No. 23A1002

In the Supreme Court of the United States

NANCY LANDRY,
IN HER OFFICIAL CAPACITY AS THE
LOUISIANA SECRETARY OF STATE, ET AL.,
Applicants,

v.

PHILLIP CALLAIS, ET AL.,
Respondents.

REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY PENDING APPEAL

ELIZABETH B. MURRILL
Attorney General
J. BENJAMIN AGUIÑAGA
Solicitor General
Counsel of Record
MORGAN BRUNGARD
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70802
(225) 506-3746
AguinagaB@ag.louisiana.gov

Additional counsel listed on signature page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The sworn testimony from Louisiana Commissioner of Elections Sherri Hadskey is that the Secretary of State needs Louisiana's 2024 congressional map by "no later than May 15, 2024," to administer a disruption-free election. Hadskey Decl. ¶ 4 n.16. There is no contrary evidence in this record. As they admit (Resp. at 43), Plaintiffs (and the district court) have known about this deadline since February 2024. But Plaintiffs served no discovery regarding the deadline, did not call Commissioner Hadskey at trial, and otherwise never complained about the deadline.

The district court nonetheless enjoined S.B. 8 on April 30. Then, on May 7, the district court (a) refused to order any map by May 15 and (b) installed its own election timeline (commencing May 17) that would result in an as-yet-unidentified map three weeks from now. The district court is courting chaos. And if this Court does not stay the district court's injunction and remedial proceedings, this case will be a roadmap for federal courts to second-guess State election officials at will, thereby sowing doubt in *Purcell* caselaw and increasing the likelihood of confusion in election-year cases.

This Court granted a stay in *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022) (mem.), in a similar *Purcell* posture when the injunction against Louisiana's former map was issued 155 days before the November 2022 elections. Here, a map at the district court's new June 4 deadline would come 154 days before the November 2024 elections. The timing is indistinguishable; Commissioner Hadskey's sworn testimony underscores that a stay here is in order; and Plaintiffs' rhetoric betrays that they have no serious defense on the merits of the district court's orders. The Court should stay the April 30 injunction against S.B. 8 and the May 7 remedial order.

ARGUMENT

Plaintiffs' missteps begin with their recitation of the traditional stay factors (Resp. at 7–9), without acknowledging that the "traditional test for a stay does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state's election law in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays). That silence is both telling and understandable: Plaintiffs cannot show that "the underlying merits are entirely clearcut in [their] favor" or that "the changes in question are at least feasible before the election without significant cost, confusion, or hardship"—with each defect being an independent justification for a stay pending appeal. *See id.* at 881 (describing these factors as "two of" a plaintiff's "four prerequisites" for avoiding a stay). Rather than directly confront that problem, therefore, Plaintiffs pretend that Justice Kavanaugh's and Justice Alito's views do not exist. They do exist—and they compel a stay here. And even under the traditional stay factors, all four strongly cut in favor of a stay pending appeal, too.

I. THE STATE FACES IRREPARABLE HARM WITHOUT A STAY.

A. The most important fact for present stay purposes is Louisiana Commissioner of Elections Sherri Hadskey's sworn testimony that the Secretary of State needs Louisiana's 2024 congressional map by "no later than May 15, 2024," to administer a disruption-free election. Hadskey Decl. ¶ 4 n.16. The Secretary's inability to begin implementing a map by May 15 will, in turn, have a domino effect on subsequent deadlines that would have to be shifted or disregarded altogether, increasing costs by hundreds of thousands of dollars and escalating the risk of voter

confusion and electoral system breakdowns. *See* State's App. at 22–23. And this problem is compounded by the impending obligation to code the State's voter-registration system with the new Louisiana Supreme Court map, which—if she must also code a congressional map after May 15—"means double the amount of time that ordinary work (like logging voter registrations, cancellations, and the like) and the Annual Canvass cannot be completed while the system is locked up." *Id.* at 23.

To be clear: This sworn testimony stands alone in this record on the subject of the May 15 deadline. Plaintiffs have known about the deadline for three months (Resp. at 43), but they did not propound discovery on the issue, they did not call Ms. Hadskey at trial, and they did not attempt to offer any record evidence countering Ms. Hadskey's testimony (in response to either her May 6 declaration in the district court or her May 10 supplemental declaration in this Court). Accordingly, this evidence alone warrants a stay against the district court's injunction and remedial proceedings, which override the Secretary's election deadlines without any countervailing record evidence to undermine them. *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of applications for stays) ("Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges.").

