No. 23-40582

IN THE 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

(*See inside cover for continuation of caption*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

SUPPLEMENTAL EN BANC BRIEF OF APPELLEE UNITED STATES OF AMERICA

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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

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INTRODUCTION

Applying settled law, the district court here concluded in a comprehensive opinion that Galveston County and its commissioners court violated Section 2 of the Voting Rights Act (VRA) by radically redrawing a voting district where Black and Latino voters had elected their preferred candidate for three decades. Confined to settled law, a panel of this Court affirmed. On rehearing, the County barely contests the record compiled at the ten-day bench trial or the result that follows from applying settled law to that record.

The County instead aims to upend the law, reinterpreting Section 2 to bar claims that a districting plan unlawfully dilutes the voting strength of voters from multiple minority groups. This Court has permitted such "coalition" claims under Section 2 for decades, "allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive." *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc). That longstanding rule reflects the most faithful interpretation of Section 2's text, context, history, and purpose.

When Congress amended Section 2 in 1982, relevant precursors used language suggesting relief might be restricted to voters of single minority groups. These included *White v. Regester*, 412 U.S. 755 (1973), on which Congress

otherwise based the amended Section 2, and the Civil Rights Act of 1960's pattern-or-practice provision for voting discrimination.

But litigation had shown that the same election practice, like a districting plan, could discriminate concurrently against voters of multiple minority groups. Congress crafted Section 2 so it could reach such discrimination. Its standard uses capacious, generic phrasing for Section 2 plaintiffs: "members of a class of citizens protected by subsection (a)." Echoing "class" as used in Rule 23, governing class actions, to mean individuals with a common injury and legal position, that language permits coalition claims. Reading it more restrictively would disregard Congress's drafting choices, while sowing inconsistency across related laws.

Though this en banc rehearing centers on textual interpretation, the County glosses over it. It devotes its brief to abstract, atextual policy considerations, while rehashing speculative arguments from long-ago opinions. But coalition claims have been permitted for decades, and experience has disproven the old predictions on which the County relies. *Stare decisis* thus bolsters the case for adhering to what is already the best reading of Section 2's text.

The County's dismantling of Precinct 3 eliminated Black and Latino voters' chance to elect their preferred candidates to any seat on the commissioners court, starkly diminishing their "opportunity," compared to "other members of the

[County] electorate," "to elect representatives of their choice." 52 U.S.C. 10301(b). Barring coalition claims against the County thus would frustrate Section 2's core command, while licensing vote dilution that harms voters of more than one minority group. This Court should adhere to its precedent and affirm.

STATEMENT

A. Legal Background

Congress passed the VRA "to address entrenched racial discrimination in voting," against which Section 2 effects a "permanent, nationwide ban." *Shelby County v. Holder*, 570 U.S. 529, 535, 557 (2013). Section 2 provides:

> (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 [language-minority status], as provided in subsection (b).
>
> (b) A violation of subsection (a) 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) 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.

Congress amended Section 2 to its current form in 1982. *See Allen v. Milligan*, 599 U.S. 1, 10-14 (2023). The Supreme Court already had ruled that voting "procedure[s]" covered by the VRA include districting plans that cause "dilution[s] of voting power." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (holding VRA applied to county's "change from district to at-large voting for county supervisors"). The Court then determined the framework for amended Section 2's application to dilutive districting plans in *Thornburg v. Gingles*, 478 U.S. 30 (1986), a challenge by Black voters to North Carolina multimember legislative districts.

Gingles requires plaintiffs to satisfy three "preconditions." 478 U.S. at 50. First, the "minority group must be sufficiently large and geographically compact to constitute a majority in a reasonably configured district." *Milligan*, 599 U.S. at 18 (alteration and citation omitted). Second, "the minority group must be able to show that it is politically cohesive." *Ibid.* (citation omitted). Third, "the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate." *Ibid.* (alteration and citation omitted). Together, these preconditions establish that the minority voters could elect a representative of their choice but the existing districting plan "thwarts" them, "at least plausibly on account of race." *Id.* at 18-19 (citation omitted).

Plaintiffs must then show, "under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters." *Milligan*, 599 U.S. at 18 (quoting *Gingles*, 478 U.S. at 45-46). The Senate Report accompanying the 1982 amendments identified factors relevant to this inquiry, including the jurisdiction's history of discrimination, the extent to which minority-group members "bear [discrimination's] effects," minority-group candidates' electoral success, and the "tenuous[ness]" of the "policy underlying" the challenged plan. *Gingles*, 478 U.S. at 44-45 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982)). Ultimately, the district court "must conduct 'an intensely local appraisal'" of the challenged plan. *Milligan*, 599 U.S. at 19 (quoting *Gingles*, 478 U.S. at 79).

B. Factual Background[1]

For 30 years, Precinct 3 was the only seat on the five-member Galveston County Commissioners Court that gave Black and Latino voters the opportunity to elect their preferred candidate; it was the product of joint Black and Latino advocacy in 1991. ROA.15911-15912.

The 2020 Census showed that only modest adjustments were needed to equalize populations across the commissioners court's four single-member precincts. The combined Black and Latino citizen voting-age population in

[1] The United States' opening brief details the background in more depth. *See* U.S. Br. 3-12.

Precinct 3 then was 58%. ROA.15911. In 2021, the County devised a minimum-change map, known as "Map 1," that kept that figure at 55% while achieving equal population. ROA.15912-15913.[2]

Rather than preserve Precinct 3, the County chose to eliminate it by enacting "Map 2," which converted Precinct 3 "from the precinct with the highest percentage of Black and Latino residents to the one with the lowest." ROA.15938. The effect of this "dramatic change" was plain. ROA.15957. As one commissioner testified, "you can look at the picture and tell." ROA.19223.

In enacting Map 2, the County acted far more secretively than in past redistricting cycles. It did not adopt a public timetable or redistricting criteria. ROA.15963. It moved slowly to draw and publicize proposed maps. ROA.15954-15955. It excluded Precinct 3 Commissioner Stephen Holmes from the process in late October and November 2021. ROA.15959-15960. And it held only one public hearing in November 2021, at which Map 2's adoption was a done deal. ROA.15968-15973.

[2] The County continues to insist (Supp. Br. 5) it had "no VRA excuse" to preserve Precinct 3. The United States explained already (U.S. Br. 5 n.1) that Section 2 districts can be drawn when "a strong basis in evidence" indicates it is necessary. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 402 (2022) (citation omitted).

The County did this at the behest of County Judge Mark Henry. Most commissioners were happy with Map 1 (ROA.15958), but it was not under serious consideration. Henry had wanted a map like Map 2 since 2011. ROA.15954, 18530-18531, 18639-18643. Henry knew that Map 2 could not have survived preclearance under Section 5 of the VRA; the Attorney General would have objected to its clear diminution of minority voting strength. ROA.15954, 18530-18531, 18639-18643. But by 2021, the County was no longer required to submit its election changes to the Attorney General. *See Shelby County*, 570 U.S. at 537-539, 553.

