No. 21A_____

In the Supreme Court of the United States

KYLE ARDOIN,
IN HIS CAPACITY AS THE
LOUISIANA SECRETARY OF STATE, ET AL.,
Applicants,

v.

PRESS ROBINSON, ET AL.,
Respondents.

EMERGENCY APPLICATION FOR ADMINISTRATIVE STAY, STAY PENDING APPEAL, AND PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

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Petitioners are R. Kyle Ardoin, in his official capacity as Secretary of State for Louisiana, and the State of Louisiana, by and through Attorney General Jeff Landry.

Respondents are Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, the National Association for the Advancement of Colored People Louisiana State Conference, Power Coalition for Equity and Justice, Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners each represent that they do not have any parent entities and do not issue stock.

/s/ *Elizabeth B. Murrill*
Elizabeth B. Murrill

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

Louisiana's congressional boundaries cannot be drawn to create two majority-minority districts without "segregat[ing] the races for purposes of voting." *Shaw v. Reno*, 509 U.S. 630, 641 (1993). Nonetheless, the district court issued a preliminary injunction ordering the Louisiana Legislature to add a second district by June 20, 2022. By fixing race as the sole "non-negotiable" district-drawing variable, *see Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017), the district court disregarded decades of this Court's precedents, which "mak[e] clear that proportionality is never dispositive." *Johnson v. De Grandy*, 512 U.S. 997, 1026 (1994) (O'Connor, J., concurring); *accord. Wis. Legis. v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022). Despite acknowledging serious flaws in the Plaintiffs' case, the Fifth Circuit declined to issue a stay—tossing Louisiana into divisive electoral pandemonium. App. 152. The district court's ruling upends statutory deadlines with a promise of more to come, throws the election process into chaos, and creates confusion statewide, all of which undermines confidence in the integrity of upcoming congressional elections. A stay is manifestly warranted because of these harms and because this case is worthy of certiorari. An administrative stay pending further evaluation of this matter is also manifestly warranted to calm the chaos and to permit more orderly proceedings. This case presents the exact question this Court will soon resolve: Whether Louisiana's 2021 redistricting plan for its six seats in the United States House of Representatives violated section 2 of the Voting Rights Act, 52 U. S. C. §10301?

Louisiana has worked long and hard to comply with federal redistricting

mandates. After receiving the 2020 Decennial Census data from the federal government far behind schedule, Louisiana began the same congressional district-drawing processes undertaken by other states throughout the Nation. It followed several guideposts. First, because the State was again allotted six congressional districts (and its demographics remained largely consistent), it maintained existing district boundaries to the extent it could, which meant retaining one majority-minority district. App. 318 n.8. Second, it took into account the fact that the United States Department of Justice had twice precleared, under Section 5 of the Voting Rights Act, congressional-district boundaries, which included only one majority-minority district. *See Hays v. Louisiana*, 862 F. Supp. 119, 124 n.4 (W.D. La. 1994). Third, it construed as a warning two federal-court cases that struck, as racial gerrymanders, Louisiana congressional maps drawn to include two majority-minority districts. *Hays v. Louisiana*, 839 F. Supp. 1188, 1191 (W.D. La. 1993) (*Hays I*); *Hays v. Louisiana*, 936 F. Supp. 360, 368 (W.D. La. 1996) (*Hays IV*). Against this legal background, the Louisiana Legislature approved new maps with two-thirds approval in both bodies.

The day the Louisiana Legislature's plan took effect, however, two groups of plaintiffs sued, insisting that, because "Louisiana has six congressional districts and a Black population of over 33%," Section 2 of the Voting Rights Act mandates proportional representation. After conducting a rushed hearing, the district court enjoined Louisiana's maps. The Fifth Circuit declined a stay despite tremendous electoral upheaval. Perhaps even more perplexingly, the Fifth Circuit failed to

disturb the district court's misapplication of Supreme Court precedent that in areas where there is significant white cross-over voting, the third *Gingles* precondition *cannot* be met. Nor did the Fifth Circuit address the badly bungled analysis surrounding racially polarized voting, which it conflated with *legally significant* racially polarized voting. As this Court well knows, there is a difference.

The record accentuates the inability to draw a constitutionally-compliant plan. Out of *ten-thousand* simulated plans using neutral, non-racial criteria, *none* produced even *one* majority-minority district, let alone *two* that the district court believes the Voting Rights Act requires. App. 270-271. The inescapable conclusion: the district court has ordered a racial gerrymander that "by its very nature" is particularly "odious." *Wis. Legis.*, 142 S. Ct. at 1248 (quoting *Shaw*, 509 U. S. at 643).

Rivaling the lower courts' blunders on the Voting Rights Act question is their baseless refusal to stay this case under *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Potential Louisiana congressional candidates can qualify for the ballot by nominating petition on July 8, 2022 (moved from June 20, 2022 by the District Court) and the regular qualifying period is July 20-22, 2022—but it is impossible for them to qualify with no congressional districts in place. When "[f]iling deadlines need to be met, but candidates cannot be sure what district they need to file for" or even "which district they live in," *Purcell* commands federal courts to refrain from "swoop[ing] in and re-do[ing] a State's election laws." *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring). The lower courts' refusal to heed this principle clashes with admonitions this Court has issued time and again—as recently as four months

ago. *See id.*

Aggravating the erroneous refusal to apply *Purcell* is the lower courts' decisions to barrel ahead despite *Merrill*, which this Court will hear less than four months from now. Because this case presents the same question as *Merrill*, the Court should grant certiorari in advance of judgment, consolidate the cases, and issue a briefing schedule for this case under which arguments could be heard the same day as *Merrill,* or simply hold the case in abeyance pending the opinion in *Merrill*.

In *Merrill* (like here), Alabama drew districts that tracked its previous district boundaries, given the relative consistency of its demographics. In *Merrill* (like here), the plaintiffs' experts[1] prioritized race in a (failed) attempt to show that an additional majority-minority district with some semblance of compactness could conceivably be created. And in *Merrill* (like here), a federal district court essentially threw out the redistricting work of a state legislature during a time that all but guaranteed "chaos for candidates, campaign organizations, independent groups, political parties, and voters, among others." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Proceeding in this case while *Merrill* is pending defies all conceivable notions of judicial economy and fairness to a State that will otherwise have to (1) redraw congressional districts in compliance with the district court's order to create racial gerrymanders, (2) litigate this question before the Fifth Circuit while conducting the 2022 midterm elections under congressional districts that are most likely illegal, and

[1] Indeed, one expert—Mr. William Cooper**Error! Bookmark not defined.**—served as a plaintiffs' expert in *both Milligan* and this case.

(3) likely have to start the redistricting process over *again* after this Court issues its opinion in *Merrill*. An administrative stay and stay pending appeal both are warranted, as is a grant of certiorari before judgment. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2319, 2322 (2018); *Perry v. Perez*, 565 U.S. 388, 392 (2012).

Events that transpired yesterday underscore why an administrative stay is necessary. In response to a motion to extend the limited time permitted to the Legislature to do its important work, the district court ordered the Speaker of House and the President of the Senate to appear in person for a hearing on the morning of the second legislative day (of only six days). At that hearing, the district court threatened the Speaker with contempt (for filing a bill she found displeasing), App. 455-457, and demanded the President of the Senate commit to suspend rules and move legislation faster, App. 437. She ordered all parties (two of which were not before her in the hearing) to submit briefs (by the close of business) on how she should proceed if the legislature failed to draw a second district. *See* App. 476. It appears the legislative session is merely a formality.

