Nos. 23A994 and 23A1002

In The Supreme Court of the United States

PRESS ROBINSON, *et al.*,

Applicants,

v.

PHILLIP CALLAIS, *et al.,*

Respondents.

NANCY LANDRY, SECRETARY OF STATE OF LOUISIANA, *et al.*,

Applicants,

v.

PHILLIP CALLAIS, *et al.,*

Respondents.

On Applications for Stay to the Supreme Court of the United States

RESPONSE TO EMERGENCY APPLICATIONS FOR STAY PENDING APPEAL AND FOR STAY OF INJUNCTION

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INTRODUCTION

In late January 2024, Louisiana imposed a brutal racial gerrymander, SB8, on Respondents and millions of other voters. Solely to concoct a second Black-majority district, the State dug up from the graveyard a particularly repugnant "slash" district that federal courts had buried back in the 1990s as an obvious racial gerrymander. *See, e.g.*, *Hays v. Louisiana*, 936 F. Supp. 360, 377 (W.D. La. 1996). Called "District 6," the jagged, narrow, 250-mile scar nearly slices the district of House Speaker Mike Johnson in half. Holding most of the land and 82% of the Black population from the offensive *Hays* district, this demographic barbell links Black-majority precincts in Baton Rouge and Shreveport, almost to the Texas border. In the narrow intervening space, it weaves with surgical efficiency to encircle pockets of Black voters and exclude whites and other races. *Cf. id.* ("The District thinly links minority neighborhoods of several municipalities from Shreveport in the northwest to Baton Rouge in the southeast (with intermittent stops along the way at Alexandria, Lafayette, and other municipalities), thereby artificially fusing numerous and diverse cultures, each with its unique identity, history, economy, religious preference, and other such interests.").

All of this work to link far-flung pockets of Black voting-age population ("BVAP") still yielded a district consisting of only 54% BVAP, which the record below will show doesn't actually perform as a Voting Rights Act-required district.

The map fails under *Gingles*, even had the State made an honest effort to undertake such analysis—which it did not. Direct evidence from the legislative record confirms what the naked eye and statistical analysis proves: the overwhelming factor driving District 6 was race. It was to bring BVAP over 50% and award the long-elusive second Black-majority district (out of six total districts) to a statewide Black population that is under 1/3 of the total.

"All good, right?" the State now flippantly asks. State App. at 3. It knew the answer in January 2024, and it certainly knows after a three-day trial that scrutinized the full record. It's not "all good." SB8 is morally repugnant. It's not a close call.

Respondents bring good news to this Court, however. The three-judge District Court has already found the core facts after a three-day trial on an exhaustive record. After taking additional remedial facts and map proposals in four days, the District Court is poised to end this years-long saga in no later than 21 days—over five months before the primary. With this, the *sole* court with jurisdiction under 28 U.S.C. § 2284 will have (i) remedied Respondents' Equal Protection injury, and (ii) considered (and, based on the dispersed nature of the Black population outside of New Orleans, rejected) any claim that the VRA requires a crazily-configured second Black-majority district. A single court will have finally considered both the Equal Protection Clause and VRA, entered a remedy, and resolved congressional districting for the remaining cycles in which Louisiana has six seats. And despite the

State's oddly shrill and last-minute warnings of chaos, this leaves ample time before November's primary.

STATEMENT OF THE CASE

Since the 2020 Census, the State of Louisiana has repeatedly tried and failed to enact a congressional redistricting map. Its first attempt was HB1. App. 263, App. 270. That map was the subject of a Voting Rights Act challenge in the Middle District Court of Louisiana. *Robinson v. Ardoin*, 605 F. Supp. 3d 759, 785 (M.D. La. 2022), *vacated by*, 86 F.4th 574 (5th Cir. 2023). The case was never adjudicated to a final judgment and never made it past preliminary findings. Instead, before the case could go to trial, the State took matters into its own hands by affirmatively repealing HB1 and enacting SB8 during a rapid-fire, expedited special session beginning January 15, 2024. App. 294, App. 767. The Governor signed SB8 into law on January 22, 2024. App. 294.

From beginning to end the State's purpose in enacting SB8 was clear: create two majority-Black districts where race predominates at the expense of all other criteria, not to comply with the Voting Rights Act, but to avoid the specific litigation in the Middle District of Louisiana.[1] The State did this by creating a second majority-Black district that stretched in a narrow slash mark 250 miles along the I-49 corridor

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[1] Shortly after the repeal of HB1, the Middle District Court of Louisiana recognized that the State's independent repeal of HB1 rendered the case before it moot. App. 1621.

from the high Black population in Southeastern Baton Rouge to the next highest Black population in Northwestern Shreveport, carefully carving in pockets of Black voters and excluding other voters along the way. App. 1094-1096; App. 1458, 1462. This slash district is akin to the unconstitutional slash districts seen by this Court three decades ago in the seminal case *Shaw v. Reno*, 509 U.S. 630 (1993), and in Louisiana's own prior attempt to create two majority-Black districts in *United States v. Hays*, 515 U.S. 737 (1995).

Mere days after SB8 was enacted, a group of twelve Louisiana voters from across the State ("Plaintiffs" or "Respondents") filed the present lawsuit, *Callais v. Landry*, seeking declaratory and injunctive relief against SB8 as a violation of their rights under the Fourteenth Amendment of the U.S. Constitution. App. 1. Respondents requested a three-judge panel pursuant to 28 U.S.C. § 2284. App. 1. On February 2, 2024, the Chief Judge of the Fifth Circuit Court of Appeals issued an Order Constituting the Three-Judge Court pursuant to 28 U.S.C. § 2284. App. 33. On February 17, 2024, Respondents filed a Motion for Preliminary Injunction. App. 34.

Meanwhile the Robinson plaintiffs who had brought a VRA challenge to the now-repealed HB1 before a single judge in the Middle District of Louisiana moved to intervene in this Fourteenth Amendment challenge to SB8 pending before the three-judge court in the Western District of Louisiana. App. 79, App. 83. They

simultaneously moved to transfer the case to the Middle District. App. 79, App. 83. Upon realizing the futility of the Motion to Transfer the case to the single-judge court that had no jurisdiction, the Robinson Applicants withdrew their Motion to Transfer. App. 140. The Middle District later agreed when it dismissed the *Robinson* case as moot and recognized that it lacked statutory authority under 28 U.S.C. § 2284 to hear the Fourteenth Amendment claim proceeding before the three-judge court in the Western District of Louisiana. App. 1621. The Western District only allowed Robinson Applicants to *permissively* intervene as defendants. App. 1435.

The Western District proceeded with expedition and scheduled a three-day trial to be held from April 8 to April 10, 2024. App. 1436. Nonetheless, at 7:30 p.m. on Saturday, April 6, 2024, as counsel and witnesses had begun travel for trial on Monday, April 8, 2024, the Robinson Applicants tried to cause undue delay and filed a Motion for Continuance or, in the Alternative, to Deconsolidate Preliminary Injunction Hearing from the Merits Trial. App. 242, App. 247. The District Court recognized this strategy as entirely inappropriate on the eve of trial and a threat to the expedited schedule requested by both Respondents and the State "to ensure that there was certainty in the election map" in advance of the November 2024 election and to protect the "substantial public interest of the citizens of Louisiana." App. 798

At trial, the parties, including Respondents, the Secretary of State, the State, and Robinson Applicants, collectively introduced thirteen (13) witnesses and one

hundred ten (110) exhibits. App. 1436. The District Court carefully examined all the evidence before it, including the entire legislative record. App. 1430. On April 30, 2024, in a 60-page opinion analyzing the law and comprehensive record, the District Court ultimately concluded that SB8 was an unconstitutional racial gerrymander and prohibited the State "from using SB8's map of congressional districts for any election." App. 1436. But the District Court recognized that its task was not complete and trial was not over. It ordered all parties to appear at a status conference on May 6, 2024 to "discuss the remedial stage of this trial," App. 1478-1479. The day after that conference, the District Court entered an "expedited schedule for the remedial phase of the case," which is currently underway. App. 1588. Under the District Court's expedited timeline, all party briefing, presentation of evidence, and argument will end by May 30, 2024, and the District Court will issue a remedial map by June 4, 2024, unless the Louisiana Legislature exercises its prerogative to enact a new map in the interim. App. 1590-1591. The parties are currently hard at work in proposing remedial maps, drafting briefs, and compiling supporting evidence in advance of the District Court's deadline for all proposed remedial maps on May 17, 2024. App. 1590-1591.

ARGUMENT

I. Legal Standard

This Court, like every other federal court, is "guided" by the same "sound . . . principles" regarding stays pending appeal. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks omitted); *see also Trump v. Int'l Refugee Assistance Proj.*, 582 U.S. 571, 580 (2017) (per curiam); *id*. at 584 (Thomas, J., concurring in part and dissenting in part). The grant of a stay pending appeal is "extraordinary relief," and the party requesting a stay bears a "heavy burden." *Winson—Salem/Forsyth Cnty. Bd. Of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, Circuit Justice).

In determining whether to grant a stay pending appeal, the Court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434.

The first two factors of the test outlined above "are the most critical." *Id*. A party seeking a stay pending appeal "will have greater difficulty demonstrating a likelihood of success on the merits" than one seeking a preliminary injunction because there is "a reduced probability of error" in a decision based upon complete

factual findings and legal research. *Mich. Coal. of Radioactive Material Users, Inc. v. Greipentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

The moving party, moreover, is required to show something more than "a mere possibility" of success on the merits; more than speculation and the hope of success is required. *Nken*, 556 U.S. at 434 (internal quotations omitted).

Moreover, this Court retains discretion to deny a stay even if an applicant meets this high burden:

> A stay is not a matter of right, even if irreparable injury might otherwise result." *Virginian R. Co.*, 272 U. S., at 672. It is instead "an exercise of judicial discretion," and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Id.*, at 672–673. . . . The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.

Nken, 556 U.S. at 434 (citation omitted). This rule persists "even if irreparable injury might otherwise result." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). A district court's "decree creates a strong presumption of its own correctness," which counsels against a stay. *Id*. at 673. On direct appeals from three-judge courts, this Court "weigh[s] heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim." *Graves v. Barnes*, 405 U.S. 1201, 1203-04 (1972) (Powell, J., in chambers).