C. Procedural Background

In early 2022, the United States and other plaintiffs challenged the County's 2021 redistricting plan under Section 2 for diluting the voting strength of Black and Latino voters. ROA.15889-15890. The United States also alleged discriminatory purpose under Section 2, while the other plaintiffs brought constitutional intentional-discrimination and racial-gerrymandering claims. ROA.15889-15890.

After a ten-day bench trial on Galveston Island, the district court concluded in a 157-page opinion that the 2021 plan is "a clear violation" of Section 2. ROA.16029. That violation meant the court "[did] not need to make findings on" plaintiffs' intent-based claims, because they would confer the same relief.

ROA.16032 (citing *Veasey v. Abbott*, 830 F.3d 216, 230 n.11 (5th Cir. 2016) (en banc)). This course of action reflected the "well established principle" that a court "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Veasey*, 830 F.3d at 265; *id.* at 319 (Smith, J., dissenting) (same). The court permanently enjoined the 2021 plan. ROA.16035-16036.

On November 10, 2023, a panel affirmed the district court's judgment, while calling for en banc reconsideration of circuit precedent allowing coalition claims under Section 2. On November 28, the Court ordered en banc rehearing.

SUMMARY OF THE ARGUMENT

This Court should adhere to its longstanding precedent allowing coalition claims under Section 2 of the VRA.

I. The best reading of Section 2's text, in light of its context, history, and purpose, supports coalition claims. Section 2 has two subsections: Subsection (a) creates an individual voting right available to "any citizen," while Subsection (b) evaluates violations of that right by gauging the political opportunity open to "members of a class of citizens protected by subsection (a)." That particular language does not restrict claims to members of a single minority group; there would be simpler ways of doing so. The use of "class" reflects common usage—"class" as any set with common attributes—while echoing Rule 23's sense of "class" as individuals experiencing a common legal injury. Because Black and

Latino voters are all citizens experiencing impaired electoral opportunity as a result of the County's 2021 redistricting plan, they can sue together under Section 2.

Congress amended Section 2 in 1982 based largely on *White v. Regester*, 412 U.S. 755 (1973), which concerned a Texas House of Representatives plan that used multimember districts only in certain counties. Otherwise borrowing *White*'s language for Subsection (b), Congress broadened it: replacing *White*'s references to "the racial group allegedly discriminated against" and "the group in question" with "members of a class" language echoing Rule 23.

White illustrated that a single election practice could discriminate against multiple minority groups—there, Black voters in Dallas County and Mexican-American voters in Bexar County. Beyond *White*, the 1982 Senate Report confirms Congress knew of districting plans that discriminated concurrently against voters of multiple groups. Numerous New York City districting plans packed or cracked Black and Puerto Rican communities, and Senators contemplated suit under amended Section 2 against New York's city council. That history enhances the significance of Congress's choice not to use single-group language in Section 2.

Barring coalition claims would sow inconsistencies in the law. Congress has sometimes chosen to specify that only a single group should be considered, as in the Civil Rights Act of 1960's pattern-or-practice provision for voting

discrimination. It has enacted other, non-restrictive provisions with language similar to Section 2, as in the Civil Rights Act of 1964's authorization for desegregation suits, which the United States used against school systems segregating both Black and Latino students. Suits by plaintiffs of multiple minority groups likewise are common across the civil-rights landscape.

II. The County's effort to interpret the text asks the wrong questions, which it answers with undefended assumptions. Section 2's text does not ask whether a coalition is itself a protected minority, and it does not matter whether Congress consciously or expressly envisioned coalition claims. A "class" need not denote a single minority group, and neither does Section 2's use of "protected class" as shorthand for the longer phrase "members of a class of citizens protected by subsection (a)." The County does not explain Congress's choice to use that long phrase rather than simpler ways of specifying single minority groups. The County also misreads Section 2's proportionality disclaimer, and it fails in trying to link coalition claims with the issue of private plaintiffs' right of action under Section 2.

No substantive canons apply here. The Supreme Court has never applied a clear-statement rule to the VRA; doing so would defy precedent and logic. The County's amorphous appeal to federalism and *amici*'s attempt to raise constitutional avoidance likewise do not change the analysis.

The County's legislative-history arguments are similarly mistaken. Because the County ignores the most relevant historical material and misunderstands the material it cites, it draws the wrong lessons on coalition claims from the VRA's legislative history.

The County's reading of precedent is no better. Coalition claims are consistent with Supreme Court precedent. The County misreads the cases, focusing on stray dicta rather than core reasoning. The weight of lower-court authority also favors coalition claims. No other court has followed the Sixth Circuit in rejecting coalition claims categorically, as the County urges here. Instead, recent decisions have allowed them.

The County's principal arguments are atextual policy considerations. Its insistence that coalition claims are "political, not racial," is a false and unpersuasive dichotomy. And its worries about the difficulty of adjudicating coalition claims ignore that the *Gingles* framework has proven perfectly capable of screening out deficient claims. This simply is not one of those deficient cases.

III. *Stare decisis* strongly favors adhering to precedent. It is especially forceful when this Court has decided an issue in en banc proceedings, as here, and when the issue is statutory, because Congress could change the statute at any time. *Stare decisis* promotes consistency in the law and the public's confidence in courts. The County makes no persuasive argument for abandoning those commitments.

IV. Plaintiffs are entitled to relief under Section 2's settled framework, as the panel determined. Plaintiffs comprehensively demonstrated a violation at trial, which the County now barely contests. Its few rehashed points misstate the record and the law, and this Court should reject them. If this Court reverses, however, it should remand for further proceedings on plaintiffs' unadjudicated claims.

ARGUMENT

I. Coalition claims are consistent with Section 2.

A. Section 2's text allows coalition claims.

1. "[W]e begin where all such inquiries must begin: with the language of the statute itself." *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056 (2019) (citation omitted). Section 2's two subsections define an individual right, the violation of which is evaluated on an aggregate basis. Subsection (a) protects "the right of *any citizen* of the United States to vote." 52 U.S.C. 10301(a) (emphasis added). "[This] right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" *LULAC v. Perry*, 548 U.S. 399, 437 (2006) (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)). Subsection (a) protects this individual right against any voting practice or procedure "which results in a denial or abridgement" of the right "on account of race or color" or language-minority status. 52 U.S.C. 10301(a), 10303(f)(2).

Subsection (b) defines violations of that individual right as occurring when "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)* 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." 52 U.S.C. 10301(b) (emphasis added). This standard entails an aggregate comparison between the political opportunity open to the plaintiff voters and to other members of the same electorate.