Without a stay, "even heroic efforts likely [will] not be enough to avoid chaos and confusion" during the rapidly approaching midterm election cycle. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Even if Louisiana pulls it off, with the proverbial gun to its head held by a federal court, the State will be forced to elect congressional representatives using boundaries anathema to the Fourteenth Amendment's Equal Protection Clause, unless this Court steps in now.

OPINIONS BELOW

Petitioners seek an administrative stay and a stay or injunction pending

appeal of the district court's preliminary injunction, entered on June 6, 2022. The district court's opinion is reproduced at App. 1. The district court's order denying a stay pending appeal is reproduced at App. 161. The Fifth Circuit's opinion denying a stay pending appeal is reproduced at App. 167.

JURISDICTION

This Court has jurisdiction to resolve this application under 28 U.S.C. Sections 1331 and 2101(f), and the authority to grant certiorari before judgment under Section 1254(1).

STATEMENT OF THE CASE

A. 2022 redistricting efforts begin against a 30-year legal history.

Louisiana's redistricting saga began thirty-years before the State legislature received the 2020 Decennial Census data. After the 1990 redistricting cycle, the Louisiana Legislature twice attempted[2] to draw congressional maps to include two majority-minority congressional districts. Both times, the maps pinned East Baton Rouge Parish as the population anchor for the second majority-minority district, which extended north along the Mississippi River, into Louisiana's Delta Region (over 180 miles away), and then across the top of the State. App. 333-334. Courts struck both maps as racial gerrymanders that violated the Fourteenth Amendment's Equal Protection Clause. *See Hays v. Louisiana (Hays I)*, 839 F. Supp. 1188, 1195 (W.D. La.

[2] The legislature was forced to attempt this feat because, at the time, the U.S. Attorney General's Office made it plain that "any plan that did not include at least two 'safe' black districts out of seven" would not be precleared under Section 5 of the Voting Rights Act. *Hays I*, 839 F. Supp. at 1196 n.21.

1993) (*Hays I*); *Hays v. Louisiana (Hays IV)*, 936 F. Supp. 360, 368 (W.D. La. 1996).

Because Louisiana could not draw two majority-minority districts without "segregat[ing] the races for purposes of voting," *Shaw*, 509 U.S. 630, 641 (1993), the *Hays* remedial map contained only one. The heart of this district (CD2) centered on New Orleans. East Baton Rouge, the anchor of Louisiana's ill-fated second majority-minority district, found itself in CD6. Since then, the Legislature has never enacted a redistricting plan connecting East Baton Rouge Parish to the Delta region.

In the three decades since *Hays* was litigated, some things changed. Louisiana lost a congressional seat after the 2000 Decennial Census, reducing the number of districts to six. Other things remained constant. Specifically, Louisiana's total black voting-age population (BVAP) did not meaningfully grow. As a matter of plain math, if the State could not draw two districts out of seven without unconstitutionally considering race, its likely impossible for it to draw two districts of six unless race predominates. Efforts to do so proved this assumption correct.

B. 2022: Roadshows, public input, hard work, a veto, and litigation.

Upon receiving long-delayed results of the 2020 Decennial Census, Louisiana, began its redistricting process. This work began months before the Extraordinary Session convened February 1, 2022, with statewide "road shows" to collect feedback and concluded (after a gubernatorial veto and subsequent override vote) March 31, 2022. Although the U.S. Constitution's one-person, one-vote requirement compelled the Legislature to modify several boundaries, its plan deliberately retained the "core districts as they [were] configured" after the 2010 census to ensure continuity of

representation, perpetuating "the traditional boundaries as best as possible" to "keep[] the status quo." Defs. Proposed Findings of Fact, App. 226-227. As enacted, Louisiana's congressional map includes one majority-Black district, as it has since the 1990s.

The same day the Legislature's plan took effect, two groups of plaintiffs sued. *See Robinson v. Ardoin*, No. 3:22-cv-00211 (M.D. La.); *Galmon v. Ardoin*, No.: 3:22-cv-00214 (M.D. La.). In their collective view, Section 2 of the Voting Rights Act requires Louisiana to create a second majority-Black congressional district. At its core, their arguments hinge on proportionality—*i.e.*, because "Louisiana has six congressional districts and a Black population of over 33%," two of Louisiana's six congressional districts must be majority Black. *Robinson, et al. v. Ardoin, et al.,* No. 3:22-cv-211 (M.D. La.) (ECF 42-1 at 4) (hereinafter, *Robinson*). The State of Louisiana and two of the State's Legislative leaders–the Speaker of the House and the President of the Senate—quickly moved for, and were granted, intervention. *Id*. (ECF Nos. 10, 30, 64). The district court consolidated the two cases,[3] denied the State's motion to stay the case pending this Court's disposition in *Merrill v. Milligan*, No. 21-1087 (U.S.) (consolidated with *Merrill v. Caster*, No. 21-1087 (U.S.)), and conducted a truncated preliminary-injunction hearing, *e.g.*, *Robinson* (ECF Nos. 135, 63). After the parties submitted post-trial briefs and proposed findings of fact and conclusions of law, the district court granted Plaintiffs' motions for a preliminary injunction. App.

[3] The consolidated case is *Galmon, et al. v. Ardoin, et al.*, No. 3:22-cv-214 (M.D. La.).

2.

In so doing, the district court concluded Plaintiffs were likely to satisfy the Voting Rights Act Section 2 preconditions this Court set out in *Thornburg v. Gingles*, 478 U.S. 30 (1986). It also reasoned that the Plaintiffs would suffer irreparable harm without a remedial map. App. 88–105, 141–42. For this reason, the district court further decreed that the Louisiana Legislature must enact a remedial plan with a second majority-minority district within the next fourteen days, or the court would contrive a map of its own. App. 2.

C. Election deadlines bumped; Special Session called; no relief from lower courts.

Within hours of the district court's preliminary-injunction order, each Defendant noticed appeals. App. 153, 156, 158. A joint motion filed with the district court for a stay pending appeal followed that same day. When the district court declined to stay its injunction, every Defendant group (the Secretary of State, the Attorney General, and the Speaker of the House and President of the Senate) filed emergency motions for a stay pending appeal with the Fifth Circuit. After expedited briefing and an administrative stay, the Fifth Circuit declined to pause the district court's preliminary injunction (though it concluded the Plaintiffs' "arguments and the district court's analysis are not without weakness"). App. 168. It did, however, expedite the appeal and scheduled oral argument July 8, 2022. App. 168-169.

D. Chaos ensues; Legislative process is undermined.

Compliance with the district court's deadline is impossible. For starters, the Louisiana Legislature adjourned *sine die* on the day the district court issued its

injunction, June 6, 2022, as required by the State Constitution. *See* La. Const. art. II, §2(A)(3)(a). So the Governor called a special session. *See* La. Const. art. II, §2(B); https://www.gov.louisiana.gov/assets/Proclamations/2022/89JBE2022CallSpecialSession.pdf. Pursuant to the State Constitution, however, seven days' notice is required before the Legislature may convene an Extraordinary Session, *see id.,* which reduced to six the number of days the ruling actually allowed to complete the task this Court knows "is *never* easy." *Abbott v. Perez*, 138 S. Ct. at 2314 (emphasis added).

