

No. 24-1328

In the
**United States Court of Appeals
For the Tenth Circuit**

COLORADO MONTANA WYOMING STATE AREA
CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs–Appellants

v.

SHAWN SMITH, *et al.*

Defendants–Appellees

Appeal from the United States District Court for the District of Colorado,
No. 1:22-cv-00581-CNS-NRN (Judge Charlotte N. Sweeney)

**APPELLANTS’ RESPONSE TO SMITH & KASUN’S PETITION
FOR PANEL REHEARING AND REHEARING EN BANC**

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Argument

The Court should deny the petition. Panel rehearing is reserved for a “significant issue” that the panel “overlooked or misconstrued,” 10th Cir. R. 40.1(A), and “reiteration of previously rejected legal theories will not prompt a change of mind.” *Westcot Corp. v. Edo Corp.*, 857 F.2d 1387, 1388 (10th Cir. 1988). En banc review is reserved for genuine conflicts and questions of exceptional importance. Fed. R. App. P. 40(b)(2). The petition identifies nothing the panel overlooked. It re-argues issues that were briefed, considered, and decided.

Take the petition’s lead argument. It faults the panel for “overlooking” two findings of “no evidence” in the district court’s oral ruling. (App. 219-21.) But both findings share the same defect. The district court made them only after it had excluded the Voter Organizations’ USEIP-related evidence because the organization was “not on trial here.” (App. 150.) Findings of “no evidence” made after the evidence was kept out can’t show that admitting the evidence would have made no difference. The “overlooked findings” are the measure of the district court’s error, not its cure. And the

panel didn't overlook the issue. The parties briefed it (Reply Br. 8), and the panel resolved it. That's adjudication, not oversight.

The rest of the petition follows the same pattern. Its challenges to the scope of the retrial and the panel's evidentiary guidance quarrel with the application of settled law to this record. Its en banc arguments rest on authorities that Kasun and Smith never cited to the panel and on a record that the petition mischaracterizes. And the constitutional question it presses is one that no court anywhere has answered—and one that the district court can address on remand.

Finally, the petition doesn't challenge the panel's published holdings that unincorporated associations are "persons" under Section 11(b) of the Voting Rights Act and 42 U.S.C. § 1985(3). The opinion's legal rulings stand unchallenged. What remains is a request to redo the panel's work, and the Court should decline.

I. The panel correctly held that USEIP’s dismissal wasn’t harmless.

A. The petition’s “overlooked findings” are products of the error itself.

The petition’s lead argument rests on two findings from the district court’s oral ruling. The first is the court’s statement that there was “no evidence that any defendant or even an agent of USEIP engaged in canvassing that objectively could rise to the level of voter intimidation.” (App. 219-20.) The second is the court’s alternative holding that the broader conspiracy theory “would not have commanded a different result.” (App. 221.) In the petition’s telling, those findings prove that USEIP’s dismissal made no difference.

But the argument gets the sequence backwards. On the first day of trial, the district court cut off the Voter Organizations’ questioning about USEIP-related evidence: “I have dismissed the organization. It’s not on trial here. We’re talking about three individuals and their actions for voter intimidation.” (App. 150.) The court held that line throughout the trial. It limited questioning and excluded the message-board evidence because USEIP was no

longer a party. (Op. 35-36.) Only then—three days later, at the close of the plaintiffs’ case—did the court find “no evidence” of intimidating canvassing by USEIP’s agents and announce its alternative holding. (App. 219-20.)

Findings of “no evidence” made after the evidence was kept out can’t show that admitting the evidence would have made no difference. The absence of proof about USEIP and its agents is what the exclusion produced. It’s the measure of the district court’s error, not its cure.

The law tracks that common sense. Harmless-error review isn’t sufficiency review. The question isn’t whether the truncated record supports the judgment. The question is what the record would have looked like without the error. *See United States v. Sarracino*, 340 F.3d 1148, 1170 (10th Cir. 2003) (quoting *United States v. Tome*, 61 F.3d 1446, 1455 (10th Cir. 1995)). And when an exclusion “effectively vitiate[s] a relevant theory” that a party was entitled to establish, the error is prejudicial. *Graham v. Wyeth Lab’ys*, 906 F.2d 1399, 1410 (10th Cir. 1990). That is this case. The dismissal of USEIP didn’t exclude a single exhibit. It redrew the

boundaries of relevance for the entire trial, and it excised a theory that the pretrial order preserved: that the defendants acted “individually and by and through USEIP” in a “coordinated campaign of voter intimidation.” (App. 72.) The petition itself quotes that language. (Pet. 10.)

