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; Galveston County Commissioners Court; Mark Henry, *in his official capacity as Galveston County Judge*

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
USDC Nos. 3:22-CV-00057, 3:22-CV-00093, 3:22-CV-00117

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR 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.

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INTRODUCTION

Thirty years ago, this Court convened en banc and decided the exact question the County raises in its petition. *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc).[1] In doing so, this Court "sp[oke] authoritatively in one voice on this very important legal issue." Pet. at 12.[2] "If blacks and Hispanics vote cohesively, they are legally a single minority group" *Clements*, 999 F.2d at 864. Although the County remarkably never mentions in its petition that the *Clements* case was decided en banc, this Court cannot ignore that fact. Statutory *stare decisis* and respect for an orderly judicial process compel adherence to the Court's en banc precedent and denial of the County's petition.

Even if the Court were inclined to revisit its *Clements* decision permitting coalition claims, this is the wrong case in which to do so. The County dismantled an existing majority-minority precinct in a redistricting process Judge Jeffrey Vincent Brown described as "[a]typical," "stark," "jarring," "mean-spirited," "egregious,"

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[1] Four prior panel decisions from the Court are consistent with the en banc ruling on this point. *See Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989) (per curiam); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988); and *LULAC, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500-02 (5th Cir. 1987).

[2] The *Clements* Court considered a claim that would have had federal courts impose single member districts elections for state judges elected in county-wide districts. This case, in contrast, involves a claim to enjoin the intentional destruction of a performing minority district that had been in place for over 30 years.

and "stunning" for its treatment of minority voters in a County with a combined Black and Latino population of over 38%. ROA.16028, ROA.16029. The district court's 157-page opinion[3] includes a ream of *Arlington Heights* factual findings—unchallenged on appeal—regarding Plaintiffs' intentional discrimination claim. Although the district court's Section 2 ruling obviated the need to ultimately decide the intentional discrimination claim, the court's factfinding plainly illustrates a process marked by purposeful vote dilution.[4] The first *Gingles* precondition is relaxed where intentional discrimination is present, making the coalition question nondispositive to Plaintiffs' lawsuit and rendering this case a poor vehicle to address the County's primary argument.

Moreover, the County is not harmed by the district court's remedial order. The district court authorized the County to impose its own map—referred to as "Map 1"—that the County contended at trial was drawn blind to race and would have been acceptable to a majority of the commissioners.

[3] The County did not include the district court's Findings of Fact and Conclusions of Law in its petition appendix. *See* 5th Cir. R. 35.2.10. It is being filed as an exhibit to this response.

[4] Notably—and unlike most redistricting cases—the County's witnesses all denied a partisan motivation for their dismantling of Precinct 3. ROA.15981. And the district court found as a factual matter that the other neutral explanations proffered at trial were untrue. ROA.15980. The County does not challenge these findings on appeal.

Finally, the County should not be rewarded for its gamesmanship in this appeal. The County has repeatedly acknowledged throughout this litigation that this Court's en banc *Clements* decision forecloses its primary legal argument. Yet rather than immediately petition for en banc hearing, the County waited until the last possible day to do so—in an appeal the panel is treating as an emergency—causing a rushed weekend briefing schedule with the status of oral argument scheduled for *tomorrow* not yet apparent. The transparent purpose of the County's delayed filing is to run the clock to manufacture a *Purcell* timing concern with the month-long candidate filing period commencing soon. That gambit should fail, and the district court's injunction and remedial order—which adheres to this Court's en banc precedent—should take effect immediately.

STATEMENT OF THE COURSE OF PROCEEDINGS

On November 12, 2023 the Galveston County Commissioner Court adopted a map that significantly altered the lines of Commissioner Precinct 3, dismantling what had served as the only majority-minority Commissioners Court precinct in Galveston County for thirty years. ROA.15911 (citing ROA.35188, 35252-35253). Plaintiffs sued, alleging intentional discrimination, discriminatory results, and racial gerrymandering in violation of Section 2 of the Voting Rights Act ("VRA"), the Fourteenth Amendment, and the Fifteenth Amendment.

