No. 19-30665

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

VINCENT FUSILIER, SR., Reverend; LIONEL MYERS; WENDELL DESMOND SHELBY, JR.; DANIEL TURNER, JR.; TERREBONNE PARISH BRANCH NAACP,

Plaintiffs-Appellees,

v.

JEFFREY MARTIN LANDRY, Esq., Attorney General for the State of Louisiana, in his official capacity,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA
CIVIL ACTION NUMBER 3:14-cv-00069-SDD

REPLY BRIEF OF DEFENDANT-APPELLANT.

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INTRODUCTION

Appellees' arguments are unavailing. The NAACP and individual plaintiffs ("Plaintiffs-Appellees") brought suit against the Louisiana Secretary of State, Governor, and Attorney General alleging that the at-large method of elections in the 32nd Judicial District Court ("32nd JDC") is a racial gerrymander and a violation of Section 2 of the Voting Rights Act ("VRA").

Under the facts of this case, allowing Plaintiffs-Appellees' claims to succeed brings about the "balkanization" of races that the Supreme Court has previously warned of. *See Miller v. Johnson,* 515 U.S. 900, 912 (1995). Plaintiffs-Appellees want this Court to uphold (1) an order that requires the *ultra vires* actions of the Attorney General and Governor in violation of Article III, *see* U.S. Const. art. III, § 2; (2) a remedial map that carefully segregates races with mathematical precision, which will not, in any event, give the non-compact minority population the ability to elect the candidate of their choice; and (3) a finding that Louisiana's linkage interest is insufficient, which is contrary to established precedent.

The District Court made these wayward rulings while attributing the fact that an African-American won an at-large election during the pendency of this litigation in the 32nd JDC as evidence of racial discrimination.[1] *See* ROA.29374-29381. The

[1] The Court also incorrectly discounted that Judge Pickett did a superb job of clearing the field, *i.e.* campaigning early and aggressively to help ensure limited opposition at the ballot box. *See* ROA.31585:21-31590:1.

Court further discounted the simple mathematical problem that there were only approximately 10 African-American attorneys living in Terrebonne Parish eligible to hold elected judicial office. ROA.29381-29382; *see LULAC v. Clements*, 999 F.2d 831, 865 (5th Cir. 1993) (the number of available candidates for judicial office is clearly relevant to Section 2 claims).

ARGUMENT

I. This Court Lacks Subject Matter Jurisdiction.[2]

The creation, implementation, and organization of voting districts in Louisiana is not within the power of the Governor or Attorney General. Neither the Governor nor the Attorney General have any power to change the method of electing judges in Louisiana, nor do they conduct elections in any electoral districts in Louisiana. These facts are so plain that Appellees do not attempt to contend otherwise. Instead, Plaintiffs-Appellees made a foundational mistake—the voluntary dismissal of the Louisiana Secretary of State in the nascent stages of this litigation.[3]

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[2] Plaintiffs-Appellees begin their analysis on the wrong foot when they argue that "the Attorney General's arguments on behalf of the Governor are irrelevant." *See* Appellees' Br. at 17. This Court's subject matter jurisdiction can be raised at any time, by any party or by the Court *sua sponte*. *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan*, 883 F.2d 345, 348 (5th Cir. 1989) ("[S]tanding is essential to the exercise of jurisdiction, and that lack of standing can be raised at any time by a party or by the court."); *see also New York v. Waterfront Airways, Inc*., 620 F. Supp. 411, 413 (S.D.N.Y. 1985) ("Because this is a challenge to the court's subject matter jurisdiction, Fed. R. Civ. P. 12(h)(3) permits it to be brought to the court's attention by persons other than the parties to the action.").

[3] To properly contextualize Plaintiffs-Appellees' decision to dismiss the Secretary, a short explanation is warranted. Plaintiffs-Appellees originally alleged that the Secretary of State "is *specifically* charged with enforcing the at-large method of election." ROA.67 (emphasis added). Plaintiffs-Appellees go on to state that the primary inquiry ought to be the Secretary of State's role in the "*maintenance* (not just the adoption) of the 32nd Judicial District." *See* ROA.250 (emphasis

ROA.2412. Simply put, neither the Governor nor the Attorney General have, in the words of this Court, "any duty or ability to do anything," *see Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001), with respect to the method of judicial elections in Terrebonne Parish.

To carry their burden, Plaintiffs must prove each element of Article III standing: (1) injury-in fact,[4] (2) traceability, and (3) redressability.[5] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). They have failed to do so. This Court reviews their failure *de novo*. *Rivera v. Wyeth-Ayerst Labs.,* 283 F.3d 315, 319 (5th Cir. 2002).

