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

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

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

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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.

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e. Joe A. Compian

f. Leon Phillips

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h. Molly Linda Zhu

i. Richard Mancino

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u. Stanton Jones

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n. Zachary Newkirk

o. Daniel David Hu

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/ Angie Olalde*

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is set for May 24, 2024 before the en banc Court.

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 within one day of the district court's October 13, 2023 final order. 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).

ISSUES PRESENTED ON REHEARING

This appeal asks whether distinct minority groups may consolidate to raise a Section 2 Voting Rights Act ("VRA") claim as a coalition, when those groups cannot form majority-minority districts on their own.

Appellants raised four issues in their opening Brief. Appellees provide additional briefing focusing on issues I and III herein:

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

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.

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 Enacted Plan").

I. Supplemental Statement of Relevant Facts

A full statement of facts is recounted in Appellants'[1] Opening Brief. Dkt. 47-1. Following is an abbreviated and supplemental statement relevant to the en banc Court's review.

A. The only way Appellees can prevail is through a coalition claim.

The parties agree, and the district court found, that the Black and Hispanic communities' citizen-age voting populations ("CVAP") in Galveston County are too small, individually, to form a majority-minority precinct.[2] ROA.15912 ¶74. The only way Appellees can pursue a Section 2 claim here is by forming a coalition of Black and Hispanic voters.

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[1] Appellants are Galveston County, Texas, the Galveston County Commissioners Court, Galveston County Judge Mark Henry, and Galveston County Clerk Dwight Sullivan (collectively, the "County" or "Appellants").

Terry Petteway, Constable Derrick Rose, and the Hon. Penny Pope are referred to collectively as "Petteway" or the "Petteway Appellees." 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 are referred to collectively as the "NAACP" or the "NAACP Appellees." The United States of America is referred to herein as the "DOJ." Appellees are also collectively referred to as Coalition Claimants.

[2] In many voting rights cases, the division in question is a district; Texas counties are divided into four precincts. Tex. Const. art. V, § 18(b).

B. Since 2010, Galveston County has been majority Republican, and has a history of electing minority candidates along party lines.

Politics explain why Republican candidates in Galveston County often run unopposed in the general elections. The County has historically been mostly Anglo and, since 2010, mostly Republican. ROA.15935, 15937 ¶¶144, 149. Before 2010, the County was run by Democrats (ROA.16371-72), and there was only one Republican Commissioner on the Commissioners Court between 1998 and 2010. Dkt. 204-6 ¶13 (Jt. Stip. Facts).

Currently, there are two Black commissioners on the County's Commissioners Court: Commissioner Stephen Holmes, a Democrat who represents Precinct 3, and Commissioner Dr. Robin Armstrong, a Republican who represents Precinct 4. The Coalition Claimants have steadfastly refused to acknowledge Dr. Armstrong, who was elected by the County's Republican Party chairs over several Anglo candidates to be the Precinct 4 candidate in May 2022, and was elected to office in November 2022—running unopposed. ROA.8168 ¶14 (stipulated facts).

The County has, and has had, several Hispanic and Black elected officials. ROA.15624-29.[3] Many of the individual Appellee-Plaintiffs are, or have been,

[3] Constable Michael Montez, who was dismissed as a plaintiff before this appeal, is Hispanic. ROA.19549. Hispanic elected officials who are also Republicans include Dwight Sullivan (who has served as County Clerk since 2010 and has been re-elected three times, ROA.19527), District Judge Patricia Grady (who has served since 2014, ROA.19547), and Judge Michelle Slaughter

elected officials: Judge Penny Pope, who is Black, served as Justice of the Peace for 26 years before retiring. ROA.16368-69. She beat a white Democrat opponent, Darrell Apffel, in 2014. ROA.16369-70.[4] Apffel now serves as a County Commissioner, after running as a Republican. Plaintiff Joe Compian, who is Hispanic, was elected to serve as a councilmember in La Marque. ROA.17866. He agreed there are several other members of the minority community who have been appointed to government positions, board positions, or membership positions. ROA.17894-96.

C. The percentage of Hispanic residents in Galveston County is more than twice that of Black residents.

Between 2010 and 2020, the County's population increased by almost 60,000 people—Hispanics increased by 3% to 25% of the total population, and the Black population decreased from 14% to 12% of the total population. ROA.23908 (DX-290).[5]

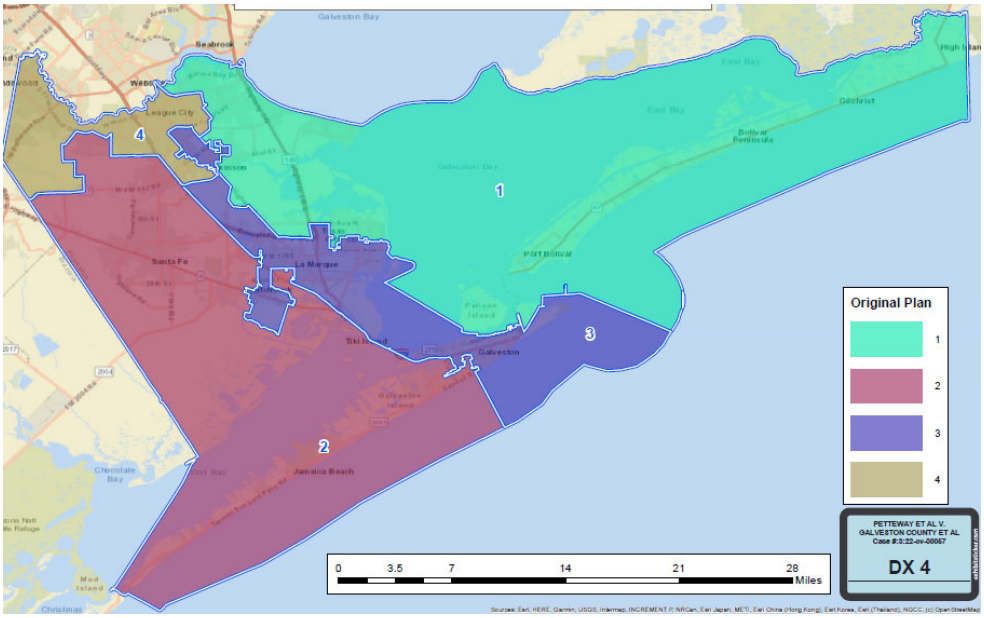
(who presided over the 405th Judicial District Court from 2013 until 2018, when she was elected to the Texas Criminal Court of Appeals, ROA.19547-48).

[4] Constable Derreck Rose, who is Black, has served Precinct 3 since 2006. ROA.16177; ROA.16208. Constable Terry Petteway, who is Black, served as Constable for Precinct 2 from 1992 until 2017. ROA.16351, ROA.19549. LaTonia Wilson, a Black Democrat, served for six years as the County's District Court Clerk; she was appointed, and then elected in 2008 after running against Anglo opponent John Ford. ROA.16351-52.

[5] A breakdown of the County's population by race and ethnicity between 1990 and 2020 appears in the record at ROA.35183 (PX-384).

And while the Hispanic population is evenly dispersed throughout the County,[6] the County's Black residents live in more concentrated areas around the center of the County, roughly along Interstate 45, stretching from the north of the County on the mainland to the Seawall on Galveston Island. ROA.23915-23916 (DX-290).

This is reflected in the shape of Commissioner Precinct 3 from the prior redistricting cycle, which was approved by the DOJ:



ROA.20189 (DX 4) (the Prior Plan or 2011 Map).

