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; 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

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

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

APPELLANTS' BRIEF

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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 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.

1. Appellants
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    b. the Galveston County Commissioners Court
    c. Galveston County Judge Mark Henry
    d. Galveston County Clerk Dwight Sullivan
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    c. Simone Leeper
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    i. Chad W. Dunn
    j. Brazil & Dunn
    k. Neil G. Baron
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    d. Edna Courville

e. Joe A. Compian

f. Leon Phillips

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Appellants certify that, to the best of their knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

By: */s/ Angela K. Olalde*
Counsel for Appellants

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is set for November 7, 2023 at 9:00 a.m. Counsel for Appellants intends to focus most of the allotted argument time on the issue of coalition claims under the Voting Rights Act, and asks that the Court instruct the parties as to any other specific issues or questions it would like to address at argument.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291 because it is an appeal from a final order or judgment that disposes of all parties' claims (apart from attorney fee requests). ROA.16038-16039. Appellants timely appealed from the October 13, 2023 final order, on October 14, 2023. ROA.16041-16042.

The trial court had jurisdiction over the over the United States' Voting Rights Act claims. 28 U.S.C. § 1345. ROA.19889-19925 (DOJ First Am. Complaint). The trial court also had jurisdiction over the Petteway and NAACP parties' claims. 28 U.S.C. § 1331 (federal question); 28 U.S.C. § 1343(a)(3) (civil rights claims for equal protection); 52 U.S.C. § 10101(d) (Voting Rights Act claims). ROA.265-305 (Petteway parties' Second Am. Complaint); ROA.20066-20105 (NAACP parties' First Am. Complaint).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The VRA does not protect minority coalitions—which present political, not racial, alliances.

II. *Gingles* I compactness is not met where coalition minority groups are dispersed in different areas of a jurisdiction, and cannot be assumed based on race alone.

III. *Gingles* II cohesion is not established for a coalition group that discounts primary data, and *Gingles* III white bloc voting does not exist to cancel out a minority group's voting power were voting is political, not racial.

IV. Section 2 cannot survive strict scrutiny because it lacks temporal limits.

STATEMENT OF THE CASE

This is an appeal of a Voting Rights Act ("VRA") case brought by a coalition of Black and Latino voters challenging the 2021 Galveston County Commissioners' Court districting plan ("2021 Plan").

I. Relevant Facts

A. Black and Latino residents make up 38.6% of Galveston County's total population; 13.3% Black residents, and 25.3% Latino residents.

Galveston County has a total population of 350,682, the composition of which includes 54.6% Anglo, 25.3% Latino, and 13.3% Black residents. ROA.15910 ¶68. The combined Black and Latino population represents about 38.6% of the County's population. ROA.15910 ¶68.

Between 2010 and 2020, Galveston County's population increased by almost 60,000 people. The Hispanic population increased from 22% to 25%, and the Black population decreased from 14% to 12%:

Table 1: Change in Galveston County from 2000 to 2010 to 2020

	2000	2010	2020
Total Population	250,198	291,309	350,682
Ideal Precinct Population (4)	62,550	72,827	87,671
Hispanic Population	44,939 (18%)	65,270 (22%)	88,636 (25%)
NH Black Population	38,179 (15%)	39,229 (14%)	43,120 (12%)
NH White Population	157,851 (63%)	172,652 (59%)	191,358 (55%)

ROA.23908 (DX-290).

Figure 1: Galveston County – 1990 Census to 2020 Census Population by Race and Ethnicity

	1990 Number	1990 Percent	2000 Number	2000 Percent	2010 Number	2010 Percent	2020 Number	2020 Percent
Total Population	217,399	100.00%	250,158	100.00%	291,309	100.00%	350,682	100.00%
NH White	144,852	66.63%	157,851	63.10%	172,652	59.27%	191,358	54.57%
Total Minority Pop.	**72,547**	**33.37%**	**92,307**	**36.90%**	**118,657**	**40.73%**	**159,324**	**45.43%**
Latino	30,962	14.24% 44,939	44,939	17.96%	65,270	22.41%	88,636	25.28%
NH Black	37,414	17.21%	38,179	15.26%	39,229	13.47%	43,120	12.30%
NH Black + Latino Pop.	**68,376**	**31.45%**	**83,118**	**33.22%**	**104,499**	**35.88%**	**131,756**	**37.58%**
NH Asian	3,357	1.54%	5,152	2.06%	8,515	2.92%	12,202	3.48%
NH Hawaiian and Pacific Islander*	NA	NA	88	0.04%	128	0.04%	223	0.06%
NH Indigenous	632	0.29%	893	0.36%	1,052	0.36%	1,036	0.30%
NH Other*	182	0.08%	268	0.11%	426	0.15%	1,455	0.41%
NH Two or More Races	NA	NA	2,788	1.11%	4,037	1.39%	12,652	3.61%
NH DOJ Black	NA	NA	38,626	15.44%	40,332	13.85%	45,637	13.01%
AP Black (incl. Hisp. Black)	NA	NA			42,280	14.51%	49,174	14.02%
NH AP Black (Any Part Black)	NA	NA					46,627	13.30%
NH AP Black + Latino Pop.	NA	NA					**135,263**	**38.58%**

*In the 1990 Census, Hawaiian and Pacific Islanders were counted in the Asian category. Persons of two or more races were counted in the "Other" category.

PX-386 (Record Excerpt 11 at 8).[1] Much of this population increase occurred in the northern suburbs of the County, including in League City. Neither Black nor Hispanic citizen-age voting population, or "CVAP," is on its own sufficiently numerous to form a majority-minority precinct. ROA.15912 ¶74.

B. Recent history of redistricting in Galveston County.

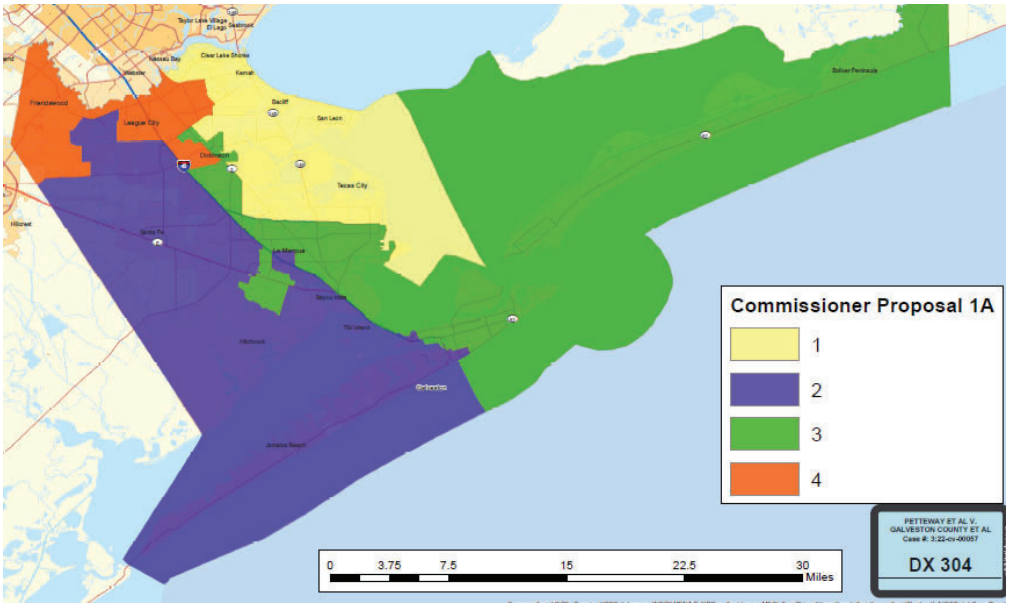
Prior to *Shelby County*,[2] Galveston County was subject to preclearance. As a majority-minority precinct, Commissioner Precinct 3 was subject to DOJ mandates,

[1] At the time this Brief is filed, not all trial exhibits have been added to the record on appeal. Appellants therefore include these citations in their Record Excerpts for ease of reference.
[2] *Shelby County v. Holder*, 570 U.S. 529, 553 (2013).

including that minority population cannot be decreased (retrogressed). A no-retrogression requirement, and particularly, its design and DOJ settlement negotiations to increase Black CVAP in 2012, shows Precinct 3 was drawn predominantly on the basis of its racial makeup. But without *Shelby County*, the County had no protection from legal exposure for that—which was an issue in 2021.

In October 2011, the County sought preclearance from the DOJ for its County Commissioners, and Justice of the Peace and Constable redistricting plans. *Petteway, et al. v. Galv. Cnty, et al.*, No. 12-40856, 2013 WL 6634558 (5th Cir. Dec. 17, 2013) ("*Petteway* I"). ROA.18505 at 14:12-15; JX-45 (Record Excerpt 10 at 22). A clearer image of the map submitted for preclearance in 2011 is:

2011 Map Submitted for Preclearance



ROA.23983 (DX-304).

After the County sought preclearance, some of the same parties in this case filed Cause No. 3:11-cv-00511 ("2011 Redistricting Case") seeking, in part, an injunction to prevent use of unprecleared maps. *See Petteway* I, 2013 WL 6634558 at *2. The County assured the DOJ and the court in the 2011 Redistricting Case that it would not implement any unprecleared maps, on November 21, 2011, a temporary restraining order was entered in the 2011 Redistricting Case that a majority of a three-judge panel vacated on December 9, 2011. *Id*.

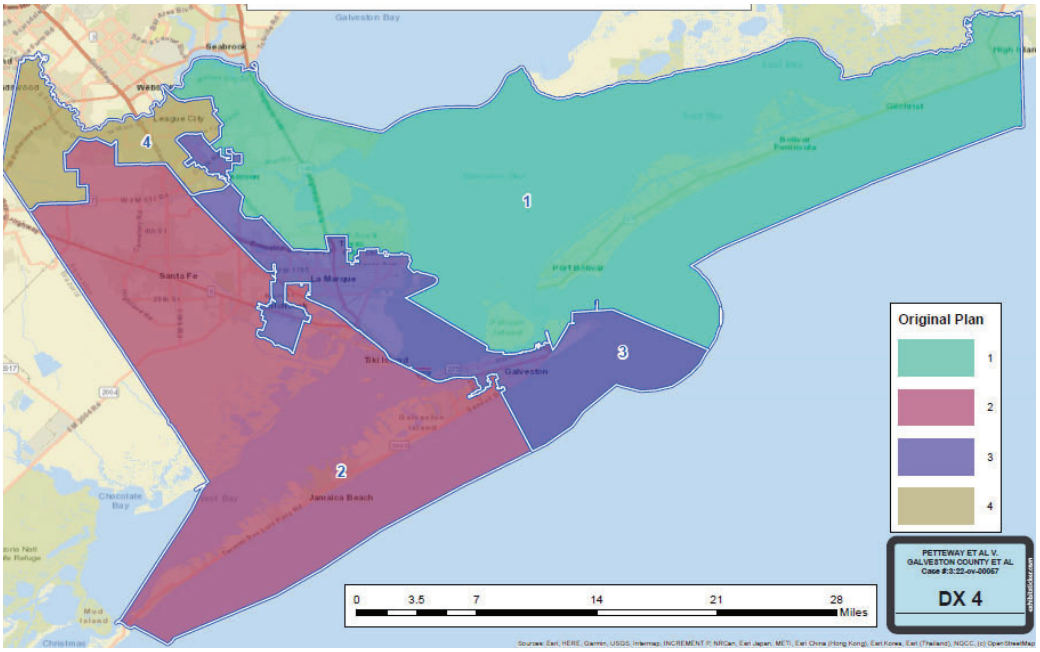
On March 5, 2012, the DOJ issued its first objection to Galveston County's submitted plan. JX-6 (Record Excerpt 6). While the letter discussed the overall decrease in Black and Hispanic population, the letter also reflects concern that relocating Bolivar Peninsula[3] had the effect of reducing the African American share of the electorate in Precinct 3 while increasing both the Hispanic and Anglo populations. JX-6 (Record Excerpt 6 at 2).

