No. 23-40582

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HONORABLE TERRY PETTEWAY; HONORABLE DERRICK ROSE; HONORABLE PENNY POPE,

Plaintiffs-Appellees

v.

GALVESTON COUNTY, TEXAS; MARK HENRY, in his official capacity as Galveston County Judge; DWIGHT D. SULLIVAN, in his official capacity as Galveston County Clerk,

Defendants-Appellants

(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

APPELLEE UNITED STATES OF AMERICA'S RESPONSE TO PETITION FOR EN BANC HEARING

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(*Continuation of caption*)

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

GALVESTON COUNTY, TEXAS; GALVESTON COUNTY COMMISSIONERS COURT; MARK HENRY, in his official capacity as Galveston County Judge,

Defendants-Appellants

DICKINSON BAY AREA BRANCH NAACP; GALVESTON BRANCH NAACP; MAINLAND BRANCH NAACP; GALVESTON LULAC COUNCIL 151; EDNA COURVILLE; JOE A. COMPIAN; LEON PHILLIPS,

Plaintiffs-Appellees

v.

GALVESTON COUNTY, TEXAS; MARK HENRY, in his official capacity as Galveston County Judge; DWIGHT D. SULLIVAN, in his official capacity as Galveston County Clerk,

Defendants-Appellants

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INTRODUCTION

This Voting Rights Act case involves the fact-bound application of settled principles. After a ten-day bench trial, the Galveston-based district court concluded that the 2021 redistricting plan adopted by the Galveston County Commissioners Court is "a clear violation" of Section 2's results test. ROA.16029. The court found that the 2021 redistricting plan "completely . . . extinguished the Black and Latino communities' voice on its commissioners court." ROA.16028-16029. The court made no errors of fact or law in reaching that judgment, and this Court should affirm it. *See* Br. of Appellee United States of America (Nov. 2, 2023). Affirming the district court's sound judgment will not create new law or disharmony in this Court's precedent. En banc proceedings, before or after the panel stage, are unwarranted.

Initial hearing en banc is especially unwarranted. Challenging more than three decades of this Court's precedent, Galveston County seeks initial hearing en banc to argue that voters of two minority groups cannot bring a Section 2 claim together against a redistricting plan. *See* Pet. 1. It would be genuinely unprecedented to grant initial hearing en banc in these circumstances. The few times this Court has held initial hearing en banc involved known, recurring problems in panel authority, which only en banc proceedings could resolve. Here, the Court's authority is entirely uniform, controlled by en banc precedent that

decided the very issue the County seeks to revisit. And the issue arises rarely: this is the first successful coalition claim to reach this Court in 30 years.

This appeal already has proceeded outside the normal order. The parties have been directed to complete merits briefing and attend oral argument in mere weeks since the district court's judgment. But the County dallied in requesting initial hearing en banc, which even the fast timetable cannot excuse. The County said nothing about initial hearing en banc in its two stay motions or its opening brief. Instead, it requested initial hearing en banc only five days before oral argument, basing its request on the same arguments it had already presented in its earlier filings. The County's belated call for even more extraordinary procedure should be denied.

ARGUMENT

I. This Court conducts initial hearing en banc only in the rarest circumstances.

En banc proceedings are "an extraordinary procedure," reserved for "bring[ing] to the attention of the entire court an error of exceptional public importance." 5th Cir. I.O.P.; Fed. R. App. P. 35. En banc proceedings are limited to cases that present an evident need to "secure or maintain uniformity of the court's decisions" or resolve "a question of exceptional importance." Fed. R. App. P. 35(a). En banc requests are so disfavored that this Court took the unusual step

in its rules of warning counsel with sanctions for abusing the procedure. 5th Cir. R. 35.1.

