

No. 23-40582

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

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

On Appeal from the United States District Court for the Southern District of Texas

**RESPONSE OF PLAINTIFFS-APPELLEES DICKINSON BAY AREA BRANCH NAACP;
GALVESTON BRANCH NAACP; MAINLAND BRANCH NAACP; GALVESTON LULAC
COUNCIL 151; EDNA COURVILLE; JOE A. COMPIAN; AND LEON PHILLIPS
TO PETITION FOR INITIAL HEARING EN BANC**

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CERTIFICATE OF INTERESTED PERSONS

No. 23-40582

HONORABLE TERRY PETTEWAY; HONORABLE DERRICK ROSE;
HONORABLE PENNY POPE,
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GALVESTON COUNTY, TEXAS; MARK HENRY, IN HIS OFFICIAL CAPACITY AS
GALVESTON COUNTY JUDGE; DWIGHT D. SULLIVAN, IN HIS OFFICIAL CAPACITY AS
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Defendants-Appellants

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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 disqualification or recusal.

Defendants

1. Galveston County, Defendant-Appellant
2. Honorable Mark Henry, in his official capacity as Galveston County Judge, Defendant-Appellant
3. Dwight D. Sullivan, in his official capacity as Galveston County Clerk, Defendant-Appellant
4. Commissioner Joseph Giusti, in his official capacity as Galveston County Commissioner
5. Commissioner Darrell Apffel, in his official capacity as Galveston County Commissioner
6. Commissioner Robin Armstrong, in his official capacity as Galveston County Commissioner
7. Commissioner Stephen Holmes, in his official capacity as Galveston County Commissioner
8. Randy Ray Howry, Counsel for Commissioner Stephen Holmes
9. J. Christian Adams, Counsel for Defendants-Appellants
10. Jason Brett Torchinsky, Counsel for Defendants-Appellants
11. Maureen S. Riordan, Counsel for Defendants-Appellants
12. Robert Barron Boemer, Counsel for Defendants-Appellants
13. Shawn T Sheehy, Counsel for Defendants-Appellants
14. Angela Olalde, Counsel for Defendants-Appellants
15. Dallin Brockbank Holt, Counsel for Defendants-Appellants
16. Dalton L. Oldham, Counsel for Defendants-Appellants
17. James Edwin Trainor, III, Counsel for Defendants-Appellants
18. Jordan Raschke Elton, Counsel for Defendants-Appellants
19. Joseph M. Nixon, Counsel for Defendants-Appellants

20. Joseph R. Russo, Jr., Counsel for Defendants-Appellants

NAACP/LULAC Plaintiffs

21. Dickinson Bay Area Branch NAACP, Plaintiff-Appellee

22. Galveston Branch NAACP, Plaintiff-Appellee

23. Mainland Area Branch NAACP, Plaintiff-Appellee

24. LULAC Council 151, Plaintiff-Appellee

25. Edna Courville, Plaintiff-Appellee

26. Joe A. Compian, Plaintiff-Appellee

27. Leon Phillips, Plaintiff-Appellee

28. Richard Mancino, Counsel for Plaintiffs-Appellees

29. Diana C. Vall-Ilobera, Counsel for Plaintiffs-Appellees

30. Michelle Polizzano, Counsel for Plaintiffs-Appellees

31. Andrew Silberstein, Counsel for Plaintiffs-Appellees

32. Molly Zhu, Counsel for Plaintiffs-Appellees

33. Kathryn Garrett, Counsel for Plaintiffs-Appellees

34. Hilary Harris Klein, Counsel for Plaintiffs-Appellees

35. Adrienne M. Spoto, Counsel for Plaintiffs-Appellees

36. Hani Mirza, Counsel for Plaintiffs-Appellees

37. Sarah Xiyi Chen, Counsel for Plaintiffs-Appellees

38. Joaquin Gonzalez, Counsel for Plaintiffs-Appellees

39. Christina Beeler, Counsel for Plaintiffs-Appellees

40. Nickolas Anthony Spencer, Counsel for Plaintiffs-Appellees

41. Aaron E. Nathan, Counsel for Plaintiffs-Appellees

Petteway Plaintiffs

42. Honorable Terry Petteway, Plaintiff-Appellee
43. Honorable Penny Pope, Plaintiff-Appellee
44. Constable Derreck Rose, Plaintiff-Appellee
45. Mark Gaber, Counsel for *Petteway* Plaintiffs-Appellees
46. Valencia Richardson, Counsel for *Petteway* Plaintiffs-Appellees
47. Simone Leeper, Counsel for *Petteway* Plaintiffs-Appellees
48. Alexandra Copper, Counsel for *Petteway* Plaintiffs-Appellees
49. Bernadette Reyes, Counsel for *Petteway* Plaintiffs-Appellees
50. Sonni Waknin, Counsel for *Petteway* Plaintiffs-Appellees
51. Neil Baron, Counsel for *Petteway* Plaintiffs-Appellees
52. Chad Dunn, Counsel for *Petteway* Plaintiffs-Appellees