In August 2023, the district court held a 10-day bench trial. *See* ROA.15890-15892. On October 13, 2023, the court issued a 157-page opinion finding that the County's adoption of the Enacted Plan was a "clear violation" of section 2.[5] ROA.16029. The district court was unequivocal in its findings, stating that

> [t]his is not a typical redistricting case. What happened here was stark and jarring. The Commissioners Court transformed Precinct 3 from the precinct with the highest percentage of Black and Latino residents to that with the lowest percentage. The circumstances and effect of the enacted plan were 'mean-spirited' and 'egregious' given that 'there was absolutely no reason to make major changes to Precinct 3.'

ROA.16029 (citations omitted).

The district court found that Plaintiffs established the three *Gingles* preconditions for Section 2 liability with little challenge from the County and its experts. *See* ROA.15902, 15919, 16007 *and* ROA. 15927 (The County's expert Dr. Alford testified that it would be hard to find "a more classic pattern of what polarization looks like in an election" than what exists in Galveston County. ROA.15927 (quoting ROA.19311-19312)). The district court further concluded that "most of the Senate factors support § 2 liability," a finding the County does not challenge on appeal. ROA.16022-16027. In considering the totality of the circumstances, the court found it "stunning how completely the county extinguished

[5] Despite finding a number of facts that would support a finding of intentional discrimination, *see, e.g.*, ROA.15964-15982, the district court did not issue conclusions of law on the intentional-discrimination or racial-gerrymandering claims as there would be no difference in relief. ROA.16032-16033.

the Black and Latino communities' voice on its commissioners court during 2021's redistricting" ROA.16028.

The district court provided the County two weeks to file a new redistricting plan, noting that the County could also simply implement one of the illustrative maps or "Map 1"—a map drawn by the County that included a majority-minority Precinct 3 drawn without considering racial data and that several Commissioners testified they would be willing to adopt and the County admitted was legally compliant. *See* ROA. 18317; 18613; 18950; 19187-19188.

ARGUMENT

I. *Stare decisis* requires denial of the petition.

Stare decisis requires the denial of the County's petition. The "foundation stone of the rule of law" is that "today's Court should stand by yesterday's decisions." *Kimble v. Marvel Entmt., LLC*, 576 U.S. 446, 455 (2015) (internal quotation marks omitted). *Stare decisis* is at its apex in this case for two reasons.

First, the issue raised in the petition was already settled three decades ago by this Court sitting en banc. *Clements*, 999 F.3d at 864. "[P]rior en banc decisions carry more *stare decisis* weight than prior panel decisions." *Riccio v. Sentry Credit, Inc.*, 954 F.3d 582, 591 (3d Cir. 2020) (en banc); *accord. Planned Parenthood of Greater Tex. Family Planning & Preventative Health Servs., Inc. v. Kauffman*, 981 F.3d 347, 369 (5th Cir. 2020) (en banc) (en banc consideration of prior *panel* decision involves

less exacting *stare decisis* consideration). The purpose of this Court's en banc review is to ensure uniformity and finality. Fed. R. App. P. 35. Adhering to this Court's en banc decisions "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Kimble*, 576 U.S. at 455. The damage from disregarding *stare decisis* here would extend far beyond the issues in this case—it would undermine the rule of law and orderliness in this Circuit and increase "incentives for challenging settled precedents" across the board. *Id.* It would send the message that this Court's en banc decisions are mere snapshots in time, cheapening the respect they garner from litigants and future judges and making relitigation of issues previously decided en banc commonplace.

Second, "*stare decisis* carries enhanced force when a decision, like [*Clements*], interprets a statute." *Id.* at 456. "Congress can correct any mistakes it sees" in cases interpreting statutes. *Id.* Indeed, just this year the Supreme Court held that "statutory *stare decisis* counsels [] staying the course" regarding settled precedent interpreting Section 2. *Allen v. Milligan*, 599 U.S. 1, 39 (2023). *Clements* has been settled law in this Circuit for over thirty years. "Congress is undoubtedly aware of [this Court] construing § 2 to apply to [coalition] challenges. It can change that if it likes." *Milligan*, 599 U.S. at 39.

The County offers no reason—let alone a "special justification," *Kimble*, 576 U.S. at 455—that would justify abandoning thirty years of settled en banc precedent.