The County promptly entered into discussions with the DOJ and negotiated a new Commissioner Court plan that was precleared and submitted in the 2011 Redistricting Case. In the DOJ's negotiations, they decreased the Hispanic population while increasing the African American population. ROA.18699-18700 at

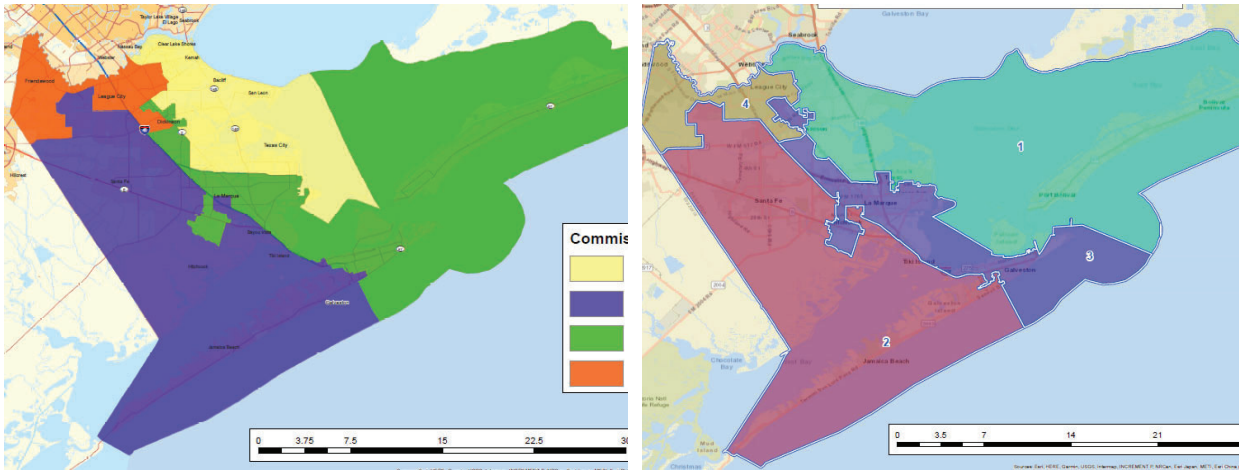
[3] Bolivar Peninsula is a relatively sparsely populated area that lies to the Northeast of Galveston Island and, since it also has coastal boundaries, shares many of the same issues as the Island, such as beach renourishment and the County's need to coordinate with the State's General Land Office to coordinate work on beaches. ROA.16275-16276 (describing Bolivar), ROA.18931, 18952-18953.

208:21-209:4. Appellee and Plaintiff in the court below, Joe Compian, wrote to the DOJ to express the Latino community's upset at the 2012 settlement map that the DOJ precleared, which had higher percentages of Black residents at the expense of Latino residents, stating the map "**absolutely does not recognize the growth of the Latino population in this County**" and that the DOJ's concern with only Black percentages leads "**our Latino congregations and organizations . . . to believe that the DOJ places a greater value on the voting rights of African Americans.**" JX-8 at 1 (Record Excerpt 7) (emphasis added). He also argued the map "**undervalues Latinos**." ROA.20304 (DX 26) (emphasis added). Despite these comments, the DOJ precleared the plan and it was adopted and submitted in the 2011 Redistricting Case. It is the 2011 Map, sometimes called the Benchmark plan:

2011 Map



ROA.20189 (DX 4). The changes made to the map submitted for preclearance and the DOJ-precleared map are evident when comparing these two maps:



ROA.18505-18506.[4]

C. The Texas Constitution requires four County commissioners.

The Texas Constitution requires counties be divided into four Commissioner Court precincts.[5] Tex. Const. art. V, § 18(b). With a 2020 population of 350,682, ideal population deviation among the four commissioner precincts is approximately 87,670.

[4] Despite agreement among the parties about the submitted map, the court in the 2011 Redistricting Case permanently enjoined the County from implementing plans for 2012 elections that were not precleared. *Petteway* I, 2013 WL 6634558 at *2. This Court made clear on appeal that the injunction had no effect on the implementation of the electoral map, and that the plaintiffs were not prevailing parties. *Id*. On remand, the district court entered a take-nothing judgment dismissing the case.

[5] In many voting rights cases, the division in question is a "district." Texas counties are divided into "precincts."

Commissioner Stephen Holmes has served as Galveston County's Precinct 3 Commissioner from 1999 to the present day. ROA.18505-18506 ¶¶11, 16.[6] Commissioner Dr. Robin Armstrong, who is Black, was appointed to represent Galveston County Commissioners Court Precinct 4 in May 2022; he was elected by the Republican Party chairs over several Anglo candidates to be the Precinct 4 Commissioner candidate, and was elected to office in November 2022 with no Democrat opponent. ROA.8168 ¶14 (stipulated facts). Darrell Apffel has served as the County's Precinct 1 Commissioner from 2016 until the present day. ROA.8168 ¶11. Joseph Giusti has served as the County's Precinct 2 Commissioner from 2014 until the present day. *Id*. Galveston County Judge Mark Henry was first elected in 2010 and has served as County Judge from that time until the present day. ROA.8168 ¶12.

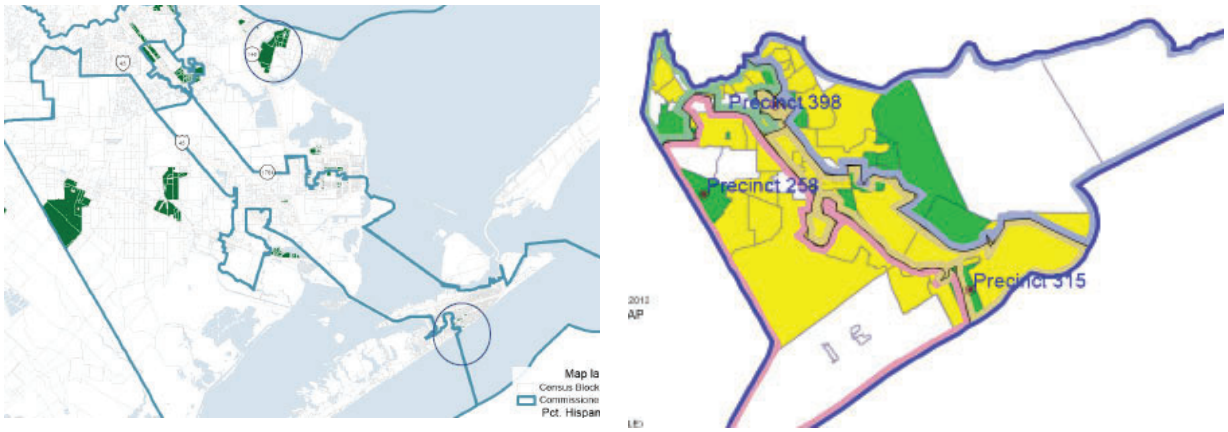
Politics in Galveston County explains why Republican candidates often run unopposed in general elections—the County is mostly Anglo, and mostly Republican. ROA.15935, 15937 ¶¶144, 149.

[6] Oddly, the trial court found Commissioner Holmes was excluded from the redistricting process—even though his own notes and testimony demonstrate his involvement. JX-23 (Record Excerpt 8).

D. 2020 Redistricting

The 2020 Census data revealed population deviations among Galveston County's four commissioner precincts.[7] Galveston County's Black population remained concentrated in Precinct 3, while the County's Hispanic population grew throughout the County. ROA.15953 at ¶197; *see also* ROA.19061:13-19064:15 (parties' experts agree Hispanic population is evenly dispersed throughout the County and not highly concentrated in any single area), ROA.15912 ¶73.

Hispanic CVAP Maps

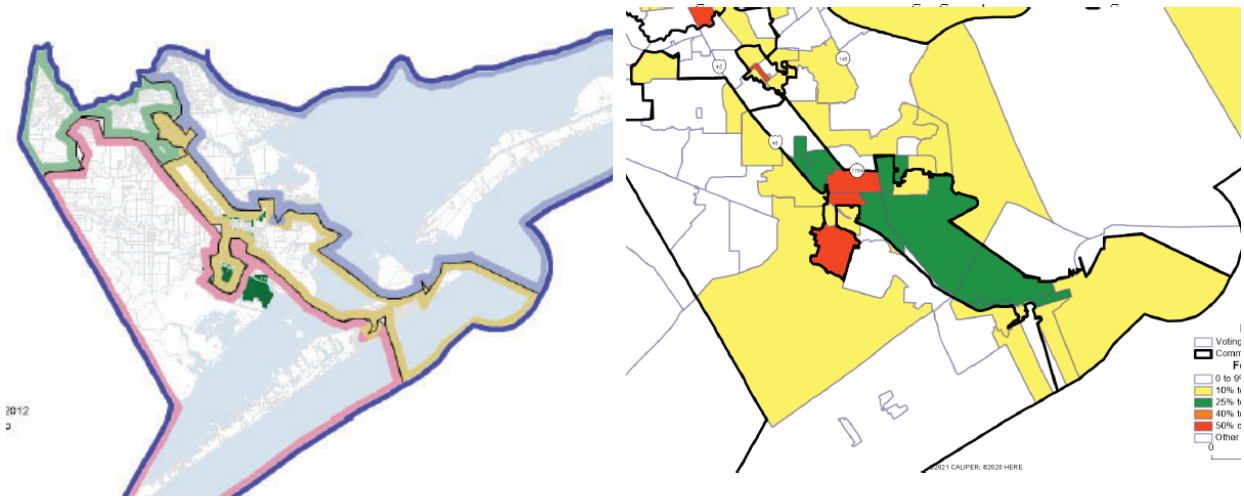


ROA.23910-23911 (DX-290) (left: showing the dispersion of Hispanic CVAP on the 2011 Map, right: showing dispersion of Hispanic CVAP in each voting tabulation district on the 2011 Map, with yellow at 10-24% and green at 25-40%).