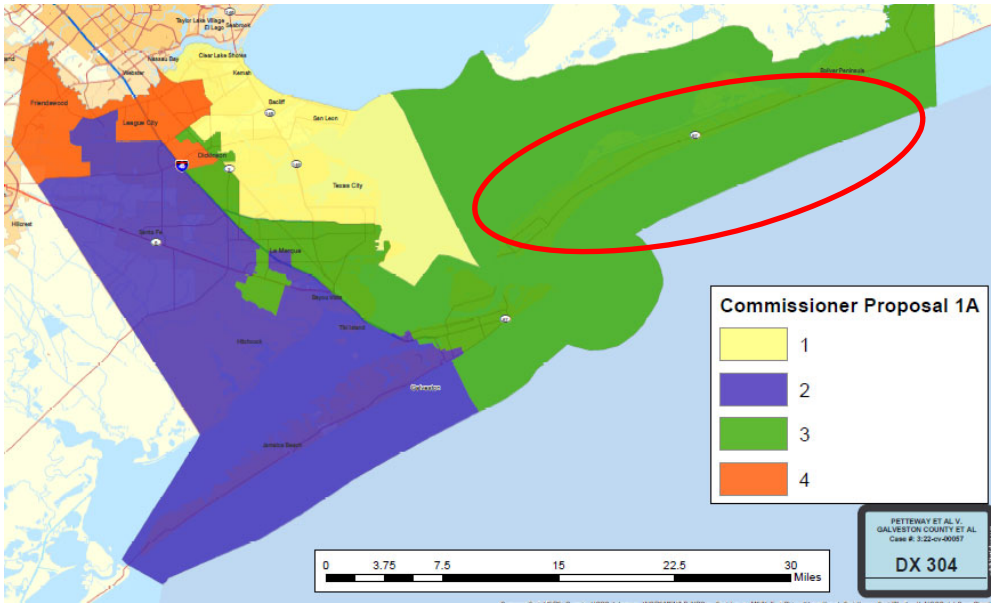
Under preclearance, Precinct 3 was drawn to include as many Black voters as possible; those boundaries meant Black voters would dominate over Hispanic voters in the Democratic primary. ROA.18508:12-ROA.18509:16. In 2021, without

[6] ROA.15953 at ¶197; ROA.15912 ¶73; ROA.19061:13-19064:15.

preclearance, there was no VRA excuse or protection for drawing such a precinct. ROA.18509:17-24.

D. Fighting over a sparsely populated peninsula: the DOJ has favored Black voters over Hispanic voters in Galveston County for over a decade.

In 2011, the County's Commissioners Court submitted the following map for preclearance to the DOJ:



ROA.23983 (DX-304) (red circle around Bolivar Peninsula[7] added). Within one month, the County was sued—before the DOJ even responded to the County's preclearance submission. *See Petteway v. Henry*, 738 F.3d 132, 134-35 (5th Cir. 2013). In March 2012, the DOJ objected, arguing that by including Bolivar in

[7] Bolivar Peninsula is a relatively sparsely populated area with just two voting precincts; one witness for the Plaintiffs agreed that Bolivar "is basically a sandbar with a road down the middle of it." ROA.16275-76.

Precinct 3, the Black share of the electorate was reduced, and the Hispanic and Anglo populations were increased. *Id*. at 136; ROA.24367 (JX-6).

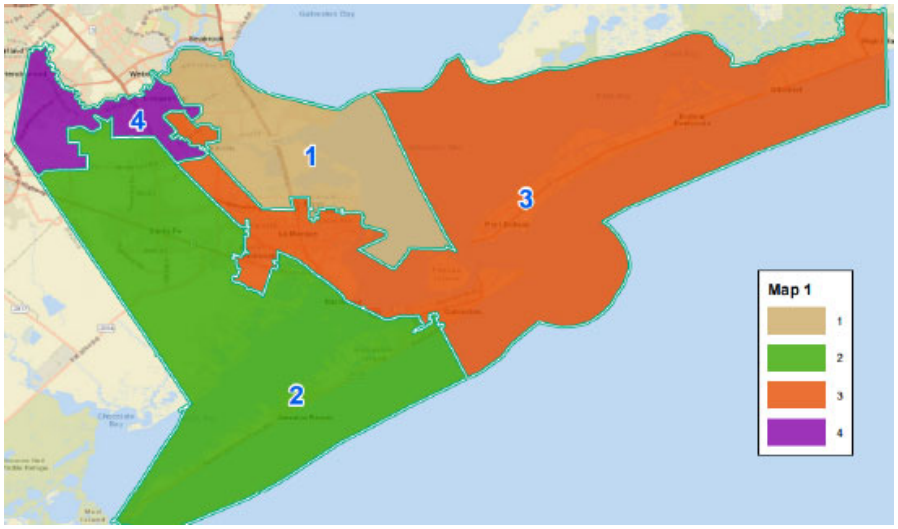
Soon after objecting, the DOJ negotiated and precleared a new plan with the County. ROA.20189 (DX 4, depicted at page 4, above). The main difference between the submitted map and the precleared map from the 2011 redistricting cycle is that the DOJ demanded the removal of Bolivar Peninsula from Precinct 3 (ROA.18508-09), which decreased the Hispanic population and increased the Black population within the precinct. ROA.18699-18700.

Galveston County's Latino community was outraged. One of the Coalition Claimants, Joe Compian, even wrote to the DOJ on their behalf to make their position clear that the precleared map "absolutely does not recognize the growth of the Latino population in this County" and that the community found it repugnant "that the DOJ places a greater value on the voting rights of African Americans." ROA.24372 (JX-8). Mr. Compian also argued the map "undervalues Latinos." ROA.20304 (DX 26). Despite these past criticisms and the growth in the Hispanic population percentage and reduction in the Black population percentage since 2010, the Coalition Claimants here contend the Prior Plan's boundaries should have largely been maintained in the 2021 redistricting cycle.

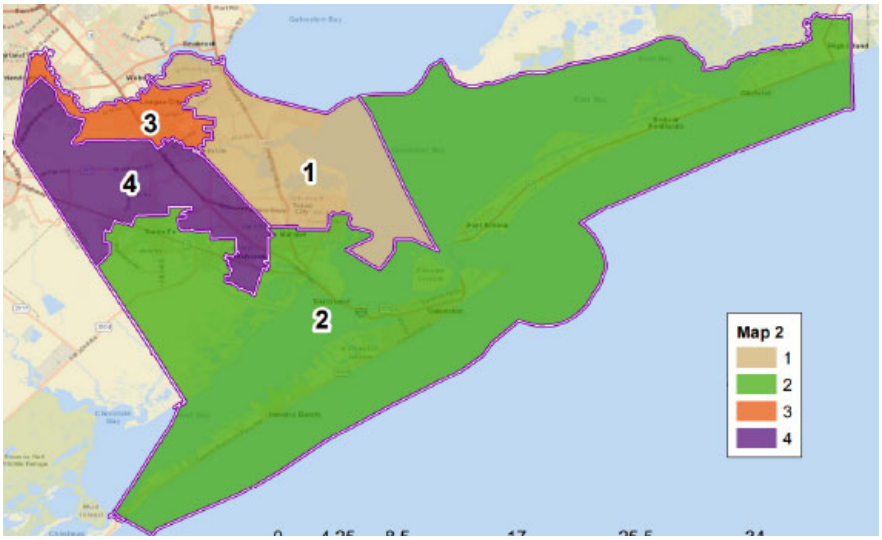
E. In 2021, the County considered two map proposals, and local Democrats told the community that neither map favored them, even though Map 1 would have continued to perform for Black and other minority voters.

The Commissioners Court considered two map proposals in 2021:

The "Map 1" Proposal (a "least changes" plan)



The "Map 2" Proposal (2021 Enacted Plan)



ROA.24458-59 (JX-29).

