No. 25-2180

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RODNEY D. PIERCE and MOSES MATTHEWS,

Plaintiffs-Appellants,

v.

THE NORTH CAROLINA STATE BOARD OF ELECTIONS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for
the Eastern District of North Carolina
The Honorable James C. Dever III (No. 4:23-cv-193-D-RN)

OPPOSITION TO PETITION FOR INITIAL, EXPEDITED HEARING EN BANC AND EXPEDITED CONSIDERATION OF PETITION

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PRELIMINARY STATEMENT

It would be difficult to imagine an appeal less suited for initial hearing en banc than this one. The petition alleges "grievous error" in "[t]he decision below," Pet. 2-3, but every appellant claims that. Here, it is clear that the appellants (Plaintiffs) are not likely to deliver on their aggressive assertions because this Court already deemed their Section 2 claim unlikely to succeed. *See Pierce v. N.C. Bd. of Elections*, 97 F.4th 194 (4th Cir. 2024). It is no surprise that the Court's prediction proved correct.

But Plaintiffs' prospects of success on appeal are beside the point here. "Congress has decided that the basic unit for hearing an appeal from the judgment of the district court is a panel of three." *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 854 (4th Cir. 2000) (Wilkinson, C.J., concurring in the denial of initial hearing en banc). If Plaintiffs are so confident in their case, they should submit it "in the manner" this Court "customarily handle[s]" cases. *Id.* Plaintiffs do not justify their extraordinary request, and it appears to be nothing but an attempt "to get a different result by having a different forum within [this] Circuit." *Ohio Republican Party v. Brunner*, 544 F.3d 711, 726 (6th Cir.) (Nelson Moore, J., dissenting), *vacated*, 555 U.S. 5 (2008). That is improper. In all events, multiple factors reveal this appeal to be an all-around bad vehicle for initial hearing en banc.

First, Plaintiffs do not attempt to meet the exacting standards governing their petition or explain why a panel cannot resolve this case.

Second, the *same* two state senate districts at issue here are challenged on the *same* grounds before a three-judge district court that could rule at any time and either afford all relief Plaintiffs seek or else further confirm the districts do not violate Section 2.[1] An aggrieved party in that case may take a direct appeal to the Supreme Court, the institution responsible to "ensure uniformity with Supreme Court precedent." Pet. 2-3.

Third, the Supreme Court itself is currently reexamining when, if ever, a government actor may intentionally create a majority-minority district. *See Louisiana v. Callais*, No. 24-109 (re-argument scheduled Oct. 15, 2025). Where the decision below is alleged to conflict with Supreme Court precedent—not this Court's precedent—this Court should not leap ahead of the Supreme Court in determining what its precedent holds.

Fourth, this case involves a large record and numerous contested issues, most of which are questions of fact, that are not properly packaged for initial hearing en banc. At minimum, the case needs the narrowing and clarification that panel review is designed to provide.

Fifth, it is not possible for an en banc appeal to be decided, for further necessary steps to be taken on any remand, and for a new redistricting plan to be configured in time for the 2026 elections. Initial hearing en banc would therefore be futile.

The petition should be denied.

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[1] The district court found Plaintiffs have standing to challenge only one district, not "Districts 1 and 2." Pet. 1; *compare* Decision 4.

REASONS FOR DENYING THE PETITION

I. Plaintiffs Do Not Attempt to Justify En Banc Proceedings

The petition reads like a miniature appeal brief declaring that the district court's "judgment rests on a cascade of fundamental legal errors." Pet. 6. This Court adjudicates such assertions every day *in panels*. At this juncture, "[t]he question is simply whether this case should be heard initially by the Fourth Circuit en banc or by a three-judge panel." *Belk*, 211 F.3d at 854 (Wilkinson, C.J., concurring in the denial of initial hearing en banc). Plaintiffs provide no good answer.

Plaintiffs first fail to satisfy the requirement that a "petition must begin with a statement" demonstrating a recognized basis for en banc review. Fed. R. App. P. 35(b). While the petition declares the appeal "exceptionally important," Pet. 1, it does not "concisely state[]" what "question[s]" satisfy the governing standard, as the rule requires. Fed. R. App. P. 35(b)(1)(B). Likewise, the petition does not provide "citation to the conflicting case or cases" Plaintiffs would bring to the Court's attention, as the rule alternatively requires. Fed. R. App. P. 35(b)(2)(A). A vague claim about "uniformity with Supreme Court precedent," Pet. 3, is insufficient. This disregard for rules matters. The Court and counsel should not have to guess the grounds asserted for initial hearing en banc.

