

**No. 22-30333**

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In the United States Court of Appeals  
for the Fifth Circuit

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PRESS ROBINSON, EDGAR CAGE, DOROTHY NAIRNE,  
EDWIN RENE SOULE, ALICE WASHINGTON, CLEE  
EARNEST LOWE, DAVANTE LEWIS, MARTHA DAVIS,  
AMBROSE SIMS, NAACP LOUISIANA STATE  
CONFERENCE, AND POWER COALITION FOR EQUITY  
AND JUSTICE,  
PLAINTIFFS-APPELLEES

*v.*

KYLE ARDOIN, SECRETARY OF STATE,  
DEFENDANT-APPELLANT

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EDWARD GALMON, SR., CIARA HART, NORRIS  
HENDERSON, AND TRAMELLE HOWARD,  
PLAINTIFFS-APPELLEES

*v.*

KYLE ARDOIN, SECRETARY OF STATE,  
DEFENDANT-APPELLANT

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF LOUISIANA  
CIV. NO. 22-0211 & CIV. NO. 22-0214  
(THE HONORABLE SHELLY D. DICK, C.J.)*

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**APPELLEES' OPPOSITION TO MOTION FOR EXTENSION OF  
TIME FOR APPELLANTS TO FILE A PETITION FOR  
REHEARING EN BANC**

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**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Fifth Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

**Intervenor Defendants-Appellants:** Clay Schexnayder and Patrick Page Cortez, in their official capacities as Speaker of the Louisiana House of Representatives and President of the Louisiana Senate, represented by Baker & Hostetler LLP attorneys Katherine L. McKnight, Richard B. Raile, E. Mark Braden, Michael W. Mengis, Patrick T. Lewis, Erika Dackin Prouty, and Renee M. Knudsen.

**Intervenor Defendant-Appellant:** State of Louisiana, by and through Attorney General Jeff Landry, represented by Louisiana's Office of the Attorney General attorneys Elizabeth Baker Murrill, Angelique Duhon Freel, Carey T. Jones, Jeffrey Michael Wale, Morgan Brungard, and Shae McPhee; and by Holtzman Vogel Josefiak Torchinsky PLLC attorneys Jason B. Torchinsky, Dallin B. Holt, and Phillip Michael Gordon. Defendant-Appellant: R. Kyle Ardoin, in his official capacity as

Secretary of State for Louisiana, represented by Shows, Cali & Walsh, LLP attorney John Carroll Walsh; and by Nelson Mullins Riley & Scarborough LLP attorneys Alyssa Riggins, Cassie Holt, John E. Branch, III, Phillip Strach, and Thomas A. Farr.

**Plaintiffs-Appellees:** Press Robinson, Edgar Cage, Dorothy Nairne, Edwin Rene Soule, Alice Washington, Clee Earnest Lowe, Davante Lewis, Martha Davis, Ambrose Sims, National for the Advancement of Colored People Louisiana State Conference (NAACP), Power Coalition for Equity and Justice, represented by Paul, Weiss, Rifkind, Wharton & Garrison LLP attorneys Adam Savitt, Amitav Chakraborty, Bridget Warlea, Jonathan Hurwitz, Robert A. Atkins, Robert Klein and Yahonnes Cleary; and by the NAACP Legal Defense Fund attorneys Jared Evans, Kathryn C. Sadasivan, Leah C. Aden, Sara Rohani, Stuart C. Naifeh, and Victoria Wenger; and by ACLU of Louisiana attorney Nora Ahmed; and by the ACLU attorneys Sarah E. Brannon, Sophia Lin Lakin, and Megan Keenan; and by Harvard Law School Clinic attorney Tiffany Alora Thomas; and by attorneys Tracie L. Washington; and by John Nelson Adcock.

