United States Court of Appeals

for the

Fifth Circuit

Case No. 19-60662

DENNIS HOPKINS, individually and on behalf of a class of all others similarly situated; HERMAN PARKER, JR., individually and on behalf of a class of all others similarly situated; WALTER WAYNE KUHN, JR., individually and on behalf of a class of all others similarly situated; BRYON DEMOND COLEMAN, individually and on behalf of a class of all others similarly situated; JON O'NEAL, individually and on behalf of a class of all others similarly situated; EARNEST WILLHITE, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees,

v.

SECRETARY OF STATE DELBERT HOSEMANN, in his official capacity,

Defendant-Appellant.

consolidated with

Case No. 19-60678

DENNIS HOPKINS, individually and on behalf of a class of all others similarly situated; HERMAN PARKER, JR., individually and on behalf of a class of all others similarly situated; WALTER WAYNE KUHN, JR., individually and on behalf of a class of all others similarly situated; JON O'NEAL, individually and on behalf of a class of all others similarly situated; EARNEST WILLHITE, individually and on behalf of a class of all others similarly situated; BRYON DEMOND COLEMAN, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees Cross-Appellants,

v.

SECRETARY OF STATE DELBERT HOSEMANN in his official capacity,

Defendant-Appellant Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, NORTHERN DIVISION IN CASE NO. 3:18-CV-188-DPJ-FKB, HONORABLE DANIEL P. JORDAN, III, CHIEF JUDGE

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CERTIFICATE OF INTERESTED PERSONS

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.

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The foregoing individuals are the named plaintiffs in *Hopkins, et al. v. Hosemann*. They seek to represent the following class, which was certified by the District Court:

> Any person who (a) is or becomes disenfranchised under Mississippi state law by reason of a conviction of a disenfranchising offense, and (b) has completed the term of incarceration, supervised release, parole, and/or probation for each such conviction.

Harness, et al. v. Hosemann, No. 3:17-cv-00791-DPJ-FKB (S.D. Miss. Feb. 13, 2019), Dkt. 89 (Order), at 6.

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PRELIMINARY STATEMENT

The Court should deny rehearing en banc.

The Petition raises no on-point circuit split nor does it present arguments that the Panel's decision is incorrect under existing Fifth Circuit law. And the Petition makes no serious argument that the Panel's decision directly conflicts with a Supreme Court holding. Rather, the Petition hinges on Supreme Court decisions (and dicta) that do not address the issue on which the Panel invalidated Section 241. This case has been pending in this Court since September 2019, when a motion to expedite was granted (over Defendant's objection), to allow for a final decision before the 2020 election. Ultimately, the Panel ruled that Section 241 of Mississippi's Constitution—which permanently disenfranchises individuals convicted of a wide range of felonies—constitutes "unconstitutional cruel and unusual punishment within the meaning of the Eighth Amendment." Op. at 2–3. The Panel rightfully remanded the case to the district court with instructions to declare Section 241 unconstitutional, restoring the right to vote to potentially tens of thousands of citizens who have completed their sentences.

En banc review will cause further unnecessary, highly prejudicial and irreparable delay. While this is a case of great importance to those directly impacted by Section 241, it is also one that requires no further Circuit consideration. Given the arguments presented in the Petition and the proximity of

the 2024 election, any further review should be immediately directed to the Supreme Court. *See, e.g.*, *United States v. Hill*, 984 F.3d 273, 274 (4th Cir. 2019) (Agee, J., concurring in the denial of rehearing en banc) (reasoning that "[t]he issues here are of significant national importance and are best considered by the Supreme Court at the earliest possible date"). A prompt petition for certiorari could be granted in time for a full merits hearing during the 2023-24 term, and the Supreme Court would already have the advantage of the two detailed opinions presented by the majority and dissent. For these reasons and as set forth below, Defendant's Petition should be denied.