United States of America

53. Alamdar S. Hamdani, Counsel for the United States
54. Daniel D. Hu, Counsel for the United States
55. Kristen Clarke, Counsel for the United States
56. T. Christian Herren, Jr., Counsel for the United States
57. Robert S. Berman, Counsel for the United States
58. Catherine Meza, Counsel for the United States
59. Bruce I. Gear, Counsel for the United States
60. Tharuni A. Jayaraman, Counsel for the United States
61. Zachary Newkirk, Counsel for the United States
62. K'Shaani Smith, Counsel for the United States

63. Michael E. Stewart, Counsel for the United States
64. Matthew N. Drecun, Counsel for the United States
65. Nicolas Y. Riley, Counsel for the United States

s/ Richard Mancino

Attorney of record for Plaintiffs-Appellees Dickinson Bay Area Branch NAACP; Galveston Branch NAACP; Mainland Branch NAACP; Galveston LULAC Council 151; Edna Courville; Joe A. Compian; and Leon Phillips

November 6, 2023

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BACKGROUND

In 2021, Defendants enacted a new precinct map for Galveston County’s commissioners court that “summarily carved up and wiped off the map” the County’s sole and historic majority-minority commissioners precinct, subsuming Galveston’s Black and Latino voters among four new majority-Anglo precincts. ROA.16028. Three groups of Plaintiffs, including the United States, brought these actions challenging the enacted plan. After a ten-day bench trial, the district court (Hon. Jeffrey Vincent Brown) determined Defendants’ actions were “egregious,” “stark and jarring” and “fundamentally inconsistent with § 2 of the Voting Rights Act.” ROA.15886, 16029. The district court entered judgment on October 13, 2023, enjoining the enacted plan and ordering a remedial process to ensure a legally compliant map would be in place for the 2024 election and before the candidate filing period begins on November 11, 2023. ROA.16038-39.

Defendants filed a notice of appeal on October 14, 2023. ROA.16041-42. On October 17, 2023, Defendants moved for a stay pending appeal of the district court’s judgment. Appellants’ Emergency Motion for Stay, No. 23-40582 (5th Cir. Oct. 17, 2023). On October 18, 2023, a motions panel (Jones, Higginson, Ho, JJ.) granted a temporary administrative stay until November 2, 2023, ordered that the appeal be expedited to the next available oral argument calendar, and deferred the motion for stay pending appeal to the oral argument panel. Unpublished Order, No. 23-40582

(5th Cir. Oct. 18, 2023). On October 19, 2023, the Court entered an expedited briefing schedule, set the case for oral argument on November 7, 2023, and extended the temporary administrative stay through November 10, 2023. Unpublished Order, No. 23-40582 (5th Cir. Oct. 19, 2023). Defendants filed their opening brief on October 26, 2023, and each of the three plaintiff groups filed their response briefs on November 2, 2023. Defendants waited nearly three weeks after noticing their appeal, and over two weeks after it was expedited, to file their motion for initial *en banc* hearing on November 2, 2023.

Oral argument is scheduled for tomorrow, November 7, 2023, before a three-judge merits panel (Jones, Elrod, Barksdale, JJ.).

REASONS FOR DENYING THE PETITION

Defendants have known since the earliest days of this case that any challenge they might mount to the recognition of coalition claims under § 2 of the Voting Rights Act is foreclosed by binding circuit precedent. Yet even after filing their notice of appeal and seeking emergency interim relief, they did not seek initial *en banc* review until the very last minute—weeks after their appeal was expedited and set for argument before a merits panel. Defendants have provided no excuse for waiting until the parties had already filed their principal briefs for tomorrow’s argument. Moreover, Defendants’ petition for initial *en banc* hearing contains no facts or arguments that were not available to them at the time they filed their notice

of appeal. Nothing, in other words, prevented Defendants from seeking initial *en banc* review well before the Court had scheduled argument before a panel, three independent plaintiff groups (including the United States) had completed principal merits briefs on an expedited schedule, and the merits panel to which this case was assigned began preparing for tomorrow’s argument. There is no excuse for Defendants’ delay. The Court should not excuse it.¹

Indeed, Defendants’ argument they are requesting initial *en banc* review to “aid judicial efficiency” (Petition at 12) is hard to take seriously given the unnecessary burdens on both the parties and this Court their lack of diligence has foreseeably caused. Furthermore, an initial hearing *en banc* is generally not the more efficient approach to appellate review, *see, e.g., Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 211 F.3d 853, 854–55 (4th Cir. 2000) (Wilkinson, C.J., concurring in the denial of initial hearing *en banc*), and in this case Defendants’ delay has destroyed any efficiencies that initial *en banc* consideration might theoretically have produced.