B. Recognizing that the district court's single sentence about "oral arguments in a related case" (*Robinson* App. 1080–81) cannot justify the district court's writing its own election deadlines, Plaintiffs dedicate 17 pages to why this Court should

second-guess Commissioner Hadskey and the Secretary, *see* Resp. at 43–59.

Plaintiffs' arguments are meritless on their own terms—but they fail at the outset for an even more basic reason: Plaintiffs' attack is completely contrary to the ordinary presumption of good faith. "[G]overnment actors in their sovereign capacity and in the exercise of their official duties are accorded a presumption of good faith because they are public servants, not self-interested private parties." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009); *see, e.g.*, *Whitaker v. Dep't of Commerce*, 970 F.3d 200, 209 (2d Cir. 2020) ("Plaintiffs have submitted no evidence to rebut the presumption of good faith accorded to the declarations."). That presumption, moreover, goes hand-in-hand with the Court's recognition that a State has an "extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays). By begging this Court to find some reason to undercut Commissioner Hadskey's testimony (despite no countervailing record evidence), Plaintiffs flip the presumption on its head—by presuming *bad* faith and casting aspersions on public servants simply trying to do their jobs. The Court should reject that invitation out of hand.

In all events, Plaintiffs' arguments are easily disposed of on their own terms. *First*, Plaintiffs complain that the May 15 date is a product of "staffing needs," "administrative strain," and "simply [] administrative burden[s]," rather than a creature of state or federal law. Resp. at 42, 51, 52. That complaint is hard to understand given that state-wide elections, by their very nature, are "extraordinarily

complicated and difficult" and "pose significant logistical challenges." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring in grant of applications for stays). Indeed, that is exactly why the Court employs *Purcell*—to accommodate the "needs" and "burdens" that Plaintiffs now try to downplay and to ensure that, "[w]hen an election is close at hand, the rules of the road [are] clear and settled." *Id.* at 880–81. Moreover, the State commends Commissioner Hadskey's declaration to the Court, which cleanly walks through how the elections timeline is tightly stitched together (and for the same reason will fall apart if pieces are rejiggered by third parties unfamiliar with the election process). The timeline of tasks is anything but "simpl[e]." Resp. at 52.

Second, Plaintiffs accuse the State of not "get[ting] their story straight" regarding whether May 15 is a serious deadline. *Id.* at 43–46. They say that, in other court proceedings, the State and the Secretary have shifted between whether May 15 or "late May" is the key date. *Id.* at 43–47. They also say that, in this case, the Secretary has shifted on whether she must have "encoded" a map by May 15 or simply received it by that date. *Id.* at 47–48.

Plaintiffs miss three dispositive facts apparent from their own arguments and citations. One, in October 2023, the State noted that an "orderly election" could occur if "a map is *in place* by late May 2024." Resp. at 43 (citation omitted and emphasis added). That representation is entirely consistent with the Secretary's position throughout this case that she must *receive* the map by May 15. Two, the State's October 2023 representation came *before* the prospect of a new Louisiana Supreme Court map, which the Legislature enacted just days ago and which, as Commissioner

Hadskey explains, significantly complicates the Secretary's election obligations over the next few weeks. *E.g.*, Hadskey Decl. ¶¶ 20, 29, 30.[1] Three, the Secretary's supposed "change in position" (Resp. at 47–48) on whether she must receive a map or it must be coded by May 15 is contrived. *Compare* Pls.' App. 160 (on February 27: "[The Secretary] hereby notifies the Court that she and her department will need an approved congressional plan no later than May 15, 2024, in order to have sufficient time and resources needed to administer congressional elections in 2024 pursuant to the schedule for congressional elections mandated by both federal and state law."); State's Add. 10 n.1 (on May 8: "Any order to change the map currently programmed in the system must be received by the Secretary's Office by May 15, 2024."); State's App. at 6 n.1 (same).