First, the Panel's threshold determination to consider Plaintiffs' Eighth Amendment challenge does not conflict with the decisions of the Supreme Court or this Circuit. As the Panel properly recognized, a fundamental canon of constitutional interpretation is that "provisions that grant…States specific power to legislate in certain areas…are always subject to the limitation that they must not be exercised in a way that violates other specific provisions of the Constitution." Op. at 24 (quoting *Williams v. Rhodes*, 393 U.S. 23, 29 (1968)). Defendant cites to no contrary authority nor challenges the validity or application of this long-standing principle. Instead, he incorrectly argues that the Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974), foreclosed the Panel's consideration of the merits of Plaintiffs' Eighth Amendment claim. In *Richardson*, the Court held,

based on the arguments presented, that Section 2 of the Fourteenth Amendment provides an "affirmative sanction" for states to enact felony disenfranchisement laws and that permanent disenfranchisement is not a per se violation of the Equal Protection Clause. 418 U.S. at 54. But, importantly, *Richardson* did not consider whether permanent disenfranchisement violated the Eighth Amendment. And following *Richardson*, the Supreme Court made clear that the legislative power to disenfranchise (as recognized in *Richardson*) was not absolute nor could it preempt other constitutional guarantees. *Hunter v. Underwood*, 471 U.S. 222, 232–33 (1985) (invalidating disenfranchisement law tainted by purposeful racial discrimination because it violated equal protection). Thus, consistent with *Hunter* and the fundamental tenet that "the applicability of one constitutional amendment [does not] preempt[] the guarantees of another," the Panel correctly determined that "disenfranchisement schemes…must still be consonant with other constitutional commands, including those embodied in the Eighth Amendment." Op. at 23, 25 (quoting *United States v. James Daniel Good Real Prop*., 510 U.S. 43, 49–50 (1993)).

Second, the Panel's analysis of Plaintiffs' Eighth Amendment claim also does not conflict with Supreme Court or binding Circuit precedent. The Panel first found that Section 241 constitutes "punishment" by applying the "intents-effect" test set forth in *Smith v. Doe*, 538 U.S. 84, 92 (2003) and adopted by the Fifth

Circuit in *Does v. Abbott*, 945 F.3d 307, 314 (2019). Op. at 28. It then determined that such punishment was "cruel and unusual" based upon an "evolving standards of decency" inquiry—entailing the two-step categorical approach of first determining whether there is a national consensus and then exercising independent judgment. *See Graham v. Florida*, 560 U.S. 48, 61 (2010). Op. at 33 n.8, 44–45. As such, the Panel's decision faithfully adheres to Supreme Court standards. To the extent Defendant argues otherwise, he relies on erroneous interpretations of Supreme Court precedents and inapposite in-circuit and out-of-circuit case law.

Specifically, Defendant argues that Section 241 is not punishment based primarily on dicta in the Supreme Court's plurality opinion in *Trop v. Dulles*, 356 U.S. 86 (1958). *Trop* recognized that a felony disenfranchisement provision would be penal if it "were imposed for the purpose of punishing," 356 U.S. at 96–97, which is exactly what the Panel found here. *See also Thompson v. Alabama*, 65 F.4th 1288, 1301–02 (11th Cir. 2023) (noting that *Trop* "explain[ed] that a felon disenfranchisement provision can be penal or nonpenal"). Defendant also argues that the Panel should not have applied the "categorical approach" set forth in *Graham*. He bases this argument, however, entirely on *United States v. Farrar*, 876 F.3d 702 (5th Cir. 2017), which is inapposite. *Farrar* held that the categorical approach did not apply to a mandatory minimum sentence for the conviction of a specific crime (repeat possession of obscene material). 876 F.3d at 716–17.

Graham, which requires the categorical approach for a challenge to a "particular type" of punishment applicable to "an entire class of offenders who have committed a range of crimes," was not applicable to *Farrar* as it concerned a specific crime (not a range of crimes). 560 U.S. at 61. Here, in contrast, Section 241 applies to an "entire class" who committed a "range of crimes." Thus, the Panel's categorical approach was proper under *Graham* and there is no Fifth Circuit authority stating otherwise.

