief that this Court ultimately deems

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[3] In addition to associational standing, the Louisiana NAACP and Power Coalition meet the requirements for organizational standing, which is demonstrated by showing that the organization itself has suffered a legal injury, fairly traceable to the defendant's conduct, and redressable through judicial relief. *See, e.g.*, *Louisiana State Conf. of Nat'l Ass'n for Advancement of Colored People*, 490 F. Supp. 3d at 1013, 1016 (finding that organizational standing was met for plaintiff Louisiana NAACP in redistricting case).

to be necessary to correct the current malapportioned map. That is more than sufficient to render the Secretary a proper defendant in this action.

CONCLUSION

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

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been sent via electronic mail to all known counsel of record on this 24rd Day of March, 2022.

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