Initial hearing en banc is especially extraordinary. The County's brief does not identify any instance of this Court taking such an uncommon step, and the undersigned has identified just three instances in the past four decades: *Williams v. Catoe*, 946 F.3d 278, 279 (5th Cir. 2020) (en banc); *United States v. Escalante-Reyes*, 689 F.3d 415, 418 (5th Cir. 2012) (en banc); *Point Landing, Inc. v. Omni Capital Int'l, Ltd.*, 795 F.2d 415, 419 (5th Cir. 1986) (en banc). These few cases show that this Court grants initial hearing en banc only with great rarity and only to fix obvious, recurring problems in panel authority that en banc decisions had not yet resolved.

Williams concerned the appealability of interlocutory orders denying the appointment of counsel to pro se plaintiffs. 946 F.3d at 279. A panel decision had allowed such appeals, *see Robbins v. Maggio*, 750 F.2d 405 (5th Cir. 1985), spawning an inordinate volume of them, which nearly always failed. The defendants in those appeals, having won, lacked the incentive and grounds to seek en banc reconsideration of *Robbins*. Finally, Texas—supported by amici Louisiana and Mississippi—asked for initial hearing en banc to abrogate *Robbins*. *See* Appellees' Pet. for Initial Hearing En Banc, *Williams v. Catoe*, 946 F.3d 278 (5th Cir. 2020) (No. 18-40825); Louisiana & Mississippi's Amicus Curiae Br.,

Williams, *supra* (No. 18-40825). The en banc court did so unanimously. *Williams*, 946 F.3d at 281.

Escalante-Reyes likewise involved a regularly recurring issue: in plain-error review, when the law is unclear at the time of trial or plea but clarified during pendency of the appeal, which law should the reviewing court consider? 689 F.3d at 418. Recent panels had reached conflicting answers. *See United States v. Broussard*, 669 F.3d 537, 554 (5th Cir. 2012) (collecting cases). This Court thus granted initial hearing en banc to resolve the issue, adopting the "time of appeal" approach and aligning itself with the majority view in an eight-two circuit split. *Escalante-Reyes*, 689 F.3d at 421-422.

Point Landing similarly resolved a recent, recurring division in panel decisions over requirements for service of process. 795 F.2d at 417. Two panel decisions "decided only three days apart, g[a]ve different answers." *Id.* at 419 (quoting *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1265 (5th Cir. 1983)). Thus, en banc proceedings were the only way to resolve that recurrent question, and initial hearing en banc enabled the Court to do it efficiently. *Id.* at 427.

Far more often, this Court denies petitions for initial hearing en banc. *See*, *e.g.*, *Gruver v. Louisiana Bd. of Supervisors for La. State Univ. Ag. & Mech. Coll.*, 959 F.3d 178, 181 (5th Cir. 2020) (denying LSU's petition); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1015 (5th Cir. 2015) (denying NLRB's petition); *United*

States v. Hagen, 349 F. App'x 896 (5th Cir. 2009) (denying United States' petition). This Court denies petitions for initial hearing en banc even in cases that later persuade the Court to revise its precedent through en banc rehearing. *See*, *e.g.*, *Hamilton v. Dallas County*, 42 F.4th 550 (5th Cir. 2022), *rev'd en banc*, 79 F.4th 494 (5th Cir. 2023) (abrogating circuit precedent after panel proceedings and after denying motion for initial hearing en banc); *United States v. Estate of Parsons*, 314 F.3d 745 (5th Cir. 2002), *vacated en banc*, 367 F.3d 409 (5th Cir. 2004) (same). These cases underscore just how rarely issues arise that not only recur and spawn panel conflict, but also need resolution so urgently as to require initial hearing en banc.

II. The district court's judgment does not warrant en banc proceedings.

This case is utterly unlike the rare circumstances in which this Court holds initial hearing en banc. There is no conflict among recent panel decisions. Indeed, this is the first case involving a coalition claim to reach this Court since 1996 and the first successful one since 1993. *See Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1214-1216 & n.21 (5th Cir. 1996) (affirming rejection of coalition claim on factual grounds); *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) (allowing coalition claims but reversing on other grounds). Moreover, unlike in the few cases that this Court

has granted initial hearing en banc, the en banc Court already has resolved the question that the County wishes to revisit. *Clements*, 999 F.2d at 864.