A passing reference to “agents of USEIP” in the court’s oral ruling can’t retroactively expand a trial that the court had confined to “three individuals and their actions.” Neither can the alternative holding. “[S]imply no evidence of sufficient voter intimidation here” describes the record after the exclusions. (App. 221.) It answers a question that the panel didn’t ask, and it begs the one that the panel did.

The petition’s hearsay argument fails for the same reason. The panel made no admissibility ruling. It said only that hearsay “may not have been an appropriate basis” for exclusion if USEIP were a party. (Op. 36.) The absence of agency or conspiracy findings in a trial where the court refused to entertain the theory is, once again, the error. It is not proof that the error was harmless.

B. The panel correctly applied the full *Bridges* standard.

Under *Bridges*, an error affects substantial rights if it “had a substantial influence” on the outcome or if it “leaves one in grave doubt as to whether it had such an effect.” *Bridges v. Wilson*, 996 F.3d 1094, 1099 (10th Cir. 2021). The panel quoted that standard in full. (Op. 34-35.) The petition quotes only half of it. It seizes on *Bridges*’s reference to the “practical likelihood” of a different result and argues that the panel never found one. But grave doubt is enough. When the question of harm is in “virtual equipoise,” the court must treat the error as harmful. *O’Neal v. McAninch*, 513 U.S. 432, 435 (1995).

That’s why the petition’s “close call” refrain defeats it. A genuinely close call about whether the error affected the outcome is grave doubt. The panel’s candor was the standard being applied, not abandoned.

The panel’s “stronger case” sentence, read in full, says the same thing. The panel acknowledged that no one can know exactly how a trial with USEIP as a party would have unfolded. But “it is certain that the Voter Organizations would have presented a

stronger case,” and the error therefore “had a substantial influence in the outcome.” (Op. 35.) When an error withholds an entire category of evidence going to a preserved theory, the certainty that the case would have been materially stronger is the “realistic assessment” that *Bridges* requires. It isn’t a new test.

Bridges itself shows the difference. The error there was harmless because a jury verdict, rendered on a complete record, necessarily resolved the one dispositive factual question against the plaintiff. 996 F.3d at 1100. Here the posture is inverted. Judgment entered in the middle of trial, under Rule 52(c), on a record that the court had truncated, against a theory that the plaintiffs were never permitted to develop.

Shinseki doesn’t help the petitioners either. The Voter Organizations bore the burden of showing prejudice, and they carried it. The panel recited the Voter Organizations’ Rule 61 argument that the erroneous dismissal narrowed the trial’s focus and excluded their evidence of an orchestrated campaign. (Op. 34.) *Shinseki* calls the appellant’s burden “not ... a particularly onerous requirement.” *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009). Often,

the Court explained, “the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said.” *Id.* This is such a case.

C. The message-board argument mistakes the statutes and the briefing.

The petition’s centerpiece is an aphorism: “A voter cannot be intimidated by words she never heard.” (Pet. 5.) The aphorism mistakes the claims. Section 11(b) prohibits attempts to intimidate. 52 U.S.C. § 10307(b). Section 1985(3) is a conspiracy provision, and its gravamen is the agreement. Internal communications about how the canvassing would be conducted—including whether canvassers would go armed—are classic evidence of agreement, intent, and authorization. None of those theories requires proof that a voter read the message board.

The petition concedes as much. It allows that the posts “might bear circumstantially on intent, agreement, or authorization.” (Pet. 7-8.) That concession ends the inquiry. Evidence that bears on the

central contested elements of both claims is precisely the evidence whose exclusion leaves grave doubt.¹

Nor did the panel overlook a briefed answer. The pages the petition cites—Resp. Br. 44-47—sit in a different section of the appellees’ brief, one addressed to the sufficiency of the Voter Organizations’ “context” evidence. The panel took that argument up expressly and resolved it. (Op. 40.) In their actual harmless-error section, the appellees argued agency and relevance, and they mentioned voter receipt in a single conclusory sentence. (Resp. Br. 29-30.) A panel that resolves an argument’s substance hasn’t overlooked it.