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in the original). According to Plaintiffs-Appellees, "Defendant SOS's conduct is indisputably (and thus well beyond 'fairly') traceable to Plaintiffs' injuries." ROA.244. The District Court originally agreed that the Secretary is a proper party because "this suit calls into question the legality of [the Secretary's] actions taken pursuant to his duties as the secretary of state and calls upon him to defend those actions." ROA.841. Needless to say, the Attorney General wholly agrees with the District Court's and Plaintiffs-Appellees' initial assessment.

As discovery proceeded apace, however, Plaintiffs-Appellees found themselves in a bind by refusing to properly answer discovery. *See* ROA.282-284 (Secretary's Motion to Compel and for Sanctions); ROA.881-885 (Order Granting Motion to Compel); ROA.968-970 (Motion for Sanctions); ROA.2397-2410 (Order Granting Motion in Part). Approximately two weeks after the Court's Order, Plaintiffs voluntarily dismissed the Secretary. ROA.2412; *see also* ROA.2415 (Order Granting Motion to Dismiss).

[4] For the purposes of Appellant's standing analysis, injury is presumed. However, Appellants dispute the existence of any injury in the first instance. *See infra* at 12-18.

[5] While immunity from suit under the Eleventh Amendment—and the limited exception of *Ex parte Young*—and Article III standing are separate inquiries, the question of "[w]hether state officials are, in their official capacities, proper defendants in a suit is really the common denominator of [the] two separate inquiries . . . ." *Morris v. Pablos*, No. 3:17-cv-3387-L-BN, 2018 U.S. Dist. LEXIS 133711 at *8 (N.D. Tex. July 18, 2018) (quoting *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013)) (internal alterations omitted). Therefore, the arguments regarding Plaintiffs-Appellees' standing with the Attorney General and Governor's "fit" under the *Ex parte Young* analysis are transferable. For the reasons outlined in this section, both the Governor and the Attorney General are improper parties which necessitates dismissal under Article III and/or state sovereign immunity.

Traceability is the "causal connection between the injury and the conduct complained of . . . ." *Lujan*, 504 U.S. at 560. "[T]he key inquiry" in the traceability analysis "is not whether the injury may be traced to the Statute generally; instead, it is whether the injury can be fairly traced to [the state officer's] . . . conduct." *Inclusive Cmtys. Project, Inc. v. Abbott*, No. 3:17-cv-0440-D, 2018 U.S. Dist. LEXIS 88674 at *12-13 (N.D. Tex. May 29, 2018) (citing *Lujan*, 504 U.S. at 560). A "particular officer [must have] the 'coercive power' to cause the alleged injury-in-fact." *Id*. at *15 (citing *Okpalobi*, 244 F.3d 405). In other words, the state official must have power to enforce the complained of act. *Okpalobi*, 244 F.3d at 426.

Similarly, redressability is simply the ability of a party to remedy the harm alleged. *See Lujan*, 504 U.S. at 560-61. "A state official cannot be enjoined to act in any way that is beyond his authority to act in the first place." *Okpalobi*, 244 F.3d at 427. "[T]here is no reason [that non-parties] should be obliged to honor an incidental legal determination the suit produce[s]." *Lujan*, 504 U.S. at 569.

A. The Louisiana Governor and Attorney General are Improper Parties.

Neither the Attorney General nor Governor have any connection with the method of electing any candidate to any office in the State of Louisiana. *See* Appellant's Br. at 10-21. To extend standing (or the *Ex parte Young* exception) to the facts of this case as they apply to the Governor or the Attorney General would allow litigants to sue any state official without regard to their actual powers under state law in order to achieve whatever relief. Fortunately, federal court precedent

stands as a bulwark against Plaintiffs-Appellees' invitations for state official standing writ large. Nothing Plaintiffs-Appellees point to as actions by the Governor or Attorney General are sufficient to convey standing.

Plaintiffs-Appellees make a number of flawed assertions in a desperate attempt to salvage their lack of Article III standing. They argue that both the Attorney General and the Governor are proper parties because they have either a generalized duty to see that the laws be executed (Attorney General), *see* Appellees' Br. at 20-21, or the ability to sign legislative enactments (Governor), *see* Appellees' Br. at 19. They also argue the Governor's ministerial duty to sign commissions is sufficient to confer standing. Appellees' Br. at 20. Plaintiffs-Appellees are incorrect at every turn.

Initially, to give the Court a sense of how strained Plaintiffs-Appellees' arguments are with regard to standing, they rely upon 4 U.S.C. § 101 in a rather weak attempt to meet Article III's standing requirements. *See* Appellees' Br. at 20. Section 101 merely requires "every executive . . . officer of a State . . . to take an oath" supporting the Constitution of the United States. *See* 4 U.S.C. § 101. This "authority" is little more than a generalized duty to enforce the law, which has been nearly universally rejected as an independent basis for standing. *See, e.g., Okpalobi*, 244 F.3d at 416-417 (rejecting that the generalized duty to enforce the law is sufficient to establish the connection required under *Ex parte Young*); *Women's Emergency Network v. Bush*, 323 F.3d 937, 949-50 (11th Cir. 2003) (noting that the

"general executive power" is insufficient to confer standing); *1st Westco Corp. v. School Dist. Of Philadelphia*, 6 F.3d 108, 113 (3d Cir. 1993) ("General authority to enforce the laws of the state" is insufficient to make an official a proper party).