Third, Plaintiffs try to undermine actual statutory deadlines such as the June 19 nominating-petition deadline and the July 19 qualifying deadline. Resp. at 49–53. Relying on the VRA plaintiffs' *Robinson* brief in this Court, they cite "representations" from Louisiana "legislative leaders" suggesting that the deadlines can be moved. *Id.* at 49. The Secretary's own record evidence in this case of course takes precedence. Moreover, Plaintiffs notably omit that this Court—in *granting* a

[1] Plaintiffs later complain that the Legislature's enactment of a new Louisiana Supreme Court map is a complication of the State's "own making." Resp. at 51 & n.9. But the Secretary and the Legislature are not a monolith, and the Secretary did not enact the new Louisiana Supreme Court map (which the Legislature sent to the Governor the day before the April 30 order and the Governor signed the day after). As a faithful administrator of the State's election laws (however they come to her), she cannot be faulted for the extremely difficult election season ahead of her. In the same breath, Plaintiffs suggest that the State is asking the Court to give special preference to the Louisiana Supreme Court map's coding to the detriment of Louisiana's congressional map. *Id.* at 51–52. Not so. The State's only request is that the Court enter a stay, which will allow the Secretary to code both the Supreme Court and (if necessary) congressional maps and otherwise administer an orderly election.

stay of the *Robinson* court's injunction—implicitly rejected the *Robinson* plaintiffs' reliance on the "legislative" representations. *See Ardoin v. Robinson*, 142 S. Ct. 2892 (2022) (mem.). And the same goes for Plaintiffs' puzzling reliance (Resp. at 50) on the Fifth Circuit's stay-denial decision in *Robinson* claiming that these election deadlines can be moved: This Court effectively overruled that decision 16 days later by itself granting a stay of the injunction against Louisiana's then-existing congressional map. Just so here.

Fourth, to the extent they engage with Commissioner Hadskey's declaration at all, Plaintiffs misrepresent and disparage it. They claim, for example, that "Hadskey laments that the June 4 deadline could require Registrars of Voting to work overtime." Resp. at 52. That is incorrect. Her actual testimony is that "there will not be enough time for the local Registrars of Voters to do their part in implementing the [court-imposed] map by July 17, 2024—the start of candidate qualifying other than through nominating petitions—while also certifying signatures for nominating petitions and the rest of their duties in this particular timeframe." Hadskey Decl. ¶ 28. And importantly, "there will be nothing the Secretary can do about this because the Registrars of Voting are their own appointing authority over which the Secretary has no direct control. The Secretary cannot force the registrars to force their employees to work overtime, etc., in order to complete these tasks on an otherwise unreasonable schedule." *Id.*

Elsewhere, Plaintiffs repeatedly criticize Commissioner Hadskey's testimony as "untested" and "may[be] not even [] on personal knowledge." *E.g.*, Resp. at 52. That

criticism is baseless. Commissioner Hadskey has "personal knowledge of the facts set forth" in her declaration. Hadskey Decl. ¶ 1. Further, Plaintiffs had every right to seek discovery on these issues, call Commissioner Hadskey as a witness, and propound their own evidence to dispute the May 15 date—after all, they have known about it for three months. But they did not. Recognizing their error now, they try to pass the problem off to the State. *See, e.g.*, Resp. at 53 ("What 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?"). "Not so fast." *Id.* at 40. Nothing prevented Plaintiffs from seeking and eliciting this information since February when they learned about the schedule (or even offering their own evidence now in response to Commissioner Hadskey). Plaintiffs cannot fault the State for their strategic misstep.

Fifth, Plaintiffs try to avoid *Purcell* by describing the State as "slow-walking" its emergency stay filings within the past week. Resp. at 53–54. According to Plaintiffs, the State should have filed a stay application on May 1 (right after the April 30 order) rather than on May 8 (right after the May 7 order). No. For one thing, that is what the *Robinson* Intervenors did and yet all parties arrived in this Court within a little over a day of each other; the State's seeking a stay earlier in the district court would have changed nothing. More fundamentally, there was a possibility that the district court would order a 2024 map at or shortly after the May 6 remedial status conference—and the State made its 2024 views clear at that conference. A stay request would thus have been premature if, for example, the district court agreed to

use S.B. 8 for 2024, as the State argued on May 6. Only after the district court rejected that path on May 7 did the State immediately seek stay relief. There was no "slow-walking."