For this reason, the Legislative Leadership moved for an extension of time to enact a remedial map. They told the district court that redrawing the State's congressional maps in only six days could not be accomplished, at a minimum, without denying the public their right to notice and to participate. In response, the district court ordered the House Speaker and Senate President, to appear in person at a hearing it had set on the motion *during* the second day of the Session. This hearing occurred June 16, 2022; neither the State's Attorney General nor the Secretary of State were allowed to participate, the district court denied the requested extension from the bench:

> [O]rder[ed] the parties to file briefs by 5:00pm setting forth their proposals for the nature and timeline of the judicial redistricting process in the event that the Legislature is unable to enact a remedial map. The Court specifies that each side will be permitted to offer one proposed remedial map.

Robinson (ECF No. 196). Moreover, during the hearing, the district court threatened the Speaker with contempt for having filed a "placeholder bill" that did not contain a second majority minority district (which he explained can be amended), attempted to

strong-arm the Senate President into suspending the rule to force the process to move faster, and all but declared the legislative process a mere formality. *See* App. 437-438.

REASONS FOR GRANTING THE STAY

Few cases are better candidates for a stay pending appeal and entry of a writ of certiorari before judgment. Indeed, the district court's preliminary-injunction order achieves the rare trifecta of (1) getting both the law and facts egregiously wrong; (2) ordering relief that inflicts immediate irreparable harm in the form of a State-wide Equal Protection violation, accomplishing nothing other than creating utter mayhem in a midterm year; and (3) ignoring the colossal waste of judicial resources inherent in resolving (wrongly) an issue this Court is taking up the first week of its next Term. The Fifth Circuit reinforced the need for this Court's intervention when it declined to act, waiving off *Milligan* as an "outlier" relative to the *Purcell* doctrine. Together, Louisiana's Attorney General and Secretary of State request that the Court return both sensibility and the rule of law to Louisiana's redistricting process.

I. THERE IS A REASONABLE PROBABILITY FOUR JUSTICES WILL VOTE TO GRANT CERTIORARI AND FIVE WILL VOTE TO REVERSE AND VACATE THE PRELIMINARY INJUNCTION.

This case, like *Merrill*, presents the important question whether prioritizing race under Section 2 is inconsistent with the federal Constitution. The answer matters: here, as in Alabama, it is impossible to draw a map without prioritizing race as the predominant factor in order to generate a second majority-minority district, which federal courts have cautioned Louisiana *not* to do in the past.

Section 2 vote-dilution claims are governed by *Thornburg v. Gingles*, 478 U.S.

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

Plaintiffs failed across the board to carry their burden. That the district court concluded otherwise (and the Fifth Circuit acquiesced in this error) affirms how terrifically far the district court's legal analysis wandered. Simply put, race predominated, politics was mistaken for racially polarized voting, and (for good measure) the district court botched the showing necessary to justify imposing mandatory preliminary relief. The result is a legally deficient preliminary injunction that offends all conceivable notions of equal protection, generates chaos during critically important qualifying periods, and undermines confidence in Louisiana's election process. It must be stayed.

A. The district court mangled *Gingles*'s third precondition.

The third *Gingles* precondition requires the Plaintiffs to show that the "amount of white bloc voting . . . can generally 'minimize or cancel' black voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 56 (citations omitted). "In areas

with substantial crossover voting," *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009), which arises when enough white voters support a Black-preferred candidate that the candidate can prevail "without a VRA remedy," (*i.e.,* the creation of a majority-minority district), *Covington v. North Carolina*, 316 F.R.D. 117, 168 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017), this third precondition remains unsatisfied. *Gingles,* 478 U.S. at 56. "[I]n the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (quoting *Gingles*, 478 U.S. at 49 n.15).

Plaintiffs' experts each defined polarized voting as existing where "black voters and white voters voted differently." App. 328. Specifically, they testified that polarized voting occurs when "black voters and white voters would have elected different candidates if they had voted separately." *Id.* But, that is not the correct standard. This Court has made clear that the Plaintiffs must prove that *extreme* white bloc voting renders the creation of a majority-minority district the only way to ensure that a minority community has an equal opportunity to elect the candidate of that community's choice. *Gingles,* 478 U.S. at 56.[4] To adopt the broader standard converts

[4] Specifically, this Court has held that "Racially polarized voting" exists whenever "there is a consistent relationship between [the] race of the voter and the way in which the voter votes." *Gingles*, 478 U.S. at 53 n.21. But *Gingles* requires evidence of "legally significant racially polarized voting." *Id.* at 55. This occurs only when "less than 50% of white voters cast a ballot for the black candidate." *Id.* Thus, a Section 2 plaintiff can prevail only when there is proof that the white majority usually votes as a bloc to defeat the minority's preferred candidate. *Cooper*, 137 S. Ct. at 1470; *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (Mem.). None of plaintiffs' experts provided any testimony that African

the Section 2's protection into electoral guarantees through the reconfiguration of district lines any time a slim majority of white voters supports a candidate that a minority group disfavors.

The Plaintiffs have not, *and cannot*, show that such an extreme level of white bloc voting exists in Louisiana. Indeed, when pressed, one of Plaintiffs' experts conceded that meaningful white crossover voting exists in Louisiana, meaning that at least two congressional districts (CD2 and CD5) could be drawn with a BVAP below 50 percent that would still, enable the Black community in those districts to elect the candidate of their choice. App. 329. Another expert testified that a district around 40 percent BVAP could perform. *Id*. And an amicus brief submitted by LSU and Tulane University mathematics and computer-science professors analyzed nineteen elections, which demonstrated that districts of about 42 percent BVAP afford an

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Americans need a congressional district with a majority BVAP to have an equal opportunity to elect their candidate of choice. Quite to the contrary, Drs. Palmer and Lichtman conceded that because of substantial white crossover voting, African Americans in Louisiana only need a congressional district with a black VAP in the low 40% range in order to control the election result. Dr. Handley agreed that districts may be "effective" in providing black voters with an opportunity to elect their candidate of choice with a BVAP under 40% but that she did not analyze whether black voters in Louisiana would have such an opportunity in a district drawn with less than 50% BVAP. While Dr. Handley did not attempt to analyze the lowest black percent needed for black voters to control a district, she also gave no testimony whatsoever that a district in excess of 50% is required. All of Plaintiffs experts testified that Plaintiffs illustrative majority black districts would perform, in the sense that black voters would have an opportunity to elect their candidate of choice in those districts. But none of plaintiffs' experts testified that a district with a black VAP in excess of 50% is necessary in order to give black voters an opportunity to elect their candidates of choice. Thus, under the Court's precedent *Gingles*, *Bartlett v. Strickland, Cooper v. Harris, and Covington v. North Carolina*, the evidence in this case only shows the presence of statistically significant RPV and nothing more.

equal minority electoral opportunity. *Robinson* (ECF 97 at 30, 34, 41–43).