This two-part provision permits coalition claims. A districting plan that dilutes both Black and Latino citizens' votes, as here, causes each Black voter and each Latino voter to suffer a violation of the right protected by Subsection (a). Under Subsection (b), those injured individuals are all "citizens protected by subsection (a)," so together they form a "class" of the same. That class can satisfy Subsection (b)'s standard: a districting plan that bolsters white voting strength at the expense of Black as well as Latino voters causes them to experience "less opportunity than other members of the electorate . . . to elect representatives of their choice." 52 U.S.C. 10301(b).

2. The text contains no explicit requirement that a "class" and its "members" must share the same Census-defined race, color, or language-minority status. "Class" on its own does not necessarily mean a particular minority group,

and the full phrase "members of a class of citizens protected by subsection (a)" does not necessarily mean a group that all shares the same identity. Instead, Section 2 uses "class" and its "members" generically to denote a group of individuals suffering the same injury to the individual voting right "protected by" Subsection (a). So understood, Section 2's text does not care that plaintiffs have different Census-defined identities, provided they experience the same lessened political opportunity from the same discriminatory voting procedure.

The non-restrictive nature of "members of a class of citizens protected by subsection (a)" was recognized when Congress adopted it. Senator Hatch, deeply involved in the 1982 amendments,[3] observed that "there is no 'class' of citizens that are singled ou[t] for protection under subsection (a)." S. Rep. No. 417, 97th Cong., 2d Sess. 104-105 n.24 (1982) (Senate Report). Rather than "provide for explicitly 'protected groups,'" Section 2's protections extend "to all individual citizens." *Ibid.*

Subsection (b)'s non-restrictive usage of "class" comports with contemporaneous dictionaries. For instance, the 1975 edition of the American Heritage Dictionary defined "class" as "[a] set, collection, group, or configuration

[3] *See generally* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347 (1983).

containing members having or thought to have *at least one* attribute in common." American Heritage Dictionary of the English Language 248 (1975) (emphasis added); *see also Class*, Random House Dictionary of the English Language 272 (unabridged ed. 1979) ("a number of persons or things regarded as forming a group by reason of common attributes, characteristics, qualities, or traits"). Coalition plaintiffs have in common that they enjoy less political opportunity than other voters on account of race, color, or language-minority status as a result of a challenged districting plan.

3. "Class" also has the sense, familiar from the class-action context, of a group of individuals with a common injury and legal position. *See* Fed. R. Civ. P. 23 (permitting "[o]ne or more members of a class [to] sue . . . on behalf of all members"); *Class*, Black's Law Dictionary (6th ed. 1990) ("[a] group of people ranked together as having common characteristics . . . from [which] there arises a common legal position vis-à-vis the opposing party"). This meaning of "class" readily fits coalition plaintiffs.

It is natural to read Section 2's language in light of Rule 23's. *See United States v. Hansen*, 599 U.S. 762, 774-775 (2023) (considering "specialized" legal meaning of disputed statutory terms due to context and history). Words "employed in a statute which had at the time a well-known meaning at common law or in the law of this country . . . are presumed to have been used in that sense." *Neder v.*

United States, 527 U.S. 1, 22 (1999) (quoting *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911)). Rule 23 underwent substantial amendment in 1966 that was inspired by civil-rights litigation and intended to facilitate it. *See* Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment (drawing on "actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration"); 7AA Wright, Miller, & Kane, Federal Practice and Procedure § 1775 (3d ed. 1998) ("[S]ubdivision (b)(2) was added to Rule 23 in 1966 primarily to facilitate the bringing of class actions in the civil-rights area.").

"Statutory history is an important part of this context" as well. *Hansen*, 599 U.S. at 775. The litigation that informed the 1982 amendments to Section 2 was brought on a class basis, including the case that prompted Congress to rewrite the statute. *See City of Mobile v. Bolden*, 446 U.S. 55, 58 (1980) (plurality opinion) ("class action on behalf of all Negro citizens of Mobile" contesting structure of city commission); *Allen v. Milligan*, 599 U.S. 1, 13 (2023) (explaining *Mobile*'s role in 1982 amendments). The cases that supplied the language for Subsection (b) also were filed as class actions. *See* p.19, *infra*; *Graves v. Barnes*, 343 F.Supp. 704, 709 (W.D. Tex. 1972) (three-judge court), *aff'd in part, rev'd in part sub nom. White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 129 n.2 (1971). So, too, was the case in which this Court distilled the factors that

Congress chose to guide Section 2's totality-of-the-circumstances inquiry. *See Zimmer v. McKeithen*, 467 F.2d 1381, 1382 (5th Cir. 1972), *vacated on reh'g*, 485 F.2d 1297 (5th Cir. 1973) (en banc); Senate Report 23, 28-29 & n.113-116 (relying on "seminal" *Zimmer* decision).

Moreover, Congress crafted Section 2 as a form of aggregate litigation. It deemed relevant such societal factors as the jurisdiction's history of official discrimination, its effects on minorities, and minority candidates' success. *See* p.5, *supra*; Senate Report 28-29. That approach reflected the era of burgeoning public law litigation during which Congress amended Section 2, including the focus on such "legislative" facts. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1288-1304 (1976); Note, *Federal Court Involvement In Redistricting Litigation*, 114 Harv. L. Rev. 878, 899 (2001) ("[R]edistricting litigation is a paradigmatic public law situation."). It thus makes sense that Congress chose to echo Rule 23, the classic form of aggregate litigation, with the phrasing, "members of a class of citizens protected by subsection (a)."

Accordingly, Section 2's overlap in language, history, and function with Rule 23 makes it appropriate to read Section 2 in its light. Reading "class" in Section 2 in Rule 23's sense—a group of individuals with a common injury and legal position—it follows that the statute permits coalition claims.

B. The backdrop to Section 2's enactment supports coalition claims.

If Congress intended to refer to a single minority group in Subsection (b), its chosen phrase—"members of a class of citizens protected by subsection (a)"—is not an obvious way. Simpler ways exist. For instance, Congress "borrowed language" for Subsection (b) from *White v. Regester*, 412 U.S. 755 (1973). *See Milligan*, 599 U.S. at 13; *see also* Senate Report 2 (explaining Congress was "codifying" *White*). The passage in *White* that Congress otherwise copied could be read to specify a single racial group. But Congress made that language more generic and capacious, underscoring Section 2's non-restrictive nature.

1. *White* involved Fourteenth Amendment challenges to the Texas House of Representatives' 1970 districting plan, which used multimember districts in Dallas County and Bexar County that discriminated against Black and Mexican-American voters, respectively. 412 U.S. at 756-759. Rather than search for legislators' motivations, *White* looked at the multimember districts' interaction with various legal and social factors: the multifaceted discrimination that Black and Mexican-American voters in Texas faced; disadvantageous aspects of the multimember districts' procedures; onerous voter registration; a "white-dominated" organization in Dallas that controlled candidate slates; "language barrier[s]" facing Mexican-Americans in Bexar; and the rarity of Black and Mexican-American candidates' election to the Texas House. *Id.* at 766-769.

