No. 24-30115

In the United States Court of Appeals for the Fifth Circuit

DOROTHY NAIRNE, DOCTOR, ET AL.,
Plaintiffs-Appellees

v.

NANCY LANDRY, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF LOUISIANA,
Defendant-Appellant

STATE OF LOUISIANA, BY AND THROUGH ATTORNEY GENERAL ELIZABETH B. MURRILL, ET AL.,
Intervenors-Appellants

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana, No. 3:22-cv-00178 (C.J. Shelly D. Dick)

RESPONSE OF PLAINTIFFS-APPELLEES DR. DOROTHY NAIRNE, REV. CLEE EARNEST LOWE, DR. ALICE WASHINGTON, STEVEN HARRIS, LOUISIANA STATE CONFERENCE OF THE NAACP, AND BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE TO 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.

Appellants: State of Louisiana, by and through Attorney General Elizabeth B. Murrill, represented by Louisiana's Office of the Attorney General attorneys Elizabeth Baker Murrill, J. Benjamin Aguiñaga, Zachary Faircloth, Morgan Brungard, and Caitlin A. Huettemann. Clay Schexnayder and Patrick Page Cortez, in their official capacities as Speaker of the Louisiana House of Representatives and President of the Louisiana Senate, succeeded by Phillip DeVillier and Cameron Henry, in their official capacities as Speaker of the Louisiana House of Representatives and President of the Louisiana Senate, in accordance with Fed. R. Civ. P. 25(d), represented by the same Louisiana's Office of the Attorney General attorneys. Nancy Landry, in her official capacity as Secretary of State for Louisiana, represented by Shows, Cali & Walsh, LLP attorney John Carroll Walsh; and Nelson Mullins Riley & Scarborough LLP attorneys Alyssa Riggins and Phillip Strach.

Appellees: Dr. Dorothy Nairne, Rev. Clee Earnest Lowe, Dr. Alice Washington, Steven Harris, Black Voters Matter Capacity Building Institute, and Louisiana State Conference of the NAACP, represented by

American Civil Liberties Union Foundation attorneys Megan C. Keenan, Sarah Brannon, Sophia Lin Lakin, and Dayton Campbell-Harris; Legal Defense Fund attorneys Stuart C. Naifeh, Victoria Wenger, I. Sara Rohani, and Colin Burke; Harvard Law School Election Law Clinic attorneys Tiffany Alora Thomas-Lundborg and Daniel Hessel; ACLU of Louisiana attorneys Nora Ahmed and Stephanie Willis; Cozen O'Connor attorneys Michael de Leeuw, Amanda Giglio, Josephine Bahn, and Robert S. Clark; and attorneys John Nelson Adcock and Ron Wilson.

Intervenors: United States of America, represented by U.S. Department of Justice attorney Erin Flynn.

Date: November 6, 2025

/s/ Megan C. Keenan
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

For nearly forty years, individual plaintiffs and civil society organizations have enforced Section 2, and the Supreme Court and this Court have evaluated Section 2 claims using the framework developed in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In 2023, the Supreme Court reaffirmed this standard's applicability. *Allen v. Milligan*, 599 U.S. 1, 17-19 (2023) (collecting cases). The district court and panel in this case followed suit.

The State now asks this Court to grant its petition for rehearing en banc, and then hold that petition until the Supreme Court issues multiple future decisions that may or may not impact this case. In so doing, the State improperly seeks to accomplish through delay what it could not obtain through its motion to stay, which this Court has already denied. Order Denying Mot. to Stay 2, ECF No. 328-2. Its petition presents no argument that clears this Court's high bar for using the extraordinary procedure of rehearing en banc.