The Governor's veto power suffers from a similar defect as reliance upon generalized executive power.[6] *Cf. Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991) (concluding the Governor was immune from suit over exercise of a veto); *Saffioti v. Wilson*, 392 F. Supp. 1335 (S.D.N.Y. 1975) (dismissing challenge to exercise of veto but not for lack of standing).[7] To hold otherwise would effectively allow the Governor to be a proper party in *any* case challenging any state law. As discussed *supra*, that is not, nor can it be, the law.

i. The Governor's Generalized Authority to Grant Commissions Is Insufficient to Confer Standing.[8]

Appellees propose that the Governor's ministerial responsibility to commission electoral victors, including judges, is a sufficient nexus to confer Article

[6] Presumably this is what Appellees mean when they state that "the Legislature, *with the Governor's consent,* can determine trial court judge's election methods." *See* Appellees' Br. at 19 (emphasis in original). However, none of their cited authority stands for that lofty proposition except for the exercise of the Gubernatorial veto found in La. Const. art. III, § 18. Notably, Plaintiffs-Appellees fail to directly sign to this provision, which is why it is unknown what power they are implying the Governor has.

[7] Despite Appellees' assertions, *see* Appellees' Br. at 21 n.5, the power to issue advisory opinions is insufficient for standing purposes. *See Greater Birmingham Ministries v. Alabama*, No. 2:15-cv-02193-LSC, 2017 U.S. Dist. LEXIS 28671 at *26 (N.D. Ala. March 1, 2017).

[8] It was Plaintiffs-Appellees' burden to prove standing. *Hotze v. Burwell*, 784 F.3d 984, 992-93 (5th Cir. 2015). "[T]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Plaintiffs-Appellees have failed their burden.

III standing. *See* La. Rev. Stat. Ann. § 18:513(A)(5) ("The name of a candidate elected . . . shall be certified [by the Secretary] to the governor, who shall issue a commission to the elected official on the date the term begins . . . ."). Appellees misunderstand their claims, their requested relief, and the relief ordered.

Plaintiffs-Appellees' Complaint alleges that the *method* of electing judges in the 32nd JDC violates the VRA and the Fourteenth and Fifteenth Amendments to the United States Constitution. *See, e.g.,* ROA.82-83 (prayer for relief requesting various "[d]eclar[ations] that Defendants' at-large *method* of electing" judges violates the law) (emphasis added). In so doing, they sought relief to change the *method* of electing judges in the 32nd JDC from an at-large system to a districted system containing a majority-minority district in order to allow African-Americans the opportunity to elect the candidates of choice. *See* ROA.82-83. Unsurprisingly, in its permanent injunction, the District Court ordered that the "Governor and the Attorney General . . . are hereby permanently enjoined from administering, implementing, or conducting future elections for the 32nd JDC in which members of the 32nd JDC are elected on an at-large basis . . . ." ROA.30554. The District Court goes on to order "all *current* parties" to implement a "five single-member district plan . . . ." ROA.30555 (emphasis added). Nothing in Plaintiffs-Appellees' requested relief, nor in the District Court's order, touches on the Governor's duty to issue commissions. Plaintiffs-Appellees "confuse[] the statute's immediate coercive

effect . . . with any coercive effect that might be applied by the *defendants*. . . .” *See Okpalobi*, 244 F.3d at 426 (emphasis in original).

Further, the method of conducting elections bears no relationship with the certification of victors in any election and is certainly unrelated to the remedy. Changing the method through districting—or redistricting as the case may be—to create majority-minority districts affords plaintiffs an electoral *opportunity* rather than producing any specific electoral *outcome*. *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994) (“[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.”). Plaintiffs-Appellees have argued that they have been denied the *opportunity* to elect the candidates of their choice. The change in the *method* of conducting elections is the remedy to that alleged wrong. The Governor’s responsibility to grant commissions under the law is irrespective of the method of conducting elections anywhere in the State. The Secretary of State is the state official charged with administration of Louisiana elections. *See* La. Rev. Stat. Ann. § 18:513(A)(5). The Governor sends out the commissions in accordance with the Secretary of State’s recommendation. As is patently the case under Louisiana law, the Governor has no authority to “administer[], implement[], or conduct[] future elections for the 32nd JDC . . . .” *See* ROA.30554.