Precinct 3 under Map 1 is 30.86% Black and 24.28% Latino by CVAP. ROA.15912 at ¶75, ROA.16008 ¶370. Under Map 1, the incumbent Democrat for Precinct 3 (Commissioner Stephen Holmes) was likely to be reelected. ROA.20554 (DX-144) (demographer hired by counsel for Commissioner Holmes noting, before the Commissioners Court voted on a map, that Map 1's Precinct 3 "appears to continue to perform for Black and other minority voters").

Considering the County's changed political makeup and that of Precinct 3 under Map 2 (the 2021 Enacted Plan), Commissioner Holmes was not likely to be reelected as a Democrat under Map 2. *See* ROA.15935, 15937, 16008-09 ¶¶144, 149, 370. Despite knowing the performance of Map 1, Commissioner Holmes did not publicly support it, or tell his constituents that Map 1 appeared able to re-elect him. ROA.18199 (Holmes), ROA.18315, 18317 (Henry), ROA.18952 (Giusti), ROA.19188 (Apffel), ROA.16279-81 (McGaskey), ROA.16379 (Pope), ROA.16604-05 (Courville). Residents of Precinct 3 testified at trial that they did not know Commissioner Holmes could have been elected under Map 1. ROA.16279-81 (McGaskey), 16379 (Pope), 16604-05 (Courville).[8]

[8] Despite the district court's finding to the contrary, Commissioner Holmes was not excluded from the redistricting process—his *own notes and testimony* demonstrate his involvement. ROA.24430 (JX-23). While there is no direct explanation in the record for why Commissioner Holmes did not support Map 1, it is clear that Appellees criticized the map that the County submitted for preclearance in 2011, and objected to including Bolivar Peninsula in Precinct 3. ROA.270-71 ¶¶34-37. Map 1 resembles that map, and includes Bolivar Peninsula in Precinct 3. *Compare* ROA.23983 (DX-304) *with* ROA.24458 (JX-29).

Local Democrats provided the message to the community that *neither* map was in their favor. ROA.20500 (DX-125). The community was given talking points, including that they should object to Bolivar being included in Precinct 3 (ROA.20493-94) (DX-120). Members of the community who provided comments about Map 1 did object to Bolivar's inclusion in Precinct 3. ROA.20526 (DX-137); ROA.18313, 18317; ROA.19188; ROA.21103-21104 (discussing online public comments).

II. Procedural History

The Coalition Claimants sued under the VRA, and the Petteway and NAACP groups also raised Constitutional claims.[9] After a bench trial, the trial court issued findings and conclusions ruling for Appellees on the VRA results claim. ROA.15881. Judge Brown determined he need not make findings on intentional discrimination or racial gerrymandering, and declined to reach any remaining constitutional claims. ROA.16032-34. Only the County appealed. On appeal, each of the Coalition Claimants have only sought affirmance. *See* Dkt. 67 at 54 (DOJ Br.); Dkt. 69 at 53 (NAACP Br.); Dkt. 72 at 54 (Petteway Br.).

This Court stayed enforcement of the district court's final order (Dkt. 40, Dkt. 122), which expired on November 28, 2023 when the panel's opinion was vacated

[9] Similarly, to the north of Galveston in Harris County, Republicans sued over the Democrat majority's redistricting efforts, which limited the Republican members of that commissioners court. *See* ROA.15962 ¶230.

and the case was set for en banc review. Dkts. 137, 145. On November 30, 2023, the district court entered an order that adopted Map 1 as the court's remedial plan, and Appellants sought and obtained an injunction of that order pending the outcome of the en banc Court's review. *See* Dkts. 152, 171-1.

III. Rulings Presented for Review

The County filed its appeal 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

The VRA has never permitted two distinct minority groups, neither of which is sufficiently numerous on its own, to aggregate to pursue a VRA claim as a minority coalition. The VRA protects members of *a class of citizens* who have less opportunity than other members of the electorate to participate in the political process, and to elect representatives of their choice. While over thirty years ago this Court allowed minority coalition claims under Section 2, prior opinions did not appear to fully analyze the VRA's text, purpose and legislative history and were constantly met with well-reasoned contrary judicial dissents and concurrences. Since then, the United States Supreme Court has consistently rejected sub-majority Section 2 challenges and has made clear that political power cannot be apportioned by federal courts.

Coalition claims are a step too far into the political sphere. Further, as districts around the nation become more geographically, culturally and socio-economically integrated, coalition claims prolong focus on race, when the VRA was meant to foster a transformation to a society that is no longer so fixated.

Other harms that flow from permitting coalition claims. When distinct minority groups aggregate into one coalition, one protected class within that group will necessarily be more powerful, numerous, or better organized than others. The needs and interests of the remaining coalition members (who are *also* members of a

protected class under the VRA) will therefore not always be heard or prioritized *within* the coalition group. For that very reason, a coalition cannot guarantee that it will meet the needs of *members of a protected class*—lose their unique identities and are subsumed into a broader, larger coalition, in the name of *political* advancement. And while coalitions may claim current agreement, they cannot proclaim lasting unity—there are too many differences when distinct groups are joined, including where people live, what they value most, who they prefer as a candidate in primary elections, and even what language they speak. They are, therefore, political creatures for whom the VRA does not provide a claim.

Appellants ask that the Court hold that minority coalition claims are not actionable under the VRA, and reverse. Appellants do not abandon the relief requested in their Opening Brief.[10]

[10] At oral argument, Appellants stated they are not arguing that Map 1 is not compact. Regardless, it is Appellees' burden to establish any *Gingles* preconditions, including compactness—a necessary component of which is sufficient population to form a majority-minority district.

ARGUMENT

I. This Court has previously permitted minority coalition claims, treating them as a question of fact rather than determining whether Section 2 meant to protect an aggregation of distinct minority groups.

A. Minority coalitions "abrade[] the requisite moorings to race or national origin"[11] required by the VRA.

The Court first addressed coalition claims in a now-vacated panel opinion that drew a strong dissent from Judge Higginbotham. Judge Higginbotham warned that, among other things, combining two distinct minority groups to raise a single Section 2 coalition claim raises a political, not racial, challenge.

In March of 1987, a panel of this Court reviewed a VRA vote dilution case brought by Black and Mexican-American plaintiffs. *LULAC v. Midland ISD*, 812 F.2d 1494, 1495 (5th Cir. 1987), *vacated on reh.*, 829 F.2d 546 (5th Cir. 1987). Later vacated by the full court on state law grounds, the two-member majority allowed a Black-and-Hispanic coalition group to be treated as a single minority group for purposes of determining *Gingles*[12] voter cohesion. *Id*. at 1499-1500. It acknowledged that there "is no doubt that there are many cultural and ethnic differences between the two groups," but concluded that "the prejudice of the majority is not narrowly focused" and that "coalition formation will often prove to

[11] *LULAC v. LULACMidland ISD*, 812 F.2d 1494, 1507 (5th Cir. 1987), *vacated on reh.*, 829 F.2d 546 (5th Cir. 1987) (Higginbotham, J., dissenting).

[12] *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*").

be mutually beneficial to the two groups." *Id*. The opinion went further, rejecting a survey finding that the two groups are "politically distinct," and stating that "[a]llegiances against a common enemy by nations or groups otherwise dissimilar are frequent in both history and in current events." *Id*. at 1501. The same is true of politics, as Judge Higginbotham explained,

> [i]f a minority group lacks a common race or ethnicity, cohesion must rely principally on shared values, socio-economic factors, and coalition formation, making the group almost indistinguishable from political minorities as opposed to racial minorities.

Id. at 1504 (Higginbotham, J., dissenting).

