

No. 22-30333

In the United States Court of Appeals for the Fifth Circuit

PRESS ROBINSON; EDGAR CAGE; DOROTHY NAIRNE; EDWIN RENE SOULE; ALICE WASHINGTON; CLEE EARNEST LOWE; DAVANTE LEWIS; MARTHA DAVIS; AMBROSE SIMS; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE LOUISIANA STATE CONFERENCE, ALSO KNOWN AS NAACP; POWER COALITION FOR EQUITY AND JUSTICE,
Plaintiffs-Appellees

v.

KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE FOR LOUISIANA,
Defendant - Appellant

CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ;
STATE OF LOUISIANA – ATTORNEY GENERAL JEFF LANDRY,
Intervenor Defendants - Appellants

EDWARD GALMON, SR.; CIARA HART; NORRIS HENDERSON;
TRAMELLE HOWARD,
Plaintiffs - Appellees

v.

KYLE ARDOIN, IN HIS OFFICIAL CAPACITY AS
SECRETARY OF STATE FOR LOUISIANA,
Defendant - Appellant

CLAY SCHEXNAYDER; PATRICK PAGE CORTEZ;
STATE OF LOUISIANA – ATTORNEY GENERAL JEFF LANDRY,
Movants - Appellants

Appeal from the United States District Court for the Western District of Louisiana No. 3:22-cv-00211; No. 3:22-cv-00214 (Hon. Shelly D. Dick.)

**APPELLANTS' OPPOSED MOTION FOR A LEVEL-TWO EXTENSION
OF TIME TO FILE A PETITION FOR REHEARING EN BANC**

(Counsel listed on next page)

RICHARD B. RAILE
KATHERINE L. MCKNIGHT
E. MARK BRADEN
RENEE M. KNUDSEN
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Phone: (202) 861-1711
Email: rraile@bakerlaw.com

MICHAEL W. MENGIS
BAKER & HOSTETLER LLP
811 Main Street, Suite 1100
Houston, TX 77002

PATRICK T. LEWIS
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, OH 44114

ERIKA DACKIN PROUTY
BAKER & HOSTETLER LLP
200 Civic Center Dr., Suite 1200
Columbus, OH 43215

*Attorneys for Clay Schexnayder and
Patrick Page Cortez*

JEFF LANDRY
Louisiana Attorney General
ELIZABETH B. MURRILL
Solicitor General
SHAE MCPHEE
Deputy Solicitor General
MORGAN BRUNGARD
Assistant Solicitor General
ANGELIQUE DUHON FREEL
CAREY TOM JONES
JEFFREY M. WALE
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
LOUISIANA DEPARTMENT OF JUSTICE
P.O. Box 94005
Baton Rouge, LA 70804
murrille@ag.louisiana.gov

JASON B. TORCHINSKY
PHILLIP M. GORDON
EDWARD M. WENGER
BRENNAN A.R. BOWEN
HOLTZMAN VOGEL BARAN
TORCHINSKY & JOSEFIK, PLLC
15405 John Marshall Highway
Haymarket, VA 20169

Attorneys for the State of Louisiana

PHILLIP J. STRACH
THOMAS A. FARR
ALYSSA M. RIGGINS
NELSON MULLINS RILEY &
SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
phil.strach@nelsonmullins.com

JOHN C. WALSH
SHOWS, CALI & WALSH, LLP
P.O. Box 4046
Baton Rouge, LA 70821

Attorneys for the Secretary of State

CERTIFICATE OF INTERESTED PERSONS

Under the fourth sentence of Fifth Circuit Rule 28.2.1, movants, as governmental parties, need not provide a certificate of interested parties.

Dated: November 22, 2023

/s/ Jason B. Torchinsky

JASON B. TORCHINSKY

*Attorney of Record for the State of
Louisiana*

RELIEF REQUESTED

Pursuant to Federal Rule of Appellate Procedure 40(a)(1) and Fifth Circuit Rules 26.2 and 35.4, Appellants State of Louisiana, by and through Jeff Landry, the Attorney General of Louisiana; the Louisiana Secretary of State Kyle Ardoin, in his official capacity; and Clay Schexnayder and Patrick Page Cortez, in their official capacities (collectively, the “State”)—respectfully request a sixty-day extension of time to file their Petition for En Banc Rehearing of this Court’s November 10, 2023 opinion. If granted, the State’s deadline would extend from November 24, 2023, to January 23, 2024. If the Court denies that request, the State requests a fourteen-day extension from the date of such denial.

In compliance with Fifth Circuit Rule 27.4, Counsel for the State has contacted all other parties, and Appellees indicated that they oppose this request and intend to file an opposition. For the reasons set forth below, the State has a “serious need for the court to act,” Fed. R. Civ. P. 27.4, by November 24, 2023, which is the current deadline for filing a petition for rehearing en banc. *See* Fed. R. App. P. 40(a)(1); 5th Cir. R. 35.4.

ARGUMENT

The Court has power to extend the deadline for an en banc petition “by order,” Fed. R. App. P. 40(a)(1), and exercises that power where there are “compelling reasons” for an extension, 5th Cir. R. 35.5. The State’s request for an extension is amply supported by three compelling justifications.

First, new and important precedent has been handed down after the panel’s decision was published, which creates a definitive circuit split as to whether Section 2 of the Voting Rights Acts (“VRA”) confers a private right of action. Just two days ago, the Eighth Circuit ruled that Section 2 does not confer a private right of action. *Ariz. State Conf. NAACP v. Ariz. Bd. of Apportionment*, No. 22-1395, 2023 WL 8011300, at *1 (8th Cir. Nov. 20, 2023). The State tendered the same argument with this Court, but it reached the opposite conclusion. *See Robinson v. Ardoin*, No. 22-30333, 2023 WL 7711063, at *5 (5th Cir. Nov. 10, 2023). The clean “conflict[]” between this Court’s ruling and “the authoritative decisions of other United States Court of Appeals that have addressed the issue” renders this case a compelling vehicle for en banc review. *See Fed. R. App. P. 35(b)(1)(B)*.

