Nos. 21-1533, 21-2431

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, *et al.*,

Plaintiffs-Appellees,

v.

City of Virginia Beach, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia

BRIEF OF *AMICUS CURIAE* THE COMMONWEALTH OF VIRGINIA

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CORPORATE DISCLOSURE STATEMENT

As a governmental party, *amicus curiae* is not required to file a certificate of interested persons. Fed. R. App. P. 26(1)(a).

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INTRODUCTION

Congress enacted the Voting Rights Act of 1965 to put "an end to the denial of the right to vote based on race," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2330 (2021), by guaranteeing "the right of any citizen of the United States to vote on account of race or color" or status as a "language minority." 52 U.S.C. §§ 10301(a), 10303(f)(2), 10310(c)(3). A state violates Section 2 of the VRA when members of a racial, ethnic, or language minority group—a protected "class of citizens" under that section—are denied equal participation in elections. *Id.* § 10301(b); *see also, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (suing to enforce rights of "black citizens of North Carolina"); *Cross v. Fox*, --- F. 4th ---, 2022 WL 127944, at *1 (8th Cir. 2022) (suing to enforce the rights of "Members of an Indian tribe"); *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (addressing whether state law "disparately impacts Latino voters").

Section 2 does not contemplate "coalitions" formed from multiple minority groups putatively bringing suit as a single Section 2 "class of citizens," and the Supreme Court has never accepted the coalition theory embraced by the district court. *See Growe v. Emison*, 507 U.S. 25, 41

(1993) ("[a]ssuming (without deciding) that it was permissible for the [d]istrict [c]ourt to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2," and reversing on other grounds). This Court should not accept the coalition theory either: the text and structure of the VRA, as well as the consequences and constitutional difficulties engendered by the coalition theory, all require reversal.

Even if the VRA did permit coalition standing in some cases, it would not do so here. The plaintiffs' challenge to Virginia Beach's defunct election plan is moot, *see* Defs. Br. at 15–18, and the plaintiffs—two black residents of Virginia Beach—cannot assert the interests of a large, geographically dispersed, and politically disparate coalition comprising multiple racial, ethnic, and language minority groups, *see id.* 18–24. The district court assumed, in the face of overwhelming contrary evidence, that all minority voters in Virginia Beach have the same political preferences and voting behavior. *Id.* at 35–46. That perverse assumption must be corrected because it relies on and perpetuates racial and ethnic stereotypes inimical to the VRA. *See Emison*, 507 U.S. at 42 ("Section 2

'does not assume the existence of racial bloc voting; plaintiffs must prove it.'" (quoting *Gingles*, 478 U.S. at 46)).

This Court should accordingly vacate the district court's injunction and dismiss this case with prejudice.

IDENTITY AND INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae the Commonwealth of Virginia has interests in protecting its citizens' voting rights and ensuring its localities' compliance with the Voting Rights Act. Plaintiffs' coalition theory distorts Section 2 and will undermine the fairness of Virginia's elections by requiring Virginia Beach to treat nonparty members of plaintiffs' putative coalition as if they share plaintiffs' political preferences. In fact, the undisputed record evidence shows that at least some members of the coalition do *not* support the same candidates or have the same political goals as the two individual plaintiffs who claim to represent them. Indeed, the Attorney General was elected as Virginia Beach's first Cuban-American member of the House of Delegates—and is now the first the Hispanic statewide officeholder—notwithstanding his affiliation with

[1] This brief is filed under Federal Rule of Appellate Procedure 29(a)(2).

the political party which, according to the plaintiffs, the coalition comprising Hispanic voters does not support.

Virginia agrees with the arguments advanced by Virginia Beach and submits this brief to express concern regarding the district court's erroneous holding, which, if affirmed, could reverberate across the Commonwealth and beyond.