But the Court need not even reach the question of whether to exercise such discretion because Applicants have not satisfied their heavy burden to meet the *Nken* factors to warrant this extraordinary relief. They cannot show that they are likely to prevail on the merits, and their application should be denied for this reason alone. Additionally, the certain injury that the panel found Respondents and the public will suffer if the preliminary injunction is stayed far outweighs any administrative hardship involved in holding the November 2024 election, over five months away, under a new, constitutional districting plan.

II. This Court should deny the Robinson Applicants' Application for a Stay, as they are permissive intervenors and cannot appeal the Order.

As a preliminary matter, Robinson Applicants, while allowed to permissively intervene, did not have Article III standing in the action below and, likewise, lack standing to appeal or seek a stay of the District Court's order. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013).

In light of the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (footnote omitted).

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an "actual controversy" persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 726 (2013) (internal quotation marks omitted). That means that standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). In the case of intervening parties, an "intervenor cannot step into the shoes of the original party . . . unless the intervenor independently fulfills the requirements of Article III." *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) (internal quotations omitted). This Court "cannot decide the merits of this case unless the [party] challenging the District Court's racial-gerrymandering decision have standing." *Id.*

This Court must therefore decide whether the Robinson Applicants have standing to appeal the District Court's order before considering their Application for a Stay. This Court has made clear that it is the burden of the party invoking federal jurisdiction to establish that he has standing. *Wittman*, 136 S. Ct. at 1737. In the face of this burden, the Robinson Applicants have made no mention of their standing to appeal this case much less put forth evidence to establish standing. Notably, the Robinson Applicants were on notice that Respondents were going to challenge their standing to appeal because Respondents included this very argument in their

Response in Opposition to Robinson Intervenors' Motion to Stay Pending Appeal. App. 1576. Applicants' neglect to address this threshold issue should tell this Court all it needs to know.

To have standing, a litigant must seek relief for an injury that affects him in a "personal and individual way." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). He must possess a "direct stake in the outcome" of the case. *Arizonans for Official English*, 520 U.S. at 64 (internal quotation marks omitted). Here, however, the Robinson Applicants have no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed is to vindicate their preference of a generally applicable Louisiana law (SB8).

Hollingsworth is dispositive. There, two couples challenged California's Proposition 8, which prohibited same-sex couples from marrying. *Id*. at 702. They sued state officials responsible for enforcing the law, but "[t]hose officials refused to defend the law." *Id*. And so "[t]he District Court allowed petitioners—the official proponents of the initiative—to intervene to defend it." *Id*. (citation omitted). Following trial, the district court declared Proposition 8 unconstitutional and enjoined its enforcement. *Id*. at 706. After the district court's judgment, intervenors sought to continue their defense via an appeal. *Id*. But this Court dismissed the intervenors' appeal, holding that they lacked standing to challenge the injunction enjoining state officials from enforcing Proposition 8. *Id*. at 715.

As this Court explained, "standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Id*. at 705 (internal quotation marks omitted). The district court's order only "enjoined the state officials named as defendants from enforcing" Proposition 8, but did "not order[]" intervenors "to do or refrain from doing anything." *Id*. Thus, intervenors "had no direct stake in the outcome of their appeal." *Id*. at 705-06 (internal quotation marks omitted). The Court likewise rejected intervenors' effort to claim standing on behalf of California, explaining that initiative sponsors had no authority under state law to represent the state in court, and had "participated in this litigation solely as private parties." *Id*. at 710 (distinguishing *Karcher v. May*, 484 U.S. 72 (1987)).

This Court reached a similar result in *Bethune-Hill v. Virginia House of Delegates*, holding that the Virginia House of Delegates, which had previously intervened and defended legislative redistricting, lacked standing to appeal after Virginia's Attorney General declined to do so. 139 S. Ct. at 1951. The Court reasoned that the House had "no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." *Id*. at 1950.

What was true for the initiative sponsors in *Hollingsworth* and the Virginia House of Delegates in *Bethune-Hill* is even more true for the intervenors in this case. They "have no role—special or otherwise—in the enforcement of [SB8]. They therefore have no 'personal stake' in defending its enforcement that is

distinguishable from the general interest of every citizen of" Louisiana. *Hollingsworth*, 570 U.S. at 707 (quoting *Lujan*, 504 U.S. at 560-61) (citation omitted). Robinson Applicants' participation in the *Robinson* litigation and testimony before the Louisiana Legislature does not give them the right to enforce the law nor does it give them a particularized grievance. *Id*. at 706-07; *id*. at 707 ("No matter how deeply committed petitioners may be to upholding [the state law] or how 'zealous [their] advocacy,' *post*, at 2669 (Kennedy, J., dissenting), that is not a 'particularized' interest sufficient to create a case or controversy under Article III."). Most obviously, the District Court's Order only enjoined the State of Louisiana, prohibiting it "from using SB8's map of congressional districts for any election." App. 1478. The Order did not, of course, direct the Robinson Applicants to do anything. Accordingly, this Court lacks jurisdiction to decide the Robinson Applicants' Motion to Stay Pending Appeal.

III. Applicants have not made a strong showing of likely success on the merits.

A. The District Court was correct—and did not clearly err—in finding overwhelming evidence that race predominated in the Legislature's drawing of SB8.

While this Court retains full power to correct a court's errors of law, "a court's findings of fact—*most notably, as to whether racial considerations predominated in drawing district lines*—are subject to review only for clear error." *Cooper v. Harris*, 581 U.S. 285, 293 (2017) (emphasis added). Under that standard, this Court "may

not reverse just because [it] 'would have decided the [matter] differently." *Id*. (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Id*. Thus, as long as the District Court's finding that race predominated in the Legislature's drawing of SB8 is *plausible*, this Court may not reverse that finding. Here, the evidence overwhelmingly meets this low burden. The direct and circumstantial evidence all indicates that "'[r]ace was the criterion that, in the State's view, could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made.'" *Bethune-Hill v. Va. State Bd. of Elecs*., 580 U.S. 178, 189 (2017) (quoting *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*)). Applicants concede as much.

During the three-day trial, the District Court heard copious testimony from legislators, experts, and lay witnesses regarding SB8. Collectively, the parties introduced thirteen (13) witnesses and one hundred ten (110) exhibits. Respondents and the State played for the District Court official audio and video recordings of the legislative hearings leading up to the enactment of SB8, and the District Court reviewed the entire legislative record. App. 1430. This direct evidence speaks for itself:

- Representative Lyons, Chairman of the House and Governmental Affairs Committee: "[T]he mission we have here is that we have to create two majority-Black districts." App. 753;

- Senator Womack: "… we all know why we're here. We were ordered to – to draw a new Black district, and that's what I've done." App. 756;
- Representative Amedee: "Is this bill intended to create another black district?" SB8 Sponsor Representative Beaullieu: "Yes, ma'am, and to comply with the judge's order." App. 760;
- Representative Carlson: "[T]he overarching argument that I've heard from nearly everyone over the last four days has been race first … race seems to be, at least based on the conversations, the driving force…." JE31, 97:17-19, 21-24.
- SB8 author and sponsor, Senator Womack: "[W]e had to draw two majority minority districts." App. 744; App. 1430;
- Senator Womack, also explicitly admitted that creating two majority-Black districts was "the reason why District 2 is drawn around the Orleans Parish and why District 6 includes the Black population of East Baton Rouge Parish and travels up the I-49 corridor to include Black population in Shreveport." App. 750;
- Senator Womack: "[W]e all know why we're here. We were ordered to draw a new black district, and that's what I've done." App. 417; App. 1430;
- Senator Morris: "It looks to me we primarily considered race." App. 467; App. 1431.

Plain and simple, race as the first criterion the Legislature considered, and it was the criterion that could not be compromised. *Bethune-Hill*, 580 U.S. at 189.

The District Court also heard live testimony from four Louisiana legislators. Senator Alan Seabaugh testified that the "only reason" the Legislature drew a new districting map is because "Judge Dick [said] that she—if we didn't draw the second majority minority district, she was going to." App. 937-938. When asked if having a second majority-Black district was the one thing that could not be compromised in the plans being considered, Senator Seabaugh testified "that's why we were there." *Id.* at App. 840.

Likewise, Senator Thomas Pressly testified that during the Special Session, "the racial component in making sure that we had two performing African American districts was the fundamental tenet that we were looking at. Everything else was secondary to that discussion." App. 859. Both Senators Seabaugh and Pressly testified that they believed HB1, the map the Louisiana Legislature enacted in 2022 should be retained. App. 842; App. 867.

The District Court also heard from Representative Mandie Landry and Senator Royce Duplessis who indicated they understood the reason for the Special Session was to put an end to the litigation and adopt a map that was compliant with the Middle District's order. App. 1309; App. 1158. Notably, even Applicants' witness, Senator Duplessis, testified that he was very proud of the passage of SB8 because:

> It was always very clear that a map with two majority black districts was the right thing. It wasn't the only thing, *but it was a major component to why were sent there to redraw a map.*

App. 1320 (emphasis added).

The District Court also acknowledged that the record includes evidence that race-neutral considerations factored into the Legislature's decisions, such as the protection of incumbent representatives. App. 1462; *see* App. 697; App. 861, App. 869; *Id.* at App. 850-851.

The District Court also heard the testimony of four expert witnesses regarding circumstantial evidence of racial predominance—two from Respondents and two from the Robinson Applicants. Importantly, the Robinson Applicants' experts did not purport to put on their own evidence, instead solely rebutting Respondents' experts.

First, Dr. Stephen Voss, an expert in racial gerrymandering, compactness, and simulations, testified that District 6 was drawn specifically to contain heavily Black-populated portions of cities and exclude more white-populated areas in the neighboring districts. App. 886; App. 721; App. 722. Dr. Voss began his testimony by comparing the districts created by SB8 to past enacted congressional maps in Louisiana and other proposals that the Legislature considered during the Special Session. App. 887-888. Dr. Voss also testified that, compared to other maps proposed during the Special Session and other past congressional maps, SB8 split more parishes, and that those splits affected more voters than other real-life maps. App. 897.

Regarding compactness, Dr. Voss testified that SB8 did not produce compact maps when judged in comparison to other real-life congressional maps of Louisiana, and SB8's majority-black districts were especially non-compact compared to other plans that also included two majority-minority districts. App. 896, 897. Notably, Dr. Voss testified that neither the goal of protecting Representative Letlow's district, nor

the alleged goal of targeting Representative Graves, would have been difficult to accomplish while still retaining compact districts. App. 900.