¹ The petition also presents the reply brief’s statement that the Voter Organizations “didn’t have to prove that the messages weren’t written by ‘bots’” as a concession that the messages connect to nothing. (Pet. 7-8.) It wasn’t. The sentence answered a relevance objection under Rule 401’s “any tendency” standard. (Reply Br. 8 (citing *United States v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998)).) And the same paragraph made the point that the petition now says was never made: “the district court excluded them because USEIP was no longer on trial.” (*Id.*)

Once USEIP’s attempts and conspiracy are back in the case, the claims don’t rise or fall on any specific voter; the conduct itself is the violation.

II. The panel properly ordered a complete new trial.

The petition next asks the Court to confine any retrial to USEIP alone. (Pet. 12-13.) Settled law forecloses that request. A partial retrial is proper only when the issue to be retried is “so distinct and separate from the others that a trial of it alone may be had without injustice.” *Gasoline Prods. Co. v. Champlin Refin. Co.*, 283 U.S. 494, 500 (1931). And this Court orders a complete new trial when it “cannot be certain about the potential effect of the district court’s errors” on the remaining findings. *Boardwalk Apartments, L.C. v. State Auto Prop. & Cas. Ins. Co.*, 816 F.3d 1284, 1298 (10th Cir. 2016). That’s published authority, and it answers the petition’s complaint that the panel relied on an unpublished decision, *Perkins v. Chris Hunt Water Hauling Contractor, Inc.*, 46 F. App’x 903 (10th Cir. 2002). *Perkins* illustrated the rule. It didn’t create it. *See also Finley v. United*

States, 123 F.3d 1342, 1349 (10th Cir. 1997) (en banc) (ordering a new trial where legal error prevented a party from presenting its evidence), cited at Op. 41.

The claims here can't be split. The Voter Organizations allege a single conspiracy. Each defendant's liability turns on his or her agreement with, and direction of, the same coordinated campaign, and the same evidence proves both the organization's operation and its leaders' role in it. Confining the retrial to USEIP would mean trying the same conspiracy twice, before two factfinders, with preclusion problems that the petition never mentions.

The petition's reliance on *Claiborne Hardware* inverts the case. *Claiborne* prescribes what the Voter Organizations must prove: that each defendant "authorized, directed, or ratified" the group's unlawful conduct. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982); see *McKesson v. Doe*, 592 U.S. 1 (2020) (per curiam). The plaintiffs' theory has always tracked that standard. The pretrial order preserved the claim that the defendants acted "individually and by and through USEIP" in a "coordinated campaign of voter intimidation." (App. 72.) The proof is a set of

affirmative acts—writing and promulgating the Playbook, recruiting and training canvassers, directing the operation—not membership in a disfavored group. Evidence of USEIP’s operation is how plaintiffs prove authorization and direction. *Claiborne* sets a standard of proof. It is not a rule of exclusion, and it cannot justify keeping out the authorization evidence and then affirming judgments for the leaders because authorization went unproven.

The petition’s textual argument fares no better. It fastens on the panel’s statement that the Voter Organizations were not fully heard on “whether USEIP took any actions that constituted voter intimidation.” (Op. 40-41.) That clause identifies the theory that the plaintiffs were prevented from presenting—the coordinated campaign—as against the artificially narrowed trial that the district court actually held. It does not say that the plaintiffs were fully heard on the individual defendants’ roles in that campaign. They couldn’t have been. The campaign evidence was excluded. That’s why the panel reversed the Rule 52(c) judgment for the individual defendants, not just the judgment for USEIP. (Op. 40-41.)

USEIP's silence on appeal changes nothing. A defendant's litigation choices don't shrink the mandate, and USEIP will be a party on remand.

III. The video guidance doesn't warrant rehearing.

The panel addressed the video "as guidance for retrial." (Op. 37.) The video's exclusion isn't the error that required reversal, so no Rule 61 prejudice analysis was required. The petition's complaint that the panel "makes no finding" of prejudice (Pet. 14) faults the opinion for skipping a step that didn't apply.

On the objections that were actually made, the panel got it right. At trial, the defendants objected on foundation, authenticity, and hearsay grounds. (Op. 38.) The panel held those objections waived under Rule 26(a)(3)(B) and meritless besides. Counsel was laying the foundation when the court cut the examination off, and the recorded statement is Smith's own—admissible against him under Rule 801(d)(2)(A) without any conspiracy predicate. (Op. 38-39.) The petition's co-conspirator argument concedes that it is "supporting rather than dispositive." (Pet. 14-15.)