Finally, the purely ministerial actions of the Governor in granting commissions to elected officials is insufficient to confer standing even if it were

somehow related to Plaintiffs-Appellees' harms. *See Morris v. Pablos*, No. 3:17-cv-3387-L-BN, 2018 U.S. Dist. LEXIS 133711 at *8-10 (N.D. Tex. July 18, 2018) (dismissing case on Article III and *Ex parte Young* grounds against the Texas Secretary of State where the Secretary had a "purely ministerial duty" to perform). The Governor's ministerial duty to grant commissions has *nothing* to do with the *method* of holding elections in the 32nd JDC.

ii. Plaintiffs-Appellees Materially Misrepresent Both the Facts and Law When Asserting that the Governor and Attorney General are Proper Parties.

Plaintiffs-Appellees cite multiple cases for the general proposition that "Courts routinely adjudicate official-capacity suits against" the Governor and Attorney General, presumably to give the impression that a lack of argument is evidence of proper party status. *See* Appellees' Br. at 18. First, this Court is never bound "when questions of jurisdiction have been passed on in prior decisions *sub silentio*." *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974); *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 393 (5th Cir. 2014) ("[Q]uestions of jurisdiction that have been passed on in prior decisions *sub silentio* are not entitled to preclusive effect . . . ." (internal quotations omitted)). Second, Appellees fail to mention that the Secretary of State or the Louisiana Commissioner of Elections[9] was a party in *every* case Appellees cite.

[9] The Commissioner of Elections is appointed by the Secretary of State and serves at his pleasure. *See* La. Rev. Stat. § 18:18(B).

For example, in *Chisom v. Roemer* as well as *Chisom v. Edwards*, both the Louisiana Secretary of State and the Commissioner of Elections were parties. *Compare Chisom v. Roemer*, 501 U.S. 380, 384 (1991) (stating that defendants were the "Governor and other state officials") *with Chisom v. Edwards*, 690 F. Supp. 1524, 1530 (E.D. La. 1988) (listing the Governor, the Secretary of State, and the Commissioner of Elections in Louisiana as named defendants).[10]

The rest of Plaintiffs-Appellees' authority suffers from the same defect where the Secretary of State was a party defendant. *See Prejean v. Foster*, 83 F. App'x 5 (5th Cir. 2003) (unpublished op.) (Secretary of State and Commissioner of Elections were named defendants); *Hall v. Louisiana*, 983 F. Supp. 2d 820 (M.D. La. 2013) (Secretary of State was a defendant); *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988) (same); *Clark v. Roemer*, 777 F. Supp. 471, (M.D. La. 1991) (same).

Plaintiffs-Appellees' reliance on *Hall v. Louisiana*, 983 F. Supp. 2d 820 (M.D. La. 2013) for the proposition that the Governor and Attorney General are proper parties is misplaced. Once again, Appellees ignore key details which make *Hall* incongruous regarding the question before the Court. First, like the previous instances of "authority" rendered in support of their assertions, the Secretary of State was also a party to the litigation.

[10] Unlike Appellees, this Court should not confuse the Supreme Court's use of shorthand when referencing defendants *en masse* with any opinion on the substance of their standing. Presumably, the Supreme Court referred to the "Governor and other state officials" because the Governor was listed first on the case caption.

Second, the question presented to the *Hall* court was in a motion to dismiss, thus requiring the court to accept plaintiffs' factual allegations as true. *See id*. at 832 ("[Plaintiffs'] Complaint, *on its face*, alleges that [the Governor] and [the Attorney General] have some connection with the enforcement of the 1993 Judicial Election Plan, or that they are specifically charged with the duty to enforce the Plan and are currently exercising and/or threatening to exercise that duty." (emphasis added)). Unfortunately for Appellees, the ship on that forgiving standard has long since sailed. As a matter of law and fact, neither the Attorney General nor the Governor caused Plaintiffs-Appellees' harm, can cause Plaintiffs-Appellees' harm, or can remedy any such harm found.

Finally, it is common for the Governor and/or Attorney General to be dismissed as parties in voting rights cases because they generally lack the causal connection required between their responsibilities and the complained of injury. *See, e.g., Does v. Abbott*, 345 F. Supp. 3d 763, 773 (N.D. Tex. 2018); *Greater Birmingham Ministries v. Alabama*, 2017 U.S. Dist. LEXIS 28671 at *8-10; *Morris v. Pablos*, 2018 U.S. Dist. LEXIS 133711 at *9-10 (dismissal of claims against the Texas Secretary of State for failure to allege proper facts on the connection between the Secretary's responsibilities and the alleged harm); *cf. OCA-Greater Houston v. Texas*, 867 F.3d 604, 613-614 (5th Cir. 2017) (distinguishing *Okpalobi* in a VRA challenge brought against the Texas Secretary of State because the Secretary "is the chief election officer of the state" and, therefore, a proper party).

Because the Plaintiffs-Appellees dismissed the Secretary of State, who is both the chief elections officer and the only one who can grant any relief, Plaintiffs-Appellees lack standing.