Dr. Voss also compared simulated congressional maps to SB8 in order to analyze the decision the Legislature made during the redistricting process and testified that none of those simulations produced a map with two Democratic districts. App. 928. On that basis, Dr. Voss testified that the non-compact features of SB8 are predominantly explained by racial considerations. App. 929.

The Robinson Applicants put on Dr. Cory McCartan to rebut Dr. Voss's testimony. Dr. McCartan primarily criticized Dr. Voss's use of simulations, but in the end, the District Court found:

> Though Dr. McCartan provided some insight into the uses of simulations in detecting the presence of racial gerrymandering, his testimony indicated that his own team had performed simulations under conditions not unlike Dr. Voss's, and with conclusions that supported Dr. Voss. Dr. McCartan's other criticisms of Dr. Voss were either not well-founded or rebutted.

App. 1447.

Michael Hefner also testified for Respondents as an expert demographer. App. 1060; App. 1061. Mr. Hefner testified that the Black population in Louisiana is highly dispersed across the state and is concentrated in specific urban areas, including New Orleans, Baton Rouge, Alexandria, Lafayette, and Shreveport. App. 1071; App. 1073-1075; App. 1129-1130. Using a heat map he created based on data representing the BVAP across the state, Mr. Hefner testified that it is impossible to

draw a second majority-minority congressional district without violating traditional redistricting criteria. App. 1072-1073.

Specifically, Mr. Hefner echoed the testimony of Dr. Voss, stating that SB8's compactness scores are so low that it is almost not compact at all. App. 1092-1093. Mr. Hefner also testified that District 6 is not reasonably compact, App. 1094; its shape is awkward and bizarre, *Id.* at App. 1094-1095; it is extremely narrow at points, *Id.* at App. 1095-1096; its contiguity is tenuous, *Id.* at App. 1083; and it splits many parishes and municipalities, including four of the largest parishes in the State (Caddo, Rapides, Lafayette, and East Baton Rouge), each of which are communities of interest. *Id.* at App. 1085. Considering these elements of SB8, Mr. Hefner testified that race predominated in the drafting of SB8. App. 1061; App. 1062.

The District Court, after considering copious factual evidence, found that the Legislature predominately relied upon race in drawing SB8. App. 1460. The District Court also found that though political factors may have also been at play in the Legislature's decisions, those goals did not require the Legislature to increase the BVAP of District 6 to over 50 percent. App. 1464.

Regarding the circumstantial evidence, the District Court found that the evidence "[told] the true story – that race was the predominate factor driving decisions made by the State in drawing the contours of District 6. This evidence shows that the unusual shape of the district reflects an effort to incorporate as much

of the dispersed Black population as was necessary to create a majority-Black district." App. 1460.

The District Court's lengthy 60-page, exhaustive Opinion speaks for itself. Indeed, the District Court's Opinion was a simple and straightforward application of the law to the facts. Given the copious evidence of racial predominance, the District Court's findings are more than "plausible." *Anderson*, 470 U.S. at 573.

Still, Applicants attempt to assign error, arguing that while the Legislature was conscious of race, race did not predominate. *Robinson* Application, at 31;[2] State Application, at 30. As this Court has recognized, race consciousness can quickly become predominance, given that the "moral imperative of racial neutrality is the driving force of the Equal Protection Clause." *Bartlett v. Strickland*, 556 U.S. 1, 21-22 (2009) (plurality) (quoting *Richmond v. J.A. Croson Co*., 488 U.S. 469, 518, 519 (1989) (Kennedy, J., concurring in part and concurring in judgment)). Here, racial predominance, not mere consciousness, was clear. The District Court properly

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[2] It must be noted that the Robinson Applicants' argument on this point fails before it gets off the ground. Namely, Applicants admit that all other considerations flowed from the Legislature's decision draw two majority-minority districts:

> The Legislature was not creating a new map in a vacuum; it was creating it in response to multiple federal court decisions requiring a second majority-Black district. How it went about that task—***once it accepted it had to***—was driven by politics.

Robinson Application, at 42 (emphasis added). Here, Applicants plainly concede that any of the Legislature's alleged political interests came into play only *after* its decision to create a second majority-Black district. This is racial predominance. *Bethune-Hill*, 580 U.S. at 189.

weighed the mountain of evidence of racial predominance and determined that the State veered far into unconstitutional territory. App. 1453 ("Race consciousness, on its own, does not make a district an unconstitutional racial gerrymander or an act of impermissible race discrimination."); *id*. App. 1454-1464 (analyzing facts and reaching the unavoidable conclusion of racial predominance).

Robinson Applicants wrongly rely on *Robinson* and legislative remarks about that case as showing mere race consciousness. "[R]ace-based redistricting, even that done for remedial purposes, is subject to strict scrutiny" *because it shows* racial predominance. *Clark v. Calhoun County, Miss*., 88 F.3d 1393, 1405 (5th Cir. 1996); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) ("Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it 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."). The State's *motives* for racial gerrymandering have no bearing on the racial predominance analysis. Even had the State truly thought it had violated the VRA and desired to comply, its action would still be subject to strict scrutiny. *Clark*, 88 F.3d at 1407.

Regardless, this gripe applies to just one source of evidence of racial predominance (*i.e.*, legislators' remarks about *Robinson*). Applicants' passing scowl

at an anthill ignores the remaining mountain of direct and circumstantial evidence of racial predominance. Nor does it meet their burden to make a strong showing of likely success on the merits. *Nken*, 556 U.S. at 434.

B. The District Court correctly concluded that the State did not satisfy strict scrutiny.

After the District Court correctly concluded that race predominated in SB8, the District Court analyzed whether the State could satisfy its burden of proof to show that "its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." App. 1452 (quoting *Cooper*, 581 U.S. at 285 (citing *Bethune-Hill*, 580 U.S. at 193)). The District Court looked to all the evidence presented at trial and rightly determined that the State had not met this burden. App. 1466-1467. This result was correct for several reasons.

1. Compliance with the VRA was not a compelling interest on this record.

To create an alleged remedial district to comply with the VRA, the Legislature must first determine that there is a VRA violation and that the newly created district will remedy that violation. *Cooper v. Harris*, 581 U.S. 285, 306 (2017); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 916 (1996). Once the State makes this determination that the VRA demands such race-based districting, it does have some "breathing room" to comply with the VRA. *Cooper*, 581 U.S. at 293 (quoting *Bethune-Hill*, 580 U.S. at 196). But any leeway or breathing room afforded to the State "does not allow a

State to adopt a racial gerrymander that the State does not, at the time of imposition, 'judg[e] necessary under a proper interpretation of the VRA.'" *Wis. Legislature v. Wis. Elecs. Comm'n*, 595 U.S. 398, 404 (2022) (per curiam) (quoting *Cooper*, 581 U.S. at 406).

There is no evidence that the Legislature found that there was a VRA violation and concluded, at the time of enactment, that SB8's second majority-Black district, District 6, was necessary to remedy that violation. *Id*. The State's avid defense of HB1 as VRA compliant, even though it only had one majority-Black district, proves the opposite. App. 177. Any breathing room for the State's egregious racial gerrymander was abandoned long ago. *Wis. Legislature*, 595 U.S. at 404.

Instead, the State readily admitted at trial that its real interest arose from its desire to avoid litigation in *Robinson*, not to ensure compliance with the VRA. App. 815-816; App. 1414. The District Court in this case reached the same conclusion based on the record before it: "legislators chose to draw a map with a second majority-Black district in order to avoid a trial on the merits in the *Robinson* litigation." App. 1461; *see also* App. 1460 ("The record includes audio and video recordings, as well as transcripts, of statements made by key political figures such as the Governor of Louisiana, the Louisiana Attorney General, and Louisiana legislators, all of whom expressed that the primary purpose guiding SB8 was to create a second majority-Black district due to the *Robinson* litigation."). But the

State does not have a compelling interest in avoiding litigation to satisfy strict scrutiny's demanding standard.

The State tries to blame everyone else for its independently enacted unconstitutional racial gerrymander—beginning with the Middle District of Louisiana.[3] The State repeatedly argues that it was between a rock and a hard place—the rock being the court "order" to draw SB8 and the hard place being the State's unwavering belief that its original redistricting map, HB1, was VRA compliant. But the State's attempt to re-write history ignores what actually happened in the *Robinson* litigation. There, the Middle District held a preliminary injunction hearing on a VRA challenge to HB1 and concluded that plaintiffs were "likely" to succeed on the merits. *Robinson I*, 605 F. Supp. 3d at 766. The Middle District never reached a final decision on whether the VRA actually required a second majority-Black district in the State—much less on whether District 6 stretching from the Northwest to Southeast corners of the State could remedy any alleged violation. *Id*. In fact, unlike the present case, no court ever made it past this preliminary stage to a final order on the merits. And unlike the present case, no map even resembling SB8 or any potential VRA violation in Northwest Louisiana was ever discussed. Throughout its opinion, the Middle District reiterated the failure of the State to meaningfully

[3] The State also holds no punches in airing its grievances against Respondents, Robinson Applicants, the Western District of Louisiana, and even the Supreme Court itself, when all the while the State is in a mess of its own making.

contest, challenge, or even present evidence in response to plaintiffs' evidence. *Id.* at 823. When the case went to the Fifth Circuit Court of Appeals on an application for stay, the panel cautioned: "The Plaintiffs have prevailed at this preliminary stage given the record as the parties have developed it and the arguments presented (and not presented). But they have much to prove when the merits are ultimately decided." *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022) (*Robinson II*). It also emphasized that "the State put all their eggs" in one basket, which proved to be a strategic misstep. *Id*. at 217. The Fifth Circuit reiterated its wariness after concluding the district court had erred in its compactness analysis. *Id*. at 222. And again, on its merits review of the preliminary injunction finding, the Fifth Circuit emphasized the limited nature of its clear error review, the State's failure to present evidence or meaningfully refute the plaintiffs' evidence, and the lack of a trial on the merits. *Robinson v. Ardoin*, 86 F.4th 574, 592 (5th Cir. 2023) (*Robinson III*). The Fifth Circuit also determined that the Supreme Court's decision in *Allen v. Milligan* "largely rejected" the "State's initial approach." *Id*. The Fifth Circuit reminded the State that its failure to address the VRA issues during the preliminary injunction stage did not bind it in subsequent proceedings and at trial. *Id*. The Fifth Circuit never ordered the State to create two majority-Black districts, and it vacated any order that may have been imposed by the Middle District. *Id*. at 602. There was no court order or mandate to enact SB8 or even repeal HB1 in January 2024. There was

no rock or pressure from any court. The State's sweeping gesture to this litigation to satisfy strict scrutiny is, at best, a paper tiger.