By comparison, Black population is more concentrated along a central corridor through the County, stretching from the mainland to Galveston Island:

[7] "The COVID-19 pandemic caused delays in the release of the data required to redistrict." ROA.15968 ¶249. "The Census Bureau ultimately released the data in the "legacy format" in August 2021 followed by a more user-friendly format the following month." ROA.15952 ¶193.

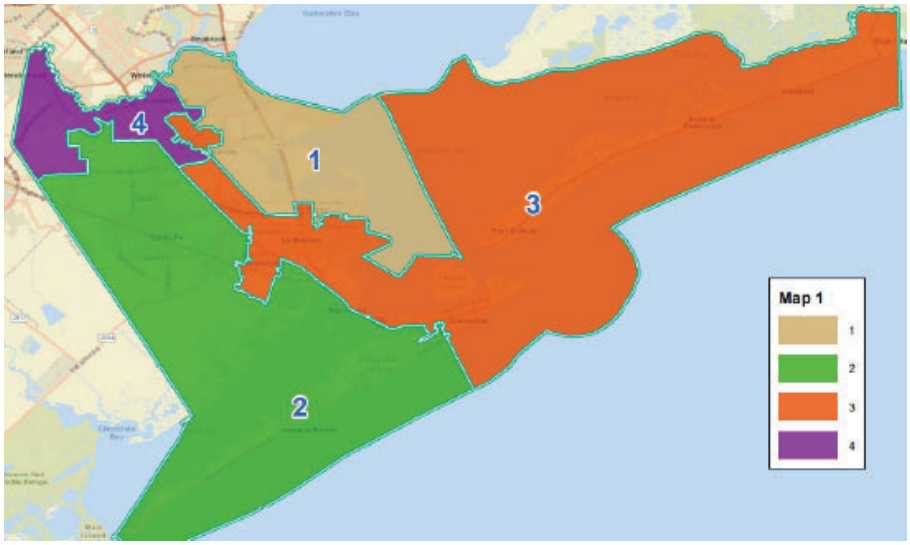
Black CVAP and VAP Maps



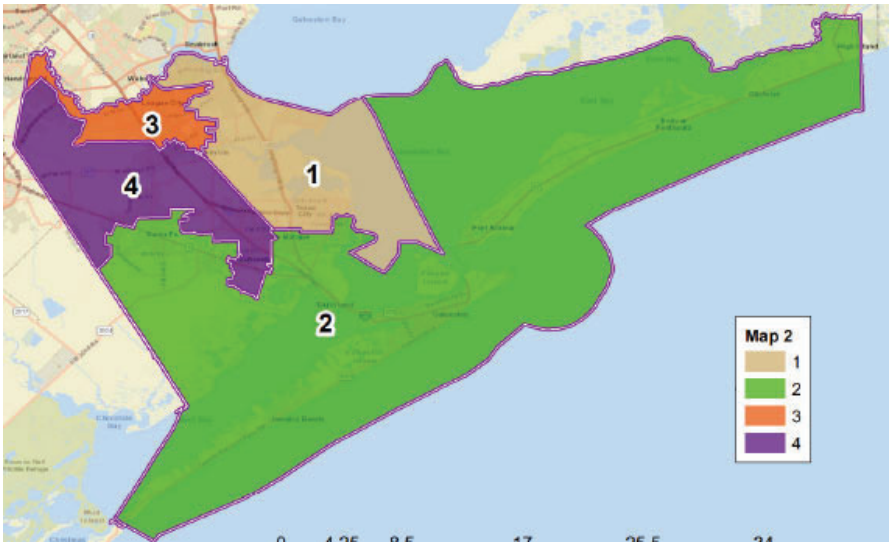
ROA.23915-23916 (DX-290) (left showing dispersion of Black CVAP with green indicating 46-100%, and right showing the share of Black VAP in voting tabulation districts, with yellow at 10-24%, green at 25-39%, and red at 50% or more).

The Commissioners Court considered two map proposals (Map 1 and Map 2) before adopting the "Map 2" proposal ("2021 Plan"):

The "Map 1" Proposal



The "Map 2" Proposal (2021 Plan)



JX-29 (Record Excerpt 9).

The 2021 Plan created a single coastal precinct. Both proposed plans kept all Commissioners within their precinct boundaries as required by the Texas Constitution (art. 16 §14), and equalized County population among the precincts. Under the 2021 Plan, the incumbent Democrat for Precinct 3 is less likely to be reelected, considering the political makeup of the County and of the new Precinct 3. *See* ROA.15935, 15937, 16008-16009 ¶¶144, 149, 370.

The trial court criticized the 2021 redistricting process. It, however, approved of Map 1, which was a product of the same preparation and vetting processes that produced the 2021 Plan. Map 1 "featured a reasonably compact commissioners precinct with a majority Black and Latino population by CVAP. That precinct—Precinct 3—was 30.86% Black and 24.28% Latino by CVAP." ROA.15912 at ¶75,

ROA.16008 ¶370. Map 1 was not supported by the community, as drafted. ROA.18199, 18313, 18317, 18952, 19188, 21103-21104.

II. Procedural History

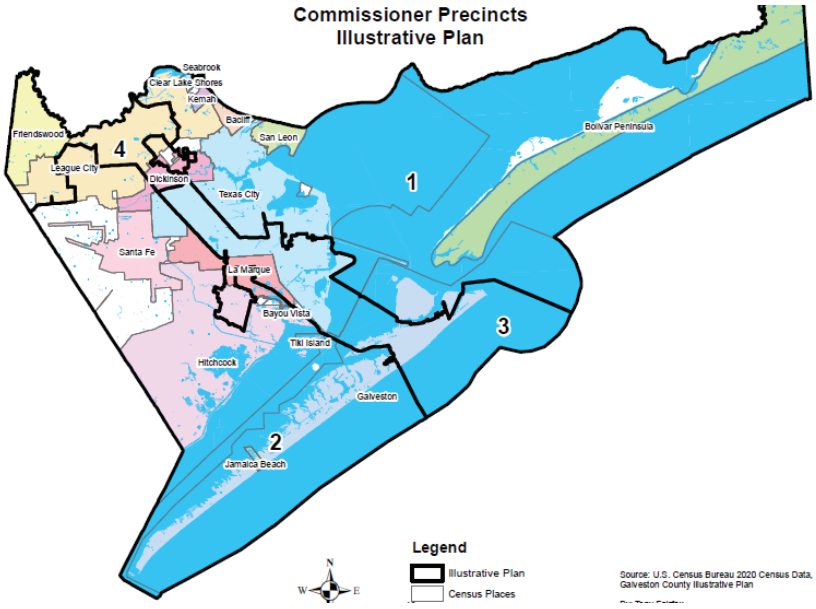
The Petteway[8] and NAACP[9] groups, and the United States of America ("DOJ") (collectively, "Coalition Claimants" or "Appellees"), sued Appellants Galveston County, Texas, the Galveston County Commissioners Court, Galveston County Judge Mark Henry, and Galveston County Clerk Dwight Sullivan (collectively, the "County" or "Appellants") under the VRA, and the Petteway and NAACP groups also raised Constitutional claims.

On October 13, 2023, after a bench trial, the trial court issued Findings of Fact and Conclusions of Law. ROA.15881. It entered an order that constitutes a final judgment, entering a mandatory injunction against the County. ROA.16038. The trial court's order mandates the adoption of a new plan with "supporting expert analysis" within seven days, or the district court would implement the Fairfax plan (ROA.16039):

[8] Terry Petteway, Constable Derrick Rose, and the Hon. Penny Pope are the "Petteway Plaintiffs." Sonny James and Michael Montez have been dismissed. ROA.1496; ROA.2979. The Petteway Plaintiffs sued Galveston County, Texas and the Hon. Mark Henry as Galveston County Judge.

[9] The "NAACP Plaintiffs" are Dickinson Bay Area Branch NAACP, Galveston Branch NAACP, Mainland Branch NAACP, Galveston League of United Latin American Citizens Council 151, Edna Courville, Joe A. Compian, and Leon Phillips. They sued Galveston County, Texas, the Hon, Mark Henry as Galveston County Judge, and Dwight D. Sullivan as Galveston County Clerk.

Plaintiffs' Exhibit 339 – the Fairfax Plan



PX-339 ("Fairfax Plan") (Record Excerpt 12). The court did not find the County acted with any discriminatory intent. *See* ROA.15961 ¶228.[10]

On October 15, 2023, the Court extended the deadlines of its order, giving the County fourteen days to propose a new plan, and held that, if Appellants "fail or prefer not to submit a revised plan, they are ordered to implement the Fairfax illustrative plan or Map 1 . . . by November 8, 2023." ROA.16068. That is, the trial court would either require the County to either adopt a new map in accordance with

[10] Several witnesses testified it is easier now to vote now in Galveston County than ever. ROA.15942 ¶164. Residents can vote anywhere in the County on election day or during early voting. *Id*. It is relatively easy to register to vote, and early voting lasts two weeks. *Id*. The County Clerk testified that "if a mail-in ballot required postage and the voter failed to affix it, the clerk's office would pay for the postage because it "want[s] every vote to count." ROA.15942 ¶165. Election materials are provided in both English and Spanish for all elections. ROA.15942 ¶166. The County also "collaborates with LULAC and allows them to use [C]ounty property for its Cinco de Mayo event" which is also a "get-out-the-vote effort." ROA.15942 ¶168.

its order, or face the imposition of a map of the court's choosing—one which will favor a Democratic candidate for County Commissioner Precinct 3 over a Republican. *See* ROA.18589:9-22 (Map 1).

Implementing the court's proposed plan would greatly alter the boundaries of the 2021 Plan that has been in place for two years, right before the candidate filing period opens on November 11, 2023. The trial court wanted to ensure that a new map be put "in place before the statutory opening date for candidate filing on November 11, 2023." ROA.16035-16036 ¶433. But if the 2021 Plan is not in place during the candidate filing period and is reinstated before the November 2024 election, since its Precinct 3 boundaries cover different residential areas than Map 1 or the district court's suggested Fairfax Plan, the vast majority of its Precinct 3 resident-candidates would be eliminated as candidates in November of 2024.

III. Rulings Presented for Review

The County appeals from the trial court's October 13, 2023 and October 15, 2023 Orders (ROA.16038, ROA.16066), and from its denial of summary judgment. ROA.8047-8048.

SUMMARY OF THE ARGUMENT

This case is about politics. The Coalition Claimants argued at trial that the 2021 Plan would not allow Precinct 3 voters to elect Commissioner Holmes, who is a Democrat. They have argued that race and politics are inextricably intertwined, and because most minority voters support Democratic candidates, a Democratic candidate should have a greater chance at election in Precinct 3 than a Republican.

Appellees' position misses the forest for the trees—the VRA's ultimate purpose is not achieved by elevating one political party's platform over others. And the end sought by the Coalition Claimants (electing a Democratic candidate) do not justify the means of using a coalitional group under the VRA to get there.