Even if the en banc Court had not vacated the opinion on state law grounds, the panel majority's rationale could not survive even the most cursory review. For example, the panel's reliance on a chart showing "equity of representation" on the school board is a clear nod to the very proportional representation the 1982 amendments *do not* guarantee. *Id*. at 1501. Judge Higginbotham squarely addressed one problem with running a coalition claim through an evidentiary *Gingles* analysis, which is that it stretches the cohesion test in a way that *expands* Section 2's mission, "increas[ing] the risk of frustrating congressional will" to create districts "unacceptably close to proportional representation." *Id*. at 1504-07. Troubles arise when an aggregated "political group lack[s] the cementing and predictive force of common race or national origin." *Id*. at 1504. By removing Section 2's tie to a single class's race or national origin, courts transform their review to "judicial

superintendence of election outcomes in the name of protecting those less able to fend for themselves in the political arena, when inability is indistinguished from political loss." *Id* at 1507. That is, using *Gingles* to test a coalition's cohesion attenuates the test to begin with by replacing statutory authority with "a judicial sense that [a] result is more 'just' than the challenged plans." *Id*. This is an undue intrusion upon a state's duty—and right—to reapportion districts. *Id*. at 1507-08.

Years later, Judge Jones voiced similar concerns. Evaluating a coalition's claim on whether *Gingles* preconditions are satisfied does not fit the VRA's text. And when coalition claims are tested on appeal, they consistently fail *Gingles* requirements. *See LULAC v. Clements*, 999 F.2d 831, 897 (5th Cir. 1993) (en banc) ("*Clements*") (Jones, J., concurring) (collecting cases where coalition claims have been repeatedly rejected on factual grounds). In the recent *Allen* opinion, the Supreme Court acknowledged that since residential segregation has sharply decreased since the 1970s, it is more difficult to satisfy traditional districting criteria like compactness. *Allen v. Milligan*, 599 U.S. 1, 28-29 (2023). In fact, the Court recounted that, since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits. *Id*. at 29; *see also Abbott v. Perez*, 138 S. Ct. 2305, 2331 (2018) (no § 2 violation where "the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino . . . districts that exist under the current plan").

This result underscores the intense factual complexity of coalition claims, and supports the conclusion that the VRA does not contemplate or authorize such claims. *Id*. (explaining that "sociological literature also demonstrates 'social distance' between minority groups that seems inconsistent with widespread coalition minority political cohesion").

B. By concluding that the VRA does not prohibit coalition claims, *Campos* asked the wrong question—the appropriate inquiry is whether a coalition is itself a protected minority under the VRA.

The year after *Midland ISD*, another panel reviewed a Section 2 challenge to an at-large election brought by Black and Hispanic citizens. *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988) (per curiam) ("*Campos* I"). The district court in *Campos* treated the distinct minority groups as one, and ordered Baytown's at-large proposal be redrawn.[13] *Campos* I reviewed that judgment for sufficient evidence. It briefly reasoned that "nothing in the law" prevents a coalition claim, and if a coalition can satisfy *Gingles*, then it should be permitted. *Id*. at 1243-44. The full court denied rehearing. *Campos v. City of Baytown, Tex.*, 849 F.2d 943, 944 (5th Cir. 1988) (per curiam) ("*Campos* II").

Judge Higginbotham dissented from this denial: the Court should not accept *Campos* I's simple statement that no explicit prohibition on coalition claims

[13] Incidentally, evidence in that case showed single member districts with Hispanics making up greater than 50% of the population were possible. *Campos* I, 840 F.2d at 1244.

somehow permits coalition claims if they survive the *Gingles* gamut. *Id*. at 944-45 (Higginbotham, J., dissenting).[14] Where *Campos* I "cite[d] no authority and offer[red] no reasoning to support its fiat," Judge Higginbotham pointed out that it asked the wrong question altogether. *Id*. at 945. It is not whether Congress intended to prohibit coalitions that is in question, but whether Congress intended to protect them. *Id*. (a "statutory claim cannot find its support in the absence of prohibitions").

This is an important distinction. Reapportionment "'is primarily the duty and responsibility of the State[s],' not the federal courts." *Allen*, 599 U.S. at 29 (internal quotation omitted). Merely assuming that a group of two distinct minorities "is itself a protected minority is an unwarranted extension of congressional intent" and "stretch[es] the concept of cohesiveness" beyond its intended bounds to include political alliances, undermining Section 2's effectiveness. *Campos* II, 849 F.2d at 945 (Higginbotham, J., dissenting). Courts cannot "play" with a local government's structure and involve themselves in the legislative task of "channel[ing] political factions." *Id*. Instead, Congress should speak plainly when it takes such power away from the states. Neither the absence of a prohibition nor inferences of intent "gleaned from the statute" can support such a transfer of power. *Id*. Identifying the root of the claim as interest-group politics, Judge Higginbotham noted that the Court "again

[14] Judge Higginbotham's dissent was joined by five members of the Court, including Judge Jones. His concerns were also shared by the en banc Sixth Circuit, which held the VRA does not permit coalition claims. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1387 (6th Cir. 1996) (en banc).

confuse[d] a cohesive voting minority with protected minorities who sometimes share political agendas." *Id*. ("[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 is true in the present case, and the consequences identified by Judge Higginbotham are just as true today.[15]

C. *Clements* did not address coalition claims, though Judge Jones' concurring opinion provided several reasons why such claims are not authorized under Section 2.

The full Court, in *Clements*, held that a Black and Hispanic coalition, which challenged county-wide judicial elections, did not prove a VRA violation. *Clements*, 999 F.2d at 837. Judge Jones, in a concurring opinion joined by four colleagues, believed the coalition issue should have been discussed by the en banc Court. She defined the issue as "whether different racial or language minority groups may be permitted to aggregate their strength in order to pursue a Section 2 vote dilution claim." *Id*. at 894 (Jones, J., concurring). Judge Jones explained that Congress' decision not to authorize coalition claims under Section 2 cannot be "engrafted" by the courts. *Id*. The problem these claims present is that, while the VRA is meant to

[15] In 1989, the Court reviewed coalition challenges: *Overton*, brought by a Black and Hispanic coalition to challenge an at-large election system, where the Court affirmed based on the record evidence, and *Brewer*, brought by Blacks, Hispanics, and Asians which ultimately held the evidence did not establish *Gingles* cohesion. *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989) (per curiam); *Brewer v. Ham*, 876 F.2d 448, 453-54 (5th Cir. 1989).

level the playing field, coalition claims skirt that intent "to forcibly advance[] contrived interest-group coalitions . . . ." *Id*.

To avoid political coalitions that may not withstand the test of time and serve to improperly broaden the scope of VRA coverage, the statute's ordinary meaning must be followed—that is, courts must allow members of *a class* of minority voters to raise a challenge.

II. Amid a shifting circuit split and more recent United States Supreme Court cases, it is clear that coalitions of distinct minority classes are another form of sub-majority claim not protected under Section 2.

A. The United States Supreme Court has never held that coalitions are permissible under the VRA and, instead, has repeatedly rejected sub-majority and political alliance claims.

The Supreme Court has not ruled on whether coalition claims are permissible under Section 2. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 41 (1993) (declining to rule on the validity of coalition claims); *see also 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").

But the Court's analyses make clear that the VRA does not protect minority coalitions. In *Growe*, the Court renewed its prior holdings that states have the primary duty to apportion their state and congressional districts, not federal courts. *Growe*, 507 U.S. at 34. The Court assumed without deciding that a coalition could bring a claim, then dismissed the case because the coalition plaintiffs did not satisfy

the *Gingles* preconditions. *Id*. at 41. Justice Scalia wrote the Court's opinion, and expressed no ringing endorsement of coalition claims. Instead, he characterized the Court's assumption that the distinct ethnic and language minority groups were compact as "dubious," and warned that when there is "such an agglomerated political bloc," proof of cohesion is "all the more essential." *Id*.