But in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court changed course. Rejecting a challenge to Mobile's city commission, it held that the Fourteenth Amendment, the Fifteenth Amendment, and then-existing Section 2 all required evidence of "racially discriminatory motivation" or "a purposeful dilution of the plaintiffs' vote." *Id.* at 62, 69.

Congress's 1982 amendments repudiated *Bolden*. Congress amended Subsection (a) to permit claims based on discriminatory results, not just intent. *See* 52 U.S.C. 10301(a) (prohibiting election practices "which result[] in a denial or abridgement" of voting rights); Senate Report 16. And to evaluate violations, Congress added Subsection (b), instructing courts to consider "the totality of the circumstances" according to language borrowed from *White*. 52 U.S.C. 10301(b); Senate Report 21-24; *id.* at 28-29 & nn.113-116 (listing relevant factors that this Court distilled in *Zimmer*).

2. Congress largely adopted *White*'s test for invidious discrimination, while making one change relevant to coalition claims. Under *White*, "it [was] not enough that *the racial group allegedly discriminated against* has not had legislative seats in proportion to its voting potential." 412 U.S. at 766 (emphasis added). Plaintiffs had to prove that "the political processes leading to nomination and election were not equally open to participation by *the group in question*—that its members had less opportunity than did other residents in the district to participate in the political

processes and to elect legislators of their choice." *Ibid.* (emphasis added) (citing *Whitcomb*, 403 U.S. at 149-150).

Had Congress used *White*'s "the racial group allegedly discriminated against" or "the group in question" along with *White*'s other language in Subsection (b), coalition claims might be more dubious. Congress instead opted for the broad, generic "members of a class of citizens protected by subsection (a)." Thus, to read a single-group restriction into Subsection (b) flouts the principle that courts "may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020).

Disregarding the textual difference between *White* and Subsection (b) would also depart from *Chisom v. Roemer*, 501 U.S. 380 (1991). *Chisom* held that Section 2 applies to state judicial elections in part because Congress changed *White*'s reference to voters electing "legislators of their choice," 412 U.S. at 766, to "representatives" of their choice in Subsection (b), *Chisom*, 501 U.S. at 398-400. *Chisom*'s majority and dissent both recognized this change as important; they disagreed only about its exact implications. *See ibid.*; *id.* at 412 (Scalia, J., dissenting). Ignoring the pertinent textual difference here would conflict with that shared premise: that Congress's textual choices matter.

C. Congress knew districting plans could discriminate against voters of multiple minority groups.

White showed that the same election practice could concurrently discriminate against voters of multiple minority groups.[4] It affirmed that the same feature of the Texas House's districting plan, multimember districts, discriminated against both Black voters and Mexican-American voters, albeit in different counties. *White*, 412 U.S. at 765-770; Senate Report 21-22 (reciting *White*'s facts). It takes little imagination to see how the same districting plan could discriminate against them in the same place.

Indeed, the Senate Report cited examples of that very thing, further exhibiting Congress's understanding that an election practice could discriminate concurrently against multiple minority groups. New York City's large Black and Puerto Rican populations meant redistricting there produced numerous districting plans that discriminated against both groups, giving rise to coalition-type lawsuits and objections.

Illustrating "sophisticated devices that dilute minority voting strength," the Senate Report cited the New York City Council's 1981 redistricting plan, to which

[4] The *White* plaintiffs included an organization with both Black and Mexican-American members, challenging the districts' impact on "racial and ethnic minorities." Br. of Appellees Regester at 1-2, *White*, *supra* (No. 72-147) (1973 WL 171745); *Graves*, 343 F.Supp. at 709.

the Attorney General objected under Section 5 because "the gerrymandered districts discriminated against black and Hispanic voters." Senate Report 11 & n.30. The objection letter—issued as Congress deliberated the Section 2 amendments—took these minority groups together, objecting to the plan's "fragmentation of minority residential areas and a corresponding dilution of minority voting strength." Letter of Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, to Fabian Palomino, Counsel, New York City Redistricting Commission (Oct. 27, 1981), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/NY-1040.pdf. It was the Senate Report that clarified this meant both Black and Hispanic voters.

The Senate Report also cited *Wright v. Rockefeller*, 376 U.S. 52 (1964), a challenge to New York's 1961 congressional districting plan. Senate Report 19 n.60. Black and Puerto Rican plaintiffs alleged that New York packed "non-white citizens and citizens of Puerto Rican origin" into certain Manhattan congressional districts "to create a white Congressional district," and the Supreme Court analyzed their populations in combination. *Wright*, 376 U.S. at 54 (noting "the Eighteenth District contained 86.3% Negroes and Puerto Ricans," versus 5.1% in the Seventeenth).

In addition, the Senate Report incorporated the prior report of the Subcommittee on the Constitution, which cited *United Jewish Organizations of*

Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977), concerning New York state legislative maps to which the Attorney General objected under Section 5 in 1974. *See* Senate Report 121, 149 n.432, 172. The Attorney General "classified Puerto Ricans in New York together with blacks as a minority group entitled to the protections of the Voting Rights Act." *Carey*, 430 U.S. at 150 n.5. The districting plans gave certain districts "an abnormally high minority concentration while adjoining minority neighborhoods [we]re significantly diffused into surrounding districts." *Id.* at 150 n.6 (quoting objection letter).

The Subcommittee also contemplated coalition claims against New York's City Council under the new Section 2. Noting the low "percentage of minorities on the City Council" (18.6%) compared to "the percentage of minorities in New York City" (40%), along with other indicia of discrimination, the Subcommittee anticipated "court-ordered restructuring" of the Council under Section 2. Senate Report 156.

Thus, Congress knew districting plans could draw objections and lawsuits for discriminating concurrently against voters of multiple minority groups. Yet it did not incorporate a single-group restriction into Section 2.

D. Barring coalition claims would sow inconsistencies in the law.

Congress's civil-rights enactments predating the 1982 amendments to Section 2 sometimes opted for language specifying that only a single minority

group should be considered, while others used non-restrictive language akin to Section 2 in ways that demonstrate its breadth. Barring coalition claims under Section 2 would introduce disharmony to these provisions and to civil-rights litigation generally, in which coalition-type suits are commonplace.

1. Congress knew how to specify when only a single minority group should be considered. For instance, the Civil Rights Act of 1960 was a precursor to the VRA in addressing systemic voting discrimination. Congress had previously prohibited interference with a person's voting rights through threats, intimidation, or coercion. *See* Pub. L. No. 85-315, § 131, 71 Stat. 637 (1957) (52 U.S.C. 10101(b)-(c)). The 1960 Act provided that, if such interference was part of a larger "pattern or practice," the court could grant relief protecting "*any person of such race or color* resident within the affected area." Pub. L. No. 86-449, § 601, 74 Stat. 90 (1960) (52 U.S.C. 10101(e)) (emphasis added). That language expressly limited relief to members of a single racial group.