**Plaintiffs-Appellees:** Edward Galmon, Sr., Ciara Hart, Norris Henderson, and Tramelle Howard, represented by Elias Law Group LLP attorneys Abha Khanna, Jacob D Shelly, Daniel Cohen, and Qizhou Ge; and by Walters Papillion Thomas Cullens, LLC attorneys J.E. Cullens, Jr., Andree Matherne Cullens, and S. Layne Lee.

**Intervenor Plaintiffs-Appellees:** Vincent Pierre (Chairman of LLBC), represented by Arthur Ray Thomas of Arthur Thomas & Associates and Ernest L. Johnson, I. Louisiana Legislative Black Caucus (LLBC), represented by Stephen M. Irving of Steve Irving LLC and Ernest L. Johnson, I.

**Amici:** Michael Mislove, Lisa J. Fauci, Robert Lipton, and Nicholas Mattei, represented by Jenner & Block LLP attorneys Alex S. Trepp, Andrew J. Plague, Jessica Ring Amunson, Keri L. Holleb Hotaling, and Sam Hirsch, and Barrasso Usdin Kupperman Freeman & Sarver, LLC attorneys Judy Y. Barrasso and Viviana Helen Aldous.

*/s/ Stuart Naifeh*

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STUART NAIFEH

NOVEMBER 24, 2023

After successfully arguing that an early trial and prompt appellate review would allow this litigation to be resolved in time for a remedy to be implemented prior to the 2024 federal election, Appellants now seek an extension of nearly two months to request that the *en banc* Fifth Circuit review a panel decision *in their favor*. The preliminary injunction that Appellants appealed has been vacated, and there is no further relief that an *en banc* panel could provide at this juncture of the case. Additionally, granting Appellants' requested extension would be inconsistent with this Court's instruction that the district court "conclude all necessary proceedings in sufficient time to allow at least initial review by this court and for the result to be used for the 2024 Louisiana congressional elections." *Robinson v. Ardoin*, \_\_ F.4th \_\_, 2023 WL 7711063 (5th Cir., Nov. 10, 2023); *see also Ardoin v. Robinson*, 143 S. Ct. 2654 (2023) (vacating stay to "allow the matter to proceed before the Court of Appeals for the Fifth Circuit for review in the ordinary course and *in advance of the 2024 congressional elections in Louisiana.*") (emphasis added).

In support of this extraordinary request, Appellants cite their intention to request that Fifth Circuit align itself with a later-decided



out-of-circuit panel decision that departs from decades of practice as well as from this Court's conclusion and the conclusion of every other circuit court to address the issue that Section 2 of the Voting Rights Act of 1965 ("VRA") provides a right of action to private parties. They further assert that their attorneys are simply too busy with other work and the holidays to prepare a petition for *en banc* review by the current deadline. These are not circumstances that suggest *en banc* review is likely to be granted and do not justify any delay, much less the extended and prejudicial delay Appellants seek. The Court should deny the request by Appellants to extend its deadline to submit a petition for *en banc* rehearing.

### **ARGUMENT**

Defendants have not established the requisite good cause for this Court to grant an extension of time to seek rehearing of the panel's decision. Fed. R. App. P. 26(b). Appellants predicate their extraordinary extension request on two assertions, neither of which is persuasive.

*First*, Appellants proffer "new and important precedent" from another circuit regarding the question of whether Section 2 confers a private right of action. App. Mot. at 2 (citing *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, No. 22-1395, 2023 WL 8011300, at \*1 (8th

Cir. Nov. 20, 2023)). The Eighth Circuit's decision creates a circuit split on the issue with this Court's decision in this case as well as the Sixth and Eleventh Circuits. *See Robinson*, 2023 WL 7711063, at \*4-5; *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999); *Alabama State Conf. of NAACP v. Alabama*, 949 F.3d 647, 651–54 (11th Cir. 2020), *vacated on other grounds* 141 S. Ct. 2618 (2021).<sup>1</sup> It also defies Supreme Court precedent recognizing a private right of action under Section 2. *See Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (plurality opinion) (finding private right of action under VRA § 10 to avoid inconsistency with recognized rights of action under §§ 2 and 5). Without addressing in whole the merits of Appellants' position, this circumstance is insufficient to justify a lengthy delay—or any delay—in the time to seek *en banc* review.