The VRA claims fail outright because the VRA does not permit coalition districts. For example, *Gingles* I cannot be satisfied by combining minority groups to achieve sufficient numerosity in a proposed majority-minority district. The Circuits are split on this issue. Since 1988, the Fifth Circuit has permitted VRA coalition claims; however, since that time other circuits have disagreed with that position and the Supreme Court has rejected crossover districts citing to case law disfavoring coalition claims. Nor is there any indication in the language or history of the VRA that it is was meant to protect two or more minority groups together, when neither could raise such claim individually.

And it does not make sense to allow coalition claims: while such claims surely satisfy a *political* outcome (an example of which is perfectly presented here), that outcome necessarily places the concerns of a single minority group behind the larger political concerns of the coalition. The interests of a coalesced minority group are no longer the immediate or single focus in a coalition claim—the combined interests of the coalition are. Horse trading may occur, just as it might within a political party. Non-Hispanic Black voters may freely agree that language assistance in education is an important issue to Hispanic voters, even though Black voters and their communities do not need such assistance. But allocating funding priority to specific programs can easily divide coalition members who do not share the same concerns, or community of interest. A candidate of choice for members of a coalition, therefore, may differ from the candidate of choice of the coalition's various parts.

The final order should also be reversed because the *Gingles* preconditions were not met. There can be no compactness that satisfies *Gingles* I where coalition minority groups are dispersed evenly around the County (ROA.15912 ¶73), and neither compactness nor traditional redistricting principles can be assumed based on race alone. A district's boundaries cannot meander around to link geographically distant minority groups and communities without violating traditional districting principles—including whether the district encircles a compact community of interest. *Gingles* II cohesion also fails for a coalition of minority groups—evidence

that is contrary to the Coalition Claimants' position cannot be ignored when it contradicts their conclusions. Nor is *Gingles* III white bloc voting established where voting within the County is not "on account of race," but is on account of politics. The district court erred in holding Appellees met their burden on this element, especially after it acknowledged the political nature of their claims.

Finally, Section 2 is also subject to Constitutional challenge, as it lacks temporal limits and therefore cannot survive review.

ARGUMENT

I. The VRA does not protect minority coalitions—which present political, not racial, alliances.

The court below found:

> Both parties agree that there is not a sufficiently large, compact, and separate Latino or Black population to constitute a majority-Latino or majority-Black precinct in Galveston County.

ROA.15912 ¶74.[11]

As the County argued in the court below, coalitions of racial groups are not protected under the Voting Rights Act. Coalition claims shift the VRA, a statute enacted to protect the voice of a minority group, into a tool to advance cross-racial political goals.

A. The VRA's purpose and legal background

1. The VRA addresses whether a minority group's voters lack an equal opportunity to participate in the political process and elect candidates of their choice.

A Section 2 case presents the question of whether, "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1120 (5th

[11] While the parties agree that Black and Latino voters must coalesce to be sufficiently numerous to form a majority-minority precinct, the trial court erred in stating that both parties agree that Black and Latino populations are sufficiently compact to support a majority-minority precinct. *Id*. Rather, the County has consistently argued that Black and Latino populations within the County are not sufficiently compact under *Gingles* I. *See* ROA.3903, 15413.

Cir. 1991). The inquiry "depends upon a searching practical evaluation of the past and present reality" and on a "functional view of the political process." *Id.; see also Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994). "The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race." *LULAC v. Perry*, 548 U.S. 399, 433-34 (2006) ("*LULAC* I") (citation omitted).

As amended in 1982, VRA Section 2(a) prohibits any state or political subdivision from imposing or applying any "qualification or prerequisite" to voting or 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 or race or color." 42 U.S.C. § 1973(a). A violation is established if the members "of a class of citizens . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301. A "totality of circumstances" must show the challenged process is "not equally open" because a minority group has "less opportunity . . . to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). Section 2 also provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

2. VRA claims are analyzed under the *Gingles* framework.

The Supreme Court, in *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*"), "construed" Section 2 to prohibit the 'dispersal of a [minority] group's members into districts in which they constitute an ineffective minority of voters.'" *LULAC v. Abbott*, 604 F. Supp. 3d 463, 493-94 (W.D. Tex. May 23, 2022) ("*Abbott II*"). "A successful *Gingles* claim remedies that situation by undoing the dispersal of minorities . . . by requiring the state to concentrate them in a new, majority-minority district that will allow the group usually to be able to elect its preferred candidates." *Id*.

Gingles requires proof of three threshold conditions: (1) a sufficiently large and geographically compact majority-minority district; (2) that is politically cohesive; in which (3) white residents vote as a bloc to usually defeat that majority-minority's preferred candidate. *Harding v. Cty. of Dall.*, 948 F.3d 302, 308 (5th Cir. 2020) (citing *Gingles*, 478 at U.S. 50-51). These three preconditions "are needed to establish that the minority has the potential to elect a representative of its own choice" in a possible district, and that "the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population." *Growe v. Emison*, 507 U.S. 25, 40 (1993). The *Gingles* preconditions require adherence to "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (quoting *Bush*

v. Vera, 517 U.S. 952, 977 (1996)). They cannot be applied mechanically or without regard to the nature of the claim. *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993).

Section 2 of the VRA requires "an intensely local appraisal of the challenged district." *Wis. Legis. v. Wis. Elections Comm'n*, 595 U.S. 398, 406 (2022) (per curiam) (citing *Cooper v. Harris*, 137 S. Ct. 1455, 14721 n.5 (2017)); *see also LULAC I*, 548 U.S. at 437; *Abbott II*, 604 F. Supp. 3d at 496. In *Wisconsin Legislature*, that was the district level. *Wis. Legis.*, 595 U.S. at 399. The Court admonished it was improper to rely on "generalizations" in reviewing *Gingles* preconditions and, instead, courts must consider the "political experiences of a minority group in a particular location." *Id*. Here, that is the precinct level.

Once *Gingles* preconditions are satisfied, the inquiry shifts to whether a totality of the circumstances show the minority group does not "possess the same opportunities to participate in the political process and elect representatives of their choice." *Clark v. Calhoun Cnty., Miss.,* 88 F.3d 1393, 1395 (5th Cir. 1996) (citation and quotation marks omitted). This inquiry is guided by the Senate factors, which derive from the 1982 Senate Report. *Gingles*, 478 U.S. at 44-45.

3. The VRA is not a remedy for political defeat, or a means to proportional representation.

The danger in recognizing a "coalition district" VRA claim is that treating a coalition of separate minority groups as a single minority stretches *Gingles* cohesiveness to include political alliances, which Section 2 does not protect and the

Fifteenth Amendment cannot reach. The Supreme Court has also made clear that partisan vote dilution claims are not actionable. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019). Racial gerrymandering does not review whether a "fair share of political power and influence" has been apportioned, but instead "asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship." *Id.* at 2495-96.

As *Rucho* explained,

> The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far."

Id. at 2497. Federal courts lack the power to apportion political power, or "vindicat[e] generalized partisan preferences." *Id*. at 2499-2501. The impropriety of using Section 2 to gain political ground is unmistakable. *See e.g.*, *LULAC v. Clements*, 999 F.2d 831, 854 (5th Cir. 1993) ("*Clements*") ("§ 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are Democrats").

In *Wisconsin Legislature*, the Supreme Court found the trial court's analysis was flawed. *Wis. Legis.*, 595 U.S. at 403. The "main explanation" for drawing an additional majority-black district was because "there is now a sufficiently large and compact population of black residents to fill it," but that explanation improperly applied "just the sort of uncritical majority-minority district maximization that [the

Court has] expressly rejected." (citing *De Grandy*, 512 U.S. at 1017) (Failure to maximize cannot be the measure of § 2").

Nor is proportionality promised: it can be considered as an upper-limit in a state-wide analysis in a Section 2 totality-of-the-circumstances analysis, but the Supreme Court has rejected attempts to rely on proportionality as a single-factor shortcut to a vote-dilution finding. *De Grandy*, 512 U.S. at 1020-22; *see also Wis. Legis.*, 595 U.S. at 403 (Court has "expressly rejected" the "sort of uncritical majority-minority district maximization" presented). Courts, therefore, cannot properly consider proportionality unless and until all *Gingles* preconditions are met, and even then, placing too much weight on proportionality in a totality analysis has led to reversal. *Id.*; *see also* S. Rep. No. 97-417 at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177.

"[A]lthough some democracies provide for proportional representations of parties and ethnic groups," the VRA does not. *Washington v. Tensas Parish School Board*, 819 F.2d 609, 612 (5th Cir. 1987) (cleaned up). A minority group with three majority districts of seven was not entitled to a fourth district to match its percentage of the population. *Id.* at 611-12. The court reasoned that, "while race may be considered as a factor, safe seats for the minorities are not required of a reapportionment plan." *Id.* at 612 (citation omitted); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1161 (5th Cir. 1981) ("Even as a remedial measure, court plans

should not aim at proportional representation."). The Seventh Circuit has applied similar reasoning. *See Gonzalez v. City of Aurora, Illinois*, 535 F.3d 594, 598 (7th Cir. 2008) ("plaintiffs have staked their all on a proposal that Latinos are entitled at least to proportional representation via two Latino-effective districts no matter what the consequences of race-blind districting would be. The Voting Rights Act does not require either outcome"); *see also Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 802 (2017).

B. The VRA's 1982 amendments show Congress contemplated statutory protection for one minority group at a time, not for multiple minority groups that form a coalition.

Section 2 of the VRA was enacted in 1965 and amended in 1982. No fair reading of the Senate and House reports from 1982 support the notion that a racial coalition could satisfy *Gingles* I. That is: *Gingles* I cannot be satisfied by combining different minority populations to achieve a majority-minority district in an illustrative plan.

As explained in the Senate Report for the 1982 amendments, the legacy of the VRA stems from the need to combat the denial of voting rights to Black Americans. S. Rep. No. 97-417 at 5. Once statutory bars to Black citizens' ability to vote were lifted, other means of discrimination in voting followed—violence, harassment, literacy tests, and other screening *Id*. Eventually, there was a "dramatic rise in registration" among Black citizens, and then "a broad array of dilution schemes

[that] were employed to cancel the impact of the new black vote." *Id*. at 6. The 1982 amendments were meant to "make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice" to establish a VRA violation. *Id*. at 27.

In *Brnovich v. Democratic National Committee*, the Court discusses the history behind its enactment and subsequent amendment to permit discriminatory results claims under the VRA. *Brnovich v. Dem. Nat'l Committee*, 141 S. Ct. 2321, 2332 (2021). *Brnovich* referenced the "oft-cited Report of the Senate Judiciary Committee" from the 1982 amendments, which established a new vote-dilution test. *Id*.