II. There Is No *Gingles I* Violation in the 32nd JDC.[11]

Gingles I requires the "minority group . . . to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). To be "sufficiently large" a minority group must, at a minimum, make up a bare majority of the proposed or illustrative district.[12] *See e.g., Gonzalez v. Harris County*, 601 F. App'x 255, 258

[11] Appellants are not arguing, in contrast to Plaintiffs-Appellees' assertions, *see* Appellees' Br. at 32, that *Miller*, *Vera*, and their progeny change the Court's analysis under Section 2 of the VRA. Instead, Appellants have argued, and continue to argue, that (1) the racially gerrymandered nature of the remedial map implemented by the District Court is *evidence* that *Gingles I* was not satisfied in the 32nd JDC, and (2) even if *Gingles I* were satisfied, the remedial map is itself a racial gerrymander in violation of the equal protection component of the Fifth Amendment's due process clause. *See* Appellant's Br. at 24-38. This makes sense because racially gerrymandered districts are not generally geographically compact. *See, e.g., Miller*, 515 U.S. at 913 (stating that bizarre shaped districts, though not required to prove a racial gerrymander, can be persuasive evidence of racial gerrymanders). If it is a bizarre shaped district, it is not geographically compact and *Gingles I* is not satisfied. *See, e.g., Bush v. Vera*, 517 U.S. 952, 979 (1996) (stating that Section 2 does not require a State to draw a district that is not reasonably compact). Similarly, if this plan were implemented by the Louisiana General Assembly, it would be an Equal Protection Clause violation. The Attorney General steadfastly holds to his opinion that the federal judiciary lacks the power to implement an unconstitutional remedy. To do so enhances, rather than lessens, the "evils of race-based redistricting," *Clark v. Calhoun Cty.*, 88 F.3d 1393, 1403 (5th Cir. 1996), and plunges Louisiana and the Nation toward the balkanization of "competing racial factions" the Supreme Court has long been wary of. *See Miller,* 515 U.S. at 912 ("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 . . . .") (quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993)).

[12] Plaintiffs-Appellees insist that the Attorney General cannot argue that the Remedial Plan is sufficiently numerous. *See* Appellees' Br. at 57 n.13. However, as shown *infra*, the Attorney General does challenge the remedial and illustrative plan's lack of numerosity.

(5th Cir. 2015) (per curiam) (citing *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009) (plurality op.)). However, the existence of a bare statistical majority is not always sufficient to meet the *Gingles I* threshold. *See, e.g., Bartlett*, 556 U.S. at 13.

The Supreme Court has repeatedly noted that a majority-minority district must be a "numerical, *working* majority," *id*. (emphasis added), or an "*effective voting* majority," *De Grandy*, 512 U.S. at 1014, in order to satisfy *Gingles I*. While it is currently an open question if a district which already contains a bare majority of minority citizens is susceptible to a vote dilution claim under the VRA, *see Thomas v. Bryant*, 938 F.3d 134, 169 (5th Cir. 2019), *opinion vacated and en banc hearing granted*, 939 F.3d 629 (*en banc* hearing and opinion pending), it can hardly be doubted that if a remedial district is to be required, it must certainly result in an "effective, working majority," *see, e.g., De Grandy*, 512 U.S. at 1014, to properly state a vote dilution claim. This is because the foundational element of a Section 2 claim is the *opportunity* to elect the minority's candidate of choice. *De Grandy*, 512 U.S. at 1014 n.11. If, even with a threadbare majority, a minority does not have the opportunity to elect its chosen candidate, then there is no claim for vote dilution. *See LULAC v. Perry*, 548 U.S. 399, 445 (2006) ("That African-Americans had influence in the district does not suffice to state a § 2 claim in these cases"); *see also Bartlett*, 556 U.S. at 13. Therefore, it is imperative that the Court "take a 'functional' view of the political process and conduct a searching and practical evaluation of reality*.*" *Gingles*, 478 U.S. at 66 (internal citation omitted).

A. Remedial District 1 Is Not a Majority Black District.

According to the Special Master's figures, District 1 of the remedial plan is only 49.7% Non-Hispanic DOJ black voting age population ("NH BVAP"). *See* ROA.30208.[13] As previously stated, a district that fails to achieve a bare majority is insufficient to prove vote dilution under Section 2.[14] *See, e.g., Bartlett*, 556 U.S. at 19-20.

Plaintiffs-Appellees argue that 49.7% NH BVAP is not the relevant number. Instead, according to Plaintiffs-Appellees, the appropriate number is 50.4% any part BVAP. Appellees' Br. at 57 n.13. Plaintiffs-Appellees argue that a footnote in *Georgia v. Ashcroft* is controlling and that the proper measure for VRA cases includes all individuals who self-identify as "any part" black. *See* 539 U.S. 461, 473 n.1 (2003). There are, however, several reasons to believe that the *Ashcroft* Court's footnote is not binding here. First, *Ashcroft* was overruled by later legislative enactment. *See Alabama Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273

[13] Note: Appellant's Brief mistakenly cited to the table for Plaintiffs' Alternative Plan, ROA.30211, instead of the table for Special Master's Remedial Plan, ROA.30208, as intended. This error has no practical effect as the relevant numbers cited are identical in both plans.