A. The district court correctly applied settled law to specific facts.

The United States and private plaintiffs challenged the Galveston County Commissioners Court's 2021 redistricting plan because it eliminated Precinct 3, a longstanding majority-minority precinct in which Black and Latino voters consistently elected their preferred candidate. *See* U.S. Br. 3-14. At trial, plaintiffs comprehensively demonstrated a violation of Section 2's results test under *Thornburg v. Gingles*, 478 U.S. 30 (1986). *See* U.S. Br. 15-36. The district court, sitting on Galveston Island, found "stark and jarring" facts: though the County had "absolutely no reason to make major changes to Precinct 3," it was "summarily carved up and wiped off the map." ROA.16028-16029.

This Court's en banc precedent permitted plaintiffs to bring their claims on behalf of Black and Latino voters together. The Court treats the viability of coalition claims "as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive." *Clements*, 999 F.2d at 864. "If blacks and Hispanics vote cohesively, they are legally a single minority group." *Ibid.* *Clements* declined to adopt the position, now urged by Galveston County, that Section 2 does not permit coalition claims. *See id.* at 895-898 (Jones, J., concurring). And *Clements* was decided after unusually thorough

litigation: the case had already undergone a bench trial, panel proceedings, en banc rehearing, Supreme Court review, and panel proceedings again. *See id.* at 838-839 (majority opinion).

Here, the district court found that "undisputed evidence" showed "the combined Black and Latino coalition is highly cohesive." ROA.16016-16017. Even the County's expert conceded that "it would be hard to find 'a more classic pattern of what polarization looks like in an election.'" ROA.15926-15927 (quoting ROA.19312). The "close correlation" that plaintiffs showed between Black and Latino voters here is the kind of cohesion evidence that *Clements* recognized as "overwhelming." 999 F.2d at 864-865 & n.29. Accordingly, the district court's judgment should be affirmed in the ordinary course, not subjected to extraordinary procedures.

B. The County fails to justify en banc proceedings.

The County's petition largely duplicates its merits brief. This repetitive material fails to justify the extraordinary measure of initial hearing en banc.

1. The County does not grapple with the rarity of initial hearing en banc in this Court. Its examples come only from dissimilar cases in other courts. *See* Pet. 12 (citing challenges to Trump Administration's restrictions on travel from certain majority-Muslim countries, Obama Administration's Clean Power Plan, Affordable Care Act contraception requirements, and University of Michigan race-

conscious admissions policies). Three of these cases presented novel issues of momentous national significance in the absence of controlling precedent. The fourth likewise raised a "question of national importance" that had divided the circuits and not been addressed by the Supreme Court in "over 25 years." *Grutter v. Bollinger*, 539 U.S. 306, 322 (2003). This case, by contrast, concerns a single electoral district for a single governing body in a single county. And it is based on Section 2, legal ground well trod by this Court.

Nor does the County attempt to base its petition on disharmony in this Court's decisions. En banc proceedings are not necessary to secure uniformity here because this Court has applied the same fact-based approach to coalition claims for more than three decades. *See Rollins*, 89 F.3d at 1214-1216 & n.21 (coalition claim rejected for lack of cohesion); *Clements*, 999 F.2d at 863 (coalition claims rejected on other grounds); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (coalition claim rejected for lack of cohesion); *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989) (coalition claim rejected on other factual grounds); *Campos v. City of Baytown, Tex.*, 840 F.2d 1240 (5th Cir. 1988) (coalition claim established); *LULAC v. Midland Independent School District*, 812 F.2d 1494 (5th Cir.) (coalition claim established), *vacated on state-law grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc).