Indeed, guesswork yields no clarity here because the petition does not demonstrate that a three-judge panel is incapable of resolving this appeal. The closest it comes is announcing that the Court's prior ruling in this case, *Pierce*,

97 F.4th at 202, was "flawed." Pet. 22. But this Court denied Plaintiffs' petition to review that decision en banc. *Pierce v. N.C. State Bd. of Elections*, No. 24-1095, Doc. 58 (4th Cir. June 18, 2024) ("No judge requested a poll … on the petition for rehearing en banc."). There is no reason for this Court to conduct a full sitting to review *Pierce* now when it elected not to then. Besides, the petition does not show that *Pierce* was wrongly decided. It focuses on "the district court's [supposed] misinterpretations," Pet. 20, which—if substantiated—a panel can correct. In fact, Plaintiffs insist "their Section 2 claim would succeed" under *Pierce*, Pet. 21 (emphasis added), which effectively concedes the petition away. Plaintiffs' contention that the *Pierce* opinion "will complicate" the appeal by compelling the parties to spend "time interpreting the prior panel's" opinion, Pet. 22, describes ordinary appellate practice. Most cases require parties to advance, and panels to entertain, competing theories about what Circuit precedent holds and how it applies.

That leaves Plaintiffs' strange assertion that "[h]olding a panel *and* en banc hearing is unrealistic on this [election] timeline." Pet. 22. But an en banc hearing is not required. "Panel decisions hold out the prospect of finality and repose every bit as much as en banc decisions do." *Belk*, 211 F.3d at 854 (Wilkinson, C.J., concurring in the denial of initial hearing en banc). That is because the judiciary has "long urged that the public resist a predetermined view of the judicial function—the notion that certain judges invariably resolve certain cases in certain ways." *Id.* at 855. There is no right to en banc review; nearly all federal appeals end with the panel. Accordingly, a claim that rehearing en banc will be

unavailable in the future does not, without more, justify initial hearing en banc. Yet Plaintiffs offer nothing more. *See* Pet. 22 ("If time were not an issue, plaintiffs would not seek initial en banc review.").

II. Possible Relief and Supreme Court Review Are Both Independently Available and Likely

Plaintiffs ignore that the same districts challenged here are challenged in parallel litigation, which is the superior vehicle to resolve Plaintiffs' stated concerns. In the consolidated cases *Williams v. Hall*, Nos. 23-cv-1057 and 23-cv-1104 (M.D.N.C.), the North Carolina State Conference of the NAACP and other plaintiffs challenge senate districts 1 and 2—the districts Plaintiffs claim are at issue here—under Section 2 of the Voting Rights Act—the statute Plaintiffs invoke. *See id.* Dkt. 165 at 180-247 (proposed conclusions of law). The case was submitted after trial on July 9, 2025, to a three-judge district court convened for resolving redistricting disputes. *See* 28 U.S.C. § 2284(a). It may rule at any time. Then, an aggrieved party may appeal directly to the U.S. Supreme Court for review on its mandatory docket. *See Shapiro v. McManus*, 577 U.S. 39, 41 (2015). In sum, three federal judges in addition to the judge who decided this case are reviewing the same claim Plaintiffs pose here, and nine Justices may soon take up the same task. The *Williams* litigation answers the grounds Plaintiffs cite for en banc review.

First, Plaintiffs claim to need expedited relief, Pet. 20-23, and—if that is warranted—the three-judge district court is postured to provide it. Whereas this Court will, if it finds errors, remand the case for new proceedings on liability, *see*

infra § V, the *Williams* court—if it finds a violation—can proceed to address remedial possibilities and processes. If Plaintiffs are right that districts 1 and 2 present "an obvious … Section 2 violation," Pet. 3, the *Williams* court will notice.

Second, the converse is equally true. If the *Williams* court rejects the Section 2 claim in that case, then up to four different judges will have rejected Section 2 claims against the same districts. That outcome would expose Plaintiffs' pointed attacks on the trial judge here as empty rhetoric. *See, e.g.*, Pet. 7 (citing "misstatements of law and refusal to credit unrebutted record evidence"). This possibility confirms there is no need for 15 judges on this Court to drop everything for this case. Accordingly, whatever the result in *Williams*, it necessarily forecloses any ground for en banc review here.