Third, there is no circuit split. Defendant argues that the Panel's decision is in conflict with *Green v. Bd. of Elections*, 380 F.2d 445 (2d Cir. 1967), a Second Circuit decision that considered whether New York's felony disenfranchisement violated the Eighth Amendment *in 1967*, and *Thompson v. Alabama*, 65 F.4th 1288 (11th Cir. 2023), a recent Eleventh Circuit case that considered whether Alabama's felony disenfranchisement law violates the Ex Post Facto Clause. But Defendant overreaches, as neither *Green* nor *Thompson* raise any such conflict. The *Green* decision, which predated the Supreme Court's "intents-effect" test, found that New York's disenfranchisement law was non-punitive per se without analyzing its intent or effects. 380 F.2d at 450–52. The *Green* court further found that there was no national consensus against lifetime disenfranchisement based on laws in effect more than fifty-six years ago—many of which have since been amended to abolish lifetime disenfranchisement. 380 F.2d at 450–51. *Thompson* is similarly

inapposite. There, the Eleventh Circuit recognized that a disenfranchisement law may be punitive, but concluded that Alabama's law was non-punitive because, *inter alia*, plaintiffs did not argue on appeal that the law was punitive in intent or effects. 65 F.4th at 1300–02.

STATEMENT OF THE CASE

Under Section 241 of the Mississippi Constitution, individuals convicted in Mississippi state courts of numerous felonies lose the right to vote for the rest of their lives. Miss. Const. art. XII, § 241. These felonies are wide-ranging, including relatively minor crimes such as writing a bad check for $100, or stealing $250 worth of timber. Miss. Code Ann. §§ 97-17-59(2), 97-19-67(1)(d). Section 253 of the Mississippi Constitution establishes a standardless legislative process for the case-by-case restoration of voting rights. Miss. Const. art. XII, § 253. Disenfranchised individuals who register to vote or cast a ballot are subject to severe criminal penalties. Miss. Code Ann. §§ 97-13-25, 97-13-35.

On March 27, 2018, Plaintiffs filed a putative class action asserting constitutional claims challenging Sections 241 under the Eighth and Fourteenth Amendments, and Section 253 under the First and Fourteenth Amendments. ROA.19-60662.14-63. On October 4, 2018, Plaintiffs and Defendant cross-moved for summary judgment. ROA.19-60662.1748-1761; ROA.19-60662.2085-2088. On February 13, 2019, the district court granted Plaintiffs' motion for class

certification. ROA.19-60662.4843-4849.

District Court Decision

On August 7, 2019, the district court denied Plaintiffs' motion for summary judgment, and granted Defendant's motion for summary judgment as to all claims except Plaintiffs' equal protection challenge to Section 253. ROA.19-60662.4857-4885. The district court did not reach the merits of Plaintiffs' Eighth Amendment claim, reasoning that "it would be internally inconsistent for the Eighth Amendment to prohibit criminal disenfranchisement while §2 of the Fourteenth Amendment permits it." ROA.19-60662.4878.

The district court certified, *sua sponte*, its holdings for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). ROA.19-60662.4884. On September 11, 2019, this Court granted the parties permission to appeal (No. 19-60678). On September 16, 2019, Plaintiffs moved to consolidate the appeal with Defendant's separately-noticed appeal (No. 19-60662), and to expedite both appeals in view of the 2020 elections. *Hopkins, et al. v. Hosemann*, No. 19-60678 (5th Cir. Sept. 16, 2019), Dkt. 20 (Mot. to Consolidate and Expedite), at 2. On September 24, 2019, this Court consolidated the appeals, and, over Defendant's objection, expedited them. The appeals were fully briefed on November 18, 2019, and oral argument was held

on December 3, 2019.[1]

Panel Decision

After three years and eight months of deliberation, the Panel reversed the district court's decision on Plaintiffs' Eighth Amendment claim. The Panel found that "the district court erred by omitting entirely to perform" an Eighth Amendment analysis. Op. at 23, 25 ("disenfranchisement schemes…must still be consonant with other constitutional commands, including those embodied in the Eighth Amendment."). The Panel then considered whether Section 241 violated the Eighth Amendment. In adherence with Supreme Court standards, the Panel determined that Section 241 was punishment which, in light of "evolving standards of decency," was cruel and unusual. Op. at 44–45.

STANDARD FOR REHEARING EN BANC

Rehearing en banc is "not favored" because it imposes a "serious call on limited judicial resources" by requiring all Fifth Circuit judges to revisit an already-decided case. *See* 5th Cir. R. 35.1; Fed. R. App. P. 35(a). "En banc hearings…generally will not be ordered unless the proceeding involves a question of exceptional importance that has not been uniformly determined by this court or other circuits." *Banks v. Lee*, 172 F. App'x 621, 622 (5th Cir. 2006) (per curiam)

[1] Plaintiffs expressly preserve all arguments raised before the Panel.