The central thrust of the State's argument—that yet-to-be-issued Supreme Court decisions may (or may not) alter Supreme Court precedents applicable to this case, like *Milligan*, *Gingles*, and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996)—is not a proper basis for ignoring the Supreme Court's existing and controlling holdings. Even in circumstances where Supreme Court decisions on an issue have shifted such that the "caselaw is arguably in flux"—something that has

not occurred with respect to Section 2—this Court has repeatedly acknowledged that it is "not supposed to get ahead of the Supreme Court and read tea leaves to predict where it might end up." *United States v. Mecham*, 950 F.3d 257, 265 (5th Cir. 2020); *see also Big Time Vapes, Inc. v. FDA*, 963 F.3d 436, 447 (5th Cir. 2020) (same).

Apart from asking this Court to speculate about what the Supreme Court might do in future decisions, the State fails to muster any meritorious attack on the panel's thorough, well-reasoned decision. It asserts a smattering of selective critiques that are devoid of context and ignore the extensive record in this case—indeed, veering into even *extra*-record critiques. None warrants the extraordinary use of this Court's en banc procedure.

This Court should deny the petition for rehearing en banc.

ARGUMENT

I. This Court Should Reject the State's Invitation to Speculate About How the Supreme Court Might Change the Law in Future Decisions.

Rehearing en banc is an extraordinary procedure reserved for correcting "errors of exceptional public importance" and opinions that "directly conflict[] with *prior* Supreme Court, Fifth Circuit or state law precedent." 5th Cir. I.O.P. 40. (emphasis added). An en banc rehearing is not a vehicle for reconsidering cases correctly decided under existing precedent based on speculation about a hypothetical future state of the law under yet-to-be-issued Supreme Court decisions in different cases.

See Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 98 F.4th 646, 648-50 (5th Cir. 2024) (Willett, J., concurring in the denial of rehearing en banc).

Yet the bulk of the State's petition does not even assert errors made by the panel. Instead, the State asks this Court to wait and see if the law might change in its favor in the future, following the Supreme Court's disposition of *Louisiana v. Callais*, No. 24-109 (U.S. argued Oct. 15, 2025), or its decision on the pending petition for certiorari in *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 25-253 (U.S. petition for cert. filed Sept. 2, 2025). The State admits that it has no idea whether or how the law might change in either of the cases that it asks this Court to wait on. *See* Pet. for Reh'g En Banc, ECF No. 335 ("Pet.") at 6 (acknowledging that the Supreme Court could deny the *Turtle Mountain* petition and that, even if the petition is granted, there is a question about "how, if at all" the Supreme Court's decision might impact the private right of action issue); Pet. 7 ("the State does not know how the Supreme Court will decide *Callais* . . ."); *id.* ("If the Court does rule in Louisiana's favor, there are many paths the Court could take."). As such, the State's petition is ultimately no more than a renewed effort to delay the disposition of this appeal pending the outcome of the appeals of different cases before the Supreme Court. This Court has already denied that request when it was properly presented through a stay motion, Order

Denying Mot. to Stay, ECF No. 328-2, and should not entertain it again in this new, alternative form.

Moreover, the law is clear that the "vertical limitation on [this Court's] judicial power, compelled by the structure of Article III and the doctrine of stare decisis, means [it is] not at liberty to get ahead of [its] skis and precipitately shrink a Supreme Court decision's precedential scope." *Consumers' Rsch.*, 98 F.4th at 648 (Willett, J., concurring in the denial of rehearing en banc); *see also Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023). In denying an en banc petition just last year, nine judges of this Court observed that even under circumstances where subsequent Supreme Court decisions have cast doubt on the continued viability of controlling precedent—let alone in the present context, where the Supreme Court *reaffirmed* the framework governing Section 2 claims only two years ago—the "'only court that can overturn a Supreme Court precedent is the Supreme Court itself.'" *See Landor v. La. Dep't of Corr. & Pub. Safety*, 93 F.4th 259, 261 (5th Cir. 2024) (Clement, J., joined by Jones, Stewart, Graves, Higginson, Engelhardt, Wilson, Douglas, and Ramirez, JJ., concurring in the denial of rehearing en banc) (quoting *Lefebure v. D'Aquilla*, 15 F.4th 650, 660 (5th Cir. 2021)).

