

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

November 10, 2023

Lyle W. Cayce
Clerk

No. 23-40582

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

Plaintiffs—Appellees,

versus

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,

versus

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,

versus

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.

Appeal from the United States District Court
for the Southern District of Texas
USDC Nos. 3:22-CV-117, 3:22-CV-57,
3:22-CV-93

Before JONES, BARKSDALE, and ELROD, *Circuit Judges*.

PER CURIAM:

The Galveston County Commissioners Court is composed of four county commissioners, elected from single-member precincts, and one county judge, elected by the entire county. From 1991 to 2021, one of the four commissioner precincts had a majority-minority population, with blacks and Hispanics together accounting for 58 percent of the precinct's total population as of 2020. In 2021, the Galveston County Commissioners Court enacted a new districting plan for county commissioner elections. The enacted plan does not contain a majority-minority precinct. Following a bench trial, the district court found that the enacted plan dilutes the voting power of the county's black and Hispanic voters in violation of Section 2 of the Voting Rights Act. Galveston County appealed.

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I. COALITION CLAIMS

The primary issue this case presents is whether distinct minority groups like blacks and Hispanics may be aggregated for purposes of vote-dilution claims under Section 2. The parties agree that neither the black population nor the Hispanic population of Galveston County is large enough to be protected, individually, by Section 2. *See Thornburg v. Gingles*, 478 U.S. 30, 50, 106 S. Ct. 2752, 2766 (1986) (explaining that, as a precondition to establishing a vote-dilution claim under Section 2, “the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district”). But precedent in this circuit permits distinct minority groups to be aggregated under Section 2. *See Campos v. City of Baytown*, 840 F.2d 1240, 1244 (1988) (“There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics.”); *LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) (noting that this circuit “allow[s] aggregation of different minority groups where the evidence suggests that they are politically cohesive”). That precedent establishes the validity of so-called minority-coalition claims like those brought in this case. And this panel is bound by it under the rule of orderliness.

But the court’s decisions in this respect are wrong as a matter of law. The text of Section 2 does not support the conclusion that distinct minority groups may be aggregated for purposes of vote-dilution claims. Subsection (b), for instance, requires a showing that “the political processes . . . are not equally open to participation by members of *a class* of citizens” protected by the statute. It again mentions “a protected class”—singular—in the next sentence. 52 U.S.C. § 10301(b). “Had Congress chosen explicitly to protect minority coalitions it could have done so by [using the phrase] *classes* of citizens. It did not.” *Clements*, 999 F.2d at 894 (Jones, J., concurring). In addition, subsection (a) prohibits states or political subdivisions from

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adopting voting practices that result “in a denial or abridgement of the right of any citizen . . . to vote on account of race[,] color,” or language-minority status. 52 U.S.C. § 10301(a). This language ties Section 2’s protection of voting rights to the particular race, color, or language-minority status of individual citizens, not to their membership in a broader coalition of races, colors, or language minorities. As the Sixth Circuit put it, “[Subsection (a)] protects a citizen’s right to vote from infringement because of, or ‘on account of,’ that *individual’s* race or color or membership in a protected language minority.” *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc).

In dissenting and concurring opinions in *Campos* and *Clements*, Judge Higginbotham and Judge Jones identified additional problems with minority-coalition claims beyond their inconsistency with the text of Section 2. *Campos v. City of Baytown*, 849 F.2d 943, 944–46 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc); *Clements*, 999 F.2d at 894–98 (Jones, J., concurring); *see also LULAC v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1503–09 (5th Cir.) (Higginbotham, J., dissenting), *majority opinion vacated on reh’g*, 829 F.2d 546 (5th Cir. 1987). These opinions demonstrate that minority-coalition claims are in tension both with the framework the Supreme Court established for analyzing vote-dilution claims in *Thornburg v. Gingles*, 478 U.S. 30, 106 S. Ct. 2752, and with the prohibition on proportional representation codified in Section 2 itself. *See Midland*, 812 F.2d at 1504 (Higginbotham, J., dissenting); *Clements*, 999 F.2d at 895–96 (Jones, J., concurring).