2. Contrary to the County's arguments (at 6-8), en banc proceedings will not further uniformity with other circuit courts. Nearly all other courts to consider coalition claims have taken the same fact-based approach as this Court. *See Frank v. Forest County*, 336 F.3d 570 (7th Cir. 2003) (holding Native American plaintiffs did not show cohesion with Black voters); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275-276 (2d Cir.) (holding coalition plaintiffs proved cohesion), *vacated on other grounds*, 512 U.S. 1283 (1994); *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 890-891 (9th Cir. 1992) (holding plaintiffs did not prove cohesion); *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 526-527 (11th Cir. 1990) (same).

The one decision that creates circuit conflict is *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc), which imposed extratextual restrictions on Section 2 to bar coalition claims. *Nixon* is incorrect, as explained below and in the United States' merits brief, and courts recently considering coalition claims have found *Nixon* unpersuasive. *See*, *e.g.*, *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015, 1051-1053 (E.D. Va. 2021), *vacated on other grounds*, 42 F.4th 266 (4th Cir. 2022); *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 233-236 (D. Mass. 2017). Even if this Court chose to align with *Nixon*, all that would achieve is turning a five-one circuit split into a four-two split. The divergence would

remain, and the weight of circuit authority would still favor allowing coalition claims supported by adequate proof.[1]

3. This case also presents no "error of exceptional public importance" warranting en banc proceedings. 5th Cir. I.O.P.; Fed. R. App. P. 35. Far from erring, the district court applied longstanding circuit precedent by allowing plaintiffs' coalition claims. And the County's request to revisit that precedent is not exceptionally important because the precedent is correct.

Permitting coalition claims against redistricting plans reflects the best interpretation of Section 2's text. *See* U.S. Br. 38-40. Subsection (a) of Section 2 protects an individual right, "the right of *any citizen* of the United States to vote," against "denial or abridgment" by a voting practice or procedure "on account of race or color" or membership in a "language minority group." 52 U.S.C. 10301(a), 10303(f)(2) (emphasis added); *see LULAC v. Perry*, 548 U.S. 399, 437 (2006) ("[T]he right to an undiluted vote does not belong to the minority as a group, but rather to its individual members." (citation and internal quotation marks omitted)).

[1] Contrary to the County's argument (at 6-8), *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), is not a part of this circuit split, and *Bartlett v. Strickland*, 556 U.S. 1 (2009), did not resolve the split. *Hall* and *Bartlett* dealt with "crossover" districts, not "coalition" districts. *See Hall*, 385 F.3d at 425; *Bartlett*, 556 U.S. at 15 (distinguishing them); U.S. Br. 44-46 (explaining that crossover districts raise different concerns). Indeed, *Bartlett* expressly reserved ruling on whether Section 2 allows coalition claims. 556 U.S. at 13-14.

Subsection (b) of Section 2 defines violations of that individual right as occurring when "members of a class of citizens protected by subsection (a) . . . have less opportunity than other members of the electorate" to participate politically. 52 U.S.C. 10301(b).

When individual Black and Latino citizens' right to vote is abridged by the same practice or procedure, such as a redistricting plan, together those injured individuals are all "members of a class of citizens protected by subsection (a)." *See Clements*, 999 F.2d at 864 ("If blacks and Hispanics vote cohesively, they are legally a single minority group."). The text contains no restriction that requires "class" to mean "a single racial group" or the "members" to be only one race. Instead, the text uses "a class" and its "members" simply to denote a group of injured individuals. That meaning is well established in legal usage. *See*, *e.g.*, Fed. R. Civ. P. 23 ("Class Actions") (permitting "[o]ne or more members of a class [to] sue or be sued . . . on behalf of all members").

Allowing coalition claims under Section 2 also best reflects Congress's aims for the VRA. The VRA includes protection for persons "of Spanish heritage," 52 U.S.C. 10310(c)(3), because Congress recognized the highly similar, overlapping experiences of Mexican Americans in Texas compared to Blacks' experiences there and across the South. *See* U.S. Br. 39-40; S. Rep. No. 295, 94th Cong., 1st Sess. 25-30 (1975).