Multiple existing Supreme Court precedents control this case, align with the panel's reasoned decision, and reject the positions the State presses here. *See, e.g.*, *Milligan*, 599 U.S. at 34 n.7 (holding that the "very reason a plaintiff adduces a map at the first step of *Gingles* is precisely

because of its racial composition—that is, because it creates an additional majority-minority district that does not then exist."); *Morse*, 517 U.S. at 232 (recognizing that Section 2 is enforceable by private action). Because these cases are "direct[ly] applica[ble]," this Court may not depart from them. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (same); *accord United States v. Umana*, 762 F.3d 413, 414 (4th Cir. 2014) (Wilkinson, J., concurring in denial of rehearing en banc) (acknowledging "clear and consistent directive from the Supreme Court not to overturn higher precedent preemptively").

Neither of the pending cases that the State brings to this Court's attention break that mold. As for *Callais*, this Court already declined to take up the State's basic request: to wait for the outcome of *Callais* before considering whether rehearing *en banc* is warranted. Order Denying Mot. to Stay 2, ECF No. 328-2. And with good reason. *Milligan* squarely controls the use of race in illustrative maps. Even if the Court *might* touch on related issues in *Callais*, which involves the State's drawing of a remedial map after the liability trial, this Court should not "get ahead of the Supreme Court and read tea leaves to predict where it might end up." *Mecham*, 950 F.3d at 265; *see also* Order on Mot. for Stay, *Alabama NAACP v. Allen*, No. 25-13007 (11th Cir. Oct. 30, 2025), ECF No. 51-2 (denying stay motion that "does little else but ask us to change Supreme Court precedent").

This Court's en banc intervention is especially unwarranted given that this is an interlocutory appeal. The district court will have an opportunity to consider any changes that the Supreme Court may or may not make to the legal standard during the forthcoming remedial phase of this litigation, with the full benefit of any Supreme Court guidance that may come out of *Callais*. *Callais*, after all, arose in the context of a *remedial* map—which does not yet exist in this case. As the State acknowledges (Pet. v), the district court has already stayed the remedial phase of this litigation pending the decision in *Callais*. Denying the petition and enabling the district court to consider the impact of any new precedent that might be relevant in the first instance is consistent with this Court's role as "a court of review, not first view." *Montano v. Texas*, 867 F.3d 540, 546 (5th Cir. 2017) (citation omitted).

The State's *Turtle Mountain* argument is likewise misguided. To start, the State's effort to stay this case pending the outcome of a different appeal on the issue of Section 2's private right of action, too, has already been denied at an earlier stage. ROA.9448-9450 (district court denying motion to stay trial in light of Arkansas decision on private right of action). And this Court has already *twice* declined to take up this exact question en banc. Order Denying Mot. for Reh'g En Banc 2, ECF No. 176-1; *see also* Order on Pet. for Reh'g En Banc, *Robinson v. Ardoin*, No. 22-30333 (5th Cir. Dec. 15, 2023), ECF No. 363-2.

Moreover, the State's argument that the "Supreme Court's denial of the *Turtle Mountain* petition would underscore the need for the en banc Court itself to eliminate the existing circuit split" (Pet. 5) is wrongheaded twice over.

First, even if this Court accepted the State's invitation to reverse its own precedent and agree with the Eighth Circuit on the private right of action, that would not "eliminate the existing circuit split." Pet. 5. Apart from the Eighth Circuit, every other federal court to consider this issue still allows private plaintiffs to bring Section 2 cases.[1] Because ruling in the State's favor could only deepen, not "resolve," the split the Eighth Circuit created, the existence of a circuit split cannot justify en banc review. *See 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); *see also* Fed. R. App. P. 35 advisory committee's note to 1998 amendment ("It is not, however, the Committee's intent to make the granting of a hearing or rehearing en banc mandatory whenever there is an intercircuit conflict.").

[1] *See, e.g.*, *Ala. State Conf. of NAACP v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020), *vacated as moot*, 141 S. Ct. 2618 (2021); *Mixon v. Ohio*, 193 F.3d 389, 406 (6th Cir. 1999).