The irony is the State demands breathing room to racially gerrymander now, when all the while, that breathing room was available to the State in the *Robinson* litigation, where the courts repeatedly invited and practically begged the State to put on a full, actual defense of HB1. But the State shirked the chance and instead used the litigation as an excuse to strategically and unlawfully sort its voters based on race. Why after years of litigation would it abandon HB1 so readily? The State's real fear was not a violation of the VRA but an unfavorable outcome from the *Robinson* litigation. Maybe the State's desire to end litigation deserves sympathy. But it doesn't deserve breathing room.

And even if properly invoked by the State in this litigation, the VRA is a mere "post-hoc justification[]" by the State to avoid liability and litigation once again rather than an actual consideration of the Legislature at the time of enactment. *Bethune-Hill*, 580 U.S. at 190; *Wis. Legislature*, 595 U.S. at 404. The State's failure to claim the VRA as the real reason behind this unlawful racial gerrymandering dooms its case.

2. Even if the State did believe the VRA required this district, SB8's districts were not narrowly tailored to advance that interest.

Second, the District Court rightly determined that even if the State properly invoked the VRA, it did not meet its demanding burden to show that the alleged remedial plan—SB8—was narrowly tailored to comply with that interest.

Narrow tailoring is a narrow constitutional needle to thread. First, the State must present a "strong basis in evidence" for believing that the VRA "required" such racial sorting. *LULAC v. Perry*, 548 U.S. 399, 426 (2006). Mere belief that "the VRA might support race-based districting—not that the statute required it" is insufficient. *Wis. Legislature*, 595 U.S. at 403. In other words, the State must have good reasons to believe the VRA "demanded such steps." *Id*. (quoting *Cooper*, 581 U.S. at 301). Timing also matters. The State "that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'" *Id*. at 404 (quoting *Shaw II*, 517 U.S. at 910) (emphasis added). This requires—at minimum—a "strong showing of a pre-enactment analysis with justifiable conclusions." *Abbott v. Perez*, 585 U.S. 579, 621 (2018). That inquiry begins and ends with the factors elucidated in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The State must "carefully evaluate" whether the *Gingles* preconditions are met based on "evidence at the district level"; it cannot reduce the *Gingles* totality-of-circumstances analysis to a "single factor," like

proportionality. *Wis. Legislature*, 595 U.S. at 404-405. The State may not "improperly rel[y] on generalizations to reach the conclusion that the preconditions were satisfied." *Id*. at 404. Rather, the "relevant" question is a "local" one—*i.e*. "whether the preconditions would be satisfied as to each district." *Id*. (quotation omitted). The State must "carefully evaluate" whether each *Gingles* precondition and the totality-of-circumstances are met for each of the remedial districts based on "evidence at the district level." *Id.* at 404-05; *see also Cooper*, 581 U.S. at 302; *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality); *Gingles*, 478 U.S. at 79.

Importantly, the State cannot outsource this inquiry by relying on third-party analysis, whether that is a non-final judicial factfinding at an expedited hearing or a well-supported letter after months of analysis by experts at the U.S. Department of Justice Civil Rights Division, Voting Section. *Shaw II*, 517 U.S. at 918 (DOJ letter insufficient; State made a factual showing); *Miller v. Johnson*, 515 U.S. 900, 923-24 (1995) (same); *Hays v. State of La*., 936 F. Supp. 360, 372 (W.D. La. 1996) (same).

And still, that is not enough. Even if the State has a strong basis in evidence to believe there is a VRA violation somewhere, the State may not create a majority-Black district just anywhere. *LULAC*, 548 U.S. at 431; *Bush*, 517 U.S. at 979; *Shaw II*, 517 U.S. at 916-17. Rather, an intentionally created majority-Black district must remedy the alleged wrong. *Shaw II*, 517 U.S. at 916-17. After all, the *Gingles*

question is a local one. *Wis. Legislature*, 595 U.S. at 404. And a remedial district that does not contain a "geographically compact" population cannot satisfy *Gingles* 1 or satisfy strict scrutiny. *Id*. at 916; *LULAC*, 548 U.S. at 430-31; *Shaw II*, 517 U.S. at 916 (holding that unless "the district contains a 'geographically compact' population" of the racial group, "where that district sits, 'there neither has been a wrong nor can be a remedy'" (quoting *Growe v. Emison*, 507 U.S. 25, 41 (1993))); *LULAC*, 548 U.S. at 430-31 ("A State cannot remedy a § 2 violation through the creation of a noncompact district.").

Finally, traditional redistricting principles matter here too. A state legislature must always satisfy traditional redistricting principles to comply with the VRA. *Allen v. Milligan*, 599 U.S. 1, 30 (2023); *LULAC*, 548 U.S. at 431; *Bush*, 517 U.S. at 979. Thus, some earlier law's purported VRA noncompliance cannot justify a new, non-compact district. *Bush*, 517 U.S. at 979.

States do have "leeway" and breathing room, but the leeway afforded States only allows for "reasonable compliance measures" once the State meets each of these requirements. *Cooper*, 581 U.S. at 293; *Wis. Legislature*, 595 U.S. at 404. And courts must always keep in mind that "[s]trict scrutiny remains, nonetheless, strict." *Bush*, 517 U.S. at 978. The State may not forgo this requisite pre-enactment analysis of the *Gingles* factors or enact an unconstitutional map. *Cooper*, 581 U.S. at 293;

Wis. Legislature, 595 U.S. at 404. As the District Court correctly determined, the State did not meet those requirements.

3. The District Court correctly applied the *Gingles* standard.

First, the District Court correctly applied the *Gingles* standard in concluding that the State could not show a strong basis in evidence. *See Wis. Legislature*, 595 U.S. at 403; *Cooper*, 581 U.S. at 302; *Bush*, 517 U.S. at 978. *Gingles* is not just a guidepost for VRA claims; *Gingles* is *the* standard to measure the State's purported strong basis in evidence for believing the VRA demanded a remedial district for purposes of Fourteenth Amendment claims. *Wis. Legislature*, 595 U.S. at 401-02; *see also Cooper*, 581 U.S. at 302 ("If a State has good reason to think that all the "*Gingles* preconditions" are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. *See Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality opinion). But if not, then not."); *id*. at 306 ("But this Court has made clear that unless each of the three *Gingles* prerequisites is established, 'there neither has been a wrong nor can be a remedy.'" (quoting *Growe v. Emison*, 507 U.S. 25, 41 (1993))). The State concededly failed to conduct such an analysis and adduce such evidence. Instead, it improperly drew the gerrymandered district based on generalizations. *Wis. Legislature*, 595 U.S. at 404.

Specifically, the District Court determined, and the record reflects, that the State failed to present sufficient evidence to show that District 6 satisfies the first

Gingles factor—*i.e*. the minority group is sufficiently numerous and geographically compact to constitute a majority in a reasonably configured district. App. 1471. The District Court, in its fact-finding capacity based on the record before it, found that, "outside of southeast Louisiana, the State's Black population is dispersed," and that SB8's District 6, in its attempt to unite the dispersed Black population, was a "a 'bizarre' 250-mile-long slash-shaped district that functions as a majority-minority district only because it severs and absorbs majority-minority neighborhoods from cities and parishes all the way from Baton Rouge to Shreveport." App. 1471. Not even Robinson Applicants (who lack standing to bring this application), in their attempt to put on a VRA case for the first time in front of this Court, argue that District 6 complied with the first *Gingles* factor. Accordingly, since the State did not present evidence to even show attempted compliance with this threshold *Gingles* requirement, its racially gerrymandered map cannot survive strict scrutiny. *Wis. Legislature*, 595 U.S. at 404-405.

4. SB8 does not comply with traditional districting principles.

Additionally, the District Court properly weighed traditional redistricting principles as part of this inquiry. A state legislature must always satisfy traditional redistricting principles to comply with the VRA. *Allen*, 599 U.S. at 30; *LULAC*, 548 U.S. at 431; *Bush*, 517 U.S. at 979. Thus, the State cannot show a district is narrowly tailored to comply with the VRA when the State's alleged remedial district directly

flouts traditional redistricting criteria. *Bush*, 517 U.S. at 979. The District Court weighed the evidence of District 6's compliance with traditional redistricting principles presented at trial and properly concluded that District 6 did not comply. **App. 1471-1478**. Based on this evidence, and the evidence that the Legislature did not have good reasons to believe that SB8 remedied any alleged VRA violation under *Gingles*, the District Court rightly enjoined SB8's map from use in any election.

5. The *Robinson* litigation is no substitute for a strong basis in evidence.

In response to all this evidence, Applicants argue, nonetheless, that *Robinson v. Ardoin* provided the strong basis in evidence for the Legislature to conclude that District 6 was narrowly tailored to comply with the VRA. But this argument fails for several reasons.

First, Applicants failed to present any evidence or citations to the *Robinson* record at trial. Applicants refused to identify or cite any specific part of the record from the *Robinson* litigation that was relevant in the legislative process. Their sweeping gesture in the direction of the *Robinson* litigation, writ large, does not satisfy strict scrutiny. *Wis. Legislature*, 595 U.S. at 404 ("Rather than carefully evaluating evidence at the district level, the court improperly relied on generalizations to reach the conclusion that the [*Gingles*] preconditions were satisfied.").

Second, Applicants' failure to satisfy their burden is their fault alone. Even though they collectively had eight hours to present their case, App. 191, they did not use all their allocated time. After a couple of failed attempts to import the entire record from *Robinson* without laying any foundation, App. 893-902, App. 959-965, Applicants gave up on admitting the record. The fact that the record does not weigh in their favor is not a gripe they can now raise with this Court.

Moreover, even if Applicants had properly presented evidence from the *Robinson* litigation, any reliance on that litigation as the necessary strong basis in evidence to enact SB8 is misguided. As an initial matter, the mere existence of the *Robinson* litigation alone does not provide a strong basis in evidence. *Shaw II*, 517 U.S. at 918; *Miller*, 515 U.S. at 923-24. Such reliance is nothing more than an "error of law" that cannot satisfy strict scrutiny. *Cooper*, 581 U.S. at 287-88.