Not only is Defendants’ delay unexcused, it risks inflicting further irreparable harm on Plaintiffs and the Black and Latino citizens of Galveston County, who—as

¹ Defendants’ technical compliance with Rule 35(c)’s deadline for an initial *en banc* petition cannot justify their delay in these circumstances. *See* Fed. R. App. P. 35(c) (“A petition that an appeal be heard initially *en banc* must be filed by the date when the Appellee’s brief is due.”). Rule 35(c) sets a deadline; it does not license gamesmanship or justify an appellant’s imposing avoidable burdens on the parties and the court.

long as the judgment below is stayed—risk voting in the upcoming election cycle under an unlawful precinct map that denies them equal voting power and will deny them any chance at representation on the commissioners court. *See* NAACP/LULAC Plaintiffs’ Br. at 50-52.

That prospect is especially galling given that, when they originally sought an emergency stay of the district court’s judgment pending appeal on October 17, Defendants represented to this Court that swift action by October 24 was required to avoid irreparable harm to *their* interests. Appellants’ Emergency Motion for Stay at 3. Based on those representations, the Court moved expeditiously to enter a temporary administrative stay through the eve of the November 11 opening of the candidate-filing period, and ordered an extraordinarily expedited briefing schedule, such that oral argument would take place only days before that date. Unpublished Order, No. 23-40582 (5th Cir. Oct. 18, 2023). Defendants have asked for, and already received, a degree of expedition from the Court that they have failed to demonstrate themselves. Defendants’ delay should not be permitted to slow the expeditious review that this Court has already granted, or enhance the likelihood that an illegal precinct map will be used in 2024 that would deny Black and Latino voters in Galveston any representation on the commissioners court for the first time in decades.

Defendants point to four occasions on which other circuits have granted initial hearing *en banc*. Petition at 12. But those cases only illustrate the unremarkable proposition that initial *en banc* hearing is appropriate on rare occasions. Beyond that, these examples work against Defendants, because they illustrate that appellants who believe that initial *en banc* hearing is warranted ordinarily request it long before the deadline to do so. The *Hobby Lobby* appellants filed their petition more than two months before the deadline, and more than a full month before their own principal merits brief. See Motion for Initial En Banc Hearing, *Hobby Lobby Stores v. Sebelius*, No. 12-6294 (10th Cir. Jan. 10, 2013). And the *Gratz* appellants—who were not even seeking expedited appellate review—filed their petition for initial hearing *en banc* shortly after their opening brief and more than three weeks before the deadline. See Petition for En Banc Hearing, *Gratz v. Bollinger*, No. 01-1333 (6th Cir. May 14, 2001).

Appellants' gamesmanship aside, *en banc* review is not warranted in this case because this Court's decades-old precedent interpreting § 2 of the Voting Rights Act to prohibit vote dilution of minority coalitions remains intact and, moreover, is correct. See *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (*en banc*); *Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988); *LULAC Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1499-1502 (5th Cir. 1987), *opinion vacated on reh'g on other grounds*, 829

F.2d 546 (5th Cir. 1987); NAACP/LULAC Plaintiffs Br. 19-22. No contrary precedent calls those holdings into question. Defendants’ appeal to intervening Supreme Court authority (Petition at 8) is unavailing, because the Supreme Court has made clear it was not addressing the argument Defendants now pose for *en banc* review. *See Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009) (plurality opinion) (“We do not address that type of coalition district here.”). And, as Plaintiffs have explained in their responsive merits brief, Defendants overstate the circuit conflict on this issue. NAACP/LULAC Plaintiffs’ Br. at 28; United States Br. at 46-48. In fact, only one circuit has held coalition claims to be impermissible, *see Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (*en banc*), an outlier decision relying on textual analysis that does not withstand scrutiny for the reasons summarized above and set forth in Plaintiffs’ merits brief. NAACP/LULAC Plaintiffs Br. at 28.

Instead, a majority of circuits recognize coalition claims under § 2, *see* NAACP/LULAC Plaintiffs Br. at 28, and Congress—which has known of this majority view for decades—has never acted to “correct” that consensus interpretation. “[U]ntil and unless it does, statutory *stare decisis* counsels” that this Court “stay[] the course.” *Allen v. Milligan*, 599 U.S. 1, 39 (2023).

CONCLUSION

The petition for initial hearing *en banc* should be denied.

Respectfully submitted.

November 6, 2023

s/ Richard Mancino

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CERTIFICATE OF SERVICE

I certify that on November 6, 2023, this brief was served on counsel for all parties via the ECF system. I further certify that all parties required to be served have been served.

s/ Richard Mancino

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 1,433 words, as determined by the word-count function of Microsoft Word 2016, and was prepared in a proportionally spaced 14-point Times New Roman font.

s/ Richard Mancino