UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

PRESS ROBINSON, et al., *Plaintiffs,* v. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, *Defendant.*	Civil Action No. 3:22-cv-00211-SDD-SDJ Chief Judge Shelly D. Dick Magistrate Judge Scott D. Johnson
EDWARD GALMON, SR., et al., *Plaintiffs,* v. R. KYLE ARDOIN, in his official capacity as Secretary of State for Louisiana, *Defendant.*	Consolidated with Civil Action No. 3:22-cv-00214-SDD-SDJ

MOTION FOR THREE JUDGE PANEL
OR TO STRIKE CONSTITUTIONAL CHALLENGE
TO CONGRESSIONAL DISTRICTS

For the first time in this case, Plaintiffs have indicated that they are "challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). Because a "district court of three judges *shall* be convened" to hear such a challenge, *id.* (emphasis added), this Court must stop all proceedings, notify the Chief Judge of the Fifth Circuit to appoint a three-judge panel, and await that appointment and the determinations of the panel before proceeding further with this case. Alternatively, this Court must strike the Plaintiffs' references to any arguments concerning the constitutionality of the challenged congressional redistricting and exclude any references to such arguments, or evidence pertaining to them, at any time in this case, including at the upcoming preliminary injunction hearing.

1. Congress has provided that a district court comprising three judges, "at least one of whom shall be a circuit judge," must hear "an action . . . challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a) and (b)(1). "[T]he mandatory 'shall' . . . creates an obligation impervious to judicial discretion." *Shapiro v. McManus*, 577 U.S. 39, 43 (2015) (citation omitted). A paradigmatic example of a constitutional challenge is a racial-gerrymandering claim under the Equal Protection Clause of the Fourteenth Amendment, where challengers contend "that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (citation omitted). Where that is shown, the burden shifts to the state to establish narrow tailoring through "a 'strong basis in evidence' in support of the (race-based) choice that it has made." *Id.* at 278 (citation omitted). Where an equal-protection racial-gerrymandering claim is joined with a Section 2 Voting Rights Act (VRA) claim against congressional districts, a three-judge panel must hear both claims, even though the Section 2 challenge to congressional districts is generally viewed a statutory claim. *Thomas v. Bryant*, 919 F.3d 298, 305 n.4 (5th Cir. 2019) (discussing and endorsing *Page v. Bartels*, 248 F.3d 175 (3d Cir. 2001)).

2. Plaintiffs in this case challenge "the apportionment of congressional districts" in Louisiana. 28 U.S.C. § 2284(a). However, their complaints did not "challenge the *constitutionality*" of the congressional plan. *Id.* (emphasis added). In *Johnson v. Ardoin*, No. 18-625-SDD-EWD, 2019 WL 2329319, (M.D. La. May 31, 2019), an action brought by many of the *Galmon* Plaintiffs here, plaintiffs argued that because their challenge to Louisiana's 2011 congressional plan was brought only under Section 2 and did not assert a constitutional claim, a three-judge panel under 28 U.S.C. § 2284(a) was not appropriate, and this Court endorsed that

position. *Id.* at *2–3. Accordingly, Legislative Defendants did not previously file a motion for a three-judge panel in this case. Plaintiffs' complaints and preliminary-injunction motion relied solely on VRA Section 2. Likewise, all briefs in opposition to Plaintiffs' preliminary-injunction motions addressed Plaintiffs' VRA claims, not any constitutional challenge (since there was, at that time, no such challenge).

3. For the first time in reply, however, the *Robinson* Plaintiffs have lodged the unequivocal claim that Louisiana's one congressional district, CD2, is an unconstitutional racial gerrymander. Doc. 123 at 12 n.12. In responding to Legislative Defendants' argument that legislative discretion entails the prerogative to chose how to draw Section 2 districts, the *Robinson* Plaintiffs now argue that race predominated in the creation of CD2 and that the Louisiana Legislature lacked a strong basis in evidence in crafting CD2, and the *Robinson* Plaintiffs cite the Supreme Court's *Alabama Legislative Black Caucus* decision—which addressed racial-gerrymandering claims under the Equal Protection Clause, *not* Section 2 claims under the VRA. The full footnote is as follows:

> Moreover, the Legislative Defendants' concession that "it is unclear" whether a 58% BVAP is necessary to provide Black voters an equal opportunity to elect candidates of their choice simply highlights that they did not have the requisite "strong basis in evidence" to support their choice to pack Black voters into CD2. *See Ala. Legis. Black Caucus*, 575 U.S. at 278–79.

Doc. 123 at 12 n.12. Embedded in this assertion are two premises: (1) that race predominated in CD2 (i.e. "their choice to pack Black voters into CD2") and (2) that the Legislature has not met its narrow-tailoring burden ("they did not have the requisite 'strong basis in evidence'"). That is, in letter and spirit, a constitutional assertion challenging CD2; it is not in any respect a VRA claim. And the citation to a leading precedent interpreting the Equal Protection Clause—not VRA Section 2—removes any remaining ambiguity.

4. The absence of this assertion from the pleadings does not, on its own, prohibit the *Robinson* Plaintiffs from challenging CD2's constitutionality. "When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." Fed. R. Civ. 15(b)(2). The *Robinson* Plaintiffs' assertion can be viewed as nothing less than an effort to amend their pleadings by implication. Assuming the Court views that as procedurally proper, it is obligated to stay proceedings immediately, cancel all deadlines, write the Chief Judge of the Fifth Circuit to request a three-judge panel, and await her determination. Then, once a panel is appointed, the panel must revisit the various orders imposed in this case.

5. Alternatively, the Court must exclude every assertion to the effect that CD2 is unconstitutional, including the assertion that race predominated in its creation, that the Legislature lacked a strong basis in evidence to justify CD2, or that the Legislature even *needed* a strong basis in evidence to justify CD2. "State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944). Thus, where Plaintiffs cannot jurisdictionally obtain such a declaration, the case must proceed upon the premise that the congressional plan is constitutional. Further, courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This Court cannot proceed on the assumption that race predominated, and only a three-judge panel can rule that it in fact did predominate.[1] Because the Court cannot entertain such allegations as those the *Robinson* Plaintiffs

[1] Such an assertion is factually untenable. As Legislative Intervenors' expert has shown, CD2 is nearly identical to the prior version of the same district, and core retention is a neutral principle that defeats an allegation of racial predominance. *See, e.g.*, *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 835 F. Supp. 2d 563, 591 (N.D. Ill. 2011) (three-judge court).

have now proffered, it must strike such arguments, order Plaintiffs not to tender additional assertions of this nature, and operate on the assumption that CD2 is not a racial gerrymander.

For these reasons, the Court must either request that a three-judge panel be appointed by the Chief Judge of the Fifth Circuit or strike the *Robinson* Plaintiffs' new argument the CD2 is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 3, 2022, this document was filed electronically on the Court's electronic case filing system. Notice of the filing will be served on all counsel of record through the Court's system. Copies of the filing are available on the Court's system.

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[PROPOSED] ORDER

Upon consideration of the Legislative Intervenors' Motion for Three Judge Panel or to Strike Constitutional Challenge to Congressional Districts, and considering the grounds presented, it is hereby

ORDERED that the motion is GRANTED; and further

ORDERED that this case qualifies as a constitutional challenge to the apportionment of congressional districts within the meaning of 28 U.S.C. § 2284; and further

ORDERED that all case deadlines, hearings, and events are cancelled until further notice, pending the Court's forthcoming request to the Chief Judge of the Fifth Circuit to appoint a three-judge panel.

SO ORDERED.

This ____ day of _____ 2022.

_____
United States District Judge