The preliminary-injunction record shows that "partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens." App. 330. This means, in turn, that there is no "legally significant" racially polarized voting sufficient to satisfy *Gingles* precondition 3. *LULAC, Council*, 999 F.2d at 850; *see also* App. 287. The motions panel wrongly adopted the test of Plaintiffs' expert Lisa Handley, that whenever the Democrat loses a district, this proves the existance of significant white bloc voting. This is in contravention of *Gingles, Covington,* and *Cooper v. Harris.*

"The Voting Rights Act," naturally, "does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.'" *Id*. at 854 (quoting *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992)). Instead, Section 2 "is implicated only where Democrats lost because they are black, not where blacks lost because they are Democrats." *Id.* (quoting *Baird*, 976 F.2d at 361). This interpretation is reinforced by the text of Section 2 itself, which prohibits state laws that "result[] in a denial or abridgement of the right . . . to vote *on account of race or color*." 52 U.S.C. § 10301(a) (emphasis added). Hence, "evidence that divergent voting patterns are attributable to partisan affiliation or perceived interests rather than race [is] quite probative" to *Gingles* precondition 3. *LULAC, Council*, 999 F.2d at 858 n.26. Bloc voting that is not "on account of race or color" is by its own terms not a violation of Section 2.

Evidence of partisan-motivated racially polarized voting permeates the record.

Defendants' expert testified that, while "voting may be correlated with race[,] . . . the differential response of voters of different races to the race of the candidate is not the cause." App. 330. Instead, he found the polarization exhibited in the data resulted from Democratic party allegiance—*not race*. App. 330-331. By analyzing the last three presidential elections, Defendants' expert found the all-white 2016 Democratic ticket received greater black and less white support than either the 2012 Democratic ticket (which featured a black presidential candidate) or the 2020 Democratic ticket (which featured a black vice-presidential candidate). *Robinson* (ECF 108-4 at 5-6). By contrast, in Louisiana elections that featured *no* Democratic candidates, "pattern[s] of racial differences in voting largely disappears." *Id.* at 6-7. This is strong evidence that racial voting differences in Louisiana are driven not by the race of the candidates, but by partisan factors.

Plaintiffs failed to carry their burden of proving "legally significant" bloc voting for purposes of *Gingles* precondition 3. *See LULAC, Council*, 999 F.2d at 850. This, in turn, renders their Section 2 claim meritless—rather than "entirely clearcut" in their favor, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). At the very least, the evidence of racial bloc voting does not "clearly favor" Plaintiffs enough to warrant striking the State's enacted congressional map. *See Martinez v. Mathews*, 544 F.2d 1233, 1243 (5th Cir. 1976). This is no ordinary error due to the enormity of its consequences.

B. The district court improperly ordered a racial gerrymander, which was wrong and worthy of certiorari before judgment.

This Court has been clear and consistent for decades. "Classifications of

citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" *Shaw*, 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *accord Wis. Legis.*, 142 S. Ct. at 1248. Creating such classifications "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Shaw*, 509 U.S. at 643 (citing *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).[5] For that reason, "the Fourteenth Amendment requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Id.* (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id.*, at 285 (O'Connor, J., concurring in part and concurring in judgment)).

This Court has assumed (but never held) that compliance with Section 2 of the Voting Rights Act constitutes a compelling governmental interest. *See Cooper v. Harris*, 137 S. Ct. 1455 (2017). It has set beyond peradventure, however, that a "sufficiently large and compact population of black residents" alone does not justify race-based redistricting. *Wis. Legis.*, 142 S. Ct. at 1249. It has never been enough to surmise that the Voting Rights Act "*may* . . . require[]" creation of additional majority minority districts; instead, there must exist "a strong basis in evidence to conclude

[5] *See also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) ((Brennan, J., concurring in part) ("Even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs."). Indeed, this is now happening as a direct consequence of the district court order.

that §2 *demands*" it. *Wis. Legis.*, 142 S. Ct. at 1249 (first emphasis in original). Without this exacting demonstration, Section 2 becomes a rank proxy "allow[ing] a State to adopt a racial gerrymander." *Id.* at 1250.

The facts to which the district court lent its imprimatur are indistinguishable from those in *Covington*, 316 F.R.D. at 130, a three-judge district court case this Court summarily affirmed, *North Carolina v. Covington*, 137 S. Ct. 2211 (2017). In *Covington*, the map-drawers were "instructed" (1) "to draw . . . districts with at least 50%-plus-one" black voting age population; (2) "to draw these districts first, before drawing the lines of other districts"; and (3) "to draw these districts everywhere there was a minority population large enough to do so and, if possible, in rough proportion to their population in the state." *Id.* at 130. In this case, one of Plaintiffs' map-drawers testified as follows:

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

App. 300-301. Additional testimony reveals that "in order to begin drawing" mapdrawers viewed the BVAP of Louisiana precincts to "get an idea where the black population is inside the state." App. 301.

The *Covington* Court criticized North Carolina map-drawers for seeking "proportionality." 316 F.R.D. at 133. In this case, Plaintiffs' pursuit of two majority-minority districts is based on the premise that Louisiana has six congressional districts and a Black voting age population of 31%. *Robinson* (ECF No. 1 at 1). And, in *Covington*, "because race-based goals were primary in the . . . redistricting process,

other 'traditional race-neutral districting principles, including . . . compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, were secondary, tertiary, or even neglected entirely." 316 F.R.D. at 137 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995). So too here.

Simply put, North Carolina relied on evidence indistinguishable from that offered by Plaintiffs here. When it did so, the courts struck down that state's racially gerrymandered districts, and this Court affirmed finding North Carolina violated the Equal Protection Clause when it created them. The district court's preliminary-injunction order, which *requires* Louisiana to create a second majority-minority district based on the very same evidence that led to North Carolina's constitutionally-defectivemaps, thus has no hope of surviving this Court's review. This is particularly true because of *Bartlett v. Strickland*. In *Bartlett*, this Court held that a state cannot rely upon Section 2 to justify using race to draw a crossover district. *Bartlett v. Strickland,* 556 U.S. 1, 14-18 (2009). If a state cannot use race to draw crossover districts, then surely a federal court cannot order a state to draw a crossover districts. *Id.* Again, this case does not call for ordinary error correction: the consequences of imposing constitutionally defective maps at the eleventh-hour during mid-term Congressional elections has nation-wide implications. That also renders this case worthy of a stay and certiorari.

C. The district court contorted *Gingles*'s first precondition beyond recognition.

To prevail under the first *Gingles* precondition, a plaintiff must show the allegedly injured racial group is "sufficiently large," and "geographically compact."

Gingles, 478 U.S. at 50-51; *see also Cooper*, 137 S. Ct. at 1470 (quoting *Gingles*, 478 U.S. at 50). The Plaintiffs failed to carry their burden here for two reasons. First, the illustrative plans they produced are irrefutably racially gerrymandered, so the Legislature could never, consistent with the Fourteenth Amendment, implement them. And second, the minority community they have identified is not compact, reasonably or in any other application of the concept. The district court erred by concluding otherwise.