Second, regardless of whether the Supreme Court grants or denies the *Turtle Mountain* petition, a premature en banc decision on Section 2's private right of action could become moot by early next year based on the Court's other impending decisions in Mississippi and Alabama cases also currently pending before the Court.[2] Expending limited judicial resources on an issue the Supreme Court will decide this term is not "a genuine opportunity to advance the rule of law." *Crane v. City of Arlington*, 60 F.4th 976, 978 (5th Cir. 2023) (Ho, J., concurring in denial of rehearing en banc). Instead, it virtually guarantees that this Court will expend considerable resources to hear this issue en banc, only for a forthcoming Supreme Court decision to conclusively decide the same issue within the year.

Notably, whether Section 2 *itself* contains a private right of action—the only private-right-of-action question the State has presented here (Pet. 1)—would also have no bearing on the resolution of this case. Plaintiffs-Appellees also asserted claims under 42 U.S.C. § 1983, *see* ROA.255, ROA.306, which provides a separate vehicle to enforce Section

[2] The issue is already squarely before the Supreme Court in a direct appeal out of Mississippi, where the only question presented is: "Whether private parties may sue to enforce section 2 of the Voting Rights Act, 52 U.S.C. § 10301." *See* Jurisdictional Statement i, *State Bd. of Election Comm'rs v. Miss. State Conf. of the NAACP*, No. 25-234 (U.S. Aug. 26, 2025). The private right of action issue is also presented in a direct appeal from an Alabama redistricting case. *See* Jurisdictional Statement i, *Allen v. Milligan*, No. 25-274 (U.S. Aug. 26, 2025).

2 under a straightforward reading of *Gonzaga University v. Doe*, 536 U.S. 273 (2002), and its progeny. *See* Resp. to Appellant's Pet. For Initial Reh'g En Banc 9-11, ECF No. 134; Mot. to Affirm 1-2, 18-30, *State Bd. of Election Comm'rs v. Miss. State Conf. of the NAACP*, No. 25-234 (U.S. Oct. 3, 2025).

Finally, the State's argument that the Voting Rights Act contains no implied private right of action is meritless and contrary to decades of precedent, both in this Court and the Supreme Court. *Morse*, 517 U.S. at 232-34; *Robinson v. Ardoin*, 86 F.4th 574, 587-88 (5th Cir. 2023); *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017). For the reasons that this Court has previously held, *Robinson*, 86 F.4th at 587-88, and the plaintiffs in *Nairne*, *Mississippi NAACP*, and *Milligan* have likewise explained in further detail,[3] the statutory text, legislative history, and Congress's repeated reenactment of the Voting Rights Act against the backdrop of decades of rulings that plaintiffs can privately enforce Section 2 all support this Court's current precedent: that Section 2 confers a private right of action.[4]

[3] Resp. to Appellant's Pet. For Initial Reh'g En Banc 9-14, ECF No. 134; Mot. to Affirm 1-12, 30-34, *State Bd. of Election Comm'rs v. Miss. State Conf. of the NAACP*, No. 25-234 (U.S. Oct. 3, 2025); Mot. to Affirm 31-33, *Allen v. Milligan*, No. 25-274 (U.S. Oct. 20, 2025).

[4] To the extent that this Court does hold the petition pending the outcome of any of the cases before the Supreme Court—which Plaintiffs-Appellees strongly oppose for the reasons articulated *supra*—Plaintiffs agree with the State's acknowledgment (Pet. vii) that another round of briefing

II. The State's Paltry Efforts at Undermining the Panel's Thorough Decision on the Merits Are Neither Persuasive Nor Worthy of Reconsideration En Banc.

The State devotes a handful of paragraphs to an attempt at undermining the thorough opinions of both the panel and the district court. As an initial matter, none of these items clear the high bar this Court set for rehearing en banc: they are neither "errors of exceptional public importance," nor do they "directly conflict[] with prior Supreme Court, Fifth Circuit or state law precedent." 5th Cir. I.O.P. 40.