The Senate Report shows through its recounting of the VRA's purpose and history that Congress envisioned Section 2 protections to enable Black citizens an equal chance at effective political participation. Of course, the VRA applies to any denial or abridgement of a citizen's right "to vote on account of race or color." 42 U.S.C. § 1973(a). The Report, however, nowhere indicates that the VRA was meant to allow different minority groups to join into a coalition to raise a VRA claim. Such claims would greatly expand and increase the impact and rate of VRA claims. *See, e.g., Rucho*, 139 S. Ct. at 2502 & 2507 (discussing "unprecedented expansion of judicial power" by ultimately asking federal courts to "take the extraordinary step of reallocating power and influence between political parties").

Such broadened application of the VRA contradicts the statute's intent to eliminate racially discriminatory structures (*see* S. Rep. No. 97-417 at 54, discussing a jurisdiction's ability to end Section 5 coverage), since *expanding* claims to a coalition of multiple races is potentially unlimited in time or scope. There will always be, in any location, races that do not form the majority of the population. Permitting different racial minority groups to ban together to challenge the majority population under the VRA vastly oversteps the VRA's intended purpose—which is to ensure that a minority group can participate in the political process in the same way that the majority group does.

This logical conclusion is evident in Senate Report references to a single race of VRA plaintiffs (e.g., the plaintiff group is referenced in terms of a single minority, as opposed to in plural terms). In fact, one of the few instances in which the Senate Report explicitly references racial groups that the amended Section 2 would affect speaks in terms of "or" not "and" in providing a remedy. In cataloging how the amendment would undo *Mobile v. Bolden*,[12] the Senate Report explains that an intent requirement "asks the wrong question," since VRA claims challenge electoral systems that operate "today to *exclude blacks or Hispanics* from a fair chance to participate . . . ." S. Rep. No. 97-417 at 36. The Report, which serves as the seminal

[12] *Mobile v. Bolden*, 446 U.S. 55 (1980), *superseded by statute as stated in Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984).

document courts have turned to for interpreting the 1982 amendments to Section 2, nowhere references the concept of a multiracial, or Black-Hispanic, fusion claim.

The House Report on the 1982 amendments likewise mentions racial groups discretely, giving no indication of intent to lump different minority voting groups together to permit a cause of action under the amended Section 2. Like the Senate Report, it primarily discusses black voters, but when it mentions other groups, it does so distinctly:

> The Committee recognizes that there has been much progress in increasing registration and voting rates for minorities since the passage of the Voting Rights Act of 1965; its sometimes dramatic successes demonstrates most clearly that it has been the most effective tool for protecting voting rights. Prior to 1965, the percentage of black registered voters in the now covered states was 29 percent; registration for whites stood at 73 percent. Today, in many of the states covered by the Act, more than half the eligible black citizens of voting age are registered, and in some states the number is even higher. Likewise, in Texas, registration among Hispanics has increased by two-thirds.

H.R. Rep. No. 97-227 at 7 (1981). The Report is replete with many more examples of discussing minority voter groups separately, providing distinct examples of black, Hispanic, Native American, and other groups' situations under the VRA's provisions. *See id*. at 14-20.

Had Congress, in its 1982 reformulation of the VRA, intended to permit coalition claims, it would have done so expressly, but it did not. Had it meant to apply a single claim to different "races", it would have said so. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (citing *Will v. Michigan Dept. of State Police*,

491 U.S. 58, 65 (1989) and *U.S. v. Bass*, 404 U.S. 336, 404 U.S. 349 (1971) (in "traditionally sensitive areas" like statutes that affect "the federal balance," courts rely on the statute's clear or plain statements to assure "that the legislature has, in fact, faced, and intended to bring into issue, the critical matters involved in the judicial decision"). And as Judge Jones has explained, well-established legal analysis precludes acknowledgment of a coalition theory "because the text of the [VRA] does not support it. " *Clements*, 999 F.2d at 894 (Jones, J., concurring).

Applying a statute's plain statements acknowledges "that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory*, 501 U.S. at 461. Allowing *Gingles* I to be satisfied with no racial minority group able to constitute a majority in a proposed district would mark an impermissible intrusion into state powers over their own elections that the Elections Clause grants to them

C. The Circuits are split on this issue.

Congress made no reference to minority coalitions in the text of the VRA, and the Supreme Court has never decided whether these claims can be sustained under Section 2. *See, e.g.*, *Growe*, 507 U.S. at 41 (declining to rule on the validity of coalition claims); *Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009) (declining to address "coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice"); *Perry v. Perez*, 565 U.S. 388, 398-99

(2012) (creating a coalition district is likely not necessary to comply with VRA Section 5). Circuit Courts of Appeal have split on the question, and have either: (1) explicitly accepted coalition claims, (2) assumed their validity, or (3) expressly rejected them.

In *Growe*, the Court renewed prior holdings that states have the primary duty to apportion their state and congressional districts, not federal courts. *Growe*, 507 U.S. at 34. But Justice Scalia's opinion is no ringing endorsement of coalition claims. As he explained,

> . . . even if we make the dubious assumption that the minority voters were "geographically compact," there was quite obviously a higher-than-usual need for the second of the *Gingles* showings. Assuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential.

Id. at 41. Similar to *Growe*, the Ninth Circuit has held, in a coalition claim of Black and Hispanic voters, that the plaintiffs failed to establish cohesion (without discussing whether coalition claims are permitted under the VRA). *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir 1992).

In the late 1980s and early 1990s, this Court decided that minority coalition claims were permitted under the VRA.[13] This determination was not reached without dissent, as Judge Higginbotham's dissents in *LULAC v. Midland ISD*, 812 F.2d 1494 (5th Cir. 1987) (Higginbotham, J., dissenting), *vacated on reh.*, 829 F.2d 546 (5th Cir. 1987) and in *Campos v. City of Baytown, Tex.*, 849 F.2d 943, 945 (5th Cir. 1988) (per curiam) (Higginbotham, J., dissenting from denial of reh. en banc), and Judge Jones' concurring opinion in *Clements*, 999 F.2d at 894, reveal.

As Judge Higginbotham stated in his dissent from the denial of rehearing in *Campos*, the question to be answered is whether "Congress intended to *protect* [] coalitions" rather than whether the VRA prohibits them. *Campos*, 849 F.2d at 945 (Higginbotham, J. dissenting on denial of rehearing, joined by five other circuit judges). No such Congressional intent can be deduced. *Id.* Furthermore, the notion "that a group composed of [different minorities] is itself a protected minority" "stretch[es] the concept of cohesiveness" beyond its intended bounds to include political alliances, undermining Section 2's effectiveness. *See id*. That is, assuming that a coalition "is itself a protected minority is an unwarranted extension of congressional intent." *Id*.

[13] *See Clements*, 999 F.2d at 864; *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (per curiam).

Analyses from sister circuits also address a lack of Congressional support or Supreme Court authority permitting coalition claims.

The Sixth Circuit has rejected the validity of coalition claims under Section 2. *Nixon v. Kent County*, 76 F.3d 1381, 1387 (6th Cir. 1996). The *Nixon* court relied on the "clear, unambiguous language" of Section 2 and the legislative record concluding that minority coalitions were not contemplated by Congress. *Id.* at 1386. If Congress had intended to extend protection to coalition groups, it would have invoked protected "classes of citizens" instead of a (singular) protected "class of citizens" identified under the Act. *Id.* at 1386-87. Because Section 2 "reveals no word or phrase which reasonably supports combining separately protected minorities," the Sixth Circuit concluded that coalition claims are not cognizable. *Id.* at 1387. It expressly disagreed with *Campos* as an "incomplete [and] incorrect analysis." *Id.* at 1388, 1390-92 (noting the difficulties of drawing district lines for minority coalitions, and that permitting coalition claims would effectively eliminate the first *Gingles* precondition).

Since that time, other circuit courts have either held the VRA does not protect minority coalitions, or have indicated strong concerns with such holding. *See Hall v. Virginia*, 385 F.3d 421, 431-32 (4th Cir. 2004); *Nixon*, 76 F.3d at 1392-93 (6th Circuit, 1996 opinion); *Frank v. Forest County*, 336 F.3d 570, 575-76 (7th Cir. 2003). As the Fourth Circuit explained in *Hall*, permitting multiracial coalitions to

bring VRA claims would transform the statute from a source of minority protection to an advantage for *political* coalitions, and a redistricting plan that prevents political coalitions among racial or ethnic groups "does not result in vote dilution 'on account of race' in violation of Section 2." *Hall*, 385 F.3d at 431. In *Frank*, which involved an Indian tribe's vote dilution claim brought with Black voters challenging a single-member municipal voting district, the Seventh Circuit acknowledged the circuit split, observed the "problematic character" of coalition claims, but avoided ruling on the issue and, instead, rejected the claim based on a lack of evidence that the two groups had a mutual interest in county governance. *See Frank*, 336 F.3d at 575.

The Second and Eleventh Circuits accept coalition claims. *See Pope v. Cnty of Albany*, 687 F3d 565 (2nd Cir 2012) (allowing the claims after briefly acknowledging the Circuit split and stating that the Supreme Court has not ruled on this issue); *Citizens of Hardee Cty. v. Hardee Cty. Bd. of Comm'rs*, 906 F2d 524, 526 (11th Cir. 1990) (permitting coalition claims if political cohesion is established). But even as Judge Keith's dissent recounts in *Nixon*, the VRA "does not indicate whether a coalition of African Americans and Hispanic-Americans may constitute a *single* 'class of citizens'" under the VRA. *Nixon*, 76 F.3d at 1394 (Keith, J., dissenting). He recounts the history of the VRA, including its protection of language minority groups, and goes on to state that Congress was aware of at least one

coalition claim in the 1970s, adding that the Attorney General argues that Section 2 applies to coalition claims. *Id*. at 1394-97.

But courts will not defer to DOJ interpretations "raising serious constitutional questions, such as where the Department proposes to create an obligation to engage in race-based redistricting." *Miller v. Johnson*, 515 U.S. 900, 922 (1995). And if Congress was aware of a coalition claim in the 1970s and did not amend the VRA's language to expressly acknowledge or permit such claims, courts cannot substitute their judgment for Congress to write in such coverage.

Nor is the VRA's protection of language minority groups, or those groups' efforts to overcome the effects of discrimination, an indication that the VRA permits a coalition of minority groups to present a coalition claim. Rather, the legislative history's comparison of discrimination faced by language minority citizens with that experienced by Black citizens is an explanation about why the VRA's protections apply to language minority voters. It is an unfounded leap to take the acknowledgment of a need for protection of Hispanic voters, and transform that need into holding that the VRA allows these different groups to ban together to present a joint claim under the VRA—especially where none is expressly permitted by the statute.

As Judge Jones has explained, the VRA first protected Black voters, then was expanded to reach language minorities—separately identifying them as persons of

Spanish Heritage, American Indians, Asian Americans, and Alaskan natives. *See Clements*, 999 F.2d at 894 (Jones, J., concurring). That the VRA separately identified these groups shows that Congress "considered members of each group and the group itself to possess homogenous characteristics" and "[b]y negative inference," *did not* indicate that these groups "might overlap with any of the others" or with Black voters. *Id*. The VRA also discusses the protection of a "class of citizens" and "a protected class"—had Congress meant to expand VRA coverage to "classes" comprised of minority coalitions, it would have done so explicitly. *See id*.