Second, even if the *Robinson* litigation could provide a strong basis in evidence, it does not do so here. Neither SB8, nor any map resembling SB8, was ever litigated in *Robinson*. *Robinson* involved a non-final vacated preliminary injunction of HB1 under the Voting Rights Act without regard for racial gerrymandering. The Middle District of Louisiana's findings were based entirely on the illustrative plans presented by then-Robinson plaintiffs, none of which created majority-Black districts or identified a VRA violation in Northwest Louisiana, but instead "connect[ed] the Baton Rouge area to the Delta Parishes along the Louisiana-

Mississippi border." *Robinson I*, 605 F. Supp. 3d at 785. On appeal, the Fifth Circuit Court of Appeals again focused its clear error review of the preliminary *Gingles* findings on the illustrative maps—each of which "connect[ed] the Baton Rouge area and St. Landry Parish with the Delta Parishes far to the north along the Mississippi River"—without venturing into analysis of other parts of the State. *Robinson III*, 86 F.4th at 590. Since the *Gingles* analysis is "an intensely local appraisal," 478 U.S. at 79; *see also Wis. Legislature*, 595 U.S. at 404, discussion of other potential majority-Black districts in *Robinson* in another part of the State cannot provide the requisite *Gingles* analysis or strong basis in evidence for SB8. The VRA does not compel remedial action on a statewide basis or set a floor for a certain number of majority-Black districts. *Bush*, 517 U.S. at 979; *Allen*, 599 U.S. at 28 ("Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2."). Even if the State has some inkling that a VRA violation exists somewhere, it cannot draw a remedial district just anywhere. *LULAC*, 548 U.S. at 431; *Bush*, 517 U.S. at 979; *Shaw II*, 517 U.S. at 916-17. The State had no strong basis in evidence to believe based on *Robinson* that the VRA was violated in traditional District 4 in the Northwest region of the State and the VRA required it to draw District 6 hundreds of miles into those far recesses of the State. In sum, the mere existence of the *Robinson* litigation alone, which was another case, with another legal challenge, another state statute, another proposed remedial plan, and at

best, a hurried, vacated, non-final preliminary injunction without a full record, cannot provide a strong basis in evidence to support the State's unlawful racial gerrymander. These decisions cannot serve as a "strong basis" to support the State's action, when such reliance is plainly an "error of law." *Cooper*, 581 U.S. at 287-88.

6. Applicants cannot present new evidence for the first time to the Supreme Court on review.

In their application for stay, Robinson Applicants posit a VRA defense. Again, the Court need not consider it because they lack standing to seek relief. But regardless, Robinson Applicants never presented this VRA defense at trial before the District Court on first view. And that is an understatement: hard as it may be to believe, they worked overtime to muzzle any party from so much as mentioning the VRA. The strategy began early, and it was consistent.

To begin, even after the District Court reminded the parties that Motions in Limine were disfavored in a bench trial, the Robinson Applicants filed a lengthy Motion in Limine on the VRA. The Motion sought to *exclude all VRA-related evidence or argument* at trial. App. 198 ("Robinson Intervenors move to exclude 1) evidence or argument offered to prove that SB 8 does not satisfy the *Gingles* standard, 2) evidence or argument on the question of whether Section 2 of the Voting Rights Act requires a congressional redistricting plan that includes two districts in which Black voters have an opportunity to elect candidates of their choice . . . ."). They argued: "These issues **are not relevant** to the claims before this Court and

evidence concerning these matters will only serve to **confuse the issues** and would **prejudice** the Robinson Intervenors." App. 198. (emphasis added). The Robinson Applicants argued that the "strong basis in evidence" required for strict scrutiny had to be the preliminary decisions in the *Robinson* case "themselves," and that the District Court was barred from considering VRA evidence on its own or "weighing that evidence differently." App. 207. Arguing that it was impermissible for the three-judge District Court to take any evidence that was supposedly "contrary to" the preliminary *Robinson* decisions, App. 208, Robinson Applicants fought to exclude evidence from Respondents' experts that would have shown that SB8 lacked a strong basis in the VRA, and that indeed, the Black population was too widely scattered outside of Southeast Louisiana to draw another district. *See generally* App. 202. They argued that the preliminary decisions in *Robinson* were conclusive against Respondents, even though it was preliminary, and even the Respondents were not present in that case and could not participate. "No matter," the Robinson Applicants argued. There would simply be no argument—let alone evidence—on the VRA.

The Robinson Applicants lost this motion at the April 4, 2024, pretrial conference, but the District Court invited them to renew their objections at trial. App. 235. This, they utterly failed to do. Despite the District Court's instruction in denying their Motion in Limine, the Robinson Applicants never questioned their conviction that the mere fact of their preliminary Middle District decision could be wielded

offensively in all proceedings, against all parties, for all purposes. They apparently hoped that by starving the Respondents and District Court of access to their supposedly dispositive Middle District evidence, the evidence could simply be preserved in pristine condition, to be rolled out later for citation. At that point, apparently, it would simply carry the field under some form of estoppel principle.

As a result, Robinson Applicants did not merely waive their objection. They doggedly refused to put in evidence on their own side. They insisted that their experts were not offering their own opinions on whether SB8 complied with the VRA, or on whether a second majority-Black district could or must be drawn outside of Southeast Louisiana. Even with eight hours to present their case (App. 191), they called not one witness to testify on the *Gingles* preconditions. Though they now belatedly reference the myriad experts in the *Robinson* case, they offer no justification for not calling more of those witnesses in this case—or at least adducing testimony regarding the VRA from the experts they did call. Instead, they steadfastly refused to let those expert witnesses testify as to whether the VRA required two majority-Black districts. *See, e.g.*, App. 1192 ("Q. Did you conduct a racially polarized voting analysis as part of your work in this case? A. No, I did not."). They carefully utilized their experts only to respond and criticize Respondents' experts' claims of racial predominance. App. 921-922; App. 978. When Plaintiffs propounded a rebuttal expert to show that the second SB8 majority-minority district

would not actually perform to elect Black-preferred candidates under the VRA, App. 196, App. 218, the Robinson Applicants cried foul and worked feverishly to assert that none of their own experts had taken the contrary position. App. 213, App. 228-229. They executed their VRA-avoidance gambit with amazing discipline.

The closest the Robinson Applicants came to attempting to present VRA evidence at trial was their premature and unsuccessful plan to have the District Court admit the entire *Robinson* record, including expert reports, as exhibits, but only as evidence that the Legislature relied on the record. App. 1141. Upon objection, the District Court questioned the relevance of these reports because there was no evidence that any legislator even viewed or relied on them. App. 1142. Though the District Court sustained Respondents' objections to the admission of these exhibits, the District Court instructed the Applicants exactly how to lay the proper foundation in order to have the reports received as evidence. App. 1143-1144 ("I'll leave it open if you wish to, if you wish to try to -- again, it would be admissible if you were to do that. Only first you would have to establish foundation that it was relied upon by those witnesses, that the Legislature relied upon it in connection with the passage of Senate Bill 8."). The Applicants failed to do so. Not a single legislator testified that they relied upon the expert reports in *Robinson*. In fact, outside of one failed attempt to present such testimony, thwarted only by Applicants' own mistakes, Applicants

neglected to even attempt to present such testimony though they certainly had the time to do so and even called an additional legislative witness.

Meanwhile, Respondents followed the instruction of the District Court and presented their evidence at trial. Respondents' experts showed that given the dispersion of Black voters across the State, any Black voters in District 6 were not sufficiently numerous or geographically compact to draw a second majority-minority district. Then, in its thorough Opinion, the District Court carefully considered the evidence as part of its *Gingles* analysis for purposes of satisfying strict scrutiny. App. 1464-1477. The District Court was convinced by the massive weight of the evidence, finding the first *Gingles* factor was not satisfied and: "The record reflects that, outside of southeast Louisiana, the State's Black population is dispersed." App. 1471.

Whatever their reason for starving the trial record of evidence to support their supposed VRA affirmative defense, Robinson Applicants must now live with that decision. If they now regret that strategy and wish to present eleventh-hour evidence for a VRA defense, the proper forum is the District Court on first view at the remedial stage of this trial, not the Supreme Court on appellate review. *Bethune-Hill*, 580 U.S. at 193. "The District Court is best positioned to determine in the first instance" whether the VRA requires a second majority-Black district. *Id*. Their attempt to import evidence from the *Robinson* litigation, for the first time in this Court, when

they failed to do so in the District Court, is unavailing. *See, e.g.*, Robinson Brief, at 34. Such gamesmanship cannot provide the basis for this Court to grant an application for a stay.

IV. Under the second *Nken* factor, the trial must be completed because neither set of Applicants will suffer irreparable injury absent a stay.

A. The Robinson Applicants fail to show irreparable injury.

The Robinson Applicants, who lack standing to even bring this Application, devote little attention to their required showing of irreparable injury. Their primary worry is that a "VRA-compliant map [is not] in place for the 2024 elections." **Application, at 49**. Not so fast. Their "harm" hinges on two misguided notions: (1) that the District Court will be unable to swiftly adjudicate the remedial phase of this case; and (2) that even if the District Court does timely impose a remedial map, it will not comply with the VRA.

Addressing the first notion, the District Court, conscious of the time constraints regarding the 2024 election, has moved expeditiously throughout this litigation, in spite of the Applicants' multiple attempts at delay. *See e.g.*, App. 242 (Robinson Intervenors' Motion to Continue Trial), App. 1555 (Robinson Intervenors' Notice of Appeal challenging, among other things, this Court's Scheduling Order and this Court's Order Denying Motion to Continue). These repeated and unfounded attempts to delay judicial proceedings belie the Applicants'

sudden supposed fear that a constitutional map will not be in place for the 2024 election.

Second, the Applicants provide no reason, and none exists, to believe that a map from the District Court will violate the VRA. The Robinson Applicants and their Galmon Intervenor allies will have double the resources, page limits, and argument time to what has been allotted Plaintiffs in the District Court during the remedial phase. They have ample resources to reverse course on their earlier refusal to put on a VRA defense in the District Court and establish that the VRA requires particular districts.

That said, Plaintiffs have already shown that the Black population is too dispersed outside of Southeast Louisiana to draw another Black-majority district. On top of this, once one moves into North Louisiana, the record will show that Black voting, turnout, and crossover voting patterns won't result in the election of Black-preferred candidates. The second district *might* elect Democrats, but it will not perform as a Black-majority district. Plaintiffs will make the showing the State never tried to make in the *Robinson* cases: that district non-performance means that VRA does not require a second majority-minority district.