II. Only the Supreme Court can resolve the circuit split the County identifies.

Only the Supreme Court can resolve the circuit split identified by the County because that split will remain regardless of whether this Court grants the petition and overrules *Clements*. "It is rarely appropriate to overrule circuit precedent just to move from one side of a conflict to another, [except] when this circuit can eliminate the conflict by overruling a decision that lacks support elsewhere." *United States v. Corner*, 598 F.3d 411, 414 (7th Cir. 2010) (en banc). Only the Sixth Circuit has held that Section 2 does not protect coalitions of racial minorities from vote dilution. *See Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc). The Second and Eleventh Circuits have held that Section 2 applies to minority coalitions. *See Pope v. Cnty. of Albany*, 687 F.3d 565 (2d Cir. 2012); *Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990).[6]

[6] The County contends that the Fourth and Seventh Circuits have rejected coalition claims, but that is not so. In *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), the court rejected *crossover* districts in which Black and a minority of Anglo voters were combined. *Id.* at 430. The Supreme Court did the same in *Bartlett v. Strickland*, 556 U.S. 1 (2009), while explaining that minority coalition claims were not at issue, *id.* at 15-16. Contrary to the County's contention, Pet. at 8, *Bartlett*'s "favorabl[e]" citation of *Hall* is thus unsurprising and has nothing to do with whether coalition claims are cognizable. Moreover, the Seventh Circuit did not reach the question of whether Section 2 protects minority coalitions from vote dilution because it found

The County is therefore wrong to contend that the panel's adjudication of this appeal would "waste judicial resources" because of the existing circuit split. Pet. at 1. Only the Supreme Court can resolve that circuit split. Indeed, granting the petition and hearing this case en banc—to address an issue this Court already resolved en banc thirty years ago—would be a tremendous waste of judicial resources. It would serve none of the Rule 35 factors because this Circuit's decisions on this issue are uniform and its precedent on the question settled.[7] En banc review would do nothing to resolve the circuit split. And in the process it would seriously undermine the foundational *stare decisis* principles upon which "the actual and perceived integrity of the judicial process" is built. *Kimble*, 576 U.S. at 455. This Court has already devoted substantial judicial resources to deciding this issue en banc. Nothing this Court does will change the fact that only the Supreme Court can resolve the circuit split the County identifies. The full Court's time and resources should not be wasted in the manner suggested by the County. Rather, the panel should adhere to this Court's binding precedent, affirm the district court's decision, and the County can

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that the purported coalition was not cohesive and thus did not satisfy the second *Gingles* precondition. *Frank v. Forest County*, 336 F.3d 570, 575-76 (7th Cir. 2003).

[7] The County's contention that en banc review is necessary to "ensure that the whole Court speaks with one voice" on this issue is bewildering. Pet. at v. The Court has already done that.

seek certiorari review by the Supreme Court if it wishes. A detour to the en banc Court will burden the full Court and achieve no resolution to this issue.

III. This case is a poor vehicle to reconsider *Clements*.

This case is a poor vehicle for the en banc Court to reconsider *Clements*. As the district court found, "[t]his is not a typical redistricting case. What happened here was stark and jarring." ROA.16029. The court found that the facts surrounding the adoption of the redistricting map were "mean-spirited and egregious," ROA.16029 (internal quotation marks and citation omitted), and that the targeting of Black and Latino voters was "stunning," ROA.16028. Although the district court's resolution of the Section 2 discriminatory results claim made its ultimate resolution of Plaintiffs' intentional discrimination and racial gerrymandering claims unnecessary, the district court's factual findings on the *Arlington Heights* factors indisputably show that Galveston County's adoption of its redistricting map "bears the mark of intentional discrimination." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006). This case thus involves both the dismantling of an *existing* majority-minority precinct as well as evidence of intentional discrimination. Unlike a coalition claim seeking a *new* majority-minority precinct where there is not evidence of intentional discrimination, the *Gingles* 1 question posed by the County's petition is not obviously even applicable here. *See, e.g.*, *Bartlett*, 556 U.S. at 20 (explaining that the Court's holding requiring a majority-minority district showing

for first *Gingles* precondition "does not apply to cases in which there is intentional discrimination against a racial minority"). Even if the Court were inclined to revisit its en banc *Clements* precedent permitting Section 2 coalition claims, the circumstances of this case make it a poor candidate. A case involving evidence of a "stark," "jarring," "egregious," "stunning," and "mean-spirited" attack on minority voting power, where the district court has catalogued extensive evidence of intentional discrimination, is not the proper vehicle for the Court to reconsider its *Clements* decision which rested on the viability of coalition claims under the *Gingles* framework in the absence of intent evidence.