(denying petition for rehearing en banc); *see also* 5th Cir. R. 35 I.O.P. (a petition for rehearing en banc is "an extraordinary procedure," warranted only "to bring to the attention of the entire [C]ourt an error of exceptional public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent"). Questions regarding "application of correct precedent to the facts of the case are generally…not [appropriate] for rehearing en banc." 5th Cir. R. 35 I.O.P.

ARGUMENT

I. En Banc Review Is Not Warranted Because The Panel Faithfully Applied Supreme Court And Fifth Circuit Precedent

A. *Richardson* Does Not Foreclose Plaintiffs' Eighth Amendment Claim

Defendant erroneously asserts that "*Richardson* forecloses the [P]anel's holding." Pet. at 5. But *Richardson* held, based on the arguments presented, "only that permanent disenfranchisement did not violate the Equal Protection Clause of the Fourteenth Amendment by burdening a fundamental right without adequate justification." Op. at 23. The Court did not consider whether permanently disenfranchising felons "after they complete[d] their sentences violates the Eighth Amendment's prohibition on cruel and unusual punishment." Op. at 23. Nor did *Richardson* "narrow[] the scope of substantive rights incorporated through the Due Process Clause." Op. at 26.

Importantly, *Richardson* did not—and indeed, could not—hold that

Section 2 immunizes felony disenfranchisement laws from other constitutional constraints. *See, e.g.*, *James Daniel Good Real Prop.*, 510 U.S. at 49–50 (rejecting "the view that the applicability of one constitutional amendment pre-empts the guarantees of another"). As Judge Jones acknowledges in her dissent, constitutional grants of legislative authority "are always subject to the limitation that they must not be exercised in a way that violates other specific provisions of the Constitution." Op. at 57 (Jones, J., dissenting) (quoting *Rhodes*, 393 U.S. at 29). The Supreme Court has confirmed that this fundamental principle of constitutional construction applies to felony disenfranchisement provisions. *See Hunter*, 471 U.S. at 233 ("[W]e are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment."). Similarly, the Fifth Circuit has never held that felony disenfranchisement provisions are immune from constitutional constraints. *Cf. Harness v. Watson*, 47 F. 4th 296, 311–312 (5th Cir. 2022) (Ho, J., concurring) (recognizing that "States may not pick and choose which felons to disenfranchise in a manner that contravenes other provisions of the Constitution"); *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978) (rejecting "the proposition that [S]ection 2 removes" felony disenfranchisement laws from "equal protection considerations").

B. The Panel Correctly Applied *Smith*'s Intent Test To Determine That Section 241 Imposes "Punishment"

Defendant claims that "[u]nder Supreme Court precedent, Section 241…is a nonpunitive voting regulation." Pet. at ii. But neither the Supreme Court nor this Court has held that felony disenfranchisement laws are nonpunitive. In fact, the Supreme Court recognized in *Trop* that a felony disenfranchisement law may be punitive if enacted for the purpose of punishment – as is the case here. 356 U.S. at 96–97 (explaining that "[t]he controlling nature" of a felony disenfranchisement provision "normally depends on the evident purpose of the legislature").

Post-*Trop*, the Supreme Court has instructed that legislative intent is dispositive in determining whether a statute imposes punishment. *See Does*, 945 F.3d at 314 ("If the intention of the legislature was to impose punishment, that ends the inquiry.") (quoting *Smith*, 538 U.S. at 92). To determine the legislative intent for Section 241's enactment, the Panel turned to the "plain language" of Mississippi's Readmission Act. Op. at 29 (citing Act of Feb. 23, 1870, ch. 19, 16 Stat. 67). Consistent with *Williams v. Reeves*, 954 F.3d 729, 738–39 (5th Cir. 2020), the Panel found that the Readmission Act is "binding federal law." Op. at 29–30.

The Panel determined that the "fundamental condition on Mississippi's power to enact a disenfranchisement scheme" that "forbade 'the constitution of Mississippi' from ever being 'amended or changed [so] as to deprive any citizen or

class of citizens…the right to vote…*except as a punishment* for such crimes as are now felonies at common law'" "cannot be ignored: 'the manner of [Section 241's] codification…[is] probative of the legislature's intent.'" Op. at 28–29 (quoting *Smith*, 538 U.S. at 94). Relying in part upon the Readmission Act, the Panel found that Section 241 "must be construed as a punitive measure" and that it "was intended as punishment." Op. at 29, 32.