In *Perry v. Perez*, the Court made clear that when a district court steps in to review a legislative redistricting plan, they cannot discount that plan or disregard "the policy judgments it reflects" when constructing an interim plan. *Perry v. Perez*, 565 U.S. 388, 394 (2012) (per curiam). This is because a court cannot "displac[e] legitimate state policy judgments with the court's own preferences." *Id*. And, in *Perry*, where the district court appeared to have intentionally drawn a "'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority," the Court held it had no basis for doing so. *Id*. at 398 (citing *Bartlett*, 556 U.S. at 1-15).

B. 2006: *LULAC v. Perry* rejected sub-majority influence districts.

Courts should avoid sub-majority theories which tend to "unnecessarily infuse race into virtually every redistricting raising serious constitutional questions." *LULAC v. Perry*, 548 U.S. 399, 446 (2006) ("*LULAC* I"). In *LULAC* I, Latino voters brought a vote-dilution claim, and the Court held that even though the presence of influence districts may be relevant under *Section 5* of the VRA, a Section 2 claim

concerns the *opportunity* to elect. If there is no ability or opportunity to elect, there is no Section 2 claim. *Id*. Therefore, states are not required to create an "influence" district, where a minority group cannot elect a candidate of their choice but otherwise plays an *influential* role in the electoral process. *Id*. This inability to meet basic Section 2 requirements is shared by Appellees here, who cannot elect a candidate of choice without joining population strength into an aggregate, coalition group.

C. 2009: *Bartlett* rejected sub-majority crossover districts.

Bartlett involved crossover districts, where minority voters make up less than a majority, but who "might be able to persuade" majority voters "to cross over and join with them" (arguably an "effective minority district"). *Bartlett*, 556 U.S. at 14.[16] The Court ruled that crossover districts contradict the VRA's mandate to prove that members of a minority group "have less opportunity than other members of the electorate to . . . elect representatives of their choice." *Id*. (quotation omitted). Where a minority group 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

[16] *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 continued opposition to *Gingles* and vote dilution claims. *Bartlett*, 556 U.S. at 26 (Thomas, J., dissenting).

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 the Fourth Circuit's opinion in *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 v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) and *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (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 ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground") (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). The Court noted that Black voters could "join other voters - *including other racial minorities*, or whites or both - to reach a majority and elect their preferred candidate," but the VRA does not force jurisdictions to draw election districts that "give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." *Id*. at 14-15 (emphasis added). Nor does it place courts "in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id*. at 17. Courts certainly are not tasked with predicting, or adopting premises "that even experienced polling analysts and political experts could not

assess with certainty, particularly over the long term." *Id*. 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*.

Coalition Claimants attempt to distinguish crossover claims from coalition claims. They contend *Bartlett* was concerned with crossover districts causing "serious tension" with the *Gingles* III inquiry into white bloc voting, and argue the same concerns are not present for a coalition of minority voters. *Bartlett*, 556 U.S. at 16.

But the same problems with a crossover district are present with a coalition district, and more. In asking the Court to recognize aggregated minority groups into one VRA claim, Appellees would have courts determine several uncertain political variables that were cautioned against in *Bartlett*. This includes whether coalition voters have turned out to support the same candidates in the past, whether they will continue to do so in the future, and whether any voting trends can be explained by factors such as incumbency. This is speculation the VRA never invited courts to perform. *Bartlett* explained there is no requirement to draw election districts based on speculative inquiries that go well beyond typical fact-finding entrusted to federal

district courts, and that courts need not enter into "highly political judgments," which they are "inherently ill-equipped" to make. *Id*. Additionally, 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 several combinations of minority voter groups. Such claims would almost certainly be politically based, rather than derive on account of race. And importantly, whether different groups in a minority coalition join together on the basis of shared political ideology, rather than common discriminatory practices, largely goes untested under *Gingles* and is likely unmeasurable by courts.

Crossover districts under Section 2 also raise "serious constitutional questions" that are only heightened when considering that Section 2 applies nationwide, to every jurisdiction that draws election districts, and every type of election. *Id*. at 17-18. *Bartlett* cautioned:

> [t]here 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. How coalition districts could even be implemented by jurisdictions across the country without giving rise to a myriad of VRA challenges is unclear, at best. Instead, an objective, numerical test is much less fraught: whether members of a minority group comprise more than 50% of the voting-age population in the relevant geographic area. *Id*. Rather than trudging through the deep waters of whether a

coalition of distinct minority groups form a community of interest, whether they will continue to serve as a coalition in the future (for example, whether Hispanic voters will vote for more Republican candidates in the upcoming years, diverging from Black voters' support for Democratic candidates), or how incumbency or candidate Spanish surnames affect voter cohesion, a simple test of whether a single, distinct minority group makes up a majority of a particular district is what the VRA envisioned, and what *Gingles* is meant to scrutinize. That question is easily answered here.

D. 2019: *Rucho* instructs that federal courts are not equipped to apportion political power.

Rucho involved "highly partisan" districting plans. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2487 (2019). The Court recognized that "[p]artisan gerrymandering is nothing new" and neither is "frustration with" partisan gerrymandering. *Id*. at 2494. But partisan gerrymandering claims are "difficult to adjudicate," basically because it is not illegal to "engage in constitutional political gerrymandering." *Id*. at 2497. And it is not possible for courts to adjudicate claims of "fairness" relating to the distribution of political power. *Id*. at 2499-2500.

Rucho explained that racial gerrymandering cases cannot "provide an appropriate standard for assessing partisan gerrymandering." *Id*. at 2502. These claims are not "subject to the same constitutional scrutiny" and, whereas partisan claims "ask for a fair share of political power and influence," racial gerrymandering

claims do not. *Id*. Racial gerrymandering claims "ask[] instead for the elimination of a racial classification, a partisan gerrymandering claim cannot ask for the elimination of partisanship." *Id.* at 2495-96. And the intent to secure partisan advantage is a permissible reason for drawing district boundaries, even if that intent predominates. *Id*. at 2503.

Similar to the concerns voiced in *Bartlett*, *Rucho* rejected a test that required "a far more nuanced prediction than simply who would prevail in future political contests" and would delve into whether sufficient margins would allow a representative to ignore constituents who support other political parties. *Id*. Rather,

> [e]xperience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time.

Id. While "[e]xcessive partisanship in districting leads to results that reasonably seem unjust," that "does not mean that the solution lies with the federal judiciary." *Id*. at 2506. *Rucho* therefore held that federal courts have no power to "reallocate political power" where there is no "plausible grant of authority in the Constitution" to do so, and "no legal standards to limit and direct their decisions." *Id*. at 2507.

Just as it is an "unprecedented expansion of judicial power" for courts to delve into the political fray, it is an improper use of Section 2 to gain political ground. *See e.g.*, *Clements*, 999 F.2d at 854 ("§ 2 is implicated only where Democrats lose because they are black, not where blacks lose because they are

Democrats"). And an aggregation of various minority groups—aggregated for the sole purpose of showing the coalition has the ability to elect a candidate of choice—delves too far into the apportionment of political power, rather than remedying vote dilution on account of race.