Similarly, Congress incorporated a single-group restriction into certain language-access provisions in 1975 when it extended the VRA to language minorities. Congress expanded the definition of the "test[s] or device[s]" prohibited by the VRA—such as literacy tests—to include providing voting materials only in English when more than five percent of a jurisdiction's voting-age citizens are "members of a single language minority." 52 U.S.C. 10303(f)(3);

see also 52 U.S.C.10303(f)(4) (requiring voting-related materials in "the language of the applicable language minority group").

Congress could have followed these models of single-group language in Section 2. Instead, it chose more capacious language, permitting voters of multiple groups to litigate together when they face discrimination together. "It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380-2381 (2020) (citation omitted). And it is "generally presum[ed] that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 777 (2020) (citation omitted). Section 2 should be read accordingly.

2. The VRA as enacted in 1965 used "member" and "class" language in a non-restrictive, non-racial way. Among other discriminatory tests, the VRA prohibited requiring that a voter "prove his qualifications by the voucher of registered voters or *members of any other class*." Pub. L. No. 89-110, § 4(c), 79 Stat. 438-439 (1965) (52 U.S.C. 10303(c)) (emphasis added). Under *noscitur a sociis*, "a word is known by the company it keeps." *McDonnell v. United States*, 579 U.S. 550, 569 (2016) (citation omitted). This usage of "members" and "class" appears alongside the non-racial phrase "registered voters." *See also* H.R. Rep.

No. 439, 89th Cong., 1st Sess. 47 (1965) (views of Rep. McCulloch et al.) (suggesting "landowners" as such a class). This indicates the term "class" need not denote a particular minority group or make any racial classification at all.

The Civil Rights Act of 1964 also used "members of a class" phrasing akin to Section 2 that yielded challenges to concurrent discrimination against members of multiple groups. The 1964 Act authorized the Attorney General to bring school-desegregation suits upon receiving complaints from parents that "their minor children, as *members of a class of persons similarly situated*, are being deprived by a school board of the equal protection of the laws." Pub. L. No. 88-352, § 407(a)(1), 78 Stat. 248 (1964) (42 U.S.C. 2000c-6(a)(1)) (emphasis added).

The United States thereby brought suits challenging concurrent segregation of Black and Latino students, such as a 1970 suit alleging that the Austin school district was "discriminating against black and Mexican-American children." *United States v. Texas Educ. Agency*, 467 F.2d 848, 853 (5th Cir. 1972) (en banc) (plurality opinion). The segregated schools included some with substantial shares of both Mexican-American and Black students. *See id.* at 876 (Johnston, Allan, Ortega schools). Another United States suit led to the desegregation of Midland's elementary schools, including three with substantial shares of both Black and Mexican-American students. *See United States v. Midland Indep. Sch. Dist.*, 519 F.2d 60, 62-64 (5th Cir. 1975) (Crockett, Milam, Pease schools).

Thus, this provision allowed litigation to redress discriminatory educational practices that affected multiple minority groups. Reading a single-group restriction into the similarly worded Section 2—barring litigation to do the same for vote dilution—would create inexplicable incongruity between the two statutes.

3. Barring coalition vote-dilution claims under Section 2 also would create unwarranted discrepancy with other litigation. No court has read Section 2 to disallow claims that an election practice discriminatorily *denies* the vote to voters of multiple groups. Such litigation is common. *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2334 (2021) (Arizona voting provisions challenged for disparate impact on "American Indian, Hispanic, and African American citizens" (citation omitted)); *Veasey v. Abbott*, 830 F.3d 216, 251 (5th Cir. 2016) (en banc) (Texas voter-identification law challenged for disparate impact on "African-American and Hispanic" voters).

Other examples can be found across the civil-rights landscape, including in the runup to Congress rewriting Section 2. *See, e.g.*, *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-343 (1977) (affirming employer "treated Negroes and Spanish-surnamed Americans less favorably than white persons," violating Title VII); *Davis v. New York City Hous. Auth.*, 278 F.3d 64, 66-67 (2d Cir. 2002) (concerning racial-steering practices affecting both Black and Hispanic residents, violating Fair Housing Act). These suits proceed on the

commonsense premise that practices can discriminate concurrently against members of multiple minority groups. It would be anomalous if only Section 2's test for vote-dilution claims is made blind to that reality.

II. The arguments against coalition claims lack merit.

The County's textual arguments are little more than the undefended assumption that Section 2's particular phrase, "members of a class of citizens protected by subsection (a)," can only be read to denote a single minority group. The other arguments against coalition claims are no better. The substantive canons invoked by the County and others do not apply here. The County also misreads the relevant legislative history and overreads non-binding precedents, while resorting continually to unfounded atextual policy considerations. None of these arguments justifies departing from the best reading of Section 2's text.

A. The County's textual arguments against coalition claims are unsupportable.

The County's interpretation of the statute begins by mistakenly framing "the appropriate inquiry" as "whether a coalition is itself a protected minority under the VRA." Supp. Br. 16 (citing *Campos v. City of Baytown, Tex.*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing)). Section 2's text does not pose that question, and the County's reliance on Judge Higginbotham's framing in *Campos* runs counter to the Supreme Court's subsequent recognition that "the right to an undiluted vote does not belong to the

'minority as a group,' but rather to 'its individual members.'" *LULAC*, 548 U.S. at 437 (quoting *Shaw*, 517 U.S. at 917).

As noted, Subsection (a) protects an individual right, belonging to "any citizen." 52 U.S.C. 10301(a); *see* pp.12-13, *supra*. Because voters of multiple minority groups all are "citizens protected by subsection (a)," they can be "members of a class" of such citizens for purposes of Subsection (b). The County's few textual arguments do not change that result.

1. "Class" does not necessarily mean a single minority group.

a. The County's arguments rest on the assumption (Supp. Br. 32) that "class" as used in Subsection (b)'s phrase "members of a class of citizens protected by subsection (a)" must denote a single minority group. The County offers no definitions, usage, or other textual evidence for its view. Nor does it explain why Congress used that longer phrase, rather than a simpler way of specifying a single minority group. The County also has no answer to the argument that "class" is often understood to mean a group of individuals with a common injury and legal position, as in Rule 23. *See* U.S. Br. 39.

The County does not explain why the phrase "protected class" in Subsection (b)'s second sentence should make a difference either. The phrase simply means "[a] class of people who benefit from protection by statute." *Protected Class*, Black's Law Dictionary (11th ed. 2019; 7th ed. 1999). Coalition claims are

consistent with this understanding because Section 2 protects both Black and Latino voters.