The petition’s textual point about Rule 26(a)(3)(B) changes nothing. The rule does except relevance and Rule 403 objections from pretrial-disclosure waiver. But no one made a Rule 402 or 403 objection at trial, and the district court never ruled on one. “I don’t know anything about the video” is not a Rule 403 balancing. (Op. 38.) And any Rule 403 objection, even if made, would have been meritless: A recording of what Smith said—his tone, his delivery, and his audience’s reaction—is not cumulative of Smith’s own after-the-fact description of it, and the Voter Organizations offered the video for its effect on the listener. (Reply Br. 13-14.)

IV. The panel’s standing holding faithfully applies *AHM* and *TransUnion*.

Start with what the petition doesn’t say. Kasun and Smith’s brief never cited *FDA v. Alliance for Hippocratic Medicine (AHM)*, 602 U.S. 367 (2024), *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), or *Murthy v. Missouri*, 603 U.S. 43 (2024). It never mentioned traceability. The standing argument they presented was a self-inflicted-harm theory built on *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013). (Resp. Br. 12-20.) The

panel introduced *AHM* and *TransUnion* on its own, in discharging its independent duty to confirm jurisdiction, and it applied their tests to the trial record. (Op. 16-17.) Because Article III standing can be raised at any time, the Voter Organizations answer the petition’s new theory on the merits. But the petition should be seen for what it is. A panel doesn’t “overlook” authorities that it applied unprompted, and it doesn’t “overlook” arguments that nobody made.

A. The injuries were the organizations’ responses to USEIP’s conduct—not media reports.

The petition’s factual premise is that the Voter Organizations diverted resources in reaction to unverified “media reports.” (Pet. 15.) The record says otherwise. USEIP ran a canvassing operation that knocked on the doors of more than 9,000 Colorado households. That is conduct, not coverage. And the diversions that the panel credited were operational responses to that conduct. The NAACP updated its voter outreach materials to explain voters’ rights if a USEIP canvasser came to the door. Mi Familia Vota rewrote the scripts and training it gives its volunteer canvassers to address

contacts with USEIP. The League diverted staff time to a white paper, expanded its misinformation programming, and fielded questions about USEIP's activities. (Op. 17-18; Trial Tr. 520:15-531:20, ECF No. 188; see Prescott Decl. 3-4, ECF No. 9; Hernandez Decl. 3-6, ECF No. 10.) The testimony about media reports that the petition features went to why the League filed this lawsuit. (Op. 8.) It wasn't the injury.

The petition's quotation from the Voter Organizations' reply brief drops the context that answers it. The footnote it quotes begins with a clause that the petition omits: media reports of armed USEIP canvassers "turned out to be true." (Reply Br. 25 n.3.) And the sentence that the footnote annotates makes the argument plain. The organizations' injuries rested "not ... on some hypothetical future harm but on USEIP's actual canvassing efforts." (Reply Br. 25.) That is *Clapper* distinguished, exactly as this Court distinguished it in *Fish v. Schwab*, 957 F.3d 1105, 1120 (10th Cir. 2020), where the challenged conduct "actually was enforced." The reply cited *Fish*. The petition ignores it.

With the record corrected, the panel’s application of *AHM* is unremarkable. The panel quoted both halves of the test. Organizations can’t “spend [their] way into standing” by gathering information and advocating against a defendant. 602 U.S. at 394. But they are injured when a defendant’s actions “directly affected and interfered with” their “core business activities.” *Id.* at 395 (discussing *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982)). The panel found interference of the second kind: forced changes to the organizations’ core services—voter outreach, education, and canvasser training. (Op. 16-18.) Whether USEIP’s canvassing was actually intimidating is the merits, not standing. (Op. 19-20 (citing *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (en banc)).) Disagreement with the panel’s application of a test that the panel quoted correctly isn’t a conflict. It’s a merits quarrel dressed as one.

B. *Murthy* doesn’t help the petitioners.

The petition’s new traceability theory fails on its own terms. *Murthy* involved forward-looking injunctive relief against

government defendants whose alleged causal role ran through the independent editorial decisions of social-media platforms that were not before the court. 603 U.S. at 57-59. This case has no independent intermediary. The injury flows from the defendants' own coordinated operation, and every alleged wrongdoer is a party. Injury traceable to a campaign is traceable to those who founded and directed it. Traceability doesn't require that a defendant be the only cause of the harm. *United States v. Ramos*, 695 F.3d 1035, 1046 (10th Cir. 2012). Each defendant's identifiable contribution is enough. *Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1246 (10th Cir. 2021). And Smith and Kasun aren't alleged bystanders. They co-founded USEIP, wrote and promulgated its Playbook, and recruited, trained, and directed its canvassers. Their acts are the campaign.