Finally, Plaintiffs try to twist *Purcell* itself and related precedents in their favor—to no avail. For example, they claim that staying the injunction against S.B. 8 would itself violate *Purcell*. *Id.* at 56–57. That backwards-sounding claim sounds that way because Plaintiffs beg the merits question in their favor. *See id.* at 56 ("[T]he 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."). Plaintiffs lose in this stay posture independently because of the merits. *See infra* Section II. But they are also wrong here because this Court has emphasized that, "under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case even though the existing apportionment scheme was found invalid." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

Plaintiffs also suggest that, by asking this Court to deny a stay in favor of permitting the district court to conduct remedial proceedings, they are asking the Court take "the path [it] has repeatedly taken in identical situations." Resp. at 58–59 (citing cases). Plaintiffs' cited cases plainly do not reflect identical situations. *See* Emergency App. for Stay and Request for an Immediate Admin. Stay at 39, No.

23A641, *Michigan Indep. Citizens. Redist. Comm'n v. Agee*, 2024 WL 144446 (U.S. Jan. 9, 2024) (applicant conceding "that the timing of the district court's injunction with sufficient time for a highly compressed redistricting does not so thoroughly threaten 'chaos' such that the *Purcell* principle commands a stay standing alone"); *see also* Emergency App. for Stay Pending Appeal at 17–19, *Allen v. Milligan*, No. 23A231, 2023 WL 5941732 (U.S. Sept. 11, 2023) (not raising any *Purcell* argument at all); Emergency App. for a Stay of Judgment and Injunction at 9–10, No. 23A862, *Trevino v. Palmer*, 2024 WL 1341879 (U.S. Mar. 25, 2024) (same).

In sum, this case falls squarely within the heartland of *Purcell*—and whether the imminent harms to the State are labeled "irreparable harm" or "changes [that are not] feasible before the election without significant cost, confusion, or hardship," *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays), a stay is warranted on this ground alone.

II. THERE IS A FAIR PROSPECT OF REVERSAL.

The merits of this case likewise independently warrant a stay pending appeal. Louisiana's unprecedented dilemma in this case has no analogue in this Court's precedents. And if Louisiana does not prevail in this case, it is difficult to imagine how the Court's current redistricting jurisprudence would permit States to comply with the competing demands of the VRA and the Equal Protection Clause going forward. For these reasons, there is a fair prospect of reversal—and, at a minimum, Plaintiffs cannot show that "the merits [are] clearcut in [their] favor." *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays).

Racial Predominance. Start first with Plaintiffs' failure to "prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Cooper v. Harris*, 581 U.S. 285, 291 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)); State's App. at 27–30. On this threshold question, the parties agree in large part about what the record shows—they just draw opposite legal conclusions from it. For example, Plaintiffs emphasize that their own witness—Senator Alan Seabaugh—"testified that the 'only reason' the Legislature drew a new redistricting map is because 'Judge Dick [said] that she—if we didn't draw the second majority minority district she was going to.'" Resp. at 15. Similarly, like the State, Plaintiffs emphasize legislators' statements such as: "'We were ordered to—to draw a new Black district, and that's what I've done.'" *Id.*; *see* State's App. at 15–16, 28–30 (cataloguing similar evidence).

The critical question in light of this evidence is whether the Middle District's and Fifth Circuit's race-based decisions—*i.e.*, the VRA likely requires a second majority-Black district—can be imputed to the State for purposes of the racial-predominance analysis. And on that question, Plaintiffs conspicuously ignore the State's two arguments why the answer should be no. *See* Resp. at 13–22. *First*, the predominance question asks whether "race was the predominant factor motivating *the legislature's* decision." State's App. at 29 (quoting *Cooper*, 581 U.S. at 291). But here, the federal courts themselves held that the VRA likely requires a second majority-Black district—and "[t]urning the courts' race-based dictate back on the Legislature would be a wholly unfair game of gotcha that this Court has never

endorsed." *Id.* Plaintiffs do not disagree. The State also argued that, "by the majority's logic, a State could never (constitutionally) remedy a VRA violation by drawing a required majority-Black district because such a remedy would always require a legislature to start from the premise that it must create a majority-Black district." *Id.* at 30. Again, Plaintiffs do not disagree.