As an initial matter, Appellants' preference for the Eighth Circuit opinion over *this* Court's opinion in *this* case is not grounds for *en banc* rehearing. The only relief that Appellants could have achieved in their appeal of the district court's preliminary injunction was a vacatur of that

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<sup>1</sup> In addition to these circuit court decisions, several district courts have addressed whether a private right of action exists under Section 2.

injunction, which is precisely what this Court ordered. Appellants' suggestion that they would have preferred to have won on different grounds is inappropriate—scarce judicial resources should be reserved for instances where Appellants are injured by an adverse judgment. Additionally, if Appellants believed the panel erred so seriously in its ruling on the existence of a private right of action under Section 2 of the Voting Rights Act, they could have sought *en banc* review within the time allotted. They need not have waited for a new, out-of-circuit decision the pendency of which they were plainly already aware. Reply Brief of Appellants, at 23-24 (citing *Ark. State Conf. of the NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893 (E.D. Ark. 2022)).

Moreover, delay is not justified where, as here, *en banc* review is based on a circuit split that will not be resolved by reversal of the panel decision. *See, e.g., United States v. Lopez*, 58 F.4th 1108, 1109 (9th Cir. 2023) (statement of Nelson, J.) (“A circuit split will exist whether this court changes its position, meaning we cannot satisfy ‘the overriding need for national uniformity’ that often justifies *en banc* review.”) (citation omitted). “A petition for rehearing *en banc* is an extraordinary procedure,” one that is “intended to bring to the attention of the entire

Court an error of exceptional public importance or an opinion that directly conflicts with the prior Supreme Court, Fifth Circuit, or state law precedent.” See Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit, at 34-35 (2023) (IOP). *En banc* reconsideration under the “exceptional public importance” prong of this Court’s *en banc* IOP may be appropriate where the panel decision has *created* a circuit split. Here, however, it was the Eighth Circuit’s decision that created the circuit split, and reversing the panel decision of this Court would simply exacerbate, not resolve, that existing circuit split. *Lopez*, 58 F.4th at 1109; *accord Rodriguez v. Garland*, 31 F.4th 935, 936 (5th Cir. 2022) (Duncan, J., concurring) (“Our *en banc* resources are rarely well spent stirring up circuit splits.”). The mere existence of a single contrary out-of-circuit decision on that issue—that arose after the panel’s decision—does not transform this case into a proper candidate for the “extraordinary procedure” of *en banc* rehearing and, given the urgency here, does not justify an extension of time to seek *en banc* review.<sup>2</sup>

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<sup>2</sup> Moreover, if Appellants are correct in their suggestion that the Arkansas decision is destined for further review by the Eighth Circuit or the Supreme Court, it makes

*Second*, Appellants cite to “overlapping commitments” by certain of its counsel in a separate Section 2 case beginning on November 27, as well as “the upcoming holidays,” Appellant counsels’ “extensive[]” travel between now and the new year,” and “the expedited proceedings, which may culminate in a trial in early 2024.” App. Mot. at 2-3. To put it mildly, these are not the “most compelling” of reasons. 5th Cir. R. 35.5. No one has forced Appellants to submit an extraordinary petition for *en banc* rehearing after the deadline imposed by Fed. R. App. P. 40, or to file an extension to do so the day before the Thanksgiving holiday. Moreover, all of the Appellants are represented by outside counsel with many lawyers on their rosters who are not involved in the upcoming trial. And the “expedited proceedings” leading to an early 2024 trial were granted at Appellants’ insistence based on Appellants’ representations about when this case must be tried and when the proceedings must conclude to allow for an orderly remedy in advance of the 2024 election.

Counter-balancing the scheduling concerns of Appellants’ counsel, the requested extension would simply shift the briefing burdens onto

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little sense for this Court to wade further into a thicket that may soon be resolved definitively in any case. *See* App. Mot. at 2.