In sum, the Robinson Applicants' purely speculative "harm" of VRA noncompliance cannot support a stay. *Holland Am. Ins. Co. v. Succession of Roy*,

777 F.2d 992, 997 (5th Cir. 1985) ("Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.").

B. The State will suffer more injury from a stay than from allowing the District Court to finish its nearly-complete remedial process.

There is little reason to credit the State Applicants' belated claims of harm or their wildly premature citation of the *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), principle. First, the May 15 deadline they espouse is belied by the facts and their own admissions. Second, the State Applicants' slow-motion stay application undermines their credibility. Third, *Purcell* is not an issue in this case.

1. May 15 is not the real deadline.

The State Applicants have made much of their May 15 deadline to have a final congressional map to implement for the upcoming 2024 Congressional election. But this deadline is simply an invention for this litigation. Unlike other actual Louisiana deadlines, this May 15 "deadline" rests not on law or rule or regulation, but on the Secretary of State's ever-changing sense of staffing needs. This Court should give it no deference for two important reasons. First, the State Applicants, together, have been wildly inconsistent in their representations to at least three federal courts, including this Court. Second, the actual statutory deadlines align with the District Court's schedule.

a. The State Applicants cannot get their story straight.

The blurry nature of the Secretary's May 15 deadline is exposed by its own inconsistency and, it must be said,[4] misrepresentation. The first place to look is this Court's own docket in a related case. The Secretary and State together represented to this Court in a jointly-submitted October 10, 2023, brief that the Secretary would need a map only by "late May" 2024:

> As the State recently informed the Fifth Circuit at oral argument, as long as there is final resolution on liability and a map is in place by late May 2024, then an orderly election can take place. The Fifth Circuit has done nothing that could conceivably change this.

See Response to Emergency Application for Stay of Writ of Mandamus, at 20, *Galmon v. Ardoin*, No. 23A282 (filed Oct. 10, 2023). There is simply no avoiding it.

Only after the State hatched a racial gerrymander in late January 2024 did its position begin to change. The shift began in the District Court below. The Secretary first suggested to the District Court that she preferred a congressional map for the November 2024 primary by May 15 *one month into the case*, on February 27, 2024, in her Response to Plaintiffs' Motion for Preliminary Injunction. App. 160. Importantly, the Secretary never supported her vague statement with facts or details

[4] Plaintiffs regret raising the issue directly in a brief with this Court, when the preferred practice is undoubtedly a call to counsel and a collegial request for a correction. However, as the Application was received only at midday Friday with a Monday morning response deadline, Plaintiffs simply had no choice but to identify it here. The State and Secretary no doubt would have avoided this misrepresentation had they remembered briefing the opposite in this Court.

regarding particular statutes or procedures, nor was it clear whether this was simply an ideal date or, instead, a date the passage of which, as the Secretary now claims, would court "chaos."

A few weeks later, in preparation for trial, the Secretary implied she may call a single witness—one to testify regarding the time constraints and procedure regarding coding a new map into her system. The Secretary declined to put on this witness—even though there was ample opportunity to do so and Applicants did not use all their allotted time at trial. Of course, calling this witness would have exposed them to cross examination.[5] The Secretary also made no argument, ceding her time to Intervenors.

Having no evidence regarding the Secretary's supposed May 15 deadline in the record, the District Court rightly did not take the Secretary's word for it and, after granting Plaintiffs' an injunction, ordered the Secretary to file an explanatory brief. Unpersuaded by that brief, the District Court issued a Scheduling Order, App. 1588, stating that, after a remedial phase, it would order the use of an interim congressional map on June 4, 2024.

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[5] Of course, the State Applicants now assert that it was somehow Respondents' burden to address the Secretary's own deadline at trial and that "[t]he May 15 deadline is thus uncontroverted." State Br. at 28. Both are false. State Applicants placed no evidence of a May 15 deadline in the record to controvert.

In that Order, the District Court cited the same Fifth Circuit oral argument that the Secretary and State cited to this Court in their October 10, 2023, brief. The District Court noted that one reason it was unpersuaded by the Secretary's new representations was that in the Fifth Circuit argument (and, the District Court might have added, in representations to this very Court), counsel for the Secretary "stated that they could be adequately prepared for [the] November election at issue herein if they received a map by approximately the end of May." App. 1589-1590. The District Court cited an audio recording of the Fifth Circuit argument. App. 1590.

Now, caught by the District Court in their (at best) inconsistency, the State Applicants represent to this Court that the statement was made by the State's counsel on rebuttal and "cannot be imputed to the Secretary." State App. at 32. This is a blatant misrepresentation of the oral argument, as the transcript reveals.

In fact, the State's counsel first represented to the Fifth Circuit that "four to six" weeks would be an acceptable timeframe.[6] In fairness, counsel for the State indicated at that point that the Secretary could better answer that question. But then when counsel for the Secretary took the podium, he did not address the issue of timing which seems to be so important at this juncture.

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[6] *Robinson v. Ardoin*, Case Number 22-30333, oral argument before the Fifth Circuit Court of Appeals held on October 6, 2023 (https://www.ca5.uscourts.gov/OralArgRecordings/22/22-30333_10-6-2023.mp3), at 08:30.

During the argument for the plaintiffs in that case, counsel for the opposing party expressed concern that the Secretary had not given a straightforward answer as to the necessary date for a map.[7] This prompted the panel to again question counsel for the State (counsel for the Secretary did not participate in rebuttal) on the matter, asking "are you going to tell us by when you would need the information?" In response to this question, counsel for the State—the same counsel who appears now before this Court—said:

> Yes. I consulted with my co-counsel. Ideally, going about six weeks out from the mid-July filing deadlines, the Secretary would ideally like to have a map in place and know what map is going to be used in 2024 by late May.

The Fifth Circuit clarified: "So that's your answer, May 30?" Counsel responded, "About that. About six weeks back from the qualifying deadlines in late July."[8]

Though the State Applicants are correct that it was the State's counsel who responded to the Fifth Circuit's questioning, the rest of their representation is false. First, counsel represented to the Fifth Circuit that "four to six weeks" from late July would be adequate for a new map. The Secretary, who then argued directly after the State, did not correct or even address that statement. Then, in response to questions by the court, the State's counsel indicated that it had conferred with the Secretary and confirmed that "about six weeks back from the qualifying deadlines in late July"

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[7] *Id*. at 34:00-35:00.
[8] *Id*. at 1:20:57-1:21:30.

would be adequate. These representations absolutely can and should be imputed to the Secretary. And as Plaintiffs show at the start of this subsection, *just after the oral argument, both the Secretary and the State referenced that precise argument to this Court in a joint filing, and made the same representation that "late May" would work*. These parties' current recasting of the argument is a serious misrepresentation that at minimum calls the State's credibility into question. The District Court did not err in doing a double take.

What does this mean in practice? In 2024, six weeks out from the qualifying deadline of July 19 is June 4—the very date the District Court stated it would order a remedial map. The Secretary is getting exactly what she repeatedly represented and asked for in multiple Courts. This Court could end its analysis here.

Yet if the Court prefers to look further, it will find that the State's waffling continues even now.

As the remedial phase began, the State first maintained that May 15 was a "hard stop" and that it needed a map encoded by that date, such that "even marginally" moving it would cause "chaos" because it would compress "other deadlines." State App. at 4. Indeed, its initial filings contained the chart still displayed at page 17 of its Application, which seems at first glance to show cascading dates flowing from May 15.

But now the State admits it can receive a "remedial order" by May 15 (State App. at 34-35), meaning that even in this situation, the Secretary of State would be coding *after* May 15. *See also* Hadskey Declaration at Paragraph 16 (outlining post-May 15 process). Why the change in position even during the remedial process? How much time will actually be needed for coding, and is this simply a matter of administrative efficiency or manpower? The State is silent.

Perhaps the Secretary's and State's worst moment, however, is their attempt to slice and dice between the three dates of May 15, "the end of" May, and June 4—as if these semantic games actually define the difference between an ordinary and "chaotic" November primary. In a moment of candor, they admit that a deadline of "approximately the end of May" is "not inconsistent with the May 15 deadline." State App. 25. Really? The Secretary and State otherwise insist that May 15 is "firm and immovable," but apparently it is immaterially different from the end of May. Yet then, in the next breath, they assert that "the court's June 4 deadline is not even conceivably 'approximately the end of May.'" *Id*. The gap between May 15 and "the end of May" can be disregarded, but not the gap between May 31 and June 4? The State's deadlines are hopelessly arbitrary and betray that something else is at work in its threats of "chaos."

b. The June and July deadlines do not require a stay.

Beginning earlier this week, in a status conference and brief on Monday night, May 6, the State Applicants began to assert that various deadlines in June and July, including the July 19 deadline to qualify as a candidate for the congressional primary, render June 4 relief impossible. Albeit with new details, they continue to make the same claims here. Although Applicants may believe they have organized a parade of horribles, it is instead a litany of "oh, dears." They never actually connect the dots, and they should not persuade this Court.

First, Louisiana's legislative leaders have made on-the-record representations regarding how Louisiana's unique election calendar permits redistricting to occur during the summer of an election year, asserting that "the candidate qualification period could be moved back, if necessary, as other states have done" and that "[t]he election deadlines that actually impact voters do not occur until October 2022 . . . Therefore, there remains several months on Louisiana's election calendar to complete the process." *Galmon* Respondents' Response in Opposition to Emergency Application for Administrative Stay, Stay Pending Appeal, and Petition for Writ of Certiorari Before Judgment, at 39-40, *Ardoin v. Robinson*, No. 21A814 (June 23, 2022).

Turning to the calendar itself, the next potential deadline is June 19, 2024. Yet the State never explains its true importance, given that it is only for the rare candidate

who qualifies by nominating petition rather than by simply paying a fee. When did it last impact any congressional candidate, and what degree of effort was required to check petition signatures? The State is silent. The Fifth Circuit, however, noted as follows in declining a stay in the *Robinson* case in June 2022:

> "…[t]he defendants have not shown that those deadlines implicate the *Purcell* principle. The June 22 deadline applies only to the few candidates who choose to qualify by nominating petition, and the record suggests that adjusting that deadline would not impact voters. *Robinson*, ––– F.Supp.3d at ––––, 2022 WL 2012389, at *60. It merits mention that even this June 22 deadline was extended by the district court to July 8. *Robinson*, ––– F.Supp.3d at ––––, 2022 WL 2012389, at *63. On that score, we also remind the parties and the district court that as this litigation progresses, "[i]f time presses too seriously, the District Court has the power appropriately to extend" that deadline and other "time limitations imposed by state law." *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 n.11, 92 S.Ct. 1477, 32 L.Ed.2d 1 (1972). And we agree with the district court that the State has enough time to implement new maps without having to change the more popular July filing deadline. *See Robinson*, ––– F.Supp.3d at ––––, 2022 WL 2012389, at *59. After all, as the district court recounted, Hadskey herself testified that after the enacted map became law, her office updated their records and notified affected voters in less than three weeks. *Ibid.* Yet almost six weeks remain before the July filing deadline.