ARGUMENT

As the City explains in its brief, the district court's jurisdictional errors require vacatur because plaintiffs' complaint is directed at a defunct election plan and because plaintiffs, two black voters, lack standing to bring coalition claims on behalf of absent Hispanic and Asian voters. *See* Defs. Br. at 15–24. If the Court were to reach the merits, however, the coalition theory embraced by the district court must be rejected. Coalition claims are not cognizable under Section 2, and, even if they were, plaintiffs cannot meet the strong showing of group cohesion that a coalition claim would require.

I. Coalition Claims Are Not Cognizable Under Section 2.

Section 2 of the VRA prohibits any "standard, practice, or procedure . . . which 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 on account of "member[ship] [in] a language minority group."[2] 52 U.S.C. §§ 10301(a), 10303(f)(2). The statute requires a court to evaluate "the totality of circumstances" in order to determine whether "the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens" described above, "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

1. The text of Section 2 precludes the district court's coalition theory, because the statute's reference to "members of *a class* of citizens" cannot be stretched to allow a claim by a coalition of *multiple classes* of citizens. *See Nixon v. Kent County*, 76 F.3d 1381, 1386–87 (6th Cir. 1996) (en banc). Rather, a minority group's claims under Section 2 must stand or fall on their own.

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[2] "'[L]anguage minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 52 U.S.C. § 10310(c)(3).

a. Section 2 calls for a comparison of the "opportunit[ies]" afforded to members of a protected class to those afforded to "other members of the electorate"—necessarily *including* members of other minority groups. 52 U.S.C. § 10301(a). By instead including the members of virtually every other sizable minority group in Virginia Beach in the plaintiff coalition, the district court twisted the VRA's text to create a comparison between the aggregate membership of *every* minority group against a single comparator: white citizens. But if the VRA had intended such a comparison, Congress would have said so. *Nixon*, 76 F.3d at 1390–91. It was not reasonable for the district court to create an artificial coalition of members of disparate minority groups and to assume, without any record evidence for support, that the interests and voting preferences of the coalition are distinct from those of white citizens.

b. The coalition theory is further undermined by Section 2's separate identification of each group of protected language minorities ("American Indian, Asian American, Alaskan Natives or of Spanish heritage"). 52 U.S.C. § 10310(c)(3). Congress's careful identification of these protected classes indicates that "Congress considered members of each group and the group itself to possess homogeneous characteristics

[and] . . . did not envision that each defined group might overlap with any of the others or with [other racial minorities]." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc) ("*LULAC II*") (Jones, J., concurring).

2. If the textual basis for rejecting the coalition theory were not enough, the Court must also consider that coalition claims are "fraught with risks." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 785 n.43 (5th Cir. 1993) ("*LULAC I*").

a. Treating "a group composed of . . . minorities" as "itself a protected minority" will ensnare the courts in a guessing game of racial assumptions. *Campos v. City of Baytown*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc). "Once the courts plunge into the business of apportioning representation among racial or ethnic coalitions, a host of difficult and potentially divisive social questions rear their heads." *LULAC II*, 999 F.2d at 897 (Jones, J., concurring).

In this case, plaintiffs are two black citizens of Virginia Beach who assert claims on behalf of a coalition of black and nonblack minority citizens. But unrebutted record evidence shows that not all members of

plaintiffs' putative coalition share the same political goals or candidate preferences. Defs. Br. at 6. Filipino voters in Virginia Beach, for example, tend to prefer Republican candidates and support conservative social policies. *Id.* Further, there may be additional divisions within the putative coalition beyond those in the record. *See LULAC II*, 999 F.2d at 897 & n.9 (Jones, J., concurring) ("[S]ociological literature . . . demonstrates 'social distance' between minority groups."). By glossing over the strong and genuine disagreements between members of different minority groups, the district court "fashioned [relief] only because of the groups' joint minority status"—which, perversely, is itself a form of discrimination, and "a cruel hoax upon those who are not cohesive with self-styled minority spokesmen." *Id.* at 896–97.