1. *Racially gerrymandered illustrative maps cannot satisfy the first Gingles precondition.*

In no uncertain terms, this Court has "expressly rejected" "uncritical majority-minority district maximization." *Wis. Legis.*, 142 S. Ct. at 1249; *see also Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994) ("Failure to maximize cannot be the measure of §2."). The reason is obvious. Maximizing majority-minority districts necessarily involves "segregat[ing] the races for the purposes of voting," which "balkanize[s] us into competing racial factions [and] threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw*, 509 U.S. at 642, 657. And for that reason, illustrative maps infected by racial predominance (which devolves inexorably to racial segregation) cannot satisfy *Gingles* precondition 1. Because elevating race to the pole position, above all other traditional district-drawing criteria, is always constitutionally abhorrent, race cannot be elevated in this way under the Voting Rights Act either. *See Cooper*, 137 S. Ct. at 1468-69.

This case is a good vehicle to affirm this principle. Here, Plaintiffs offered only racially gerrymandered exemplars. Both common sense and the record irrefutably show that they were fabricated to "segregate the races for purposes of voting." *Shaw*, 509 U.S. at 642. Indeed, in their effort to produce exemplar maps featuring two majority-Black districts, the Plaintiffs warped each step in this process.

First, the Plaintiffs declined to use the U.S. Department of Justice's definition of "Black" when calculating the BVAP. The Justice Department's definition covers those Census respondents identifying as black alone or multiracial black and white, but "does not include Hispanic individuals that may identify as black, nor multiracial individuals identifying as a combination of races other than 'White' and 'Black or African American.'" *Pope v. Cnty. of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2014 U.S. Dist. LEXIS 10023, at *7–8 n.3 (N.D.N.Y. Jan. 28, 2014).

Instead, Plaintiffs chose "Any Part Black," a broader measure that includes persons who may be 1/7th Black and also self-identify as both Black and Hispanic. They claimed this choice followed from a footnote in *Georgia v. Ashcroft*, 539 U.S. 461, (2003) but their conclusion does not follow what the Court said there. *See Robinson* (ECF Nos. 41-2 at 11; 43 at 6). When this Court decided *Ashcroft*, the Georgia Secretary of State lacked access to a racial category corresponding to "DOJ Black" that it could use for district drawing. *See Georgia*, 539 U.S. at 473 n.1. Thus, the Court permitted Georgia to use "Any Part Black," while underscoring the novelty of this approach by explaining it in a long footnote. The Plaintiffs here are not in the same predicament. Their use of "Any Part Black" was a deliberate choice intended to

load the dice in favor of triggering Section 2.

Second, Plaintiffs offered exemplar maps with districts that exceeded the 50 percent BVAP threshold by a razor-thin margins and surgical precision. The BVAP percentage for the *Robinson* Plaintiffs' majority-Black illustrative districts are 50.16 percent, 50.04 percent, 50.65 percent, 50.04 percent, 50.16 percent, and 51.63 percent. (ECF Nos. 172, at 41-42). For the *Galmon* Plaintiffs, they are 50.96 percent and 52.05 percent. In other words, after adopting the most expansive definition of "Black" they could find, they contrived districts that eked over the majority-Black threshold by a hair's breadth.

Third, Plaintiffs undeniably subordinated *all* traditional redistricting criteria while elevating race to the apex position. By "reach[ing] out to grab small and apparently isolated minority communities," *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 433 (2006) (*LULAC*). Plaintiffs obliterated any argument that the minority population within their majority-Black exemplar districts is reasonably compact.[6] The illustrative maps often split cities, counties, and communities of interest while merging far flung and distinct areas with nothing in common but-for their common racial makeup. Indeed, the State's demographic expert showed many examples of how Plaintiffs' map-drawers intentionally segregated cities by race. App. 210-217.

In one illustrative plan for Baton Rouge, for instance, the line drawn through

[6] Although the Fifth Circuit believed that Plaintiffs' compactness evidence was "unrebutted," App. 176, the record belies that notion.

the middle of the map depicts the division between Plaintiffs' proposed majority-minority District 5 in the north and Districts 2 and 6 in the south. App. 210.[7] The only conceivable reason District 5 reaches only so far into Baton Rouge is to pick up the majority BVAP Census blocks (shaded in green). The only other district in this exemplar map that contains any substantial black population is District 2, which is also a majority-minority district. To accomplish this designation, District 2 extends to the New Orleans area to fill out its BVAP. The same scenario, in which district lines are drawn precisely to segregate white voters from black voters, is repeated throughout Plaintiffs' proposed maps in communities as far flung as Baton Rouge, App. 210-213, and Lafayette, App. 214-215.

Louisiana's spatial analytics expert also offered a mileage chart that showed the distance between the center of the Black populations in communities across Louisiana. *Robinson* (ECF 169-12 at 25); App. 288 (showing the large distance between two minority population centers "as the crow flies"); *see also* App. 242 (testimony of Plaintiff witness who stated that it would take almost four-and-a-half hours to get from Baton Rouge to Lake Providence, which lies at the northern end of Plaintiffs' illustrative plans in the delta region). The Plaintiffs' illustrative maps combine Monroe's Black population with the Black population of Baton Rouge and Lafayette—even though these communities are, respectively 152 and 157 miles apart. *Robinson* (ECF 169-12 at 25); App. 288. Combining in the same district Black

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

communities from far-flung parts of Louisiana eviscerates any consideration of the different experiences and make-up of those communities. Incredibly, it improperly assumes all persons belonging to the same racial group share homogenous political interests. The Equal Protection Clause rejects this race-based assumption.

Lest the Court have any residual doubt that Plaintiffs' exemplar maps used race as the predominant consideration, their map-drawers' testimony resolves it. When asked whether they ever attempted to produce a map containing only one majority-minority district, they said no "because I was specifically asked to draw two by the plaintiffs." App. 368. This is indistinguishable from *Covington*, where map-drawers were ordered to produce a map that maximized majority-minority districts to the exclusion of all other criteria. *See* 316 F.R.D. at 130.

"Courts cannot find § 2 violations on the basis of *uncertainty*." *Harding v. Cnty. of Dallas*, 948 F.3d 302, 310 (5th Cir. 2020) (emphasis in original). If Plaintiffs were compelled to use illustrative plans where race predominated, then it is at the very least *uncertain* whether a remedial plan can be drawn that does not violate the Fourteenth Amendment. Phrased differently, if the only evidence that a Plaintiff can produce for *Gingles I* is rife with racial intent, that amounts to no evidence at all.

Elevating race in this way routinely dooms legislative redistricting efforts. If the district court's preliminary injunction ultimately results in adoption of one of Plaintiffs' exemplar plans (which remains a possibility), that map would itself likely be stricken as unconstitutional. *Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 799 (2017) (noting that a finding of racial predominance usually coincides with

a showing that traditional redistricting criteria were subordinated to racial considerations). At a minimum, then, the merits are not "entirely clearcut" in favor of Plaintiffs—the appropriate standard for awarding an injunction in an election case.*Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring); *see also infra* at Section 2D. A stay pending appeal should thus issue.

2. *The compactness of the minority population, not the district as a whole, is the relevant inquiry under Section 2 of the Voting Rights Act.*

Beyond subordinating traditional redistricting criteria to race, the district court and the Plaintiffs' experts further erred by examining the compactness of the *district* rather than the compactness of the relevant *minority population*, *see,* e.g.*,* App. 27 (relying on metrics that measure the *district's* compactness). The Fifth Circuit motions panel correctly recognized that "the requirement relates to the compactness of the *minority population* in the proposed district, not the proposed district itself," even though it noted that "the Supreme Court has not developed a 'precise rule' for evaluating all facets of that requirement." App. 173 (quoting *LULAC*, 548 U.S. at 433). The Fifth Circuit nonetheless excused this error after conducting "a visual inspection" of the district (*i.e., not* the underlying minority population) and conjecturing that "the illustrative CD 5 appears geographically compact." App. 174.