[14] The Special Master's Plan 2 District 1, which was the adopted remedy, is identical to Plaintiffs-Appellees' Alternative Plan. ROA.30189. There is some reason to doubt that the Special Master's all-black voting age population figures are correct. Plaintiffs-Appellees' expert, Mr. Cooper, admitted during his rebuttal testimony that the VAP in the Alternative Plan was derived from adding Parish Councils 1 and 2, removing a precinct, and then using American Community Survey census (not decennial census) estimates to derive a Black CVAP over 50%. ROA.32651-32652. Appellant's expert took the electronic shapefiles sent by Plaintiffs-Appellees' attorneys and found both Mr. Cooper's imported plan and the original source shapefiles had the *exact* same numbers. Those numbers showed a Black VAP of 49.7% which is below the threshold requirement of *Gingles I*. This was not disputed by the Plaintiffs below. ROA.32638.

(2015). A footnote that did not directly address the distinction between a person who identifies as "black only" or "any part black" and which is legally required in the Section 5 context is not controlling here where the distinction makes a significant difference in the proper application of law.

Further, the *Ashcroft* Court narrowed the scope of its footnote to where "the case involves an examination of only one minority group's effective exercise of the electoral franchise." *Ashcroft*, 539 U.S. at 473 n.1. While the primary analysis here is of the African-American population in Terrebonne Parish, the mere fact that the existence of those who identify as "any part" black has such a monumental impact on the outcome *Gingles I* seems to indicate the existence of other racial considerations not clearly articulated in the data.

Therefore, because the African-American population is not sufficiently numerous to form a majority, there is no violation of the VRA.

i. Even if this Court Considers District 1 to be a Majority-Minority District, it Does Not Provide an Opportunity to Elect a Candidate of Choice.

Even if the Court determines that 50.4% "any part" BVAP is the appropriate black population number to use for claims under Section 2, Plaintiffs-Appellees still will not have the opportunity to elect their candidate of choice. The Special Master manipulated the data to construct a threadbare majority-minority district under the broadest possible definitions. Meanwhile, the District Court failed to address the

disparity in voter turnout between black and white voters in Terrebonne Parish. *See generally* ROA.30521-30532. This disparity will prevent black voters from having the opportunity to elect the candidate of their choice. *Cf.* ROA.32193-32194 (expert trial testimony stating that a majority-minority district with 50.81% BVAP would not guarantee electoral success).

Initially, the District Court's Remedial Plan cobbles together a mere .4% majority under the broadest possible definitions. District 1's total population is 21,562 persons. ROA.30208. This .4% variation results in a difference of approximately 862 persons. Interestingly, the Special Master underpopulated District 1 by 810 people. ROA.30208. This is not an accident. The Special Master had to remove almost exclusively white voters from District 1 to create anything approaching a numeric majority-minority district.

Further, there was expert testimony that in *bi-racial* elections, African-American voter participation lags behind non-African-Americans. *See* ROA.30274 (Defendant's expert noting that in 2014 parish-wide elections, the difference in voter participation between African-Americans and non-African-Americans was -16.8% for one election and -6.6% for the other). Those numbers hold true for the November 2018 elections where white voter turnout was 51.69% and African-American turnout was 41.97%, a difference of 9.72%. ROA.30274-75.

Under any permutation of the data, and any statistical definition of "black" used, there is no reasonable opportunity, without significant white crossover voting,

for African-American voters in District 1 to elect a candidate of their choice. Therefore, because Section 2 does not mandate "crossover" districts, *Bartlett*, 556 U.S. at 15., there is no Section 2 violation in the 32nd JDC.

B. District 1 Is Not Compact.

District 1 of the Remedial Plan has extraordinarily low compactness scores on both mathematical matrices provided by the Special Master. *See* ROA.30220; ROA.30278 (Defendant's expert stating the Reock and Polsby-Popper are "well below generally accepted scores for geographical compactness."). The Polsby-Popper scores are particularly concerning. Polsby-Popper is an accepted method utilized by Courts and redistricting commissions to evaluate district compactness. *See, e.g., Perez v. Abbott*, 250 F. Supp. 3d 123, 167 n.49 (W.D. Tex. 2017). District 1 has a score of .09 on that measure of compactness. For reference, a score of 1 is perfectly compact and a score of 0 is absolute non-compactness. *Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 743, n.3 (Va. 2018); *cf.* ROA.30278, ROA.30322-30328 (Appellant's experts noting the Remedial Plan is not compact).