Instead, the State offers a series of selective and misleading attacks on the panel's decision. For example, the State argues (Pet. 12) that today, the Louisiana Supreme Court has two Black justices, not one—notably, without any record cite. Months after the close of trial and the record before this Court, Louisiana redistricted its state supreme court map to include an additional majority-Black district following years of Section 2 litigation challenging its previous map.[5] And months after the briefing on appeal was submitted to the panel in *Nairne*, that district elected a second Black justice to the Supreme Court.[6] The State suggests

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would be required following the Supreme Court's decision to assess whether the decision provides any basis for en banc review.

[5] *See* Second Am. Compl., *La. State Conf. of the NAACP v. Louisiana*, No. 19-479-JWD-SDJ (M.D. La. Mar. 21, 2024), ECF No. 204; La. Governor Amicus Br. 22, *Louisiana v. Callais*, No. 24-109 (U.S. Sept. 3, 2025).

[6] *Associate Justice John Michael Guidry*, LA. SUPREME COURT, https://www.lasc.org/About/Biography?p=John_Michael_Guidry (last visited Oct. 30, 2025).

that the panel's failure to mention this unbriefed (and therefore unpreserved) extra-record update is some sort of error that impacts the totality analysis and requires rehearing en banc. Pet. 12-13. But the Court's reliance on the record before it is hardly an error worthy of en banc reconsideration. *Compare* Op. 50, *with* ROA.9207 (district court opinion, citing ROA.19777). And to the extent this point bears on the totality analysis, these new facts—*i.e.*, that, following Section 2 litigation, the State created an additional Supreme Court district in which Black voters had an opportunity to elect their preferred candidate, who is only the fourth Black justice in Louisiana's history—only *reinforce* the panel's and the district court's totality analysis. After all, the district court relied on the fact that Black elected officials in Louisiana have only ever represented districts specifically drawn to provide that electoral opportunity to Black voters.[7]

The State's other attacks flounder in similar ways. For example, the *Gingles* I argument the State continues to press (Pet. 11-12) hinges on the testimony of an expert that the district court discredited as

[7] *Cf.* ROA.9591 (Rep. Cedric Glover testifying: "I don't think that there's been any significant advancement with regard to voting rights, the expansion of representation [in Louisiana] that did not come at the tip of a federal spear, whether that was the Civil War or the Civil Rights Act or the Voting Rights Act . . . or any of the other provisions that have been necessary over the years in order to ensure that we end up having basic representation."); ROA.9206 (district court opinion finding that "Since 1991, only four Black Louisianans have been elected to Congress, and then only from majority-Black districts.").

"'fundamentally flawed,' 'oversimplistic,' 'unhelpful,' 'untested,' and 'completely useless.'" Op. 24 (quoting ROA.9166-9167).

Likewise, the State's standing arguments are foreclosed both by Supreme Court precedent and the fact that Plaintiffs-Appellees proved *three different bases* of standing that support their claims. See Op. 7-13 & n.8 (finding both organizational standing and individual standing sufficient to support Plaintiffs-Appellees' claims, and declining to reach district court's additional finding of associational standing as unnecessary).

The theme of the State's petition is clear: Don't let the existing Supreme Court precedent, the facts, or the record get in the way of the State's desired outcome. These attacks on the panel's thorough and well-reasoned decision are not compelling, and they certainly are not worthy of the extraordinary devotion of judicial resources entailed in rehearing the case en banc.

CONCLUSION

This Court should deny the petition for rehearing en banc.

Date: November 6, 2025

Respectfully submitted,

/s/ Megan C. Keenan .

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**Practice is limited to federal court.*

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Date: November 6, 2025

/s/ *Megan C. Keenan*
Megan C. Keenan
Counsel for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to Fifth Circuit Rule 32.3, I certify that Plaintiffs-Appellees' response to the petition for rehearing en banc complies with:

(1) the type-volume limitations of Federal Rule of Appellate Procedure 40(d)(3), because it contains 3,002 words; and

(2) the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook) using Microsoft Word.

Date: November 6, 2025

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