The phrase "protected class" lacks a fixed meaning in the U.S. Code that it would obviously carry into Section 2. It does not appear elsewhere in the VRA or similar provisions, and the County cites no instance of it appearing in other statutes. Other legal usage indicates that the meaning of "protected class" depends on the relevant provision, rather than always and only denoting a single minority group. *See, e.g.*, *Piper v. Chris-Craft Indus.*, 430 U.S. 1, 37-38 (1977) ("shareholder-offerees" facing corporate takeovers as "protected class" under Securities Exchange Act of 1934); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 352 (1968) ("retailers" as "protected class" under Robinson-Patman Act).

The phrase "protected class" should not be conflated with "suspect class," the concept employed in equal-protection cases to trigger heightened scrutiny. *See Plyler v. Doe*, 457 U.S. 202, 216-217 & n.14 (1982). Needless to say, that is not the language Congress used in Section 2. And importing that understanding into Section 2 would conflict with this Court's recognition that Section 2 also protects white voters. *See United States v. Brown*, 561 F.3d 420, 432-435 (5th Cir. 2009). If "class" and "protected class" must mean specific disfavored minorities, *Brown* could not stand.

Moreover, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 577 U.S. 424, 438 (2016). Subsection (b) uses the phrase "protected class" in its second sentence as shorthand for the longer phrase that appears in its first sentence: "a class of citizens protected by subsection (a)." It would be cumbersome to repeat that longer phrase each time the same concept recurs in Subsection (b).

Congress's use of a shorthand should not be taken to import a single-group restriction into Section 2, particularly when Congress did not use the sort of restrictive language there that it used elsewhere. Courts should "not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply," especially "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. ICE*, 543 U.S. 335, 341 (2005).

b. The County suggests (Supp. Br. 32) that the VRA's enumeration of certain language minorities, *see* 52 U.S.C. 10310(c)(3), means that "class" in Section 2 must denote a single minority group. That inference does not follow. Besides Section 2, the VRA provides protections relating to language access. *See, e.g.*, 52 U.S.C. 10303(f)(3)-(4) (specifying when non-English voting materials are required). Such relief must be tailored to the language minority; it does not help Vietnamese speakers to get materials in Spanish. By contrast, voters bringing a

coalition claim against a districting plan seek the same remedy: a plan that does not dilute their voting strength.

The VRA's enumeration of language minorities also proves less than the County thinks. The listed minorities include capacious categories like "Asian American" and "of Spanish heritage," each containing broad diversity. Listing them in the VRA hardly indicates a congressional judgment that they have "homogeneous characteristics" sealing each group off from all others. *Contra* Supp. Br. 32. Nor does it indicate that these groups could never simultaneously experience discrimination from the same districting plan—for instance, one that dilutes the voting strength of both Spanish-speaking and Vietnamese-speaking neighborhoods.

The County also contends (Supp. Br. 33) that a coalition claim scrambles the comparison required by Subsection (b) between the plaintiff "members of a class" and the "other members of the electorate," because one of the coalition's groups must be the "members of a class," while the other group must be among the "other members." That problem disappears when it is understood that the phrase "members of a class" does not necessarily denote a single minority group.

The County also suggests (Supp. Br. 33) that the minorities in a coalition always will differ in their levels of political opportunity. That is a factual question for each case, not a dictate of the statutory text. In any case, "the plaintiff is the

master of the complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-399 (1987). Here, plaintiffs asked the district court to compare Black and Latino voters' political opportunity in Galveston County against Anglo voters' opportunity. If plaintiffs could not satisfy *Gingles* on that theory, their lawsuit would have failed. And if other Black or Latino voters opposed that theory or the relief it would obtain, they could have sought intervention. *See* Fed. R. Civ. P. 24. None did here. Only the County is trying to "pit distinct coalition plaintiff groups against each other." Supp. Br. 33.

2. It is enough that Section 2 protects "a class," not "classes."

The County again assumes that "a class" must mean a particular minority group in arguing (Supp. Br. 27, 35) that Congress would have used "classes" of citizens in Subsection (b), rather than "a class," if it meant to allow coalition claims. But because "class" does not have that restrictive meaning, there is no grammatical need for "class" to be plural to cover coalition claims. Rule 23 class actions show a class can be large and diverse, as long as its members' claims raise common questions. The coalition claims here involve individuals who all suffered the same injury, yielding the same legal position: Black as well as Latino voters experienced vote dilution when the County dismantled Precinct 3.

The argument that Congress could have used "classes" boils down to the proposition that Congress could have been clearer or more specific. That

argument, available in virtually any genuine dispute over statutory interpretation, is more forceful the other way around. Crafting Subsection (b), Congress could have followed *White* ("the racial group allegedly discriminated against"), the 1960 Act's pattern-or-practice provision ("any person of such race or color"), or the language-access provision, 52 U.S.C. 10303(f)(3) ("members of a single language minority"). But it did not. This Court should not insert requirements Congress omitted.

3. Section 2's proportionality disclaimer does not bar coalition claims.

Subsection (b) provides that minority candidates' successful election to office is "one circumstance which may be considered," but it declines to "establish[] a right" to proportional representation of minority populations by minority officeholders. 52 U.S.C. 10301(b). Thus, proportionality is "a relevant fact in the totality of the circumstances," *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994), but not an entitlement.

The County once understood this provision correctly. *See* Appellants' Br. 23 (acknowledging courts can "consider proportionality," though it is not "promised"). But it now mischaracterizes (Supp. Br. 33-34) the proportionality disclaimer as an outright "prohibition" in arguing that it disallows coalition claims.

This argument is mistaken not just legally but factually. Plaintiffs did not stake their case on simple proportionality, such as by citing Black and Latino

voters' population share and demanding an equal share of commissioners court seats. The district court's remedy also would not achieve proportionality. Against their 38% share of total population (ROA.16027), the court's remedy would increase Black and Latino voters' opportunity to elect their preferred candidate from zero of five seats on the commissioners court (0%) to one of five (20%). This distinguishes the County's cited cases (Supp. Br. 34), where plaintiffs were at or near proportional representation already.[5]

Courts can make findings and conclusions on proportionality based on each case's facts. Section 2's proportionality disclaimer cannot be made a justification to bar coalition claims altogether.

4. The text controls, not what Congress may have envisioned.

The County errs by suggesting that the question of statutory interpretation is "whether Congress intended to protect" coalition claims. *See* Supp. Br. 17 (citing *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting)). This question is inapt because statutory interpretation is about reading texts, not reading minds. It

[5] *See Washington v. Tensas Par. Sch. Bd.*, 819 F.2d 609, 612 (5th Cir. 1987) (noting Black voters, 48.6% of registered voters, already were majority in three of seven districts); *Wyche v. Madison Par. Police Jury*, 635 F.2d 1151, 1161 (5th Cir. 1981) (approving plan with Black voters, 48% of registered voters, as majority in three of eight districts); *Gonzalez v. City of Aurora, Ill.*, 535 F.3d 594, 600 (7th Cir. 2008) (rejecting plea of Latino voters, 16.3% of citizen-voting age population, for second "Latino-effective" seat on ten-member body).