Furthermore, Plaintiffs-Appellees' arguments that the other district maps are non-compact is unavailing. Appellees' Br. at 29-31; *see also* ROA.30224 (showing Parish Council District 1 with a Polsby-Popper score of .06); ROA.30277 (Defendant's expert noting that the Parish Council and School Board districts are malapportioned). Simply because a less compact district exists does not make the Remedial Plan's District 1 any less violative of basic compactness principles.

Essentially, Plaintiffs-Appellees are calling upon this Court to render an opinion *sub silentio* on the compactness (and constitutionality) of other districts not properly before it in order to determine that District 1 is sufficiently compact. This Court should disregard Plaintiffs-Appellees' at-least-it's-not-as-bad-as-other-districts argument.

III. Louisiana Maintains a Substantial Linkage Interest in Electing Judges in the 32nd JDC.

Yet again, Plaintiffs-Appellees resort to patent mischaracterizations of fact and law in defending the District Court's erroneous linkage analysis. Elsewhere, Plaintiffs-Appellees merely regurgitate the District Court's reasoning regarding Louisiana's linkage interest in at-large judicial districts, all without much meaningful analysis. Specifically, Plaintiffs-Appellees completely mischaracterize the linkage standard from *Clements* and Louisiana's linkage interest. Not only must Plaintiffs-Appellees' arguments fail because they are legally insufficient, but they must also fail because they are simply wrong.

Most prolific among their desperate arguments, Plaintiffs-Appellees hinge their entire linkage analysis on an incorrect interpretation of *Clements*. Appellees' Br. at 45. Specifically, Plaintiffs-Appellees assert *Clements* mandates that "[a] state may defeat a §2 claim only *if* it has a 'substantial' linkage interest and that interest outweighs evidence of vote dilution." *Id*. (emphasis in original) (citing *Clements*, 999 F.2d at 868). In this red herring, Plaintiffs-Appellees drastically stretch *Clements*

to its breaking point and misframe the proper linkage analysis. *Clements* actually states "[t]he weight of a substantial state interest, determined as a matter of law, is balanced against localized evidence of racial vote dilution. This substantial state interest may be overcome only by evidence that amounts to substantial proof of racial dilution. Otherwise, the at-large election of district court judges does not violate § 2." *Clements*, 999 F.2d at 868. *Clements* therefore stands for the principle that it is the substantial proof of racial dilution that must overcome the state's linkage interest, not the other way around. The proper *Clements* standard is clearly and expressly preferential to states' linkage interests. Accordingly, Plaintiffs-Appellees hinge nearly their entire linkage argument in their Opposition Brief on a backward standard.

Similar to Plaintiffs-Appellees, the District Court also flips *Clements* standard, applying an incorrect linkage analysis. What the District Court and Plaintiffs-Appellees fail to realize is that when *Clements* calls linkage interests substantial, it is not requiring courts to make findings as to whether a given state's linkage interest reaches a certain level. It is merely stating that linkage interest *is* a substantial interest and that substantial proof of racial dilution is required to overcome such an interest. *See Clements*, 999 F.2d at 871 (The weight of a state's linkage interest is a matter of law, "not a question of fact that somehow will be described on a county-by-county basis."). Essentially, if a court invokes a linkage

interest in at-large elections, that linkage interest is *per se* substantial. *See id*. Because the District Court misapplied the linkage analysis in this case, which is determined as a matter of law, *Clements*, 999 F.2d at 868, and Plaintiffs-Appellees couch their arguments in a similarly misconstrued standard, the District Court erred as a matter of law.

On the other side of the linkage equation, Louisiana's *per se* substantial linkage interest in maintaining at-large JDCs can *only* be overcome by what amounts to substantial proof of vote dilution. *Clements*, 999 F.2d at 868. Plaintiffs-Appellees have failed to present the substantial proof of vote dilution necessary to overcome Louisiana's linkage interests. *See supra* at 12-18. Specifically, the 32nd JDC does not contain a sufficiently compact minority group to constitute a working majority in a single member district. *Supra* at 12-18. Although the remedial subdistrict may contain a bare statistical majority, it certainly does not contain a working majority, nor could one be created within the 32nd JDC in a compact manner. *Supra* at 12-18. Indeed, that seems to be one of the principle reasons why the 32nd JDC was excluded from the *Clark* settlement—because it was "impossible to create single-member subdistricts" in the 32nd JDC. *Clark*, 725 F. Supp. at 289. Accordingly, Plaintiffs-Appellees have not shown and cannot show, and the District Court erred in holding, that the first *Gingles* precondition is satisfied in this case. *See supra* at 12-18. Since the *Gingles* preconditions are not satisfied, there is no "substantial proof" of vote

dilution in the 32nd JDC, *Clements*, 999 F.2d at 868, and certainly none sufficient to outweigh Louisiana's substantial linkage interest in maintaining at-large voting therein. The District Court, therefore, erred as a matter of law in discounting Louisiana's linkage interest.