E. There is a circuit split on the question of coalition claims.

The Sixth Circuit has rejected the validity of coalition claims under Section 2. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1387 (6th Cir. 1996) (en banc). *Nixon* 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." *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 claims. *See Hall*,

385 F.3d at 431-32; *Frank v. Forest Cnty.*, 336 F.3d 570, 575-76 (7th Cir. 2003).

Defining crossover voters as persons outside a minority group who support the minority group's candidate in an election, the Fourth Circuit in *Hall* stated that a "'coalition' claim alleges that minorities can, in fact, elect a candidate of their choice with the support of crossover voters from other racial or ethnic groups." *Hall*, 385 F.3d at 425 n.6 & 428 n.11. The court explained that, "[f]undamentally, the plaintiffs contend that Section 2 authorizes a claim that an election law or practice dilutes the voting strength of a multiracial coalition." *Id*. at 426. Therefore, 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. This concern is similar to that voiced by the United States Supreme Court in *Rucho*, and *Bartlett* also cites *Hall*, agreeing that the VRA does not give minority voters the right to forge advantageous political alliance[s]." *See, e.g., Bartlett*, 556 U.S. at 14-15.

In *Frank*, which involved an vote dilution claim brought by an Indian tribe and Black voters, challenging a single-member municipal voting district, the Seventh Circuit acknowledged the circuit split, observed the "problematic character"

of coalition claims, but ended up rejecting the claim for lack of evidence that the two groups had a mutual interest in county governance. *See Frank*, 336 F.3d at 575.

The Eighth Circuit has recently gone even further by holding that only the Attorney General may bring Section 2 enforcement actions. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1209 (8th Cir. 2023) (petition for rehearing filed). Its discussion of the VRA's text and structure is relevant here, as well as its result of severely narrowing who may bring VRA claims. *Id*. 1207-08 (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). Implying a cause of action is something courts are reluctant to do, and *Arkansas State Conference* noted that the United States Supreme Court has been "increasingly reluctant" to do so in recent years. *Id*. at 1209. The court held that, where Section 2 only states what is unlawful, and Section 12 only gives the Attorney General the right to sue without mentioning private plaintiffs, the omission cannot have been accidental—and "silence is not golden for the plaintiffs." *Id*. at 1209-10. The court also explained that this does not cut off private recourse, as private plaintiffs may still bring Section 1983 cases. *Id*. at 1213. Refusing to accept the plaintiffs' argument that Section 3's reference to "an aggrieved person" must apply to Section 2 violations, the court concluded that Congress did not "decide[] to transform the enforcement of 'one of the most substantial' statutes in history by the subtlest of implications," or otherwise hide "the proverbial 'elephant in a mousehole.'" *Id*. at 1212-13.

By contrast, an older Ninth Circuit opinion 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). And the Second and Eleventh Circuits have previously accepted coalition claims, albeit over a decade ago. *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 Cnty. v. Hardee Cty. Bd. of Comm'rs*, 906 F2d 524, 526 (11th Cir. 1990) (permitting coalition claims if political cohesion is established).

Therefore, while a split among the circuits exists, reasoning in cases from the Supreme Court and other circuits do not support Appellees' position that coalition claims are somehow permitted by the VRA.

III. The Voting Rights Act does not permit coalition claims.

A. The VRA's text unambiguously applies to claims by members of *a class* of protected citizens, and does not support coalition claims.

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). When a statute's language is unambiguous, courts first find the ordinary meaning of its words "in its textual context" and then, "using established canons of construction," determine if any "clear indication" exists that

another "permissible meaning other than the ordinary one applies." *Chisom v. Roemer*, 501 U.S. 380, 404 (Scalia, J., dissenting). "If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning." *Id*. (collecting cases).

Section 2 of the VRA provides in full:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner 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 in contravention of the guarantees set forth in section 10303(f)(2)[17] of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by **members of a class of citizens protected by subsection (a)** of this section 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. The extent to which members of **a protected class** have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, 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.

52 U.S.C. § 10301 (emphasis added).

[17] That section provides: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because **he is a member of a language minority group**." 52 U.S.C. § 10303(f)(2) (emphasis added).

This language is plain and unambiguous, does not exist in a vacuum, and must be read in context with the language around it as well as with the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The VRA repeatedly refers to "*a class* of citizens," "*a protected* class," and "its members," all in the singular. 52 U.S.C. § 10301. One circumstance to consider in assessing a Section 2 claim is the extent to which members of "a protected class" have been elected. *Id*. All of this language points to the conclusion that the VRA does not allow distinct minority groups to aggregate to establish a Section 2 violation.

Other provisions support this conclusion. Language minority groups, protection for whom was added in the 1970s, are defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 52 U.S. Code § 10310(c)(3). These groups are separately referenced in an exhaustive list, and each corresponds to "a class of citizens" or "a protected class" as stated in Section 2. That the VRA separately identifies these groups shows 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. *See Clements*, 999 F.2d at 894 (Jones, J., concurring).

Members of a protected class must also have "less opportunity than other members of the electorate" to participate in the political process and to elect representatives. 52 U.S.C. § 10301(b). This requirement presupposes that a protected class (in the singular) has sufficient CVAP (and therefore sufficient opportunity) to elect a candidate of choice. Reading the VRA to protect coalitions would only read ambiguity and confusion into this language. "[M]embers of a class of citizens" (meaning each separate minority group within the coalition) must show they have less opportunity to elect than *other members of the electorate*—which necessarily includes other coalitional plaintiffs in a different minority group. If two distinct groups raise a claim together, and one of those groups has less opportunity than the other (as will almost certainly be the case—one group will be bigger or more organized or have more favorable districting than the other or others), the VRA's test under 52 U.S.C. § 10301(b) regarding "other members of the electorate" and members of "a protected class" would be rendered ambiguous, if not meaningless, and would pit distinct coalitional plaintiff groups against each other. These concerns frustrate, rather than further, the VRA's language and purpose.

Finally, the VRA expressly states that it does not create a right to proportionate representation. 52 U.S.C. § 10301(b); *see also Panior v. Iberville Par. Sch. Bd.*, 536 F.2d 101, 104 (5th Cir. 1976) (minority group is "not constitutionally entitled to an apportionment structure designed to maximize its political advantage,"

and has "no federal right" to proportional representation). This was a key negotiation of the 1982 Amendments to the VRA. Coalition claims work to evade this prohibition. *See Clements*, 999 F.2d at 895-96 (Jones, J., concurring). A "minority group will sometimes fail to merit a single member district solely because they lack the population . . . ." *Id*. at 895. That is, where the VRA protects equal opportunities, it does not prescribe proportional results. *See Washington v. Tensas Parish Sch. Bd.*, 819 F.2d 609, 611-12 (5th Cir. 1987) (holding minority group with three majority districts of seven was not entitled to fourth district to match its percentage of the population); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1161 (5th Cir. 1981) ("[e]ven as a remedial measure, court plans should not aim at proportional representation."); *Gonzalez v. City of Aurora, Ill.*, 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" but the VRA "does not require either outcome").

B. An ordinary-meaning review of the VRA's unambiguous language does not change under the Dictionary Act or through a broad construction of the VRA.

The Coalition Claimants cite to 1 U.S.C. § 1 in support of their argument that the VRA covers a coalition of multiple, distinct minority groups. That statute provides that a singular word will include the plural, but *not* if "the context indicates

otherwise." 1 U.S.C. § 1. Appellees' reliance on this statute fails at the outset because the context *does* indicate otherwise. For the reasons discussed above, a singular class is afforded protection, not plural or multiple classes of different minority groups. This general statute does not alter the specific language and context within Section 2.