The Fifth Circuit was wrong. Although a bizarrely gerrymandered district can suggest that the underlying minority population is insufficiently compact for Section 2 purposes, *see LULAC*, 548 U.S. at 433, that ratchet twists only one way. Visual compactness of a district, in contrast, *does not* automatically translate into a conclusion that the minority population within that district is itself compact. A

facially compact district could, for example, house two separate minority population centers separated by a vast swath of rural areas containing negligible minority populations. In that scenario, the *district's* compactness says nothing about the compactness of the relevant minority population—*i.e.*, the only criterion of compactness that matters. Because "there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates," naked-eye district compactness proves next to nothing. *Id*

The Fifth Circuit compounded the error when it concluded that Plaintiffs' illustrative maps "respect traditional redistricting criteria" because, essentially, Plaintiffs' map-drawers said so. App. 175. Specifically, it credited the map-drawers' testimony that they respected political-subdivision boundaries and contiguity when they created their exemplar maps. App. 175-176. That is not how strict scrutiny works, and the Fifth Circuit erred by rubber-stamping this *ipse dixit*.[8]

The Fifth Circuit did not need to dig deep to identify Plaintiffs' failure and the lower court's error. Specifically, Plaintiffs' map drawers testified that they never tried to draw a map containing only one majority-minority district consistent with traditional redistricting criteria. They made no attempt to do so because they were

[8] Indeed, a district connecting Baton Rouge with the Northeast Delta region does not satisfy *Gingles* I, because it is not based on a compact minority population. *See Hays v. Louisiana*, 839 F. Supp. 1188, 1196 n.21 (W.D. La. 1993), *vacated*, 512 U.S. 1230 (1994), *order on remand*, 862 F. Supp 119 (W.D. La. 1994), *vacated sub nom*., *United States v Hays*, 515 U.S. 737 (1995), *decision on remand*, 936 F. Supp. 360 (W.D. La. 1996), *affirmed*, 518 U.S. 1014 (1996).

"specially [sic] asked to draw two by the plaintiffs." App. 368. How that testimony can be construed as anything but a subordination of traditional redistricting criteria to race remains a mystery. At a minimum, this concession shows that the relevant racial community is not compact enough to constitute a second majority district without torquing all traditional notions of compactness to their breaking point. *See id.*; *see also LULAC*, 548 U.S. at 433 (noting that since "no precise rule has emerged governing § 2 compactness, the inquiry should take into account traditional districting principles." (quotations omitted)). The segregation of voters on account of race is *not* a traditional districting principle, and "[w]e do a disservice to the[] important goals [of the VRA] by failing to account for the differences between people of the same race." *LULAC*, 548 U.S. at 434. If the minority community in Louisiana were sufficiently compact, there would be no need for race to predominate in drawing the illustrative plans; a second majority-minority district would emerge from the application of traditional redistricting principles without creative line-drawing. Defendants' unrebutted evidence that no second majority-minority district naturally emerged from *ten-thousand* simulated districts using race-neutral criteria conclusively proves no naturally-occurring, sufficiently compact minority group supports a second majority-minority district. *Robinson* (ECF No. 109-3 pp. 3-4).

D. Mandatory preliminary relief was improper without a showing of a clear right to relief.

To secure injunctive relief during an election year, "the underlying merits [must be] entirely clearcut in favor of the plaintiff." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). And a "mandatory injunction" (*i.e.,* an injunction that

forces a party to *take* action rather than an injunction that *prohibits* a party from taking action is an "extraordinary remedial process which is granted, not as a matter of right but in the exercise of sound judicial discretion." *Morrison v. Work*, 266 U.S. 481, 490 (1925). These admonitions make sense. A district court decision at the preliminary-injunction stage is often based on "procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981).

Plaintiffs have not shown, and cannot show, that the facts and law were so "entirely clearcut" in their favor, *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), such that a mandatory preliminary-injunction must issue. In holding to the contrary, the district court failed to apply the appropriate heightened standard. Instead, it relied solely on the standard four-factor preliminary injunction test applicable to prohibitory, not mandatory, injunctions. *See* App. 17. But "[t]he 'clear' or 'substantial' showing requirement" for *mandatory* injunctions applies in federal courts across the country, including the Fifth Circuit, and it "alters the traditional formula by requiring that the movant demonstrate a *greater* likelihood of success" than is required for the issuance of a prohibitory injunction. *Tom Doherty Assocs.*, 60 F.3d at 34 (emphasis added). The district court missed this legal point entirely and failed to explain its resort to the laxer standard. And the Fifth Circuit failed to question that decision, despite purporting to "review the district court's legal conclusions *de novo*." App. 170.

The Fifth Circuit did identify flaws in Plaintiffs' argument that cast doubt on

their likelihood of success on the merits. *See, e.g.*, *id.* at 11 (noting that "the plaintiffs' evidence has weaknesses"); *see also id.* at 2; *id.* at 35 ("[N]either the plaintiffs' arguments nor the district court's analysis is entirely watertight."). The Fifth Circuit even conceded that "it is feasible that the merits panel . . . may well side with the defendants" after a complete review of the record. *Id.* at 33. Based upon a record like this, "the underlying merits appear to be close and, at a minimum, not clearcut in favor of the plaintiffs." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). In such a scenario, "[e]ven under the ordinary stay standard outside the election context," both parties have "at least a fair prospect of success on appeal," and no preliminary injunction—much less a mandatory one upending a state's elections—should have issued. *Id.* Nevertheless, the Fifth Circuit denied a stay. App. 199.

The Fifth Circuit's decision is perplexing. It acknowledges holes in Plaintiffs' argument, *id.* at 2-3, concedes Defendants could prevail on the merits, *id.* at 33, and yet leaves the mandatory injunction in place. At no point in the panel's thirty-three-page opinion does it nod to the heightened legal standard, even though it is directly implicated. If Plaintiffs "have much to prove when the merits are ultimately decided" as the Fifth Circuit claimed, then they were not entitled to a mandatory preliminary injunction even if they ultimately prevail later. *Id.* at 3. That award grants Plaintiffs' deference to which they are not entitled and turns the applicable burdens on their head.

Although the heightened mandatory injunction standard should have been sufficient to defeat Plaintiffs' request, the district court's decision was particularly

improper given the unique election context. A "preliminary" injunction granted for the duration of a single election is effectively permanent. If the 2022 election is conducted under a court-ordered congressional map that is later determined held to be an unconstitutional racial gerrymander, the harm cannot be undone. There is no do-over when a federal court order denies citizens the right to vote under a lawful map enacted by their duly-elected representatives. The injury to the State and its voters is permanent and irreparable. Because a mandatory injunction "issues to remedy a wrong, not to promote one," *Morrison*, 266 U.S. at 490, this Court should stay the order below.