Plaintiffs' refusal to engage with these core questions in the racial-predominance analysis signals that there is at least a fair prospect of reversal and, in all events, "the merits [are not] clearcut in [Plaintiffs'] favor." *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays).

Strict Scrutiny. The Court need not proceed to strict scrutiny since, as outlined above, Plaintiffs failed to prove racial predominance. But, even if Plaintiffs had proved racial predominance, this is the unique case that plainly satisfies strict scrutiny—and Plaintiffs' protests otherwise are unavailing.

First, and for the first time in this litigation, Plaintiffs spend significant time disputing whether S.B. 8 achieves a compelling interest. Resp. at 22–26. They claim now that the Legislature's enactment of S.B. 8 was not actually a sincere attempt to comply with the VRA; it was instead simply a "desire to end [the *Robinson*] litigation." *Id.* at 26. Plaintiffs also insist that, "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." *Id.* Accordingly, "[t]he State's failure to claim the VRA as the real reason behind this unlawful racial gerrymandering dooms its case." *Id.*

Respectfully, it is difficult to understand Plaintiffs. The VRA was the whole reason for the *Robinson* litigation. It was the core of the Middle District's and the Fifth Circuit's conclusions that the plaintiffs in *Robinson* "were likely to succeed on their claim that" H.B. 1 violated "Section 2 of the Voting Rights Act" by failing to contain a second majority-Black district. *Robinson v. Ardoin*, 86 F.4th 574, 583 (5th Cir. 2023). And those conclusions regarding what the VRA likely requires were (as Plaintiffs admit, Resp. at 14–15) the impetus for the special legislative session that resulted in S.B. 8 and its second majority-Black district. There is no basis for Plaintiffs' bizarre suggestion that the State cannot claim a compelling interest in complying with federal court decisions that themselves instruct the State on what VRA compliance likely requires.

Notably, even the majority below did not find this issue hard. The majority easily proceeded past the compelling-interest analysis because it "assume[d] … that compliance with Section 2 was a compelling interest for the State to attempt to create a second majority-Black district in the present case." App. 431. The Court should do the same here, particularly given the layers of judicial decisions articulating for the State what the VRA likely requires. State's App. at 31.

Second, Plaintiffs similarly stumble in their argument that S.B. 8 is not narrowly tailored to achieve that compelling interest. They do not dispute that, in this unique redistricting context, "the narrow tailoring requirement insists only that the legislature have a strong basis in evidence in support of the (race-based) choice that it has made." State's App. at 31–32 (quoting *Bethune-Hill v. Va. State Bd. of*

Elections, 580 U.S. 178, 196 (2017)). Nor do they dispute that this standard is intended "to give States 'breathing room' to navigate 'the competing hazards of liability under the Voting Rights Act and the Equal Protection Clause.'" *Id.* at 32 (quoting *Bethune-Hill*, 580 U.S. at 196); *see* Resp. at 22, 29. Plaintiffs nonetheless insist that the State lacks a strong basis in evidence here, even though both the Middle District and the Fifth Circuit told the State that the VRA likely requires a second majority-Black district. Plaintiffs are mistaken.

Plaintiffs first resist the State's strong basis in evidence on the ground that the State does not invoke "any evidence or citations to the *Robinson* record." Resp. at 32. But it is the courts' *decisions* themselves that are the strong basis in evidence. They told the State that H.B. 1 likely violates the VRA because it lacks a second majority-Black district. In any event, Plaintiffs' demand that the Legislature show its work flouts *Bethune-Hill*, where the plaintiffs tried to fault the Virginia Legislature for failing to "memorialize[] in writing" its VRA analysis. *Bethune-Hill*, 580 U.S. at 195. This Court rejected that argument and upheld the challenged map under strict scrutiny, explaining that federal courts "'do not require States engaged in redistricting to compile a comprehensive administrative record.'" *Id.* (cleaned up).

Plaintiffs also argue that, "even if the *Robinson* litigation could provide a strong basis in evidence, it does not do so here" because "[n]either SB8, nor any map resembling SB8, was ever litigated in *Robinson*." *Id.* at 33; *see id.* at 33–34 ("The Middle District of Louisiana's findings were based entirely on 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.'").