Third, Plaintiffs repeatedly claim the judgment "is irreconcilable with the Supreme Court's square holdings." Pet. 15. That theory can be tested in *Williams*, where the losing side may take senate districts 1 and 2 to the Supreme Court, which can "address[] this case on a clean slate, without a [supposedly] flawed interlocutory decision" of this Court. Pet. 22. As explained below, the Supreme Court is currently reevaluating its precedents and is well-equipped to decide how they (including forthcoming modifications) apply to districts 1 and 2. *See infra* § III. This Court should not race ahead of the Supreme Court to decide how its precedents apply to these districts.[2]

[2] Plaintiffs' failure to petition for certiorari after *Pierce* undercuts their credibility in invoking Supreme Court precedents.

Finally, the *Williams* proceedings underscore how wasteful Plaintiffs' request is. By the time all is said and done, senate districts 1 and 2 will likely have been examined by the trial court here, a panel of this Court, and the three-judge *Williams* court, and it is possible that nine Justices will have reviewed the districts as well. This crowded kitchen does not need as many as 12 additional cooks. "[I]nitial hearing en banc has traditionally been utilized to address" matters of broad importance, like "the legality of nationwide executive or agency action." *Mayor & City Council of Baltimore v. Azar*, 799 F. App'x 193, 195 (4th Cir. 2020), *as amended* (Mar. 30, 31 2020) (Thacker, J., concurring in grant of initial hearing en banc); *compare In re MCP No. 165, Occupational Safety & Health Admin., Interim Final Rule: COVID-19 Vaccination & Testing*, 20 F.4th 264, 266-67 (6th Cir. 2021) (denying initial hearing en banc in challenge to nationwide vaccine mandate). Challenges to two state legislative districts in one state do not warrant this astounding allocation of limited judicial resources.

III. The Supreme Court Is Currently Reevaluating Its Own Precedents

Plaintiffs also fail to address that the Supreme Court is presently reevaluating its own precedents governing the subject of this dispute. It would be improper for this Court sitting en banc to review "Supreme Court precedent," Pet. 2, when the Supreme Court itself has taken up the question.

"The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Abbott v. Perez*, 585 U.S. 579, 585-86 (2018) (citation omitted). Because the VRA "often insists that districts be created precisely because of

race," the Supreme Court's Section 2 and equal protection decisions "leave[] states vulnerable to 'competing hazards of liability.'" *Id.* at 587 (citation omitted). Conflicting obligations have become so stark that the Supreme Court is currently weighing whether to jettison or substantially curtail its Section 2 precedents. *See Louisiana v. Callais*, No. 24-109 (re-argument scheduled Oct. 15, 2025). In *Callais*, Louisiana configured a second majority-Black congressional district after the Fifth Circuit held that Section 2 likely required this. *Robinson v. Ardoin*, 86 F.4th 574, 584 (5th Cir. 2023). Subsequently, another court held that Louisiana violated the Constitution by creating that second majority-Black district, notwithstanding the Fifth Circuit's ruling. *Callais v. Landry*, 732 F. Supp. 3d 574 (W.D. La. 2024) (three-judge court). The Supreme Court was unable to decide the case last term under the existing framework and directed re-argument on the question: "Whether the State's intentional creation of a second majority-minority congressional district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution." Order, *Louisiana v. Callais*, No. 24-109 (Aug. 1, 2025).

As the district court recognized, Plaintiffs here "contend that the North Carolina General Assembly violated Section 2 … by not engaging in race-based districting and not creating a majority-black Senate district in northeast North Carolina." Decision 1. Plaintiffs ask this Court to issue a decision like *Robinson*—commanding race-based redistricting—that would leave the General Assembly vulnerable to a suit like *Callais*—finding that race-based redistricting

to be unconstitutional. It would be imprudent for this Court to act in the manner of the *Robinson* court when the Supreme Court may side with the *Callais* court.

The Supreme Court has shown skepticism towards lower-court rulings that anticipate its own resolution of issues in this area. In the *Robinson* litigation that led to *Callais*, as the Supreme Court was assessing the scope of Section 2 in the case that became *Allen v. Milligan*, 599 U.S. 1 (2023), a federal district court enjoined the Louisiana congressional plan under Section 2, and the Fifth Circuit denied a stay application. But the Supreme Court promptly stayed the injunction, took the case itself, and held it in abeyance pending *Milligan*. *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). Yet Plaintiffs ask this Court, as the Supreme Court is addressing the scope of Section 2 in *Callais*, to proceed towards an injunction of the same genre the Supreme Court stayed in *Robinson*. The Court should decline that invitation.