II. DECLINING TO STAY THIS CASE INFLICTS PROFOUND, IRREPARABLE HARM UPON NOT ONLY IN LOUISIANA, BUT NATIONWIDE.

This case falls within the heart of the *Purcell* doctrine, which, standing alone, should compel a stay. Dismissing and diminishing Louisiana's *Purcell* arguments as "administrative burdens" that inflict ordinary "bureaucratic strain" on Louisiana's elections officials, App. 195, egregiously misses the point. Mistakes and voter confusion flow directly from increasing the burdens on electoral processes and election officials, particularly as election-year deadlines and responsibilities barrel ever closer. Indeed, this Court recently stayed a materially identical case based expressly on potential infliction of "significant logistical challenges" requiring "enormous advance preparations." *Merrill v,* 142 S. Ct. at 880 (Kavanaugh, J. concurring in grant of applications for stays). The same is true here and having stayed *Merrill*, the justifications here are doubled.

Successful elections demand enormous preparation. Chaotic administration of

elections undermines public trust in the election results. Disturbing *any* step in that process has a cascading effect on many other interlocking and interdependent steps. For the upcoming November 2022 midterm elections, ballots must be drafted, proofed, printed, and distributed to Parish Registrars of Voters by September 23, 2022, so that ballot mailing can be completed by the September 24, 2022 Federal UOCAVA deadline. La. Rev. Stat. §18:1308.2. But before any of that can happen, candidates need to know *where* they can run and voters need to know the districts in which they can vote.

The sand in this electoral hourglass is rapidly sifting. To successfully reach federal UOCAVA deadlines without electoral catastrophe, many interlocking tasks must be completed. Louisiana election officials must comply with state and federal laws about candidacy, ballot preparation, and voter assignment, all of which require significant preparation. A key part of this preparation requires ensuring that voters are correctly assigned in the State's election database system (ERIN). App. 376-379. Only *after* voters receive are assigned in ERIN can the State begin to draft ballots. *Id.* And *before* these assignments can be made, the Secretary of State must know where the congressional district boundaries lie.

The timeline for completing these tasks becomes more compressed the longer the State's congressional districts remain unsettled. *Purcell* exists to make sure that the sand does not run out of the hourglass before all preparations necessary for a smooth election conclude. It applies here. There are hundreds of statewide and local elections running in November 2022. To hold a successful election for the November

2022 election cycle in Louisiana the following major steps must be taken:

First on June 22, 2022, all other municipal and school board redistricting plans are due to the Secretary of State for verification and coding. La. Rev. Stat. §18:465(E)(1)(a). This deadline presupposes that the statewide districting plans have already been entered in the system, and that only the municipal and school board plans remain outstanding. The Legislature's Congressional plan was already implemented in ERIN, meaning that, if the district court's preliminary injunction remains intact, a new plan must be coded. This, in turn, means that elections staff who would otherwise work on assigning voters to their assigned municipal and school board plans need to forgo those tasks to recode the new Congressional district lines. App. 376-379.

Assigning voters to their districts is complicated, time-consuming work. For example, the Legislature's Congressional plan moved only 250,000 voters, but it took weeks to implement. App. 372. In fact, elections administrators worked for a week studying the plan before any coding began. *Id.* If this Court does not stay the district court's preliminary injunction, elections administrators will have to code a different Congressional plan (while coding the municipal and school board plans) by July 13, 2022—less than a month from now. La. Rev. Stat. §18:58(B)(2). Piling on to this coding work will inevitably increase the likelihood of mistakes, which impacts ballot assignment. App. 377-379.

Second, election administrators must handle nominating petitions, qualifying, and objections to candidacy. The deadline for candidates to file by nominating petition

is now, because of the district court's preliminary injunction, July 8, 2022. The candidate qualifying period, which begins July 20 and ends July 22, 2022, has not been moved[9]. La. Rev. Stat. §18:462; 18:467; 18:468(A). This means that under the current, district-court imposed schedule, elections administrators have one week to proof assignments and make any adjustments based on inadvertent mistakes in ERIN. This makes moving the coding deadline impossible. State law affords citizens just one week to object to the candidacy of any person running for election, and they must do so by July 29, 2022. La. Rev. Stat. §18:493; 18:1405(A).

Third, election administrators must program and prepare ballots. Ballot programing must begin no later than August 1, 2022, to ensure that all ballots can be created, proofed, and printed ahead of the September 23, 2022, deadline for local registrars to receive ballots in time to mail them in accordance with federal UOCAVA deadlines. These ballots, in turn, cover hundreds of state and local elections during the November 2022 election cycle. This August 1 date comes just days after the deadlines for qualifying and objections to candidacy. The elections administration calendar is already tight; moving these deadlines back any further will likely result in an insufficient time to prepare the ballots needed for the November election cycle.[10]

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[9] The Governor's call included one thing: drawing a second majority minority map. Changing deadlines and taking any other actions, such as appropriating additional funds necessary to accomplish these Herculean tasks are not included in the call and would likely require another Extraordinary Session (with the accompanying seven-day notice before convening).

[10] These dates are calculated based on the current qualifying period running from July 20-22, 2022, and the court-ordered nominating petition deadline of July 8, 2022. Because many of the statutory deadlines run from one of these two dates, pushing

Fourth, election administrators must work to register voters and administer the November 2022 election cycle. While the election begins on September 24, 2022 for some voters under federal law, the last six weeks before the election are dedicated to registering and assisting people in exercising their right to vote. Statewide voter registration week begins on September 26, 2022. La. Rev. Stat. §18:18(A)(8)(b). This is followed shortly by the deadline to register to vote by mail or in-person (October 11, 2022), and online (October 18, 2022). La. Rev. Stat. §18:135(A)(1)&(C); La. Rev. Stat. §18:135(A)(3). Also on October 18, 2022, early voting begins under the nursing home voting program. La. Rev. Stat. §18:1333(B). Statewide early voting begins soon after on October 25, 2022. La. Rev. Stat. §18:1309

The timeframe to conduct the November 2022 election cycle was *already* extremely tight at the time the district court conducted the rushed preliminary injunction hearing. It is worse now, including merely *three weeks* to code millions of Louisianans to dozens, if not hundreds, of redistricting plans. Adding a new statewide congressional plan to these coding efforts causes rushed coding efforts likely to be riddled with mistakes, especially if the new plan splits precincts, which requires the local registrar of voters to move voters in split precincts *by hand*. App. 376-379.

This is not mere conjecture. Ms. Hadskey, Louisiana's Commissioner of Elections testified that this scenario has already occurred because of a compressed timeframe this cycle. For example, in Calcasieu Parish, late census information

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either of these dates would have a waterfall effect, impacting numerous deadlines that, in turn, decrease the time needed for ballot coding and printing, ahead of federal deadlines that cannot be moved.

caused a rushed entry of voter information and led to entry of incorrect voter information, ultimately resulting in the issuance of incorrect ballots. App. 379. As a result, a judge required state and local officials to hold a special municipal election to remedy the issue. *Id*. Thus, the undisputed evidence shows that rushing voter assignments in ERIN leads to mistakes. App. 378-379. That these issues arose in a small parish-wide election suggests catastrophe during the congressional races. A statewide special election might ensue if the election tanks, and Louisiana's failure to seat its Congressional representatives on time would not be out of the question.