Robinson II, 37 F.4th at 229–30.

The same analysis can apply to the next important date, the July 17-19 qualifying period, if necessary. Over two months pass between that date and the September 21, 2024, deadline for mailing overseas ballots. The State never explains what would happen if, in the event an insufficient number of coders are hired or they

work too slowly, the qualifying period must be shifted back one or two weeks in order to remedy violations of voters' Fourteenth Amendment rights.

Next, the State relies heavily on a post-litigation development of its own making, the alleged need to code districts for an entirely different and unrelated election: the State Supreme Court. State App. at 22-23; Hadskey Decl. ¶ 20. This is unpersuasive for at least three reasons. First, as discussed in Subsection IV.B.4 below, this is a garden variety claim about administrative strain months before an election that can be solved by intensifying staffing or coding efforts; *Purcell* has never extended so far. Second, it is of the State's own making after it already knew that weighty issues were being litigated regarding its brand-new Congressional districts.[9] Third, neither the State nor the Court should treat the State Supreme Court re-coding as a fixed requirement, but the congressional districting issue as a luxury

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[9] The State omits the key background facts from its untested Declaration and its briefing. The Secretary is the named defendant in *Louisiana State Conference of the NAACP v. Louisiana*, currently pending in the Middle District of Louisiana (3:19-cv-00479-JWD-SDJ). The plaintiffs in that case raise a VRA § 2 claim regarding state supreme court election districts. On March 31, 2024, the parties attempted to enter into a consent judgment which would have given the Legislature until April 29, 2024 to pass a new map, required the court to hold a hearing regarding a map on May 6, 2024, and required the court to implement any remedial map by May 15, 2024. Minute Entry, *See* No. 19-479-JWD-SDJ (M.D. La. April 24, 2024), ECF No. 214, at 1. In the meantime, the State decided to enact new districts on May 1, 2024. ECF 220, at 2. The State took this step even after the trial record in this case left little doubt that SB8 would be enjoined, and a day after the District Court entered judgment in Plaintiffs' favor below. It is unclear if this litigation will continue, as the parties never attempted to enter a new consent judgment and have not, though they indicated they would, advised the court of the status of legislation.

that may have to be abandoned if the combined administrative cost of coding both maps is too great. Nothing in *Purcell* or its progeny justifies such choices.

Turning to the remainder of the hardships referenced in the Hadskey Declaration, they are either speculative, including many issues which "may" occur, or they simply entail administrative burden. For example, Hadskey laments that the June 4 deadline could require Registrars of Voting to work overtime. Hadskey Dec. at 11. The speculative fear that other officials may need to work overtime should not justify irreparable harm to Respondents and the citizens of Louisiana as a whole.

The State's one example of an actual election impact—as opposed to administrative annoyance—is from 2022. State App. at 24. A city in Calcasieu Parish reportedly attempted to have an election on March 26, of that year using Census data that was "rushed." Tellingly, Hadskey's untested declaration, which on this point may not even be on personal knowledge, never explains the nature of the Calcasieu "rush" or compare it to the current situation, but the Parish had apparently received the underlying Census data only two months before, in January.[10] *Id*. The State never explains how this solitary example compares to the five or six-month window available here. Instead, the State simply jumps to the conclusion that *any* delay that

[10] *See* Andrea Robinson, *Redistricting to blame for Sulphur's election confusion*, KPLC (Mar. 28, 2022), https://www.kplctv.com/2022/03/29/redistricting-blame-sulphurs-election-confusion.

leads to "decreasing the time to code, print, and proof these ballots" presents an unacceptable risk of incorrect ballots. State App. 24. On its face, that reasoning is utterly illogical. What redistricting or other election-related change would not then be subject to a *Purcell* challenge? Why stop at six months—perhaps the real deadline was in late 2023? The State's failure to fill this obvious gap in its showing (and its logic) suggests that something other than threats of "chaos" is driving its position.

2. The State and Secretary's slow-motion stay application and slow-rolling disclosure of threatened post-May 15 chaos undermine their credibility.

There are other reasons to question the credibility of the State's complaints. Given these impending, "serious deadlines" that the State has known about for months, one can't help but wonder: Why did the State never put on this evidence during the three-day trial in April? Where was this showing when witnesses—including Ms. Hadskey—could have been cross-examined? What of the Secretary of State's decision to say nothing at all to the Court at trial? It took the District Court asking for briefing to support the May 15 deadline *at the May 6, 2024, remedial status conference* for the parties to actually learn how the Defendants had settled on May 15 as the relevant date. The State trumpets the Secretary's "uncontroverted testimony" (State App. 23) on this point, but there was never testimony, just a last-minute, self-serving affidavit (from Hadskey) sprung on the District Court and

parties after remedial proceedings were already beginning. That is hardly the way to protect the election process if this had been the State's true interest.

There is also the question of the State's slow movement during this alleged emergency. Where was the State's urgency almost two weeks ago, on April 30, when the Court issued its injunction? The State inexplicably consumed over half of the fifteen days to May 15, sending out a Joint Motion for Stay after close of business on May 8, and not filing its Motion in this Court until midday on May 10. By slow-walking disclosure of its new claim that the May 15 date is the last bulwark against "chaos" in the November elections, and by letting most of its allegedly precious time elapse, the State jammed Respondents, the District Court, and now this Court by forcing emergency briefing. The State's delay should not be this Court's, or Respondents', emergency.

3. *Purcell* is not even remotely in play.

The State claims that "this case screams" *Purcell* (State App. at 1), but the only screaming is from the State's briefing—and not even from its untested, last-minute declaration. The State presents no evidence that even approaches a *Purcell* problem. *Purcell* does not apply this far in advance of an election, the State has not shown that the risks of chaos, distrust, or voter confusion at the heart of *Purcell* are present, the State does not have a compelling interest under *Purcell* to institute this unconstitutional map, and any delay is the State's, not the District Court's, fault.

First, *Purcell* does not apply this far in advance of an election. *Purcell* concerns election day—not any conceivable internal, non-published date. 549 U.S. at 2. Once the date of the election is determined, courts work backwards. *Purcell* problems arise mere "weeks before an election." 549 U.S. at 4. Louisiana's primary congressional election is not until November 2024—over five months after June 4, 2024, when the map will be in place. App. 1588. Both this Court and lower courts have recognized that imposing new redistricting maps five months before an election does not create a *Purcell* problem.

For example, in *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398 (2022), this Court reversed a lower court's imposition of redistricting maps that violated the Equal Protection Clause. *Id*. at 401. The Court held that even though the primary election was less than five months away from the Court order, issued on March 23, 2022, the lower court on remand nonetheless had "sufficient time to adopt maps consistent with the timetable for Wisconsin's August 9th primary election." *Id*. *Wisconsin Legislature* is dispositive here.

Likewise, the United States Court of Appeals for the Fifth Circuit has determined that there was no *Purcell* problem in the context of Louisiana congressional elections in late June, five months before a November election:

> The classic *Purcell* case is different. It concerns an injunction entered days or weeks before an election—when the election is already underway. In *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014), we stayed an injunction entered nine days before the start of early voting.

> In *Texas Alliance*, we stayed an injunction entered eighteen days before the start of early voting. 976 F.3d at 567. In *Texas Democratic Party*, we stayed an injunction entered "weeks" before the start of in-person voting. 961 F.3d at 411. Purcell itself stayed an order changing election laws twenty-nine days before an election. *Tex. All.*, 976 F.3d at 567. And the Supreme Court has blocked injunctions entered five, thirty-three, and sixty days before Election Day.

Robinson II, 37 F.4th at 228-29.

Second, the State has failed to show that chaos, distrust, or voter confusion will persist if the redistricting map is available a few weeks after the State's preferred date. The State and voters will have over five months to prepare and understand new districts. The State's parade of horribles—voter confusion and legislative impossibility—is entirely speculative. None of this "evidence" was presented or even discussed at trial. Any "administrative burdens" in complying with an injunction "would inflict no more than ordinary bureaucratic strain on state election officials." *Robinson II*, 37 F.4th at 230.

Third, unlike *Purcell*, where the State's "compelling interest in preventing voter fraud" and ensuring "[c]onfidence in the integrity of our electoral process" was clear, 549 U.S. at 4; *see also Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021) (similar), here the State has no compelling interest in ensuring a redistricting map that has already been struck down as an unconstitutional racial gerrymander in a final order from the three-judge panel is used in the November election. The State makes much of its interest in avoiding chaos and protecting the

electoral process. But in fact, allowing SB8 to go into effect, despite the District Court's final order determining that it is unconstitutional, would only dismantle confidence in the integrity of the electoral process. The State's goal is clearly at odds with *Purcell*.

Finally, any potential timing issue is the State's own making and part of the State's effort to keep SB8, a law it continues to press as constitutional, in effect for the congressional election in November 2024. While Respondents and the District Court have sought speed at every turn, the State has opted to slow the process down as much as possible. The State enacted SB8 on January 22, 2024. App. 294. Plaintiffs filed this lawsuit days later. App. 1. The State did not move to intervene until February 20, 2022. App. 112. One day later, the District Court immediately issued an expedited scheduling order for briefing, discovery, and trial to all be complete in a month and a half. App. 115, App. 116. It was only after the District Court issued the scheduling order that the Secretary of State finally filed its answer. App. 120. Respondents and the District Court moved quickly on these expedited deadlines through trial, and after a flurry of post-trial briefing by the parties, the District Court issued its sixty-page final order on April 30, 2024. App. 1420. Then after **ten days** elapsed from the District Court's April 30 Order, and despite the purported urgency of the State's May 15 "deadline," the State finally filed an Application for Stay in this Court on May 10. Any "emergency" is the State's own creation. The State's

Application to this Court five days before May 15 may have some rhetorical appeal, but it comes after repeated delays on the State's part. The Louisiana voters should not suffer as a result.