b. It is not sufficient in this case to respond that courts could avoid this trap by requiring evidence of the voting patterns of each minority group within the proposed coalition. Here, plaintiffs failed to put forward any evidence of Hispanic and Asian voting patterns, and the special master appointed by the district court concluded that it was impossible to develop reliable statistical evidence of Hispanic and Asian voting patterns due to those groups' relatively small populations in

Virginia Beach. Defs. Br. at 13–14. That difficulty is well documented in other cases, as well, "suggest[ing], if not the utter bankruptcy of Section 2 minority coalition claims, . . . at least their factual complexity." *See LULAC II*, 999 F.2d at 897 (Jones, J., concurring).

c. As this Court has already recognized, "any construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004). In *Hall*, plaintiffs alleged a "crossover" theory that, in a newly drawn congressional district, "blacks are too small in number to form the same winning coalition with 'crossover' white voters that existed before" the creation of the new district. *Id.* at 425. Similarly, the coalition plaintiffs here have no "potential to elect a candidate *on the strength of their own ballots*." *Id.* at 429. Plaintiffs instead may elect their preferred candidates only by "join[ing] their political hands" with other groups—Asian, Hispanic, White, or others. *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494,

1505 (5th Cir.) (Higginbotham, J., dissenting), *opinion vacated on reh'g*, 829 F.2d 546 (5th Cir. 1987).

Permitting plaintiffs' coalition claims would therefore grant them "a right to preserve their strength for the purposes of forging an advantageous political alliance," *Bartlett v. Strickland*, 556 U.S. 1, 14–15 (2009) (plurality opinion) (quoting *Hall*, 385 F.3d at 431), thus vindicating their "ability to form a political coalition with other racial or ethnic groups," rather than creating any "potential to form a majority in a district," *Hall*, 385 F.3d at 431. But "Section 2 does not create an *entitlement* for minorities to form an alliance with other voters in a district who do not share the same statutory disability as the protected class." *Id.* at 431 n.13; *see also Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing en banc) ("A group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition."). The same difficulty that caused this Court to reject the crossover claim in *Hall* should also cause it to reject plaintiffs' coalition claim in this case.

d. Judicially enlarging Section 2 to authorize coalition claims would also raise constitutional concerns. Congress "retained the

statutory language restricting relief under [Section] 2 to 'denials or abridgments of the right to vote on account of race or color.'" *LULAC II*, 999 F.2d at 854 (alterations omitted) (quoting 42 U.S.C. § 1973 (1982)). "This limitation was not so much the product of legislative discretion as constitutional imperative, given that the scope of Congress'[s] remedial power under the Civil War Amendments is defined in large part by the wrongs they prohibit." *Id.* At bottom, coalition claims are problematic because they loosen the ties between Section 2 and race or color, risking the possibility of plaintiffs using Section 2 to prosecute grievances beyond what is permitted by the Constitution or the VRA.

II. Even Assuming Section 2 Did Allow Coalitional Standing, It Would Require A Strong Showing Of Cohesion That Plaintiffs Have Not Made And Cannot Make.

Evidence of "minority political cohesion" is a prerequisite to a Section 2 claim. *Emison*, 507 U.S. at 40; *Gingles*, 478 U.S. at 31. Before a court can "combine distinct ethnic and language minority groups for purposes of assessing compliance with [Section] 2," "there [is] quite obviously a higher-than-usual need" for the plaintiff to make this showing. *Emison*, 507 U.S. at 41; *see also LULAC II*, 999 F.2d at 898 (Jones, J., concurring) ("At the very least, only under very convincing

proof of a minority coalition's sociological similarities and goals as well as its political cohesion can such a claim be made."). In *Emison*, the Supreme Court rejected the plaintiffs' claims because "the record simply 'contains no statistical evidence' of minority political cohesion (whether of one or several minority groups)." 507 U.S. at 41 (quoting *Emison v. Growe*, 782 F. Supp. 427, 436 n.30 (D. Minn. 1992), *rev'd*, 507 U.S. 25, (1993)).