"begin[s] with the understanding that Congress says in a statute what it means and means in a statute what it says there." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (citation omitted).

Congress is not obligated to identify every possible application of a statute expressly in its text. That statutes may reach "situations not expressly anticipated by Congress" demonstrates only their "breadth." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998). Just as *Yeskey* found it "irrelevant" that the Americans with Disabilities Act did not expressly mention "prisons and prisoners," *ibid.*, it is irrelevant whether Section 2 expressly mentions coalition claims.

It also would not be dispositive if the County could demonstrate that Congress never consciously envisioned using Section 2 for coalition claims. The county has not shown that; the legislative record indicates Congress knew of districting plans that discriminated against multiple groups. *See* pp.21-23, *supra*. But "[e]ven if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018).

That is because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). *Oncale* held that Title VII prohibits "male-on-male sexual harassment," though that "was assuredly not the principal evil" leading Congress

to enact Title VII. *Ibid.* Likewise, this Court held that a county violated Section 2 by discriminating against white voters—assuredly not Congress's principal concern animating the VRA. *See Brown*, 561 F.3d at 432-435. But "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79.

5. The County's argument against all private claims under Section 2 fails.

The County cites another court's (gravely mistaken) ruling that Section 2 does not create a private cause of action, arguing that Section 2 therefore must not allow coalition claims. *See* Supp. Br. 29, 35-36 (citing *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023)).

The County cannot defeat coalition claims this way. It forfeited this non-sequitur argument by not briefing it until now. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397-399 (5th Cir. 2021). Binding precedent also forecloses the argument that Section 2 does not allow private claims. *See Robinson v. Ardoin*, 86 F.4th 574, 587-588 (5th Cir. 2023). And the argument is both irrelevant and unsound because the United States is a plaintiff here.

B. No substantive canon changes the analysis.

1. Judge Oldham's stay opinion suggested a clear-statement rule should apply. *Petteway v. Galveston County, Tex.*, 87 F.4th 721, 725 (5th Cir. 2023) (calling for "'unmistakably clear' statutory language" (quoting *Gregory v.*

Ashcroft, 501 U.S. 452, 460 (1991))). The County declines this suggestion (Supp. Br. 37 n.18), calling clear-statement rules "a nonissue."

Clear-statement rules do not apply here in any case. Clear-statement rules require special justification because they put "a thumb on the scale" of statutory interpretation. *Sackett v. EPA*, 598 U.S. 651, 713 (2023) (Kagan, J., concurring in judgment). Judge Oldham's opinion cited no instance of a clear-statement rule applying to the VRA. It relied on *Bond v. United States*, 572 U.S. 844 (2014), where the Supreme Court doubted that Congress intended to reach "purely local crime[s]" by implementing an international chemical-weapons convention. *Id.* at 848. *Bond* cited "the background assumption that Congress normally preserves the constitutional balance between the National Government and the States," under which "local criminal activity" is left "primarily to the States." *Id.* at 848, 862-863 (citation omitted).

The Constitution establishes the opposite expectations here. The VRA stands on Congress's authority to enforce protections in the Fourteenth and Fifteenth Amendments that explicitly bind States. Accordingly, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation.'" *City of Rome v. United States*, 446 U.S. 156, 179 (1980) (citation omitted). Those "Amendments were specifically designed as an

expansion of federal power and an intrusion on state sovereignty." *Ibid.*; *see also Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-456 (1976) (citing VRA to illustrate permissible "suits against States or state officials which are constitutionally impermissible in other contexts").

The clear-statement rule in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), has no bearing on this case. As the County correctly observes (Supp. Br. 37), the Supreme Court decided *Gregory* the same day as *Chisom v. Roemer*, 501 U.S. 380 (1991), which applied the VRA to elected state judges *without* using a clear-statement rule. *See id.* at 411-412 (Scalia, J., dissenting). Noting this, Justice Scalia recognized that the VRA is "a general imposition upon state elections" that "obvious[ly]" arises from Congress's authority under the Civil War Amendments. *Ibid.* He also acknowledged that the Court rejected applying "a 'plain statement' rule" to Section 2 in *City of Rome*. *Ibid.*

Cases applying clear-statement rules often involve general statutes that leave their application to States uncertain. *See, e.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245 (1985) (concerning Rehabilitation Act's provision of damages for disability discrimination by "any recipient of Federal assistance"). But Section 2 applies expressly, and *only*, to States' and localities' election practices. Its encompassing text establishes Congress's intent to reach all manner of voting "standard[s], practice[s], or procedure[s]" adopted by "State[s]" and their

"subdivision[s]." 52 U.S.C. 10301(a). When a statute "exudes comprehensiveness from beginning to end" this way, further enumeration of each object it reaches is unnecessary. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023).

Congress deliberately used broad language in the VRA because States and localities might "resort[] to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination." *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). The VRA targets both "the subtle, as well as the obvious," limits on voting rights: not only "prohibition[s] on casting a ballot," but also "dilution[s] of voting power." *Allen v. State Bd. of Elections*, 393 U.S. 544, 565, 569 (1969). Denying Congress the discretion to legislate broadly, instead requiring that it expressly anticipate every possible means of voting discrimination, would nullify the statute.

Nor would a clear-statement rule make sense only for the narrow sub-issue of coalition claims. *See Petteway*, 87 F.4th at 725. The impulse to craft such an ad-hoc rule betrays doubt that the statutory interpretation it would bolster is correct. "[I]nterpretive rules" should be "reasonably administrable, comport with linguistic usage and expectations, and supply a stable backdrop against which Congress, lower courts, and litigants may plan and act." *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1610 (2020). Deciding cases through novel, one-off

interpretive steps—that, owing to their novelty and narrowness, are not "rules" at all—contradicts that principle.

2. The County tries to place another thumb on the scale through an amorphous appeal to federalism, relying on *Rose v. Secretary, State of Georgia*, 87 F.4th 469 (11th Cir. 2023). *See* Supp. Br. 38. Whether or not *Rose* correctly rejected a Section 2 challenge to the Georgia Public Service Commission using statewide at-large elections rather than single-member districts, this case poses no such issue. Plaintiffs do not seek to change the commissioners court's structure, only to restore Precinct 3 to a majority-minority district, as it was for three decades.