Though *Purcell* does not apply now, "[a]s an election draws closer that risk will increase." *Purcell*, 549 U.S. at 4-5. A stay by this Court now presents increasing risk of voter confusion and disruption of Louisiana's 2024 primary election. This Court should not allow Applicants, currently complaining in vain of a *Purcell* issue, to invite such a predicament into these proceedings by obtaining of a stay. *Cf. North Carolina v. Covington*, 585 U.S. 969, 977 (2018) (per curiam) (holding that since "the District Court had its own duty to cure illegally gerrymandered districts through an orderly process in advance of elections," under *Purcell*, the District Court did not abuse its discretion when it drew the remedial districts itself rather than give the Legislature another try).

As the State of Louisiana admits, redistricting has eluded it for years now. The best path, and the path this Court has repeatedly taken in identical situations, is to deny the State's application for a stay pending appeal and to let the three-judge District Court proceed to the remedial phase of this trial on its expedited time frame so the merits of this litigation are finally resolved. *See, e.g.*, *Mich. Indep. Citizens Redist. Comm'n v. Agee*, 144 S. Ct. 715 (2024) (Mem) (denying the State's application for stay after injunction before remedial proceedings); *Allen v. Milligan*,

144 S. Ct. 476 (2023) (Mem) (same); *see also Trevino v. Palmer*, 144 S. Ct. 1133 (2024) (Mem) (denying Intervenors' application for stay pending appeal after the district court ordered both an injunction and remedial order).

V. Under the third *Nken* factor, a stay will harm Respondents.

With regard to the third factor (harm to other parties), issuance of a stay will seriously harm Respondents and other parties. *Nken*, 556 U.S. at 434. Though Applicants inexplicably neglect to address the harm to Respondents, the District Court already found that Plaintiffs are *irreparably* harmed absent an injunction. App. 1478. Respondents and other non-party voters will at least be *substantially* harmed (a lesser standard), *Nken*, 556 U.S. at 434, if that injunction is now stayed because a blatant gerrymander will rise from the ashes, even if technically just "pending appeal." The inevitable delay in adjudication would nearly ensure that the State could not pass a remedial map in time for the 2024 election—effectively reinstating the gerrymander and preventing relief to the prevailing party. This Court should be reluctant to grant a stay with the effect of "giv[ing] appellant the fruits of victory whether or not the appeal has merit." *Jimenez v. Barber*, 252 F.2d 550, 553 (9th Cir. 1958); *see also BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618. (5th Cir. 2021).

Crucially, each Plaintiff is harmed *as a matter of law* because they are subject to a racial gerrymander under SB8. *See Covington*, 585 U.S. at 978 (holding that plaintiffs can establish a cognizable injury by showing "they had been placed in

their legislative districts on the basis of race"); *see also Miller*, 515 U.S. at 911; *Hays*, 515 U.S. at 744-45; *Shaw I*, 509 U.S. at 650; *Harding v. Cnty. of Dallas, Tex.*, 948 F.3d 302 (5th Cir. 2020). Contrary to the Applicants' purely speculative harm, if Respondents are forced to vote under SB8, a map the District Court already definitely determined is unconstitutional, their harm would be real and imminent.

VI. The public interest weighs against a stay.

Finally, the public interest weighs heavily against a stay. The harm to Respondents is shared by every Louisiana voter. Once a scheme is found unconstitutional, "it would be the unusual case in which a court would be justified in not taking appropriate action to ensure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). This is no such case; no equitable considerations justify the withholding of immediate relief. *Id.* The State Applicants have no interest in enforcing an unconstitutional law; the Robinson Applicants, who have no standing anyway, have no valid interest in voting under an unconstitutional scheme. *BST*, 17 F.4th at 618 ("Any interest . . . in enforcing an unlawful (and likely unconstitutional) [law] is illegitimate."). Further, this Court has recognized that though public interest may lie in the execution of statutes enacted by representatives of the people, such interest yields in the face of a "showing of [the statute's] unconstitutionality." *Nken*, 556 U.S. at 436. This Court should not award the Applicants "the fruits of victory" mere days after the District Court issued a

permanent injunction against them on the merits, especially after they made every attempt to stall proceedings. *Jimenez*, 252 F.2d at 553.

Two considerations in particular weigh against a stay here. First, if certainty and finality for the November primary is important, then finishing the District Court's trial and completing the record is within reach, just 21 days away. A stay would scuttle this opportunity and place all of the parties back at square one. Second, far from allowing the Court to preserve the status quo, a stay runs a serious risk of picking a winner in the dispute below: neither Respondents nor the State, but the Robinson Applicants, who seek without an adequate showing to force through a second Black-majority district. The Court should reject this course of action.

A. The District Court should be allowed to finish its trial and remedy Respondents' gerrymandering injury.

The best avenue for this Court is to allow the District Court to develop a full record before it preliminarily stays the proceedings below.[11] Remedial proceedings

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[11] The Galmon Amici make a judicial economy argument, suggesting a stay is appropriate in this case because this Court is presently adjudicating a similar case, *Thomas C. Alexander, et al. v. The South Carolina State Conference of the NAACP* (No. 22-807). Such a conclusion is folly. First, there is no reason to believe there are issues in that case which would affect this case. Though both cases relate to racial gerrymandering, the factual predicates are different, and each will be reviewed under a clear error standard. This is distinguishable from the novel legal issues presented in cases like *Milligan*. Second, the Galmon Amici suggest no reason why this Court should not wait until the District Court has ordered a remedial map to address their issues.

have already begun; the District Court is set to take the parties' evidence in just four days, on Friday, May 17, 2024; and it is set to enter its final remedial judgment on June 4, 2024—just 21 days from today. As in *Michigan Independent Citizens Redistricting Commission v. Agee* and *Allen v. Milligan* when this Court denied the State's stay applications, the record in this case has yet to be fully developed.

The same was true in *Ardoin v. Robinson*. There, the State argued in a letter to this Court that the Supreme Court should continue to stay proceedings below, allow briefing and argument, and decide the case before it had the opportunity to be fully litigated in the lower courts. *See* Reply letter (No. 21-1596), *Ardoin v. Robinson*, No. 21A814, at 2-3 (filed June 14, 2023). This Court instead determined that the writ of cert was improvidently granted, vacated the stay, and remanded the case to the Fifth Circuit Court of Appeals for further proceedings. *Ardoin v. Robinson*, 143 S. Ct. 2654 (2023) (Mem). Likewise, in *Garcia v. Hobbs*, 144 S. Ct. 994 (2024) (Mem), this Court recognized that the case had yet to proceed through the proper channels with a full development of the record; accordingly, the Court remanded the case with instructions to allow the case to proceed before the proper court. *Id*. at 995. The result should be the same here.

B. A stay chooses a winner in the dispute below and may allow the imposition of an unnecessary Black-majority district, aggravating the public injury from the current gerrymander.

Finally, the Court should consider that a stay will in reality preserve nothing for appeal. Instead, on these facts, it will effectively choose a 2024 winner in the three-way controversy below between Plaintiffs' impending Equal Protection remedy, the Galmon-Robinson Intervenors' alleged VRA remedy, and the State's alleged interest (six months before the November primary) in administrative ease.

First, as noted above, a stay pending appeal means Respondents and millions of other voters will receive no remedy in 2024 for the brutal racial gerrymander identified by the three-judge District Court. It freezes the District Court in mid-trial just a few weeks before it is poised to remedy the gerrymander. It also awkwardly leaves the parties to brief only the District Court's liability determination on appeal, when a more complete factual record is nearly ready at the impending conclusion of the remedial phase.

Second, it allows the Robinson Applicants—whose goal all along was to force the three-judge panel to surrender its exclusive jurisdiction over the Equal Protection claims to the single-judge Middle District Court, or else abstain—to slip out from under the three-judge Western District court's remedial jurisdiction. Under 28 U.S.C. 2284, the Western District has exclusive jurisdiction over the Equal Protection *claims* and, importantly, an Equal Protection *remedy*. "Congress intended a *three-*

judge court, and *not a single district judge*, to enter *all* final judgments in cases satisfying the criteria of § 2284(a)." *Shapiro v. McManus*, 577 U.S. 39, 44 (2015) (emphasis added).

The danger from this gamesmanship is imminent. Although there is no longer any operative pleading in the *Robinson* case in the Middle District, the court there never closed the case, potentially waiting to spring back into subject matter jurisdiction upon some future development. That time may be now. These same Robinson-Galmon Intervenors urged the Middle District to take precisely this course, and even without a stay, the Galmon Intervenors are currently urging it leap ahead of the Western District to create its own remedial map. Although, in order to slow proceedings, the Intervenors refuse to expeditiously share proposed maps in the Western District's remedial phase, they have told the Middle District they are ready to begin on a remedy immediately. Based on earlier proceedings, every single Intervenor-proposed map contains two majority-minority districts, every single map fails to perform under the VRA, and every map is its own racial gerrymander. Staying only the Western District not only deprives Respondents of a remedy, it lays all the groundwork that is necessary for the Middle District to awake from its dormancy, skip a final trial on liability, and move directly to impose a map that is itself a racial gerrymander.

Third, if the State is correct that not receiving a map until after May 15 will guarantee "election chaos," *any remedy* from the Intervenors' court in the Middle Court—which may be waiting on a stay here to even begin its own remedial proceedings—will necessarily come too late to avoid this supposed danger. Although the State is wrong that *Purcell* is implicated if Respondents receive a remedy from the Western District, an even later remedy from the Middle District will trigger *Purcell* chaos on steroids.

Put another way, the only way to truly avoid the State's asserted "election chaos" harm is to freeze all proceedings below—in both the three-judge and single-judge District Courts, and proceed under the currently-encoded plan, HB1, for the current election.

But tellingly, neither the State nor Robinson Applicants ask for this remedy. Instead, all of Respondents' opposing parties are openly advocating or secretly hoping for a stay that will cause HB1 to appear as a default, thereby creating an irresistible temptation for the Middle District to restart remedial proceedings and impose its own two-majority-minority map. The gambit is now clear. This Court should reject it. The Western District should be allowed to finish its work, and if the State and Intervenors at that point wish to resuscitate SB8 or any other map that attempts to gerrymander a second majority-minority district from Baton Rouge to North Louisiana, they can pursue that remedy on appeal in the ordinary course.

CONCLUSION

For the foregoing reasons, the Applications for Stay should be denied. The District Court should be allowed to complete its trial, issue a remedy by June 3, 2024, and put an end to years of litigation.