IV. *Clements* correctly held that Section 2 protects minority coalitions from vote dilution.

The Court should not grant en banc initial review because its en banc *Clements* decision is correct. In *Clements*, the Court explained, in a context devoid of discriminatory intent, that whether minority coalitions can raise a vote dilution claim under Section 2 is "a question of fact" and that the Court "allow[s] aggregation of different minority groups where the evidence suggests that they are politically cohesive." 999 F.2d at 864; *id.* ("If blacks and Hispanics vote cohesively, they are legally a single minority group"). This flows directly from the statutory text.

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of rid[ding] the country of racial discrimination in voting" and the Supreme Court has held that "the Act should be interpreted in a manner that provides the

broadest possible scope in combatting racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (internal quotation marks and citations omitted) (alteration in original). The plain text of Section 2 authorizes coalition claims. Section 2(a) of the VRA prohibits any voting standard or practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," or language-minority status. 52 U.S.C. §§ 10301(a), 10303(f). Section 2(b) sets forth how a violation of Section 2(a) is established, and notes that it applies to "a class of citizens protected by subsection (a)." *Id.* § 10301(b). The "class of citizens" to which Section 2(b) refers is not a singular minority group, but rather those "protected by subsection (a)"—*i.e.*, "any citizen" subject to a denial or abridgment of voting rights "on account of race or color, or" language-minority status. *Id* § 10301(a), (b). Nothing in the text of Section 2 requires every member of the "class of citizens" to share the same race, as opposed to the same experience of being politically excluded "on account of race," whatever their race is. *Id.* Section 2 protects all minority voters, and where they are cohesive with another group of minority voters, the act protects them together. Reading into the statute that it must protect only one distinct group of minority voters at a time defeats its broad textual mandate.

The County's sole engagement with Section 2's text is a brief, strained statutory interpretation of "class" in subsection (b) to mean only a single harmed

minority group. Pet. at 5. But this reading improperly plucks "class" from its statutory context. *See Yates v. United States*, 574 U.S. 528, 537 (2015) (the "meaning of a word cannot be determined in isolation") (citation omitted)). "Class" instead means "[a] *group of people* . . . that have common characteristics or attributes," Black's Law Dictionary (11th ed. 2019) (emphasis added), and refers to the plural of "citizens" listed as protected groups in subsection (a): racial, ethnic, *and* language-minority citizens. Accordingly, "class of citizens" means the class members must merely share the common characteristic of being a Section 2 protected racial, ethnic, or language minority voter experiencing vote dilution. Reading "class of citizens" to include a combination of protected minority citizens accords with both the last antecedent grammatical rule, *see Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), and the singular-plural canon of statutory interpretation, *see, e.g.*, *F.D.I.C. v. RBS Sec. Inc.*, 798 F.3d 244, 258 (5th Cir. 2015) (applying 1 U.S.C. § 1).

Even if it were ambiguous whether Section 2's text protects minority coalitions, its legislative history and the broad remedial purpose of the VRA both support recognizing such claims. The 1975 amendment to Section 2 added language-minority protections because Congress sought to address "pattern[s] of racial discrimination that ha[ve] stunted . . . black *and* brown communities." S. Rep. No. 94-295, at 30 (1975) (citation omitted; emphasis added); *see also generally id.* at 22-31. Congress knew that Texas, for example, had a substantial minority population

"comprised primarily of Mexican Americans and [B]lacks" and "has a long history of discriminating against members of *both* minority groups." *Id.* at 25 (emphasis added). Congress thus sought to protect together all "racial or ethnic groups that had experienced appreciable prior discrimination in voting," noting that Latinos "suffered from many of the same barriers to political participation confronting [B]lacks," including "'invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others'"—like that present here. *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1549 & n.19 (5th Cir. 1992) (quoting S. Rep. No. 94-295, at 30). Indeed, the Senate stressed that "racial discrimination against language minority citizens seems to follow density of minority population" overall, citing examples of jurisdictions and electoral systems that have "den[ied] Mexican Americans *and* [B]lack voters in Texas political access." S. Rep. No. 94-295, at 27-28.