Plaintiffs' characterization is accurate—but misdirection, for reasons the State emphasized and Plaintiffs now avoid. State's App. at 33–34 & n.7. In particular, Plaintiffs' argument implies that the Legislature could have drawn another two majority-Black district map that complies with Plaintiffs' view of the Constitution. At the same time, however, Plaintiff expressly argue that such a map is impossible to draw. *See, e.g.*, Resp. at 18–19 (emphasizing that Plaintiffs' expert "testified that it is impossible to draw a second majority-minority congressional district without violating traditional redistricting criteria"); *id.* at 39 ("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."); *id.* at 41 ("Plaintiffs have already shown that the Black population is too dispersed outside of Southeast Louisiana to draw another Black-majority district."); *see also* State's App. at 33 n.7 ("Not a single map produced by any demographer in both *Robinson* and *Callais* demonstrated that there is enough Black population in southeastern Louisiana to draw two majority-Black districts in that region.").

Plaintiffs thus inadvertently accentuate the State's exact problem: The *Robinson* courts told the State that the VRA likely requires a map with two majority-Black districts, but the majority below struck down such a map on constitutional grounds, and Plaintiffs insist that no such map can be constitutionally drawn in the

first place. *See* State's App. at 33–34. That is why this Court's "breathing room" concept is uniquely at stake here. "[I]f the State is deemed to have violated the Fourteenth Amendment by adding a second majority-Black district in S.B. 8—after being told by the Middle District and the Fifth Circuit that the VRA likely requires a second majority-Black district—there is no oxygen in that room." *Id.* at 34.

Here, too, there is at least a fair prospect of reversal and, in all events, "the merits [are not] clearcut in [Plaintiffs'] favor." *See Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring in grant of applications for stays).

III. PLAINTIFFS' ARGUMENTS ON THE REMAINING FACTORS ARE MERITLESS.

Finally, Plaintiffs argue in closing that the Court should decline to stay the district court's injunction because they themselves face harm and the public interest cuts against a stay. These arguments are unavailing on their own terms.

First, a central premise of Plaintiffs' arguments is that they will prevail on the merits of their Equal Protection claim. *See* Resp. at 59 ("Respondents and other non-party voters will at least be substantially harmed … if that injunction [against S.B. 8] is now stayed because a blatant gerrymander will rise from the ashes, even if technically just 'pending appeal.'"); *id.* at 60 (arguing that "the public interest weighs heavily against a stay" because "[t]he harm to Respondents is shared by every Louisiana voter"); *id.* at 63 ("a stay pending appeal means Respondents and millions of other voters will receive no remedy in 2024 for the brutal racial gerrymander"). That is question-begging. If there is a fair prospect of reversal (or, at least, if the merits are not clearcut in Plaintiffs' favor), then this premise collapses—and neither supposed "harm" to Plaintiffs nor the public interest cuts against a stay. And because

Plaintiffs are not clearly correct on the merits, their attempt to piggyback the other stay factors on the merits goes nowhere.

Second, Plaintiffs' remaining "[t]wo considerations" do not withstand scrutiny. *Id.* at 61. They first complain that "this Court [should] allow the District Court to develop a full record before it preliminarily stays the proceedings below." *Id.* Plaintiffs' reasoning is difficult to follow. If their suggestion is that the Court should not entertain the State's emergency stay motion until "21 days" from now (*id.* at 62), Plaintiffs have completely misunderstood the State's dilemma. The State needs to know by tomorrow, May 15, which map it may use for the 2024 elections. Permitting the district court to impose its own map three weeks from now would not solve anything—it would make the present situation worse. Further, if Plaintiffs are suggesting that the Court does not have an adequate record to decide the *merits* of the State's appeal from the three-judge panel's liability decision, they are wrong (and the panel itself had no problem adjudicating the merits). And even if Plaintiffs were right, any record deficiencies would be Plaintiffs' fault.

Plaintiffs also complain that, by entering a stay, this Court would "effectively choose a 2024 [map] winner." *Id.* at 63. But that is the certainty Louisiana desperately needs right now—not nine extra innings like the Giants against the Nationals in 2014. In addition, it will *always* be the case that a stay of an injunction against a congressional map will effectively decide which map is used for the impending elections. The only question here is whether (a) this Court will step in, consistent with its traditional *Purcell* practice, to ensure election integrity and

prevent election confusion, or (b) deny a stay and let the district court perpetuate election uncertainty, including the likelihood of further litigation in this Court—in an even-more desperate time crunch—over whatever map the district court selects in three weeks.