The County presents no sound reason to revisit this Court's considered precedent. The County repeats textual arguments that did not carry the day in *Clements*. Pet. 4-5. For instance, it says (at 5) that Congress could and would have used "*classes*," not "a class," if it meant to allow coalition claims. That point readily cuts the other way: Congress could and should have specified "a single racial class" if that is all it meant to allow. The text Congress chose covers coalition claims, and that is what matters. The County also suggests (at 9-10) that coalition claims will involve impossible predictive questions about voters' behavior, but the questions it lists are amenable to the standard empirical methods used in all Section 2 claims about redistricting. The County simply lost on those questions at trial. *Clements* forecloses these points in any event.

Finally, the County tries (at 11) to boil this case down to being "about politics." In one sense, that point is inane. Section 2 is about protecting minority voters' opportunity "to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b).

But in another sense, the County's point is wrong. The district court rejected the County's theory that race-neutral partisanship drove election defeats for Black and Latino voters' preferred candidates. ROA.15936-15938. It made detailed findings to explain why, including the "extreme degree of Anglo bloc voting" in opposition to minorities' preferred candidates; minority candidates' lack of success

outside majority-minority areas; and "continued racial appeals in Galveston County politics." ROA.16019. Before the panel, those detailed findings will be subject to clear-error review and controlling precedent allowing coalition claims. The County's eleventh-hour attempt to escape the panel reflects its recognition that, under that standard of review and that precedent, its appeal stands little likelihood of success.

C. The County's belated request for initial hearing en banc disserves the appellate process.

The County has acknowledged at least since its summary judgment motion in May 2023 that "Fifth Circuit precedent expressly permits VRA Section 2 coalition claims." ROA.3898. It even cited *Clements* (ROA.3898), showing it knows that only the en banc process or Supreme Court review could revise that precedent. Yet the County's stay motion to the district court on October 14, its stay motion to this Court on October 17, and its opening brief on October 26 said nothing about initial hearing en banc. The County waited until the morning of Thursday, November 2, 2023, to inform appellees (whose merits briefs were due that same day) of its intent to request initial hearing en banc. And it did not file its petition until that evening, even though nearly all the petition's content was already included in the County's opening brief. By that time, oral argument before the panel—scheduled for Tuesday, November 7—was less than five days away.

Although the County's petition technically is timely because it was filed the same day appellees' briefs were due, *see* Fed. R. App. P. 35(c), that rule contemplates the ordinary appellate schedule, where briefs are submitted well in advance of oral argument. This appeal, of course, is proceeding on an expedited basis. *See* Order (Oct. 19, 2023). By waiting until the last moment to file, the County shortened the already-condensed time for appellees to respond and for the members of this Court to deliberate before the panel hears oral argument. Besides the panel members assigned to this case, six active judges will be hearing argument on the mornings of Monday, November 6 and Tuesday, November 7.[2] Two others will be hearing argument on Monday afternoon.[3]

Jamming briefing and deliberation into such a short, busy period imposes a needless burden on the judges and staff of this Court. If the County's petition were not already short on merit, denial would be warranted on that basis alone.

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[2] According to the Court's currently posted calendars, Judges Southwick, Engelhardt, and Wilson are sitting in the East Courtroom, and Chief Judge Richman and Judges Haynes and Duncan are sitting in the West Courtroom. *See* Court and Special Hearing Calendars, https://www.ca5.uscourts.gov/oral-argument-information/court-calendars/MonthYear/2023/11/ (last visited Nov. 4, 2023).

[3] A panel including Judges Willett and Douglas is sitting in the En Banc Courtroom. *Ibid.*

CONCLUSION

For the foregoing reasons, this Court should deny appellants' petition for initial hearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On November 6, 2023, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Matthew N. Drecun
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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 35(b)(2)(A) and (e) because it contains 3,302 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 5th Cir. Rule 32.1. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Matthew N. Drecun
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Date: November 6, 2023