So too here. In fact, the unrebutted record evidence shows that the political preferences of the groups in plaintiffs' putative coalition are diverse and frequently conflicting. Virginia Beach's Filipino community, the City's largest Asian population, for example, backs Republican candidates and conservative policies, while the black community typically supports Democrat candidates and progressive policies. *Compare* J.A. 322, 1003, 2269–2270, 2293–2294, *with* J.A. 713; *see also* J.A. 860. Tellingly, no member of Virginia Beach's Hispanic or Asian communities joined plaintiffs' suit, and nothing in the record even indicates that plaintiffs asked any member of those communities to do so. *See* J.A. 171, 524. On this record, "[s]ince a court may not presume bloc voting within even a single minority group, it made no sense for the

[d]istrict [c]ourt to (in effect) indulge that presumption as to bloc voting within an agglomeration of distinct minority groups." *Emison*, 507 U.S. at 41 (citation omitted).

Accordingly, even if the Court were to overlook the jurisdictional defects in the district court's decision, and even if the Court were to embrace a coalition theory of Section 2, plaintiffs' claims must still fail, because they cannot make, and have not tried to make, the strong showing of cohesion required to advance a coalition claim under the Voting Rights Act.

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The district court's agglomeration of a diverse set of "non-white" communities, *Holloway v. City of Virginia Beach*, 531 F. Supp. 3d 1015, 1048 (E.D. Va. 2021), into a single racial "class" for purposes of the VRA in this case demonstrates the obvious danger of stretching the text of Section 2 beyond what Congress intended. Virginia Beach, like the rest of the Commonwealth and the country, is composed of diverse ethnic, racial, religious, and linguistic communities. They are distinct from each other. They are shaped by their respective heritages, experiences, and traditions. Communities of recently arrived immigrants, for example,

have a different American experience than communities that have been in North America for centuries. Bilingual communities have a different American experience than those who speak primarily English. And communities who practice a minority religion, like Roman Catholicism, have a different American experience than those who do not.

Those experiences inform and shape the "distinctive minority group interests" of those communities. *Gingles*, 487 U.S. at 51. The rich diversity across minority communities in Virginia Beach and the Commonwealth weighs heavily in favor of honoring Congress's expressed intention to limit Section 2 claims only to those brought by individual minority groups.

But even if this Court were to recognize coalition claims, it should do so only in the presence of overwhelming evidence of political cohesion among the constituent groups of the coalition. Demanding anything less would erase the unique heritages and experiences of the varying members of the putative coalition and subordinate their "distinctive . . . interests," *id.*, to those of the most powerful group in the coalition, *see LULAC I*, 986 F.2d at 785 n.43.

That is precisely what the district court did here. The record contains no evidence that Asian and Hispanic voters share the sorts of interests with black voters that would make them a cohesive voting bloc in Virginia Beach. In fact, the evidence points the other way. The district court therefore combined Asian and Hispanic voters into a coalition with black voters based on their shared status as "non-white" rather than on their actual political interests. It reduced the diverse coalition members to a mass of persons who are not the majority race, rather than seriously engaging with the unique qualities of each community.

The district court's approach is dangerous. The Supreme Court explained nearly thirty years ago that combining "in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Doing so "reinforces . . . impermissible racial stereotypes" that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same

candidates at the polls." *Id.* The district court's approach here flouts *Shaw*'s exhortation. It treats diverse groups of "non-white" voters—regardless of age, education, economic status, heritage, language, or religion—as thinking alike, sharing the same political interests, and preferring the same candidates merely because they are not white.

"It is a sordid business, this divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). The district court's reasoning made this sordid business much worse. The Court should reject it.

CONCLUSION

The injunction should be vacated, and the case remanded with instructions that this case be dismissed or, alternatively, that judgment be entered for Defendants.

Respectfully submitted,

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/s/ Andrew N. Ferguson

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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