D. More recent United States Supreme Court cases indicate that allowing coalition VRA claims is improper.

Though the United States Supreme Court has not yet ruled on this issue, it has cited *Hall* favorably. *Bartlett*, 556 U.S. at 14-15. *Bartlett* involved crossover districts, where minority voters make up less than a majority but whom "minority voters might be able to persuade . . . to cross over and join with them" (arguably an "effective minority district"). *Id*. at 14.[14] The Court ruled that crossover districts contradict the VRA's mandate, because the VRA requires proof that minorities "have less opportunity than other members of the electorate to . . . elect representatives of their choice." *Id*. (quotation omitted). Where a minority group

[14] *Bartlett* resulted in a 5-4 judgment, with the Court's opinion written by Justice Kennedy (joined by Chief Justice Roberts and Justice Alito), a concurring opinion from Justice Thomas (joined by Justice Scalia), and Justices Breyer, Ginsburg, Stevens, and Souter, dissenting. Justice Thomas' concurrence reiterates his position that Section 2 of the VRA does not permit any vote dilution claim, and his continued opposition to *Gingles*. *Bartlett*, 556 U.S. at 26 (Thomas, J., dissenting).

forms less than a majority, it "standing alone ha[s] no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength." *Id*. The Court explained that a minority group could "join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidate." *Id*. Where one minority group cannot elect a candidate on its own "without assistance from others," the Court quoted *Hall* favorably, stating that such a "VRA claim would give minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance.'" *Id*. at 14-15 (quoting *Hall*, 385 F.3d at 431 and *Voinovich*, 507 U.S. at 154 (minorities in crossover districts "could not dictate electoral outcomes independently")).

Clearly, *Bartlett* rejects the argument that minority groups have special protection under the VRA to form *political* coalitions. *Id*. at 15 ("[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground") (quoting *De Grandy*, 512 U.S. at 1020). As noted there, "African-Americans . . . have the opportunity to join other voters - *including other racial minorities*, or whites or both - to reach a majority and elect their preferred candidate." *Id*. at 14 (emphasis added). Simply stated, the VRA "does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." *Id*. at 15.

The VRA cannot "place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id*. at 17 (stating courts "would be directed to make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term"). That is precisely what Appellees asked at trial:

- How have Hispanic Galveston County voters turned out to support the same candidate as Black Galveston County voters in the past?
- How reliable a prediction could be determined for future elections?
- What candidates have Black and Latino voters supported together, and will those trends continue?
- Were past voting trends based on incumbency, and did that depend on race?
- What are the turnout rates among white and minority voters, and will that continue into the future?

See id. at 17-18. These questions invite speculation, and impermissibly force courts, ill equipped, into the decisionmaking based on political judgments. *Id*. (cautioning that courts "must be most cautious before" requiring "courts to make inquiries based on racial classifications and race-based predictions"). To permit the type of crossover district urged in *Bartlett* "raise[d] serious constitutional questions." *Id*.

The same problems with a crossover district are present with a coalition minority district, and more. There is no line as to how many minority groups could join to form a VRA claim—beyond a Black and Hispanic coalition, plaintiffs could raise any combination or number of minority voter groups. Such claims would

almost certainly constitute *political*, rather than minority, coalitions. And, whether different groups in a minority coalition join together on the basis of shared political ideology, rather than common discriminatory practices, largely goes untested.

As *Allen v. Milligan* observed, reapportionment "is primarily the duty and responsibility of the State[s]," not the federal courts. *Allen v. Milligan*, 599 U.S. 1, 29 (2023) ("*Milligan*"). Section 2 limits judicial action to "instances of intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate." *Id*. (cleaned up).

Section 2 does not require, or allow, that a minority group's political strength be maximized. There is no right to proportional representation, or even a guarantee that redistricting "come as near as possible" to proportional representation—that argument is "clearly foreclose[d]'" under Supreme Court cases—Plaintiffs' claims do not rise to the level of invoking this Court's power. *See Rucho*, 139 S. Ct. at 2499. And as Judge Jones explained in her *Clements* concurrence, the 1982 amendments show "Congress clearly walked a fine line" in its work to "codify the results test for vote dilution claims while expressly prohibiting proportional representation for minority groups." *Clements*, 999 F.2d at 896 (Jones, J. concurring). A results-based VRA claim will therefore sometimes fail because a minority will lack sufficient population to create a majority single-member district. *Id*. However, "opportunistic minority coalitions" can circumvent this numerosity requirement to seek a remedy

prohibited under the VRA, which is "possibly unconstitutional"—court-mandated proportional representation. *Id*.

As this Court has discussed, minority groups are "not constitutionally entitled to an apportionment structure designed to maximize its political advantage" and have "no federal right to be represented in legislative bodies in proportion to their numbers in the general population." *Panior v. Iberville Par. Sch. Bd.*, 536 F.2d 101, 104 (5th Cir. 1976) (internal quotations omitted). Appellees' request for a majority-coalition district attempts to circumvent the Supreme Court's clear prohibition against maximizing political power.

The Supreme Court has not ruled on this question. *See, e.g.*, *Growe*, 507 U.S. at 41 (declining to rule on the validity of coalition claims writ large); *Bartlett*, 556 U.S. at 13-14 (declining to address "coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice"); *Perry*, 565 U.S. 398-99 (no basis for lower court to create a minority coalition). The question is ripe for Supreme Court review. Under the rationale in *Bartlett* and in other circuit court opinions, the VRA does not protect minority coalitions.

Section 2 affords minorities a right to equal opportunity to elect "representatives of their choice," which is different than a right to elect representatives of their choice. 52 U.S.C. 10301(b). Section 2 does not confer on minority groups the right to elect their ideal candidate; that is a right no one in the

political system enjoys. *See De Grandy*, 512 U.S. at 1020 ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground").

Crossover districts would also cause "serious tension" with the *Gingles* III inquiry into white bloc voting, and could force courts to "reformulate" the entire *Gingles* threshold test. *Bartlett*, 556 U.S. at 16. With crossover district claims, courts would have to "make predictions or adopt premises that even experienced polling analysts and political experts could not assess with certainty, particularly over the long term." *Id*. at 17. Those judicial inquiries—such as what percentage of white voters supported minority-preferred candidates in the past, how reliable will crossover votes be in the future, what types of candidates have pulled both white and minority support and will that trend continue, how did incumbency affect voting, and whether those trends depended on race—"are speculative" and the answers to these questions "would prove elusive." *Id*. *Bartlett* explained that the VRA does not create a requirement to draw election districts based on these types of inquiries. *Id*. These inquiries go well beyond typical fact-finding entrusted to federal district courts, and enters into "highly political judgments" which courts are "inherently ill-equipped" to make. *Id*. The Court explained that the invitation to permit crossover districts under Section 2 raised "serious constitutional questions" that are only heightened when one considers that Section 2 applies nationwide, to every

jurisdiction that draws election districts, and every type of election. *Id*. at 17-18. It cautioned:

> There is an underlying principle of fundamental importance: We must be most cautious before interpreting a statute to require courts to make inquiries based on racial classifications and race-based predictions.

Id. Instead, an objective, numerical test is much less fraught: "Do minorities make up more than 50% of the voting-age population in the relevant geographic area?" *Id*. This same advice applies here—rather than trudging through the deep waters of whether a coalition of minority voters form a community of interest, or whether they will *continue* to comprise a coalition in the future (for example, will Hispanic voters continue along a trend of voting for more Republican candidates, while Black voters continue to support Democrats), or how incumbency or candidate Spanish surnames affect voter cohesion. Instead, a simple test of whether a single minority group makes up more than 50% of a particular area is what the VRA envisioned, and what *Gingles* tests.

II. *Gingles* I compactness is not met.

The purpose of the first *Gingles* precondition is to "establish that the minority has the potential to elect a representative of its own choice in some single-member district." *Milligan*, 599 U.S. at 18. It asks whether the minority group is sufficiently numerous, as measured by CVAP. *Id*.; *Campos*, 113 F.3d at 548. The first precondition also asks whether the proposed district is geographically compact,

meaning whether it is reasonably configured. *Milligan*, 599 U.S. at 18. A district is reasonably configured when it complies with traditional redistricting criteria (*id*.), such as contiguity, compactness, and when it encompasses a community of interest as measured by common socioeconomic factors.

The Court further explained:

> Beyond geography, plaintiffs must also show that putting the minority population into one district is consistent with traditional districting principles such as maintaining communities of interest and traditional boundaries…Thus, combining discrete communities of interest—with differences in socio-economic status, education, employment, health, and other characteristics"—is impermissible.

Robinson v. Ardoin, 37 F.4th 208, 218 (5th Cir. 2022) (per curiam).

A. One coalition minority group is concentrated in the center of the County and the other is evenly dispersed throughout the County.

The Supreme Court's recent opinion in *Allen v. Milligan* reinforces the rule that the VRA is not a tool to force proportional representation—because, "as residential segregation decreases—as it has "sharply" done since the 1970s—satisfying traditional districting criteria such as the compactness requirement "becomes more difficult." *Milligan*, 599 U.S. at 28-29. The district court found that while the Black community is primarily in the center of the County, "the Latino community is evenly dispersed throughout" the County. ROA.15912 ¶73. But this Court recently stated that *Gingles* I "relates to the compactness of the minority population in the proposed district, not the proposed district itself." *Robinson*, 37

F.4th at 218. Because the two populations are not in the same area of the County, and one of the coalition groups is "evenly dispersed throughout" the County (ROA.15912 ¶73), the district court's findings that illustrative plans are compact amount to clear error.[15]

B. Compactness cannot be assumed based on race, and cannot be established on this record.

It cannot be assumed merely "from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls." *LULAC I*, 548 U.S. at 433. For that reason, illustrative plans that "lump[] together" minority populations "separated by considerable distance," *Sensley v. Albritton*, 385 F.3d 591, 598 (5th Cir. 2004), or "combin[e] 'discrete communities of interest'" that differ "'in socio-economic status, education, employment, health, and other characteristics'" cannot satisfy the first *Gingles* precondition. *Robinson*, 37 F.4th at 218 (quoting *LULAC I*, 548 U.S. at 432). But the Coalition Claimants' experts largely did just that—despite testimony from witnesses who actually live in

[15] Even though the Hispanic population is twice that of the Black population in the County, and even factoring CVAP numbers into the analysis, each of the Coalition Claimants' proposed plans place a higher percentage of Black CVAP in their illustrative plans, than Hispanic CVAP. ROA.23907 (DX-290). The emphasis on Black CVAP and Black communities in La Marque and on Galveston Island, over Hispanic CVAP and Hispanic communities, is reminiscent of Mr. Compian's criticism of the 2011 settlement map required by the DOJ: "The plan undervalues Latinos." DX 26. He explains the settlement map "and absolutely does not recognize the growth of the Latino population in this County," called the DOJ's attention "only" to "African American percentages" "repugnant," and stated that "our Latino congregations and organizations are beginning to believe that the DOJ places a greater value on the voting rights of African Americans." JX 8.

the County showing the differences in the minority communities there. As Lucille McGaskey testified, there are primarily two Black communities—one in Galveston and another in Texas City/La Marque; the Hispanic community is "all over the place." ROA.16281-16282. As Appellee Leon Phillips testified, he lives on the Island and he does not know much about the mainland population. ROA.24129, 24139-24140 (DX-310 at 93:16-18, 103:20-104:8. Even Coalition Claimant expert Cooper testified there is a "large disparity" between the Texas City and League City communities and it "makes no sense" to consider them one unit "because the two places are totally different. ROA.16841, ROA.16848.