Similarly, Appellees have cited *Chisom* in arguing that the Court should broadly construe Section 2 to add coalition claims when Congress did not explicitly do so. *Chisom* held that state judicial elections are covered by Section 2 after the 1982 amendments. *Chisom*, 501 U.S. at 399. State judicial elections were covered under the original statute, and the 1982 amendments did not change that outcome. *Id*. at 403-04. Minority coalition claims, however, were not a settled, permissible use of the VRA before the 1982 amendments. *See Nixon*, 76 F.3d at 1389. Including state judicial elections under Section 2 did not complicate the application of *Gingles* principles, and was not in tension with the VRA's warning against any right to proportional representation. *Chisom*, therefore, does not support Appellees' request to imply coverage for coalition claims when no such claims were permitted before the 1982 amendments.

As discussed above, the Eighth Circuit recently construed the VRA's plain text in holding that it does not create a private right of action. *Ark. State Conference NAACP*, 86 F.4th at 1209. The court explained that the Civil Rights Act of 1964

provided a person experiencing discrimination to bring a private claim. *Id*. Only a year later, the VRA did not provide such explicit instruction. Therefore, "[w]hen those details are missing, it is not [a court's] place to fill in the gaps, except when 'text and structure' require it." *Id*. (quoting *Sandoval*, 532 U.S. at 288). Here, the VRA does not protect aggregated groups of minority classes, and its text and structure do not require such claims.

Appellees have also argued that the statute's remedial purpose supports protection for aggregate plaintiff groups. Remedial or not, a broad or liberal construction cannot re-write a statute's text or insert terms or protections that Congress itself did not create. Nor can it be used to "engage in 'purposive' rather than textual interpretation." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 365 (Thomson/West 2012). Rather, a "liberal construction" means nothing more than a rejection of the "strict construction" of statutes in derogation of the common law, and an "insistence on fair meaning"—making a liberal construction canon "either incomprehensible or superfluous" today. *Id*. at 364-65. Because Section 2's language is plain and unambiguous, courts will not rely on general canons of construction to alter that plain language or write in additional protections that Congress did not. As Justice Scalia has warned, Section 2 "is not some all-purpose weapon for well-intentioned judges to wield as they

please in the battle against discrimination. It is a statute." *Chisom*, 501 U.S. at 404 (Scalia, J., dissenting).

C. Courts cannot discount state interests or basic principles of federalism.

Important principles of federalism do not disappear to permit an inferential broadening of statutory coverage.

On the same day that *Chisom* issued, the Supreme Court issued its opinion in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). While *Chisom* stated that the VRA should be broadly construed (which it supported, in part, by the 1982 amendments' expansion of Section 2 to allow discriminatory results claims), *Gregory* held that, unless it was clear a statute meant to exclude state judges, the Court would construe it to include them "since the contrary construction would cause the statute to intrude upon the structure of state government, establishing a federal qualification for state judicial office." *Chisom*, 501 U.S. at 411 (Scalia, J., dissenting) (citing *Gregory*, 501 U.S. 452). *Gregory* relied on the plain statement rule, a rule Justice Scalia noted was not discussed in *Chisom*, and one that applies when statutory language is ambiguous. *Id*. at 411-12; *see also Salinas v. U.S.*, 522 U.S. 52, 60 (1997) (explaining *Gregory* noted that the plain statement rule does not apply to an unambiguous statute and "does not warrant a departure from the statute's terms.").[18] Therefore, while

[18] Section 2 of the VRA is not ambiguous, so the question of whether the plain statement rule applies is a nonissue—and courts instead review the statute's plain *language*. *See Salinas v. U.S.*, 522 U.S. 52, 59 (1997) (where statute is unambiguous, legislative history and *Gregory*'s plain-

"[s]tatutes should be construed to avoid constitutional questions, [] this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature." *Id*. at 59-60 (quoting *Heckler v. Mathews*, 465 U.S. 728, 741-742 (1984)). Thus, the VRA cannot be broadly construed to write terms into the statute that are not there. To do so would contradict the Supreme Court's approach in interpreting Section 2, as courts should avoid sub-majority theories which tend to "unnecessarily infuse race into virtually every redistricting raising serious constitutional questions." *LULAC* I, 548 U.S. at 446.

The Eleventh Circuit also recently rejected plaintiffs' challenge to Georgia's statewide elections for public utility commissioners, and refused to accept plaintiffs' requested remedy of replacing the state's "chosen form of government" with "a completely different system" of single-member districts. *Rose v. Sec'y, State of Georgia*, 87 F.4th 469, 479 (11th Cir. 2023) (holding statewide elections do not constitute vote dilution under Section 2). This drastic request would thwart interests the state viewed as important, and therefore "strain[ed] both federalism and Section 2 to the breaking point." *Id*. Discussing federalism principles, the Court noted that while the VRA will "overcome state sovereignty in certain factual situations" courts

statement rule did not alter the Court's analysis); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 364-65 (Thomson/West 2012) (rather than liberally construe a remedial statute, "a fair reading is all that is required").

must always "remain mindful of state authority, which is a hallmark of American government." *Id*. at 480 (quoting *Clements*, 999 F.2d at 871).

IV. The Voting Rights Act's legislative history does not support coalition claims.

"The purpose of the [VRA] 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* I, 548 U.S. at 433-34 (citation omitted); *Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013) (VRA passed "to address entrenched racial discrimination in voting"). Not only were Section 2 protections created, but states with a history of discrimination were required to preclear changes to their voting laws. *Id*. at 537. Originally, the statute only protected Black voters. *Clements*, 999 F.2d at 894 (Jones, J., concurring); *see also Gingles*, 478 U.S. at 47 ("essence" of § 2 claim "is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters").

In 1975, the VRA was amended to include language minorities and, as discussed above, separately identified four different groups. *Id*. This indicates that the minority groups protected under the VRA do not overlap. *Id*. "The committee report for the 1975 amendments does not make any reference, implicit or explicit, to the issue of aggregation." *Nixon*, 76 F.3d at 1387 (citing S. Rep. No. 295, 94th Cong., 1st Sess. 1 (1975) U.S. Code Cong. & Admin. News 1975 p. 774). The VRA's

protection of language minority groups, or those groups' efforts to overcome the effects of discrimination, does not imply that the VRA permits coalition claims. Rather, the legislative history's comparison of discrimination faced by language minority citizens with that experienced by Black citizens explains 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 different minority groups to ban together to present a joint claim under the VRA—especially where none is expressly permitted by the statute.

Appellees have argued that the legislative history supports coalition claims because one case involving a coalition was referred to in the 1982 Senate Report, even though there is no express discussion of coalition claims or their validity in the VRA, or in its legislative history.[19] There is, however, an example within the VRA and its legislative history that directly addresses whether certain claimants may aggregate—and the example expressly prohibits it. *See Nixon*, 76 F.3d at 1387 n.7 (citing VRA for its statement that language minorities may not aggregate their numbers for purposes of meeting threshold numeric requirements for obtaining

[19] Of course, no legislative history can be used to alter clear statutory language. *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 285 (2011) (statute at issue "speaks both clearly and broadly, and a legislative report misdescribing the provision cannot succeed in altering it").

foreign-language ballots).[20] In determining whether ballots should be provided in a specific language, more than 5% of a state or political subdivision's CVAP must be members of a "single language minority group" without aggregation. For example, "the American Indian population and the Spanish heritage population cannot be added together to meet the five per centum test." S. Rep. No. 94-295, at 47.

While Appellees have relied on *Chisom* to broadly construe the VRA, that case also noted that Section 2 does not provide "two distinct types of protection" (e.g., the opportunity to participate in the political process, and the opportunity to elect representatives of choice). *Chisom*, 501 U.S. at 396-97. Rather, it treated these opportunities as "inextricably linked." *Id*. at 397-98.[21] If, under *Chisom*, the same protections must be afforded to vote denial claims and to equal-opportunity-to-elect claims, it makes no sense to prohibit aggregation for language minority ballot access, yet permit minority aggregation for Section 2 vote dilution claims.