Defendant relies on *Richardson* to argue that "[t]he Reconstruction-era Congress itself treated disenfranchisement as a matter of voter qualifications rather than as punishment." Pet. at 9. But *Richardson* pointed to the "fundamental condition" in Readmission Acts, including the restriction that disenfranchisement provisions not be enacted "except as a punishment for such crimes as are now felonies at common law," as "convincing evidence of the historical understanding of the Fourteenth Amendment." 418 U.S. at 51–53.

Defendant further contends that the "panel should have read the Act's 'punishment' reference to mean 'consequence of a crime,'" Pet. at 10 (citing Op. at 62) (Jones, J., dissenting), and that the Panel should have found that Section 241 is nonpunitive based, *inter alia*, on "Section 241's text and structure" and its effects. Pet. at 7–8. But Defendant's mere disagreement with the Panel's "application of correct precedent to the facts of the case" does not warrant en banc review. 5th Cir. R. 35 I.O.P.

C. The Panel Correctly Followed *Graham*'s Two-Step Categorical Approach

Because Section 241 "implicates a particular type of [punishment] as it applies to an entire class of offenders who have committed a range of crimes," the Panel correctly applied the "categorical approach." Op. at 33 n.8 (quoting *Graham*, 560 U.S. at 61).

The Panel first determined that there is a "national consensus" against lifetime disenfranchisement, and then concluded, in its exercise of "independent judgment," that Section 241 is cruel and unusual as applied to individuals who have completed their sentences. Op. at 32–44.

Defendant did not previously question the applicability of the categorical approach. *See* Op. at 33 n.8 (noting that "no party suggests" the categorical analysis is inapplicable). Defendant now relies on *Farrar*, which concerned a challenge to a term-of-years sentence for a particular crime, to argue that the Panel's use of the categorical approach was improper. 876 F.3d at 716–17; Pet. at 11. The Panel's decision, however, does not conflict with *Farrar* for the reasons noted above. *See* supra at 4-5.

1. The Panel Correctly Determined That There Is A National Consensus Against Lifetime Disenfranchisement

Despite the Panel's finding that "thirty-five states and the District of Columbia do not permanently disenfranchise felons," Op. at 34, Defendant claims

that "[t]here is no 'national consensus' against indefinite disenfranchisement." Pet. at 11. Yet, as the Panel explained, "the Supreme Court has found a national consensus against a punishment when far fewer states than here opposed it." Op. at 34–35 (citing *Atkins v. Virginia*, 536 U.S. 304, 321, 326 (2002) (30 states); *Roper v. Virginia*, 543 U.S. 551, 564 (2005) (same)).[2]

2. The Panel Properly Exercised Its "Independent Judgment" In Concluding That Section 241 Is A Cruel And Unusual Punishment

Neither Defendant nor the dissent cite to any Supreme Court or Fifth Circuit precedent contrary to the Panel's "independent judgment" that Section 241 is cruel and unusual. Pet. at 12. Applying *Graham*'s factors, the Panel correctly found that Section 241 is unconstitutional as applied to individuals who have completed their sentences. Op. at 39–44. The Panel concluded that "[p]ermanent denial of the franchise…is an exceptionally severe penalty," "Section 241's punishment applies equally to all members of the class, regardless of their underlying crime or…individual mental state…[and] does not reflect society's measured response to a felon's moral guilt," and "Section 241's permanent disenfranchisement serves no

[2] Defendant claims that "about a third of States still use the practice" of lifetime disenfranchisement. Pet. at 12. To the extent Defendant is claiming "errors in the facts of the case" or "in the application of correct precedent to the facts of the case," such questions do not warrant en banc review. 5th Cir. R. 35 I.O.P.

legitimate penological purpose" because it "does not incapacitate a convict from committing crimes; it only prevents him from voting." Op. at 3, 40–44 (*citing, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 489 (2012); *Graham*, 560 U.S. at 71).

II. The Panel's Decision Does Not Create A Circuit Split

Contrary to Defendant's contention, the Panel's decision does not conflict with either the Second Circuit's 1967 decision in *Green* or the Eleventh Circuit's recent decision in *Thompson*.