The district court concluded that "the plaintiffs do not need to consider specific communities of interest when drawing illustrative maps to satisfy the first *Gingles* precondition." ROA..16009 ¶371. This was an error of law, and its findings based on this erroneous statement are clearly wrong.

The court stated broadly that the illustrative plans were reasonably compact. The district court found that the Coalition Claimants' experts testified that Map 1, and that their illustrative plans, meet *Gingles* I compactness. ROA.15913 ¶76-77.

Black and Latino CVAP has to be joined to create a majority-minority district. ROA.15912 ¶75. For traditional redistricting criteria, the Court found that Mr. Cooper's plan 1 was a least-change map, and that "Precinct 3 is reasonably compact given the [C]ounty's complex geography." ROA.15915 ¶83-84. The court similarly

stated the experts testified that the remaining illustrative plans were "reasonably compact" but made no findings or explanations relating to these conclusory statements. ROA.15915-15917 ¶85-88 (Cooper), ROA.15917-15918 ¶89-90 (Fairfax), ROA.15918 ¶93 (Rush), 18ROA.15920 ¶98. Rush's illustrative plans are the only ones the district court stated keep together communities of interest, though there is no explanation for that statement in the court's findings. ROA.15918 ¶94. The Court also stated that Black and Latino residents share similar socio-economic struggles. ROA.15921-15922 ¶104.

Plaintiffs' expert Anthony Fairfax did not look to the issue of whether a community of interest was contained within his proposed map. ROA.17207. Nor did Dr. Rush. *Id*. 59:14-22. The Plaintiffs fail to establish adequate geographic, historic, or other interests beyond politics or socioeconomic status to join Black and Hispanic voters. The clearest evidence that these separate communities do not form a community of interest are the disparate locations of the Black and Hispanic communities within the County. Even though the Hispanic population is currently twice the size of the Black population, and even factoring CVAP numbers into the analysis, the illustrative plans place a higher percentage of Black CVAP in their illustrative plans, than Hispanic CVAP. ROA.23907 (DX-290).

The emphasis on Black CVAP and Black communities in La Marque and on Galveston Island, over Hispanic CVAP and Hispanic communities, is reminiscent

of Appellee Compian's criticisms of the settlement map required by the DOJ—including that it "undervalues Latinos." ROA.20304 (DX-26); JX-8 at 1 (Record Excerpt 7).

While the illustrative plans may fit enough people into a precinct to elect a Democrat, as Justice Kennedy explained in *LULAC I*, the effectiveness of an opportunity district does not mean courts can fail to account for compactness. *LULAC I,* 548 U.S. at 441 (Texas' decision "to break apart a Latino opportunity district to protect the incumbent" and create a new "district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest," violated Section 2—even if the new district is "more effective" that does not cure the district court's failure to "account[] for the detrimental consequences of its compactness problems). "[T]here is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first Gingles condition contemplates." *LULAC I*, 548 U.S. at 433. This is "because the right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" *Id.* at 437 (citation omitted).

III. The district court failed to give credence to primary elections, and erred by failing to consider whether reasons other than race, such as politics, causes white bloc voting in Galveston County.

This Court reviews legal conclusions de novo, and reviews a district court's findings for clear error. *Robinson*, 37 F.4th at 216. Findings are "clearly erroneous where, after reviewing the entire record," the Court is "'left with the definite and firm conviction' that the district court erred." *Id*. (quotation omitted). A district court's "[f]indings that rest upon erroneous views of the law must be set aside." *Clements*, 999 F.2d at 877.

A. *Gingles* II cohesion was not met, and the relevance of primary elections was erroneously discounted.

The second *Gingles* precondition shows whether a candidate of the minority voters' choice "would in fact be elected." *Milligan,* 599 U.S. at 19. In reviewing *Gingles* II, especially in the context of a coalition claim, the Coalition Claimants erred by discounting the importance of nonpartisan elections, such as primaries; the limited review of primary elections they did provide was flawed. The district court therefore erred in finding cohesion, and in adopting the analysis of the Coalition Claimants' experts.

"[T]he relative legal significance of general and primary elections remains undecided" in the Fifth Circuit. *LULAC v. Abbott*, 601 F. Supp. 3d 147, 169 n.10 (W.D. Tex. May 4, 2023) ("*Abbott* I"). Whether primary elections are relevant in a cohesion analysis is a question for the Court, not witnesses. *Id*. at 165.

It is beyond dispute that when voter behavior changes (and coalition voters diverge) when partisanship is removed from an election, that something other than race is driving voter behavior. *See Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y.) (per curiam) (three-judge court) (concluding that divergence in primaries defeats a showing of political cohesion), *aff'd*, 543 U.S. 997 (2004) (mem.); *see, e.g., Tex. v. U.S.*, 887 F. Supp. 2d 133, 174 (D.D.C. 2012) (three-judge court), *vacated on other grounds*, 570 U.S. 928 (2013) (concluding "shared voting preferences at the primary level would be powerful evidence of a working coalition, but it is not needed to prove cohesion").

Primary election results show, particularly in a coalition case, whether different minority groups select the same candidates. *See Abbott* I, 601 F. Supp. 3d at 169 n.10. In *Abbott* I, the three-judge panel agreed with Dr. Alford's view that primary elections "are relevant to analyzing divisions within political coalitions and that partisan affiliation is the main driver of voter behavior in general elections." *Id*. at 166. The court recounted Dr. Alford's testimony that general elections show Black and Hispanic voter cohesion, since both prefer Democrats over Republicans. *Id*. But that same cohesion was absent in primary elections. *Id*. While Dr. Alford analyzed only one primary, and the panel would have had more confidence in his findings "if he had conducted a more thorough analysis," the court still found his analysis of that primary "relevant and helpful," as it showed that Hispanic voters favored the

Hispanic candidate, while Black and Anglo voters preferred the Anglo candidate. *Id.* at 166-67. Here, Dr. Alford served as the County's *Gingles* II and III expert, and he analyzed 24 primary elections, finding only 2 where Black and Latino voters supported the same candidate with 75% or more of their vote. ROA.23984, ROA.15575-15578 ¶¶432, 436-439. Using a lower threshold for cohesion (60%) promoted by one of Appellees' experts, Dr. Trounstine, Dr. Alford found only a one-third cohesion rate, which is not cohesion, as a matter of law. *See Abbott I*, 601 F. Supp. 3d at 166.

Experts for Appellees had inconsistent approaches with respect to primary elections. Dr. Trounstine analyzed 14 primary elections, and found 12 of those were racially polarized. ROA.17265:3-14. Dr. Trounstine acknowledged that of all Democratic Party primary elections analyzed, only one election had African Americans and Latinos agreeing on their candidate of choice, i.e., the Commissioner of General Land Office election. ROA.17288. In a series of six Democratic Primary elections for County Commissioner that Dr. Trounstine analyzed in her report, there was only one election where Latino and African American voters were cohesive for the same candidate. ROA.17291.

Appellee expert Dr. Trounstine's regression analysis found only one out of eight primary elections in Galveston County showed cohesion between African Americans and Latinos. ROA.19331. Similarly, in one out of six endogenous

primary elections are African Americans and Latinos cohesive for the same candidate. ROA.19332. Perhaps because of this data, Dr. Barreto did not conduct racially polarized voting analyses for Democratic primaries, and he did not consider nonpartisan general elections. ROA.16924:16-22. He testified he did not believe primary elections were relevant. ROA.16930, ROA.16934-16935. But elsewhere he testified it is important to look at primary elections to determine whether race or partisanship is at play in voter decision-making. ROA.16932:9-19. His only explanation for not looking at the primary election data in this case was because there was not enough minority voter participation in the Republican primaries to make reliable observations. ROA.16896:11-24.

While the district court found Dr. Alford's testimony, analyses, and opinions credible (ROA.15906 ¶55), and "[r]ecognizing Dr. Alford's concerns about the reliability of the wide confidence intervals" between Black and Latino voting patterns evident in primary elections, the court still found cohesion. ROA.15926 ¶117.

For example, of the 29 elections analyzed by Coalition Claimant expert Dr. Barreto, Latino confidence intervals spanned between 20 points and 34.4 points, and became even broader when adjusted for Spanish surname turnout—to consistently 40 points wide. ROA.15563-15564 ¶383. Dr. Barreto agreed his analysis did not show Hispanic voter cohesion levels "consistently above 75%" (ROA.16891:5-22)

and acknowledged his analysis revealed wider confidence intervals for Latino voter cohesion than for Black or White voters. ROA.16948:13-16949:1. Appellee expert Dr. Oskooii "also had broad confidence intervals for Latino voters." ROA.15926 ¶117.[16] The court, however, found primary elections had "limited probative value in determining inter-group cohesion." ROA.15928 ¶122.

In *Clements*, the Court held the district court clearly erred when it ignored elections involving Hispanic and white candidates. *Clements*, 999 F.2d at 864-65.

B. *Gingles* III white bloc voting does not exist to cancel out a minority group's voting power if the reason driving voting patterns is political, not racial.

The third precondition, which is "focused on racially polarized voting," asks whether Anglo voters "thwart[] a distinctive minority vote at least plausibly on account of race." *Milligan*, 599 U.S. at 19. If polarized voting is on account of politics, as opposed to race, *Gingles* III is not met. Here, the district court found that

[16] Dr. Oskooii similarly limited his primary-election analysis to ten Democratic Party primary elections with two candidates, without considering Republican Party or multi-candidate primary elections. ROA.17372, 17375, 17382. Dr. Oskooii also excluded Anglo voters from his cohesion analysis in ten primary elections, where Anglo voters voted in alignment with Hispanic and Black voters. ROA.17391-17392, 17394, 22949 (DX 217).

"partisanship undoubtedly motivates voting behaviors in Galveston County . . . ." ROA.15936 ¶147.[17]

The Supreme Court has warned against conflating discrimination on the basis of party affiliation with discrimination on the basis of race. *See Brnovich*, 141 S. Ct. at 2349 ("[P]artisan motives are not the same as racial motives"). The third *Gingles* precondition requires proof "that the challenged districting thwarts a distinctive minority vote at least plausibly on account of race.'" *Milligan*, 599 U.S. at 19 (quoting *Growe*, 507 U.S. at 40).