Appellees. A 60-day extension would require Appellees to prepare any *en banc* briefing during the critical window of trial preparation and discovery into any new map enacted by the Legislature. A 14-day extension, in turn, would require Appellees to brief over the same holidays that Appellants regard as inviolable. Even an extension of this alternate length to file a petition for *en banc* rehearing—and the potential of subsequent briefing and oral argument, should the Court grant the petition—conflicts with the discovery and the preparations for trial that the parties will undertake over the next several weeks, and runs into the same scheduling issues in 2024 raised by the longer extension.<sup>3</sup>

No matter the length of the extension, the delayed *en banc* proceedings that would result from Appellants' request would run at cross purposes with the schedule contemplated by the Supreme Court, this Court and the district court and would risk the possibility that a map compliant with the VRA cannot be implemented in time for the 2024

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<sup>3</sup> In addition, a two-week delay would do nothing to avoid the work conflicts of Appellants' counsel on which they base their motion. Indeed, it would require them to prepare their *en banc* petition at the very time they are in trial in the parallel VRA challenge to Louisiana's state legislative redistricting plans. See App. Mot. at 2-3 (citing the trial schedule in *Narine v. Ardoin*, No. 3:22-cv-178 (M.D. La.).

elections. Avoiding disruption of this Court’s carefully considered schedule for the orderly resolution of Appellees’ Section 2 claims surely outweighs the fully anticipated disruption to Appellants’ work, travel, and holidays commitments stemming from their choice to file that application and their insistence on a trial before the 2024 election. Appellants’ stated reasons simply do not meet the high bar necessary to grant an extension of time under these circumstances and given the severe prejudice it would impose on Appellees. 5th Cir. R. 27.4; 5th Cir. R. 35.5.

In sum, Appellants’ requested extension would be inconsistent with this Court’s recognition that “[t]here is not much time before initial deadlines for the next congressional election cycle are visible,” and Appellants’ explicit premise that “a trial can likely occur prior to harm occurring in the 2024 elections.” *Robinson v. Ardoin*, No. 22-30333, 2023 WL 7711063, at \*15–16 (5th Cir. Nov. 10, 2023). To avoid the “irreparable harm” of “forcing black voters to vote under a map that likely violates Section 2 is a continuing and live injury,” *id.* at \*15, this case must proceed to its next stage without further distraction.

## CONCLUSION

Time is of the essence. Louisiana voters, as this Court has recognized, suffer and will continue to suffer irreparable harm unless a VRA-compliant map is entered. *Id.* at \*15. Appellants have tried again and again in multiple fora to delay relief from that harm, and this Court rightly set clear parameters for the orderly resolution of this case prior to the 2024 elections. Appellants' most recent request is an affront to that decision. The Court, the district court, the Louisiana Legislature, Appellees, and the people of Louisiana cannot proceed at a start-stop pace dictated by Appellants' every whim and disagreement with the Court's mandate.

For the foregoing reasons, the Appellants' request for an extension of time to file a petition for rehearing *en banc* should be denied.



Respectfully submitted,

/s/ Stuart Naifeh

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*Counsel for Galmon Plaintiffs*

November 24, 2023

**CERTIFICATE OF SERVICE**

I, Stuart Naifeh, a member of the Bar of this Court and counsel for appellees certify that, on November 24, 2023, a copy of the foregoing was filed with the Clerk through the Court's electronic filing system. I further certify that all parties required to be served have been served.

/s/ Stuart Naifeh  
STUART NAIFEH

**CERTIFICATE OF COMPLIANCE**  
**WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Stuart Naifeh, a member of the Bar of this Court and counsel for appellees certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Fifth Circuit Rule 32.3, that the foregoing is proportionately spaced, has a typeface of 14 points or more, except for footnotes, which are 12 points, and contains 1,844 words.

/s/ Stuart Naifeh  
STUART NAIFEH

November 24, 2023