In *Green*, the Second Circuit rejected an Eighth Amendment challenge to New York's felony disenfranchisement law. F.3d at 450–51. But the court did not assess whether the law was intended to impose punishment, as now required under *Smith*. *Id.* The Second Circuit has since recognized "the nearly universal use of felony disenfranchisement as a punitive device." *Muntaqim v. Coombe*, 366 F.3d 102, 122–23 (2d Cir. 2004), *vacated on other grounds*, 449 F.3d 371 (2d Cir. 2006); *Hayden v. Pataki*, 449 F.3d 305, 327 (2d Cir. 2006).

The *Green* court further determined that there was no national consensus against permanent disenfranchisement in view of "the great number of states [42 at the time] excluding felons from the franchise." 380 F.2d at 450–51 (citing *Trop*, 356 U.S. at 101). But in the fifty-six years since *Green*, society's standards have changed and a supermajority of states no longer impose lifetime disenfranchisement.

Defendant also incorrectly claims that the Opinion conflicts with *Thompson*. Pet. at 13. Unlike here, the *Thompson* plaintiffs did "not argue on appeal that Alabama intended [its] felon disenfranchisement provision to impose punishment or that felon disenfranchisement is so punitive as to override the intent of the Alabama legislature." 65 F.4th at 1300.

Moreover, the *Thompson* court found it significant that Alabama's felony disenfranchisement provision applies to federal and out-of-state convictions, which Alabama does not have jurisdiction to punish, and is enforced through "a civil, regulatory scheme." *Id.* at 1304–05. Section 241, by contrast, is limited to convictions in Mississippi state courts, within Mississippi's power to punish, and enforced through harsh criminal penalties. The two panels thus "reach[ed] different conclusions." *See* Op. at 30 n.5.

Finally, Defendant speculates that the "[t]he Eleventh Circuit would reject the view that Section 241 imposes punishment." Pet. at 13. But the Eleventh Circuit has twice recognized that felony disenfranchisement laws do impose punishment. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1039 (11th Cir. 2020) (en banc) (noting that in Florida, "[s]ome *punishments*, like disenfranchisement, are imposed on all felons regardless of the severity of their crimes.") (emphasis added); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) ("Felon

disenfranchisement laws are unlike other voting qualifications [and]…are a punitive device stemming from criminal law.").

III. Any Additional Review Should Be For The Supreme Court

At issue are the voting rights of "tens of thousands of Mississippians" who "may be able to vote" in upcoming "elections in Mississippi." Pet. at 14. Although expedition in this Court was granted in September 2019 to allow for a decision before the 2020 election, if en banc review is granted, Plaintiffs' claim may remain unresolved through the next Presidential election in 2024.[3]

Given the weighty and time-sensitive constitutional questions at stake, Plaintiffs respectfully request that the Court deny the Petition to avoid further delay and "speed this case on its way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration." *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1021 (2d Cir. 1973) (Kaufman, J., concurring in denial of rehearing en banc); *see also Hill*, 984 F.3d at 274; *United States v. Wurie*, 724 F.3d 255, 255 (1st Cir. 2013) (denying rehearing en banc because "the preferable course is to speed this case to the Supreme Court for its consideration"); *Freedom from Religions Found., Inc. v. Chao*, 447 F.3d 988, 988 (7th Cir. 2006) (Flaum, J.,

[3] Based on counsel's review of the Court's en banc decisions from 2017 to present, the Court issues an en banc decision, on average, more than 8 months after oral argument on a rehearing en banc, with some coming far later.

concurring in denial of rehearing en banc because a case that "can only be resolved by the Supreme Court…would be unnecessarily delayed by [the court's] further deliberation" on en banc review).

CONCLUSION

For the foregoing reasons, Defendant's Petition should be denied.

Dated: August 31, 2023

By: /s/ Jonathan K. Youngwood

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CERTIFICATE OF SERVICE

I, Jonathan K. Youngwood, hereby certify that on August 31, 2023, an electronic copy of the foregoing response was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, by which service was accomplished on all counsel of record.

Dated: August 31, 2023

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the foregoing response complies with the type-volume requirements of Federal Rule of Appellate Procedure 35(b)(2)(A), 35(e), and 32(e) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 3852 words.

Undersigned counsel certifies that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Fifth Circuit Rule 32.1 and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

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