IV. This Fact-Laden, Multi-Issue Appeal Is Badly Suited for Initial Hearing En Banc

Even if en banc review might be merited at some point in this appeal—which Plaintiffs have not shown—it would be premature now. "Panel decisions refine, narrow, and focus issues before the court." *Belk*, 211 F.3d at 854 (Wilkinson, C.J., concurring in the denial of initial hearing en banc). By comparison, en banc proceedings are "a rarely satisfying, often unproductive, always inefficient process." *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring). The petition shows that this appeal needs refinement, narrowing, and clarification.

For a Section 2 results claim to succeed, a challenger must prove the three *Gingles* preconditions, *see Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), and then "go on to prove that, under the totality of the circumstances, the district lines dilute the votes of the members of the minority group," *Abbott*, 585 U.S. at 614. As Plaintiffs admit, the district court held against them under the first and third preconditions and numerous components of the totality-of-circumstances inquiry. Pet. 3-19. To obtain reversal, Plaintiffs must achieve the appellate equivalent of shooting the moon by winning virtually every contested issue. That is exceedingly unlikely, especially given that "the ultimate finding of vote dilution [is] a question of fact subject to the clearly-erroneous standard of Rule 52(a)," *Gingles*, 478 U.S. at 78. Even if Plaintiffs were to prevail on some issues, panel review is needed to provide clarity and focus so that the full Court may assess whether any important legal question that *might* emerge from Plaintiffs' messy presentation even matters.

For example, Plaintiffs fault the district court for conducting an inquiry concerning whether "race 'predominated'" in illustrative plans they offered to show the first precondition, claiming "*Milligan* rejected exactly this holding." Pet. 12. In fact, as the district court explained, *Milligan* called for a predominance inquiry, Decision 50, and the United States Solicitor General has recently filed a brief endorsing this view, Brief for the United States, *Louisiana v. Callais*, Nos. 24-109, 24-110 at 22 (filed Sept. 24, 2025) ("eight Justices in

Milligan all appeared to accept that race may not predominate in illustrative districts").[3]

But even if that question lent itself to en banc review, it will not likely matter. Plaintiffs must also overcome the *other* grounds on which the district court rejected their illustrative plans. The court found that the Black voting-age population (BVAP) reported in the decennial census for two illustrative remedial districts was below 50% and that Plaintiffs failed to overcome the presumptive accuracy of that figure because they countered it only with data from the *less* accurate American Community Survey (ACS). Decision 36-38. The national consensus supports that finding of fact. *See, e.g.*, *Missouri State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 932 (8th Cir. 2018). The court found that one of the remaining districts "grossly distorts county groupings and surrounding senate districts" and that the other contains a "tail-like 'appendage,'" and that Plaintiffs' configurations would result in the dismantling of a naturally occurring crossover district nearby—thereby trading minority opportunity for other minority opportunity.[4] Decision 42-48. Plaintiffs ask all members of this Court to review their record evidence on these questions of fact, Pet. 9-19, but that is not what en banc review is for. If any legal question merits

[3] Insofar as Plaintiffs contest the district court's finding of fact that race predominated, they argue against *Cooper v. Harris*, 581 U.S. 285 (2017), which affirmed predominance findings on far less than what was shown here. *Id.* at 299-322.

[4] In claiming the crossover district could be frozen in violation of the State's whole county requirements, Pet. 11-12, Plaintiffs argue squarely against *Bartlett v. Strickland*, 556 U.S. 1 (2009).

en banc review, a panel should first sort through the issues to determine whether it even matters to the outcome.

Likewise, Plaintiffs' argument about the third precondition is weighed down in confusion—some of their own making. Plaintiffs fault the district court for a supposedly erroneous "'district-effectiveness' analysis," Pet. 13, but they quote the district court's discussion of *their* evidence, *see* Decision 53 ("Plaintiffs' expert Collingwood conducted an effectiveness analysis"). The only legal assertion the district court provided was that "[c]ourts often consider a 'district effectiveness analysis,'" which the precedent it cited supports. *Id.* at 52. The legal question the Supreme Court has posed is whether there is "substantial crossover voting," *Bartlett*, 556 U.S. at 24 (plurality opinion), and the district court did not hold that an effectiveness analysis is dispositive on that. Instead, it found many methodological problems with the district effectiveness analysis Plaintiffs chose to proffer to meet their burden, Decision 52-67, which is presumably what Plaintiffs refer to in their complaint about "factual misstatements and inconsistent treatment of the witnesses," Pet. 16. This assertion will not withstand scrutiny. But, that aside, a panel must sort the alleged factual errors from the legal questions before this case would even plausibly be ripe for consideration en banc.