A circuit split has also developed since this court decided *Campos* and *Clements*. For example, the Sixth Circuit has expressly rejected minority-coalition claims, *Nixon*, 76 F.3d 1381, while the Eleventh Circuit—following the holdings of this court—has expressly authorized them, *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs*, 906 F.2d 524, 526 (11th Cir. 1990). In addition, decisions of the Supreme Court over the past

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two decades have undermined the validity of minority-coalition claims. The most notable is *Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009). *Bartlett* held that Section 2 does not require the creation of crossover districts, *i.e.*, districts in which the minority population “make[s] up less than a majority of the voting-age population” but “is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate.” *Id.* at 13, 129 S. Ct. at 1242 (plurality opinion). The plurality wrote, “Nothing in § 2 grants special protection to a minority group’s right to form political coalitions.” *Id.* at 15, 129 S. Ct. at 1243.

The district court appropriately applied precedent when it permitted the black and Hispanic populations of Galveston County to be aggregated for purposes of assessing compliance with Section 2. But the members of this panel agree that this court’s precedent permitting aggregation should be overturned. We therefore call for this case to be reheard *en banc*.

II. REMAINING ISSUES

Apart from challenging minority-coalition claims, Galveston County raises three issues on appeal. The first two relate to the district court’s findings under the three preconditions minority groups are required to prove in Section 2 cases under *Gingles*. See 478 U.S. 50–51, 106 S. Ct. at 2766–67. This court has held that a district court’s *Gingles* findings are reviewed for clear error. *E. Jefferson Coal. for Leadership & Dev. v. Par. of Jefferson*, 926 F.2d 487, 491 (5th Cir. 1991). After reviewing the district court’s findings in this case, we are not “left with the definite and firm conviction that a mistake has been committed.” See *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 365 (5th Cir. 2001) (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511 (1985)). The district court thus did not clearly err. The final issue concerns the constitutionality of Section 2. Galveston County has

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failed to show that Section 2 is unconstitutional under existing precedent, especially in light of the Supreme Court's recent decision in *Allen v. Milligan*, 143 S. Ct. 1487, 1516–17 (2023). We therefore reject the County's constitutional challenge.

III. CONCLUSION

The judgment of the district court is AFFIRMED. We request a poll on whether this case should be reheard *en banc* at the earliest possible date.¹

¹ Galveston County's petition for initial hearing *en banc* is DENIED as moot.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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CLERK

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November 10, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 23-40582 Petteway v. Galveston County
USDC No. 3:22-CV-57
USDC No. 3:22-CV-93
USDC No. 3:22-CV-117

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and Fed. R. App. P. 35, 39, and 41 govern costs, rehearings, and mandates. **Fed. R. App. P. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and Fed. R. App. P. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. Fed. R. App. P. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that

this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Appellants pay to Appellees the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By: _____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Mr. Neil G. Baron
Ms. Pooja Chaudhuri
Ms. Sarah Xiyi Chen
Ms. Alexandra Copper
Mr. Matthew Nicholas Drecun
Mr. Chad Wilson Dunn
Mr. Mark P. Gaber
Mr. Bruce I. Gear
Mr. Daniel David Hu
Ms. Hilary Harris Klein
Mr. Richard Mancino
Ms. Mimi Murray Digby Marziani
Mr. Hani Mirza
Mr. Aaron E Nathan
Mr. Joseph M. Nixon
Mr. T. Russell Nobile
Ms. Angela K. Olalde
Ms. Bernadette Reyes
Ms. Valencia Richardson
Mr. Nicolas Riley
Mr. Joseph R. Russo Jr.
Mr. Nickolas A. Spencer
Ms. Adrienne Spoto