However, the Eighth Circuit’s decision did not issue until November 20, leaving the State only four days to analyze it and, as appropriate, prepare and file an en banc petition. Without an extension, the State may not have the opportunity to present this important question to the full Court in an adequate en banc petition. An extension is essential to preserve this opportunity. Moreover, by the proposed extension, this Court can benefit from further developments in the Eighth Circuit proceeding, including en banc review or review in the Supreme Court.

Second, undersigned counsel require an extension because of their extensive overlapping commitments in this case and in many others including *Nairne v. Ardoin*, No. 3:22-cv-00178-SDD-SDJ, (M.D. La.), a Section 2 challenge to

Louisiana’s state legislative map. *Nairne* is set for trial that begins on November 27 and could last for up to two weeks.

Moreover, undersigned counsel will soon become engaged in expedited proceedings, which may culminate in a trial in early 2024. Although this Court instructed the district court “to conduct no substantive proceedings until the earliest of (1) the completion of legislative action, (2) notice indicating the Legislature will not create new districts, or (3) January 15, 2024[,]” *Robinson v. Ardoin*, No. 23-30333, 2023 WL 7711063 at *17 (5th Cir. Nov. 10, 2023), this Court permitted the district court to “conduct[] proceedings to schedule future proceedings[,]” *id.* The district court has done so, setting a scheduling conference for November 27, and ordering briefing for that conference by November 22.

Third, additional time is warranted given the upcoming holidays between now and the end of the year. Counsel will be traveling extensively between now and the new year, further complicating the briefing timeline for a petition for rehearing en banc.

CONCLUSION

For the foregoing reasons, the State’s request for a sixty-day extension of time, from November 24, 2023, to January 23, 2024, to file a petition for rehearing en banc is supported by compelling justifications and should be granted.

Respectfully submitted,

/s/ Jason B. Torchinsky
Jason B. Torchinsky (DC 976033)

Phillip M. Gordon (DC 1531277)
Brennan A.R. Bowen (AZ 036639)
Holtzman Vogel Baran
Torchinsky & Josefiak, PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 phone
(540) 341-8809 fax
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
bbowen@holtzmanvogel.com

Elizabeth B. Murrill (LSBA No. 20685)
Shae McPhee (LSBA No. 38565)
Morgan Brungard (CO Bar No. 50265)
Angelique Duhon Freel (LSBA No. 28561)
Carey Tom Jones (LSBA No. 07474)
Jeffrey M. Wale (LSBA No. 36070)
Office of the Attorney General
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6000 phone
(225) 326-6098 fax
murrille@ag.louisiana.gov
freela@ag.louisiana.gov
walej@ag.louisiana.gov
jonescar@ag.louisiana.gov
mcphees@ag.louisiana.gov
brungardm@ag.louisiana.gov

Jeff Landry
Louisiana Attorney General on behalf of Appellant the State of Louisiana

/s/ Phillip Strach
Phillip Strach
phillip.strach@nelsonmullins.com
Thomas A. Farr
tom.farr@nelsonmullins.com
John E. Branch, III
john.branch@nelsonmullins.com
Alyssa M. Riggins
alyssa.riggins@nelsonmullins.com
Cassie A. Holt
cassie.holt@nelsonmullins.com
**NELSON MULLINS RILEY &
SCARBOROUGH LLP**

John C. Walsh (Louisiana Bar Roll No. 24903)
john@scwllp.com
SHOWS, CALI & WALSH, L.L.P.
P.O. Box 4046
Baton Rouge, LA 70821
Telephone: (225) 346-1461
Facsimile: (225) 346-5561

Counsel for Appellant R. Kyle Ardoin

4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: (919) 329-3800
Facsimile: (919) 329-3799

/s/ Richard B. Raile
E. Mark Braden
Katherine L. McKnight
Richard B. Raile
BAKERHOSTETLER LLP
1050 Connecticut Ave., N.W., Ste.
1100
Washington, D.C. 20036
(202) 861-1500
mbraden@bakerlaw.com
kmcknight@bakerlaw.com
rraile@bakerlaw.com

Patrick T. Lewis
BAKERHOSTETLER LLP
127 Public Square, Ste. 2000
Cleveland, Ohio 44114
(216) 621-0200
plewis@bakerlaw.com

Erika Dackin Prouty
BAKERHOSTETLER LLP
200 Civic Center Dr., Ste. 1200
Columbus, Ohio 43215
(614) 228-1541
eprouty@bakerlaw.com

Michael W. Mengis, LA Bar No.
17994
BAKERHOSTETLER LLP
811 Main Street, Suite 1100
Houston, Texas 77002
Phone: (713) 751-1600
Fax: (713) 751-1717
Email: mmengis@bakerlaw.com

*Counsel for Appellants, Clay
Schexnayder, in his Official Capacity as
Speaker of the Louisiana House of Repre-
sentatives, and of Patrick Page Cortez, in
his Official Capacity as President of the
Louisiana Senate*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. (“Rule”) 32(a)(7)(B) because it is 718 words, excluding the parts that are exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5) and Rule 32(a)(6) because it is printed in 14-point Calisto MT font, a proportionally spaced typeface with serifs.

Dated: November 22, 2023

/s/ Jason B. Torchinsky

JASON B. TORCHINSKY

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2023, a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Dated: November 22, 2023

/s/ Jason B. Torchinsky

JASON B. TORCHINSKY