Ms. Hadskey expressed this very concern in her testimony. Specifically, she testified that the issues Calcasieu Parish experienced will arise again on a much larger scale if a new congressional plan is implemented by the Court in June or July—especially since there are nineteen new registrars who have never handled decennial redistricting before. App. 379-380. She continued:

> I'm extremely concerned. I'm very concerned because when you push—when you push people to try and get something done quickly and especially people that have not done this process before, the worst thing you can hear from a voter is I'm—I'm looking at my ballot and I don't think it's right, I think I'm in the wrong district or I don't feel like I have the right races.
>
> The other thing is notifying the voters. I think we all can relate to we know who our person is that we voted for Congress or for a school board or any race; and when you get there and you realize it's not the person you are looking for, you're thinking that's who you are going to vote for and then you find out, wait, I'm in a different district. If we don't notify them in enough time and have that corrected, it causes confusion across the board, not just confusion for the voters, but also confusion for the elections administrators trying to go back and check and double check that what they have is correct.

App. 381-382.

This is precisely why *Purcell* requires a stay of the lower court's orders. The Supreme Court held in *Purcell*, "[c]ourt orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." 549 U.S. at 4-5. In similar situations, this Court has regularly issued stays.[11]

Purcell is a "bedrock tenet of election law." *Milligan*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). It stands for twin simple, unassailable propositions: "(i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle." *Id*. at 879 (Kavanaugh, J., concurring) (citing *Purcell*, 549 U.S. 1).

The lower courts transgressed these principles. Because they did, this Court should resuscitate them by issuing the stay.[12] The lower courts erred in both simply counting days until the election and comparing that count with the other cases

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[11] *See Andino v. Middleton*, 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring in grant of stay application); *Merrill**Error! Bookmark not defined.** *v. People First of Ala*., 141 S. Ct. 25 (2020); *Clarno v. People Not Politicians*, 141 S. Ct. 206 (2020); *Little v. Reclaim Idaho,* 140 S. Ct. 2616 (2020); *Republican Nat'l Comm. v. Democratic Nat'l Comm.,* 140 S. Ct. 1205 (2020) (per curiam); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (per curiam); *Veasey v. Perry*, 574 U.S. 951 (2014).

[12] Where lower courts have transgressed these principles, this Court has consistently stayed those opinions. *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers) (issuing stay in March of election year); *Gill v. Whitford*, 137 S. Ct. 2289 (2017) (issuing stay about a year and a half before the next election); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018) (stay of an order enjoining North Carolina's Congressional districts 4 months ahead of the primary election).

applying the *Purcell* doctrine. They made a faulty assumption that all state election laws and administrative burdens are equal. Under *Purcell* "the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or non-issuance of an injunction, considerations specific to election cases and its own institutional procedures." *Purcell*, 549 U.S. at 4. The lower courts did not address Louisiana-specific laws that require additional time and administrative duties beyond what is required in other states. Nor did the courts adequately grapple with the fact that a Louisiana parish has already held one special election this year because of rushed election administration, much less state-wide and ultimately harm the nation as a whole as well.

The courts simply did basic math and assumed *Purcell* did not apply. This is insufficient. Under *Purcell,* courts were required to balance the harms. The lower courts here performed no balancing that took into account that administrators are not just implementing the state Congressional plan, or a few statewide redistricting plans, but dozens, if not hundreds of municipal and school board redistricting plans too. App. 376-380. Thus, under Louisiana's election laws, the work required to administer the election is significantly more than states' where administrators may only deal with a few plans.

Take for example, *Moore v. Harper,* 142 S. Ct. 1089 (2022), where just this term this Court refused to grant relief that would change North Carolina's congressional election districts due to *Purcell.* 142 S. Ct. 1089 (Kavanaugh, J., concurring). In North Carolina the plans at issue for the State Board of Elections were statewide plans for

congressional elections, and state general assembly elections. The State Board told this Court that those three plans were needed three months before the primary for orderly implementation of the election.[13]

The situation here could not be any more different, where dozens of municipalities and school boards are also redistricting after the decennial census, with plans all due to the Secretary of State for administration in the November 2022 election cycle on June 22, 2022. La. Rev. Stat. §18:465(E)(1)(a). Logically, if a state's election administrators need three months to administer three statewide districting plans to ensure an orderly election, then it's impossible to not find that more than three months might be needed in a state like Louisiana with dozens if not hundreds of redistricting plans to implement. And, as discussed above, ballots for Louisiana's election cannot be prepared until *all* redistricting plans are implemented.

Louisiana is entitled to have state election laws that allow for municipalities and school boards to redistrict in the same year as congressional districting. Louisiana's elections officials should not be penalized for attempting to comply with their own laws that make election administration in a decennial redistricting year more difficult to administer than other states'. Because the lower courts erroneously assumed all state election laws are equal, and all state election administrators are faced with the same burdens, they failed to adequately weigh the harms under *Purcell*. As a result, this Court should stay these opinions as they are in contravention

[13] https://www.supremecourt.gov/DocketPDF/21/21-1271/215498/20220302161119617_21A455_Response.pdf pp. 9-10.

of *Purcell*. *Merrill,* 142 S. Ct. at 879-880

III. THE EQUITIES TILT DRAMATICALLY IN FAVOR OF GRANTING A STAY.

Given that Plaintiffs elected solely to bring *statutory* claims, their interests must subordinate to the *constitutional* claims of Louisiana's public. Simply put, it "is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014); *see also Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest."). And here, the constitutional rights of the entire Louisiana electorate hang in the balance. "The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification," *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). (citing *Shaw I*, 509 U.S. at 641), and the district court's preliminary-injunction order mandates a racial gerrymander. *See supra* at Section I, B. If Section 2 does *not* require creating a gerrymandered second majority-Black district, Louisiana's entire electorate suffers an irreversible Fourteenth Amendment violation when they next cast their ballots for their congressional representatives.

This Court will address an identical issue to the one here—*i.e.,* when does Section 2 of the Voting Rights Act command the creation of additional majority-minority districts. Given the public deprivation that would ensue if (1) the district court's preliminary injunction were to stay in effect, (2) the 2022 midterms were to take place with Louisiana's judicially mandated majority-minority districts and (3) soon after, this Court held that the district court's analysis perpetuated an Equal

Protection violation against every one of the State's voters, the public interest all but ensures that entering a stay is the correct approach here. Given the risk to the public that would arise without a stay, entering one far outweighs any burden Plaintiffs may claim.

CONCLUSION

From start to finish, the proceedings below have transgressed this Court's instructions—and, making matters worse, as recently as yesterday the district court threatened the House Speaker with contempt for engaging his legislative duties, which were apparently not to her satisfaction, interfering with the very legislative defense the State is owed by federal courts in this process.

Only two months ago, the Court reversed a decision from the Wisconsin Supreme Court that—as here—"embrac[ed] just the sort of uncritical majority-minority district maximization that [the Court] ha[s] expressly rejected." *Wis. Legis.*, 142 S. Ct. at 1249 (citing *De Grandy*, 512 U. S., at 1017. And four months ago, this Court stayed a district court order imposing the *precise injunction* that the district court levied in this case—*i.e.*, creation of an additional majority-minority district under the auspices of Section 2.

For all these reasons, the Petitioners request that the Court (1) immediately enter an administrative stay, (2) enter a stay pending appeal, and (3) construe this stay application as a petition for writ of certiorari before judgment, grant it, expedite it and consolidate it, or alternatively grant it and hold in abeyance pending the Court's decision in *Merrill*.

Respectfully submitted,

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