Finally, Plaintiffs end (*id.* at 63–65) with a bewildering theme that pervades their brief—that the State is part of a vast, secret conspiracy to encourage the Middle District to impose its own map with two majority-Black districts. *See, e.g.*, *id.* at 43 (the State "hatched a racial gerrymander"); *id.* at 48 ("something else is at work"); *id.* at 53 ("something other than threats of 'chaos' is driving [the State's] position"). As best the State can understand it, Plaintiffs claim that, by enacting S.B. 8 and now seeking a stay of the district court's injunction, the State seeks to "awake" "the Middle District … from its dormancy [in *Robinson*], skip a final trial on liability, and move directly to impose a map that is itself a racial gerrymander." *Id.* at 64; *id.* at 65 ("[A]ll 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," Plaintiffs proclaim. *Id.* at 65.

With all due respect, what are Plaintiffs talking about. For one thing, if this Court stays the Western District's injunction, that means *S.B. 8*, not *H.B. 1*, will be used for the 2024 elections. How could that "awake" the Middle District to try to enjoin H.B. 1, which would not even be in use? For another thing, even if this Court ordered H.B. 1 to be used by issuing a stay after May 15, how could the Middle District

"awake" and countermand this Court by enjoining H.B. 1? And for yet another, if the record is clear on anything, it is clear that the State enacted S.B. 8 under protest to *prevent* the Middle District from drawing its own map—and the State has since successfully moved to *dismiss Robinson*. If the State secretly had its eye on some other two majority-Black district map the whole time—but instead enacted and defended S.B. 8 to get to that map—that would be a mind-bending mystery not even Sherlock Holmes could untangle.

There is nothing to Plaintiffs' conspiracy theories. And their wild speculation certainly cannot overcome the presumption of good faith owed to the State and the Secretary, particularly supported by the Hadskey Declaration. That Plaintiffs felt compelled to place such enormous reliance on it only underscores that Plaintiffs have no real defense against a stay of the district court's injunction.

CONCLUSION

Applicants respectfully request that the Court stay the district court's April 30 injunction against S.B.8 and the May 7 remedial order **by Wednesday, May 15**. If the Secretary does not have a map by May 15, the only map that could be feasibly implemented after May 15 (and avoid election chaos) is the H.B. 1 map, which remains in the State's voter-registration system.

Respectfully submitted,

PHILLIP J. STRACH
ALYSSA M. RIGGINS
CASSIE A. HOLT
NELSON MULLINS RILEY
& SCARBOROUGH LLP
301 Hillsborough Street
Suite 1400
Raleigh, NC 27603
Telephone: (919) 329-3800
Facsimile: (919) 329-3799

JOHN C. WALSH
SHOWS, CALI & WALSH, L.L.P.
628 St. Louis St. (70802)
P.O. Box 4225
Baton Rouge, LA 70821
Telephone: (225) 346-1461
Facsimile: (225) 346-5561

Counsel for Applicant NANCY LANDRY, in her official capacity as Louisiana Secretary of State

ELIZABETH B. MURRILL
Louisiana Attorney General

J. BENJAMIN AGUINAGA
Solicitor General
Counsel of Record
MORGAN BRUNGARD
Deputy Solicitor General
LOUISIANA DEPARTMENT OF JUSTICE
1885 N. Third St.
Baton Rouge, LA 70802
(225) 506-3746 phone
aguinagab@ag.louisiana.gov

JASON B. TORCHINSKY
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
2300 N Street, NW
Suite 643A
Washington, DC 20037
Tel: 202-737-8808
jtorchinsky@holtzmanvogel.com

DREW C. ENSIGN
BRENNAN A.R. BOWEN
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
2575 East Camelback Rd, Ste 860
Phoenix, AZ 85016
602-388-1262
densign@holtzmanvogel.com
bbowen@holtzmanvogel.com

PHILLIP M. GORDON
ZACHARY D. HENSON
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIAK, PLLC
15405 John Marshall Hwy.
Haymarket, VA 20169
Telephone: (540) 341-8808
Facsimile: (540) 341-8809
pgordon@holtzmanvogel.com
zhenson@holtzmanvogel.com

Counsel for the State of Louisiana