"The burden of proof on the plaintiffs (who attack the district) is a 'demanding one.'" *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (finding lack of evidence to support district court findings, particularly that the legislative motive was predominantly racial, not political). In terms of burden-shifting, a plaintiff must "present evidence of racial bias operating in the electoral system by proving up the *Gingles* factors" and only then will a defendant be burdened with rebutting that evidence "by showing that no such bias exists in the relevant voting community." *Teague v. Attala Cnty*, 92 F.3d 283, 290 (5th Cir. 1996). "When the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns" among white and minority voters, Section 2's "rigorous

[17] Unlike for the second precondition, *Gingles* III looks to the *challenged* map. *LULAC v. Abbott*, No. 1:21-CV-1038-RP-JES-JVB, 2022 WL 4545754, at *5 (W.D. Tex. Sept. 28, 2022) .

protections" do not apply because the VRA only protects against "defeats experienced by voters 'on account of race or color.'" *Clements*, 999 F.2d 850. Courts must look "into the circumstances underlying unfavorable election returns" to determine whether results are discriminatory, or just losses at the polls. *Id*. The trial court below did exactly what this Court admonished in *Clements*:

> In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat.

Id. (citing, inter alia, *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *Gingles*, 478 U.S. at 83 (majority of Justices rejecting "interest-group politics rather than a rule hedging against racial discrimination" (White, J., concurring)). That is, "it is not mere suffering at the polls but discrimination in the polity with which the Constitution is concerned." *Id*. at 853 (quoting *Shaw v. Reno*, 509 U.S. 630, 661 (1993) ("*Shaw* I") (White, J., dissenting)). The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if Black voters are likely to favor that party's candidates." *Id.* at 854.

The failure to address political causation here is particularly troubling, considering Appellees' repeated contention that the candidate of choice will be a Democrat (*see* ROA.16197, 16367-16368, 16548-16549), and the district court's finding that the Coalition Claimants contend that race and politics are "inextricably

intertwined." ROA.15935, 15937 ¶¶144, 149 (finding that in general elections in Galveston County, Anglos overwhelmingly vote Republican and Blacks overwhelmingly vote Democrat, while Latinos "very often support the same candidates").

The district court erred by failing to "undertake the additional inquiry into the reasons for" electoral losses (*see Clements*, 999 F.2d at 854-54), and instead found Anglo bloc voting exists in the County, that Anglos comprise a supermajority, are mostly Republican, and that Blacks and Latinos are mostly Democrats. ROA.15935 ¶144. While plaintiffs contended "that race and politics are 'inextricably intertwined,'" Appellants argued "that partisan affiliation is the "main driver of voter behavior." *Id*. The court did not account for Commissioner Dr. Armstrong (a Black Republican) as an outlier for that proposition, and it scuttled over the past and present reality of the number of minority elected officials in Galveston County, at all levels of government, both past and present. ROA.15624-15625. For example Appellant Dwight Sullivan is Hispanic and a Republican, and serves as the elected County Clerk. ROA.15625. The prior District Clerk, LaTonia Wilson, is Black and a Democrat, whose term ended in 2012 (after the County turned "red" in 2010). ROA.15627, ROA.16371 (Judge Pope testifying County first had a majority of Republicans in 2010 and before then it was run by Democrats). Judge Patricia Grady

is Hispanic, and is a Republican who serves as the elected Judge for the 212th Judicial District Court. ROA.15625.

The Coalition Claimants did not attempt to eliminate, as a causative factor, the impact of politics on voting patterns. There is no stop to courts allowing minority coalitions that gather for political reasons to jointly raise a VRA claim and, as the Coalition Claimants did here, ignore primary or other nonpartisan data to form the foregone conclusion that in general elections minorities typically vote for the Democrat. Courts permitting minority coalitions facilitate claims by various groups, some of which absolutely share political ideologies and which sometimes is the only reason for cohesive voting. For this reason alone—that Appellees' experts utterly failed to rule out any potential causes for polarized voting—Appellees failed to carry their burden or to defeat the County's evidence and affirmative defense that politics, rather than race, explains the reasons for Galveston County voting.

IV. The district court erred in holding that the lack of a temporal limitation in Section 2 of the VRA is constitutional.

Because Section 2 requires governments to consider race in making redistricting decisions (*Milligan*, 599 U.S. at 30), tension exists with the Equal Protection Clause. Governmental actions that demand exception to equal protection must survive strict scrutiny. *Students for Fair Admissions, Inc. v. Pre. and Fellows of Harvard College,* 600 U.S. 181, 206 (2023) ("*Students*"). Redistricting plans are no exception. *Wis. Legisl.*, 595 U.S. at 401-03 (plans that "sort voters on the basis of

race 'are by their very nature odious' and "cannot be upheld unless they are narrowly tailored to achieving a compelling state interest"). In considering the constitutionality of using racial classifications in government decisions, courts first ask whether the use of race furthers a compelling governmental interest. *Students*, 600 U.S. at 206-07. If so, courts can then look at whether the government's use of race is narrowly tailored, meaning necessary, to achieve that goal. *Id*. at 207. However, this does not end the inquiry.

In addition to surviving strict scrutiny, recent Supreme Court cases remind that because Section 2 demands race-conscious decisions, oversight and temporal guideposts are also required. *See Grutter v. Bollinger*, 539 U.S. 306, 341-342 (2003) ("all governmental use of race must have a logical endpoint"); *Milligan*, 599 U.S. at 88 (Thomas, J., dissenting) (citing *City of Boerne v. Flores*, 521 U.S. 507, 533 (1997), *superseded by statute as stated in Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004)); *see also Shelby Cnty.*, 570 U.S. at 553 (striking Congress' outdated coverage formula built on "decades-old data relevant to decades-old problems, rather than current data reflecting current needs").

The Supreme Court has consistently held that strict scrutiny applies to laws requiring race-based decision-making. *Milligan*, 599 U.S. at 54 (Thomas, J., dissenting) (citing *Miller*, 515 U.S. at 911). Redistricting plans that "sort voters on the basis of race 'are by their very nature odious' and "cannot be upheld unless they

are narrowly tailored to achieving a compelling state interest." *Wis. Legisl.*, 595 U.S. at 401-03 (quoting *Shaw I*, 509 U.S. at 643 and *Miller*, 515 U.S. at 904). In considering the constitutionality of using racial classifications in governmental decisions, Courts first ask whether the use of race furthers a compelling governmental interest. *Students,* 600 U.S. at 206-07. If so, Courts can then look at whether the government's use of race is narrowly tailored, meaning necessary, to achieve that goal. *Id.* at 207. However, this does not end the inquiry.

"A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Grutter v. Bollinger*, 539 U.S. 306, at 341 (2003). Racial classifications of voters are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("*Shaw II*"). Importantly, "all 'race-based governmental action' should 'remain subject to continuing oversight to assure that it will work the least harm possible to other innocent persons. . . .'" *Students,* 600 U.S. at 212 (citing *Grutter*, 539 U.S. at 341). This is because "there are serious problems of justice connected with the idea of racial preference itself . . . and all 'racial classifications, however compelling their goals' [are] dangerous." *Id*. (internal citations omitted and cleaned up). As a result, "all governmental use of race must have a logical endpoint." *Grutter*, 539 U.S. at 342. In race-conscious admissions programs, this takes the form

of "durational limits," "sunset provisions," or "logical end points" such that the "deviation from the norm of equal treatment [is] 'a temporary matter.'" *Students,* 600 U.S. at 212. These same oversight and temporal limitations apply to Section 2 race-based requirements. *Milligan*, 599 U.S. at 88 (Thomas, J., dissenting);[18] *see also Shelby County v. Holder*, 570 U.S. 529, 553 (2013) (striking Congress' outdated coverage formula built on "decades-old data relevant to decades-old problems, rather than current data reflecting current needs").

Concerns over lack of oversight and temporal limits are validated in this case. Indeed, the absence of a temporal limit facilitated Section 2's unconstitutional application here, where, for example, the district court's examples of discrimination draw from the "Antebellum era" while conceding it is "easier to vote now than it has ever been in Galveston County." ROA.15940-15942 ¶¶160-164. Without limitations, Section 2 should not be sustained.

The Supreme Court's trends support limits. *Shaw II* squarely holds that a government's desire to alleviate the effects of societal discrimination cannot form a compelling interest. *Shaw II*, 517 U.S. at 909-910. Instead, a compelling interest must involve specific and "identified discrimination." *Id*. at 909. In disallowing

[18] In Thomas' dissent, he discusses Congress' ability to adopt preventive measures "when there is reason to believe" many laws affected by the statute could be unconstitutional, "particularly when it employs 'termination dates, geographic restrictions, or egregious predicates' that 'tend to ensure Congress' means are proportionate to ends legitimate." *Milligan*, 599 U.S. at 88 (Thomas, J., dissenting) (citing *City of Boerne*, 521 U.S. at 533 and *City of Rome v. U.S.*, 446 U.S. 156, 181-82 (1980)).

generalized justifications arising from past discrimination, *Shaw II* further confirms that temporal limits are necessary. Then, in *Shelby County*, the Supreme Court struck down Section 5's application to only certain states based on an outdated coverage formula. *Shelby Cnty.*, 570 U.S. at 553. The Supreme Court expressly held in *Students* that, to survive strict scrutiny review, racial classifications in college admissions "must be a temporary matter" with "reasonable durational limits." *Students*, 600 U.S. at 212. That holding arises from the same "equal protection principle" at issue in this case. *Id*.

To be sure, the Supreme Court has long recognized the need to avoid interpretations of § 2 that "'would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.'" *Milligan*, 599 U.S. at 78 (Thomas, J., dissenting) (citing *Bartlett,* 556 U.S. at 21 (plurality op.) (quoting *LULAC I*, 548 U.S. at 446 (Kennedy, J.)). "To justify a statute tending toward the proportional allocation of political power by race throughout the Nation, it cannot be enough that a court can recite some indefinite quantum of discrimination in the relevant jurisdiction." *Id*. at 1541 (Thomas, J., dissenting). "If it were, courts 'could uphold [race-based] remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.'" *Id*. (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276 (1986)).

In this case, Section 2 cannot survive strict scrutiny because it lacks any temporal limitations. On its face, Section 2 contains no termination mechanism and no end date; it applies permanently. Today, more than 50 years distant, its original justifications can only be described as generalized past discrimination, which is not sufficient to survive strict scrutiny under the most basic reading of *Shaw II*. 517 U.S. at 909.

CONCLUSION AND PRAYER

This appeal presents serious questions of law that are of national importance. The County asks that the Court reverse the district court's final order, and render a take-nothing judgment against Appellees.

Respectfully Submitted,

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Dated: October 26 , 2023

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