Even then, the judgment below would stand secure on the totality-of-circumstances inquiry, which the district court addressed in 54 pages of fact-laden analysis. *See* Decision 73-126. Plaintiffs assure the Court that this was "riddled with legal error," but are content to note just "a few." Pet. 17. Plaintiffs

cannot reasonably expect the Court to commit to initial en banc review to later discover what exactly is being reviewed.

The omissions are material. For example, the district court found against Plaintiffs on the proportionality inquiry, Decision 124-26, and the Supreme Court has found that substantial proportionality can—standing alone—foreclose a Section 2 claim. *Johnson v. De Grandy*, 512 U.S. 997, 1021 (1994). Plaintiffs do not say why the district court erred in this inquiry. Pet. 17-19. Thus, they provide no reason to guess that *any* of their arguments would impact the outcome of this appeal. Meanwhile, examples Plaintiffs picked as their best are deficient on their face. For example, Plaintiffs claim it helps their case that North Carolina's "maps were struck down *three times* as unconstitutional racial gerrymanders." Pet. 17. That occurred because the State made the mistake of drawing majority-minority districts, which is what Plaintiffs demand here. See *Pierce*, 97 F.4th at 204-06 (recounting the history). As this Court and the district court both recognized, that history provides one of many reasons Plaintiffs are unlikely to prevail in this case. *Id.*; *see* Decision 8-19.

V. Plaintiffs Have No Realistic Prospect of Their Desired Outcome Before the Next Election

Plaintiffs claim they "would not seek initial en banc review" but for the "limited time for this Court's review," Pet. 22, but fail to connect that point with the standard governing en banc petitions. A request for expedition can and should be determined by a panel. *See supra* § I. That aside, Plaintiffs' argument makes no practical sense. Plaintiffs seek "a decision before candidate filing

opens on December 1," *id.* at 23, but even assuming a ruling in Plaintiffs' favor, that would only begin—not end—the path towards a new redistricting plan.

If the Court were to find "legal errors" that might change the outcome, Pet. 6, it would remand to require the district court to make new findings under the correct legal standard. *See Biggs v. N.C. Dep't of Pub. Safety*, 953 F.3d 236, 243 (4th Cir. 2020) ("we are a court of review, not first view"). The outcome would be "further proceedings," *Levy v. Lexington County*, 589 F.3d 708, 716, 720 (4th Cir. 2009), not an injunction. If an injunction were to issue, the federal courts would need to "afford the General Assembly a reasonable opportunity to redraw the Senate districts." *Pierce*, 97 F.4th at 227; *see In re Landry*, 83 F.4th 300, 306-07 (5th Cir. 2023) (issuing writ of mandamus where court failed to afford reasonable opportunity to redistrict), *stay denied*, 144 S. Ct. 6 (2023). If the General Assembly did not do so, the district court would conduct remedial proceedings, which can be time-consuming. *See Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1298-99 (11th Cir. 2020). For the 2026 election to be governed by a new map, all of those steps would need to be taken before "the period close to [that] election." *Pierce*, 97 F.4th at 226 (citation omitted); *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam); *Wise v. Circosta*, 978 F.3d 93, 103 (4th Cir. 2020) (en banc).

It is too late for all that to occur—if it ever occurs—in time to impact the 2026 election. That elections will proceed under the challenged plan in the interim presents no problem. The vehicle to afford expedited, interim relief "until a trial on the merits can be held" is a preliminary injunction, *Univ. of Texas*

v. Camenisch, 451 U.S. 390, 394 (1981), not initial hearing en banc. Because Plaintiffs' effort at a preliminary injunction was unsuccessful, they have no right to relief during the pendency of proceedings. Their en banc petition misses this point, among others.

CONCLUSION

The petition should be denied.

October 14, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2) because it contains 3,791 words, excluding the parts of the brief exempted by FRAP 32(f).

2. This brief complies with the typeface and type-style requirements of FRAP 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Calisto MT font.

October 14, 2025

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2025, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

October 14, 2025

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