In 1982, Congress amended Section 2 to codify a results test. *Clements*, 999 F.2d at 854. The House Report on the 1982 amendments mentions racial groups discretely, giving no indication of any intent to join different minority voting groups

[20] That provision is currently codified at 52 U.S.C. § 10303(f)(3).

[21] Justice Scalia identified a critical flaw in this reasoning. Citing *Gingles*, Justice Scalia explained that limiting the hours in which voters could register that has the effect of making it more difficult for black voters to register would amount to a Section 2 violation, even if there were not enough black voters to be able to elect a candidate of choice. *Chisom*, 501 U.S. at 407-08 (Scalia, J., dissenting)

together to permit a cause of action under the amended Section 2. The House Report 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 passages discussing minority voter groups separately, and providing distinct examples of Black, Hispanic, Native American, and other groups' situations under the VRA's provisions. *See id*. at 14-20.

Per 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 (1982), reprinted in 1982 U.S.C.C.A.N. 177. 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 Senate Report references a single race of VRA plaintiffs. 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 the disjunctive—"or" not "and"—in providing a remedy. Cataloging how the amendment would undo *Mobile v. Bolden*,[22] the 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. It does not adopt the concept of a multiracial, or Black-Hispanic, fusion claim.

V. The consequences of permitting coalition claims further evidence that Section 2 does not protect aggregate, sub-majority groups.

Coalition-caused complications for VRA litigation "in our increasingly multi-ethnic society will be enormous. Those complications alone imply that Congress rather than the courts should first address any such innovation." *Clements*, 999 F.2d at 896 (Jones, J., concurring). Coalition claims frustrate the *Gingles* analysis because *Gingles* does not test for a homogeneity of a coalition comprised of distinct minority groups with different cultural, language and socio-economic experiences (potentially several distinct groups), beyond their "maintenance of a joint lawsuit." *Id.*

Complications of a coalition Section 2 claim are several—and begin with the

[22] *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).

question of "whether transitory unions rooted in political expedience may be properly equated with those whose source lies in the more enduring bonds supplied by a shared race or ethnicity." *Id.* at 864. Where the VRA works to protect a minority class' opportunity to elect candidates of their choice, a coalition of two or more minority groups will more likely operate to *ignore* cultural or racial differences, sacrificing the many for a few.

If coalitions are allowed, they could create or increase racial animosity among their members if aggregation is allowed "on too insubstantial a basis and effectively submerges members of one group in a district controlled" by another. *Clements*, 999 F.2d at 896 (Jones, J., concurring).

Not only do coalition claims stretch *Gingles* cohesion to the point of ineffectiveness for testing causal links among the statutory disability, challenged practice, and election outcomes,[23] they can also be used to *limit* Section 2 protection—for example, by creating a new defense against challenged at-large voting systems. *Id*.

The ability of legislators to redistrict without running afoul of the VRA, if coalition claims are allowed, also presents a serious question. And when it is unclear how legislators could traverse such interpretation, a court's ability to apportion

[23] *Campos* II, 849 F.2d at 945 (Higginbotham, J., dissenting).

districts in a Section 2 coalition claim is even more attenuated. One issue both legislators and courts would have to face is to avoid favoring one minority group within a coalition over another, in the name of enforcing the VRA. They could face decisions about which group will be prioritized within a district—or whether a single minority group with sufficient CVAP to form its own majority-minority district should be prioritized above a coalition district. As Judge Jones has warned, "merging fundamentally different groups for the purpose of providing 'minority' representation could be a cruel hoax upon those who are not cohesive with self-styled minority spokesmen." *Clements*, 999 F.2d at 897 (Jones, J., concurring). Coalitions could therefore be misused by a jurisdiction that chooses to redistrict to create a coalition group, while limiting an individual minority group's population within a district. This could ultimately limit the protections of the VRA, and allow defendants to use aggregation as a defense.

As discussed above, coalitions can also be used to bypass the VRA's express prohibition against a right to proportional representation. These are just some examples of the consequences and serious concerns that follow from allowing coalition claims under Section 2, without express Congressional authorization or guidance.

VI. 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.

Appellants briefed this issue in their opening Brief. Dkt. 47-1 at 45 (PDF page 59), and do not repeat those arguments here.

Establishing cohesion is difficult for one minority group. It "should be self-evident" that this difficulty "is compounded when different minority groups, with radically different cultural and language backgrounds, socioeconomic characteristics and experiences of discrimination seek Section 2 coalition status." *Clements*, 999 F.2d at 896-97 (Jones, J., concurring). Justice Scalia, in *Growe*, agreed that a "higher-than-usual need for the second of the *Gingles* showings" existed with a coalition claim:

> [a]ssuming (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.

Growe, 507 U.S. at 41. An agglomerated claim by different minority groups elevates and protects only a shared agenda, and not the voting rights of members of a minority group.

As discussed during the panel argument, it is not possible to challenge *Gingles* cohesiveness without looking to evidence that rules out a political component to test Black and Hispanic voting cohesiveness. Where there is cohesion in a general

election but not in the primary, that is evidence of not only a lack of cohesion, but also that politics explains voting in the County, so that voting patterns are not "on account of race." The district court, therefore, erroneously discounted the importance of primary elections. ROA.15928 ¶122 (stating primary elections have "limited probative value in determining inter-group cohesion").[24] This was based on Appellees' failure to explore primary results: plaintiff expert Mr. Barreto chose not to analyze primaries or nonpartisan elections (ROA.16924:16-22 ROA.15561-15562 ¶¶375-378) and testified it was necessary to consider Republican minority nominees but conducted no local analysis separating partisan and racial polarization. ROA.16932:5-13, ROA.15562 ¶378; ROA.16993.

Plaintiff expert Dr. Oskooii analyzed only ten Democratic primaries with two candidates and excluded multiple-candidate primary elections. ROA.15568-15569 ¶¶406-410. This is despite the fact that the record shows no change in Anglo, Latino or Black voting patterns based on a candidate's race. ROA.19363; ROA.19344-47. Rather, plaintiff experts' selective review of general elections omits evidence of dissipated cohesion when partisan cues are removed. ROA.19314-19316. They also discounted evidence of large Latino confidence intervals (up to 40 points) when

[24] The district court even found that "partisanship undoubtedly motivates voting" in the County. ROA.15936 ¶147.

Spanish surname turnout was considered. ROA.15563-15564 ¶383, ROA.16950-16953.[25]

Appellees' experts failed to analyze whether another reason, such as politics or incumbency, explains their conclusions about cohesion—even though a Section 2 violation can only occur "on account of" race and is a plaintiff's burden to prove—not a defendant's burden to disprove.

PRAYER

The County asks that the Court reverse the district court's final order, and render a take-nothing judgment against Appellees.

[25] The district court found the County's expert on cohesion, Dr. Alford, credible (ROA.15906 at ¶55), and Dr. Alford opined that the primaries that plaintiff expert Dr. Oskooii analyzed show Black and Latino voters were cohesive in only six out of ten elections—a low 60% threshold that presents a "far different pattern" from general elections (ROA.23997) (DX-305). Dr. Alford also pointed out that in only 2 of 24 primary elections reviewed by plaintiff expert Dr. Trounstine were Black and Latino cohesion at 75% or more. ROA.23996 (report, table); ROA.15575-15578 ¶¶432-439.

Respectfully Submitted,

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Dated: January 15, 2024

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I certify that, on January 15, 2024, this document and its attachments were electronically served on all counsel of record in this case in accordance with the Federal Rules of Appellate Procedure.

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