Murthy also supplies the answer to the petition's wholesale framing. "[F]or every defendant, there must be at least one plaintiff with standing." 603 U.S. at 61. So even if the petition's media-reports attack had force as to the League, it would say nothing

about the NAACP or Mi Familia Vota, whose diversions responded to the canvassing itself.

The petition’s remaining complaints go to two supporting citations. The panel itself flagged the *Nairne* vacatur. (Op. 19.) That vacatur was a remand in light of *Louisiana v. Callais*, 608 U.S. _____ (2026)—intervening Supreme Court authority on the merits of redistricting claims—and it says nothing about organizational standing. *Nairne v. Landry*, 151 F.4th 666, 682 (5th Cir. 2025), *vacated and remanded on other grounds*, 2026 WL 1255781 (5th Cir. May 7, 2026) (per curiam). And the Fourth Circuit’s pleading posture in *Republican National Committee v. North Carolina State Board of Elections*, 120 F.4th 390 (4th Cir. 2024), goes to weight, not principle. The panel’s holding rests on trial evidence in any event. One last point. If the Voter Organizations lacked standing, the remedy would be vacatur and dismissal for want of jurisdiction—not the affirmance the petition seeks.

V. *Counterman* is a question for remand, not rehearing.

The petition offers *Counterman v. Colorado*, 600 U.S. 66 (2023), as an alternative ground to affirm. It can't be one. Whether any defendant acted with subjective recklessness is a fact question that the district court never reached, on a record that the panel has just held was improperly truncated. A court of appeals can't affirm a judgment for failure to prove an element that nobody was asked to prove, at a trial where the plaintiffs' evidence was erroneously restricted. The petition's own framing gives the answer away. It argues that the district court will need to know the governing *mens rea* before retrial. (Pet. 18-19.) That's an argument for litigating the question on remand, where it belongs.

Nor is the question a candidate for en banc review. Courts don't resolve constitutional questions unnecessarily, and the parties' shared appetite for an answer doesn't change that. *United States v. Cusumano*, 83 F.3d 1247, 1250-51 (10th Cir. 1996) (en banc) (declining to reach a constitutional question that both parties urged the court to decide). There is also no conflict to resolve. No court anywhere has extended *Counterman* beyond criminal true-

threats prosecutions. The petition quotes the Voter Organizations’ reply for that concession, and it remains true. A district court in this circuit has since expressly declined the extension that the petitioners propose. *Kansans for Const. Freedom v. Kobach*, 789 F. Supp. 3d 1062, 1081-82 (D. Kan. 2025).

The petition’s premise is wrong in any event. The predicate acts here aren’t “almost entirely political speech.” They are a course of conduct—canvassers visiting more than 9,000 households armed with voters’ personal information, and sometimes with guns. Smith’s recorded remark was “just one piece of USEIP’s intimidating enterprise. The rest is pure conduct.” (Reply Br. 21-22.) The First Amendment doesn’t immunize intimidation accomplished through conduct. *Claiborne Hardware*, 458 U.S. at 916. Whether and how *Counterman* bears on these statutes, on a full record, is exactly what the remand is for.

VI. The dismissal of Appeal No. 25-1111 should stand.

The petition’s final argument asks the Court to reinstate the fee-award appeal if the petition succeeds in restoring the

judgments below. (Pet. 19.) But it doesn't succeed, so this argument fails with the rest.

Conclusion

The Court should deny the petition. Its panel-rehearing arguments re-litigate issues that were briefed, considered, and decided. And its en banc arguments rest on authorities that were never cited to the panel, a record that the petition mischaracterizes, and a constitutional question that no court has answered—and that the district court can take up on remand.

Dated: July 24, 2026

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This response complies with the type-volume limitation of Rule 40(d)(3)(A) of the Federal Rules of Appellate Procedure because, excluding parts of the response exempted by Rule 32(f), it contains 3,765 words. This response also complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared using Microsoft Word in the 14-point Century Schoolbook typeface in Roman style.

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