The judicial protection of this linkage interest is no accident and is especially important to judges in the 32nd JDC. Indeed, many witnesses at trial—including the judges from the 32nd JDC—testified to the importance of maintaining the link between judges and their voters. *See, e.g.,* ROA.32008:2-19, 32008:23-32009:14, 31892:15-18, 32638:4-12. This included testimony that the judges of the 32nd JDC are accountable to all people within the district and concerns that if the 32nd JDC were subdistricted, four-fifths of those coming before a particular judge might not have an opportunity to vote for that judge. *Id*. Louisiana has a substantial interest in ensuring that this decoupling of voters and their judges does not happen.

Nevertheless, Plaintiffs-Appellees argue that because Louisiana elects its *appellate judges* by districts, this somehow weakens its linkage interest in electing *trial judges* from at large districts. Appellees' Br. at 47. Trial courts are, of course, clearly distinguishable from appellate courts and this Court can take judicial notice. Appellate courts sit in panels while trial court judges hear cases alone. *See* La. Const. art. V, §§ 3-4, 8-10, 15, 16. Therefore, in the appellate context, one of the judges hearing the case will hail from the district from which each party to the proceeding

hails. Accordingly, this fact does nothing to overcome Louisiana's linkage interest in electing trial judges at-large and is not even applicable in the context of this case.

Plaintiffs-Appellees also re-assert the District Court's incorrect analysis that Louisiana has abandoned its linkage interest in at-large election of trial judges as a result of the *Clark* litigation. Appellees' Br. at 47. However, the *Clark* settlement was just that—the settlement of a long running and costly legal dispute regarding certain JDCs. It in no way, expressly or impliedly, represented an abandonment of Louisiana's linkage interest. In fact, the *Clark* settlement did not concern the 32nd JDC and predated *Clements*—making it impossible for the state to have knowingly abandoned its linkage interest, which had not yet been enunciated by this Court. *See Clements*, 999 F.2d at 868.

In re-arguing another of the District Court's erroneous considerations, Plaintiffs-Appellees argue that Louisiana has abandoned its linkage interest because majority-minority districts have been created elsewhere in the state outside of litigation. Appellees' Br. at 47-48. However, not only have these districts been on a very minor scale throughout the state, but none have been created for parish-wide courts. All of the District Court's (factually correct) examples, and all of Plaintiffs-Appellees examples, of voluntarily created judicial majority-minority subdistricts are of city courts and juvenile courts. There is not a single example of a parish-wide trial court with subdistricts being voluntarily created in the state. *Id*. The complete

lack of voluntary subdistricting of JDCs is much more telling of Louisiana's substantial linkage interest than the handful of completely distinguishable examples from below the JDC level. Regardless, the creation of an extremely limited number of subdistricts in smaller lower courts does not weigh on the state's linkage interest at the JDC level whatsoever.

In reiterating yet another of the District Court's points against Louisiana's linkage interest, Plaintiffs-Appellees argue that the Attorney General's calculations, which correct clear and obvious error by the District Court, are mere "quibbles" that this Court should ignore. Appellees' Br. at 48. The District Court, in performing statistical gymnastics, clearly erred when it: 1) incorrectly calculated the number of JDCs that were subdistricted as a result of the Clark litigation; and 2) excluded Orleans Parish from any of its calculations. Plaintiffs-Appellees can barely argue this point, devoting a mere sentence to explaining that excluding Orleans Parish is "sensible . . . given its unique history". Far from sensible, these statistical gymnastics skew the numbers that the District Court relied on to reach its conclusion that Louisiana did not have a substantial linkage interest. *See* Appellant's Br. at 49-50. Further, the weight of a state's linkage interest is a matter of law, "not a question of fact that somehow will be described on a county-by-county basis." *Clements*, 999 F.2d at 871. Plaintiffs-Appellees are trying to do just that—describe in a highly factual, county-by-county basis where Louisiana has a linkage interest and where it

does not. The District Court's statistical contortions do the same, and this Court should not continence such error.

The District Court erred when it discounted Louisiana's linkage interest. Plaintiffs-Appellees' conclusory and incorrect Brief fails to repair that error. Louisiana maintains a substantial interest in its at-large system in the 32nd JDC. The District Court's legal error to the contrary infects the entirety of its ruling. This Court should reverse the ruling of the District Court.

CONCLUSION

For the aforementioned reasons, as well as the reasons stated in Appellant's Brief, Defendant-Appellant the Attorney General of Louisiana respectfully requests that the Court reverse the District Court's ruling and remand to the District Court with instructions to dismiss the complaint.

November 26, 2019

RESPECTFULLY,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been filed with the Clerk using the Court's CM/ECF system which will provide notice to all counsel of record.

November 26, 2019.

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Reply Brief of Appellant contains 6,490 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and a copy of the word or line printout.

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