Importantly, in its discussion of the history of discrimination and the need for expanded Section 2 protection, the Senate was aware of "at least one case in which African-Americans and Hispanics brought a joint claim" under the VRA. *Nixon*, 76 F.3d at 1395 (Keith, J., dissenting) (citing *Wright v. Rockefeller*, 376 U.S. 52 (1964)). The Senate also repeatedly referenced another case—*Graves v. Barnes*, affirmed by *White v. Regester*—in which several voting rights claims involving Black and Latino voters were consolidated in one action with their rights evaluated collectively. *See*

S. Rep. No. 94-295, at 27 ("In January, 1972, a three-judge Federal court ruled that the use of multi-member districts for the election of state legislators in Bexar and Dallas counties, Texas, unconstitutionally diluted and otherwise cancelled the voting strength of Mexican Americans *and* [B]lacks in those counties.") (emphasis added); *see also id.* at 30.

When Congress amended Section 2 in 1982 it was no less aware of coalition claims. In its Report on the 1982 amendments, the Senate Judiciary Committee twice referenced *Wright*—involving a coalition of Black and Hispanic voters, just as here. S. Rep. No. 97-417, at 19 n.60, 132 (1982) (citing *Wright*, 376 U.S. at 52-54). The Senate likewise again repeatedly cited to *Graves* as affirmed by *White*, describing *White* as "the leading pre-*Bolden* vote dilution case" and among "the leading cases involving multi-member districts." *Id.* at 2, 22.[8] The Senate made clear its understanding that, in that case, multimember districts "'operated to dilute the voting strength of racial *and* ethnic minorities.'" *Id.* at 21 (quoting *White*, 412 U.S. at 767) (emphasis added); *see also id*. at 130 (noting that the Supreme Court relied upon evidence that included "a long history of official discrimination against *minorities*") (emphasis added).

[8] The House Report on the 1982 amendments likewise cited to *White*. H.R. Rep. No. 97-227, at 20 (1981).

Beyond citation to cases involving coalition claims, the 1982 Senate Report spoke repeatedly of the need to protect racial and ethnic minorities together, explaining that "the amendments would make racial and ethnic groups the basic unit of protection." *Id.* at 94; *see also, e.g.*, *id.* at 122 (local electoral arrangements are expected to conform with guidelines "established to maximize the political strength of racial *and* ethnic minorities") (emphasis added). For example, in recounting an illustrative list of municipalities "in jeopardy of court-ordered change under the new results test," the Senate spoke of the overall minority population in each, without differentiating among Black, Latino, or other groups—including in jurisdictions like New York City, where its 40 percent minority population necessarily encompassed multiple minority groups. *See id.* at 154-57. The Senate thus reinforced that minority groups, together, must have "a fair chance to participate" and "equal access to the process of electing their representatives." *Id.* at 36. Just as in 1975, if Congress meant to exclude coalitions, "Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment." *Chisom*, 501 U.S. at 396 (holding that the absence of exclusion of judicial elections from Section 2's statutory text meant they were within Section 2's ambit).

The County's position is also divorced from reality. Imagine a plaintiff who is half Black and half Latino. Under the County's proffered reading of the text, the

"class" such a plaintiff would belong to would be other half Black and half Latino citizens. Would she be required to proffer a *Gingles* 1 demonstrative district in which a majority of the eligible voters were half Black and half Latino? That would be an impossible hurdle. Would she instead be required to choose which half to select in advancing her claim—either Black or Latino but not both? Even if her ability to participate equally in the political process is undermined on account of *both* her Black and Latino heritage? The County's proposed racial purity test is irreconcilable with the text of Section 2 and Supreme Court's command to interpret the VRA in the broadest possible terms.

CONCLUSION

For the foregoing reasons, the petition should be denied.

November 6, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2023, this document was electronically served on all counsel of record via the Court's CM/ECF system.

/s/ Mark P. Gaber
Mark P. Gaber
Counsel for Petteway *Appellees*