3. *Amici* offer yet another thumb for the scale: constitutional avoidance. *See* Nat'l Repub. Redist. Tr. Br. 24-26. This Court should reject that argument. The County has abandoned its constitutional challenge to Section 2, and it does not argue avoidance itself, disclaiming (Supp. Br. 36) such "canons of construction." *See Voices for Int'l Bus. & Educ., Inc. v. NLRB*, 905 F.3d 770, 775 n.6 (5th Cir. 2018) ("[W]e do not consider arguments raised by an amicus that the party it is supporting never made.").

Regardless, the argument fails because no constitutional doubt is present. The Supreme Court has upheld Section 2's constitutionality under the Fifteenth

Amendment for decades, *see Milligan*, 599 U.S. at 41-42, and plaintiffs seek the same relief under the same framework as any vote-dilution plaintiffs.

C. The County misreads the VRA's legislative history.

Though the 1982 amendments' well-documented history is informative, *see Milligan*, 599 U.S. at 11-14, the County's legislative-history arguments confuse more than edify. The County draws unfounded inferences, while overlooking the most relevant historical material.

1. The County is mistaken (Supp. Br. 40) that the Senate Report cited only "one case involving a coalition." The Senate Report and the Subcommittee's report cited at least four examples between them, three actual and one hypothetical. *See* pp.21-23, *supra*. And Congress derived Subsection (b) from *White*, which illustrated how a single election practice could discriminate against voters of multiple minority groups. *See* p.21, *supra*.

The County also is mistaken (Supp. Br. 41-42) that the House Report on the 1982 amendments "gives no indication of any intent" to allow coalition claims. The House Report cited an attempted Texas voter purge in 1975, to which the Attorney General objected because it would affect "minority groups in Texas, namely, black and Mexican-Americans." H.R. Rep. No. 227, 97th Cong., 1st Sess. 15-16 (1981). The House Report then suggested that the "purging of voter registration rolls would violate Section 2 if plaintiffs show a result which

demonstrably disadvantages minority voters." *Id.* at 31 n.105. The report did not distinguish between minority groups or suggest they would need to litigate separately.

2. The County draws unfounded inferences (Supp. Br. 41) against coalition claims from the Senate Report to the 1975 VRA amendments. It relies on the 1975 report not mentioning "aggregation" of different groups, but Congress amended Section 2 in 1982, not 1975. Neither is it meaningful that the 1975 report referred to a "single language minority group" when discussing the VRA provision that requires jurisdictions to provide non-English materials when such a group exceeds 5% of the population. Supp. Br. 41 (quoting S. Rep. No. 295, 94th Cong., 1st Sess. 47 (1975)). As already noted, common sense explains a single-group focus for language-access issues: it does not help Vietnamese speakers to get materials in Spanish. *See* pp.31-32, *supra*. The right lesson of the language-access provisions is that Congress knew how to write a single-group restriction, so it matters that Congress declined such language for Section 2 in 1982.

If anything, the 1975 legislative history bolsters coalition claims. As the County acknowledges (Supp. Br. 40), Congress added persons "of Spanish heritage" to the VRA because it saw great similarity in Mexican-American voters' and Black voters' experiences with discrimination. *See* 52 U.S.C. 10310(c)(3); S. Rep. No. 295, 94th Cong., 1st Sess. 25-28 (1975). Congress's emphasis on Black

and Latino voters' similar experiences dispels the idea that, by adding language-minority groups to the VRA, Congress somehow indicated "[b]y negative inference" that each language-minority group could never "overlap with any of the others or with blacks." *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (1993) (en banc) (Jones, J., concurring). That gets Congress's understanding exactly backwards.

D. The precedential arguments against coalition claims are mistaken.

1.a. Two Supreme Court decisions have reserved the question of whether coalition claims are permissible. *See Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009) (plurality opinion); *Growe v. Emison*, 507 U.S. 25, 41 (1993). Contrary to the County's view (Supp. Br. 19-25), coalition claims are consistent with both.

Rather than rule out coalition claims, *Growe* relied on *Gingles*' factual requirements, particularly "proof of minority political cohesion." 507 U.S. at 41-42. Consistent with *Growe*, this Court's decisions have carefully analyzed cohesion and thereby screened out debatable coalition claims. *See Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1214-1215 & n.21 (5th Cir. 1996) (rejecting coalition claim for lack of cohesion); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (same). *Growe* requires no change to this Court's precedent.

As for *Bartlett*, coalition claims lack the problems that led it to reject "crossover" claims, in which minority voters are less than a numerical majority but

join with white voters to elect their preferred candidate. 556 U.S. at 13-14. Coalition claims' rarity dispels *Bartlett*'s worry that allowing them will "infuse race into virtually every redistricting," as crossover claims might have done. *Id.* at 21 (citation omitted). This is not speculative. This Court has allowed coalition claims since 1987, *see LULAC v. Midland Indep. Sch. Dist.*, 812 F.2d 1494 (5th Cir.), *vacated on state-law grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc), yet only a handful have ever been litigated.

Coalition claims also satisfy *Bartlett*'s desire for "an objective, administrable rule" for the first *Gingles* precondition—that minority voters can compose a "numerical, working majority" in a compact district. 556 U.S. at 13, 22. A crossover claim complicates this question: 39% might be enough in one case but not another, depending on "many political variables." *Id.* at 17. *Bartlett* thus chose "an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Id.* at 18. Coalition claims meet *Bartlett*'s test.

Coalition claims likewise avoid the "serious tension" posed by crossover claims "with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates." *Bartlett*, 556 U.S. at 16. A minority is not submerged by white bloc voting if it can elect its preferred candidates with white voters' help. The County speculates about these issues (Supp. Br. 23-25) without

reference to facts. The present case shows cohesive minority groups can face submergence collectively from white bloc voting, satisfying *Gingles*' requirements. *Bartlett* thus does not justify, much less mandate, disallowing coalition claims.

Avoiding *Bartlett*'s core reasoning, the County focuses (Supp. Br. 21-22) on its passing reference to Black voters possibly cooperating with "other racial minorities." Such dicta is not controlling because "more complete argument [may] demonstrate that the dicta is not correct." *Kirtsaeng v. John Wiley & Sons*, 568 U.S. 519, 548 (2013). Dicta "may not be fully considered" or may face "no adversarial testing" from parties it does not implicate. *Torres v. Madrid*, 592 U.S. 306, 329 (2021) (Gorsuch, J., dissenting). Other minorities were not present in *Bartlett*. Here, the County's dismantling of Precinct 3 amid intensive racial politics plainly lessened Black and Latino voters' political opportunity; they cannot elect preferred candidates to any of the commissioners court's five seats. That squarely implicates "the mandate of [Section] 2." *Bartlett*, 556 U.S. at 14.

b. The County's other invocations of Supreme Court precedent are no stronger. It cites (Supp. Br. 20-21) the treatment of Texas's 24th congressional district in *LULAC v. Perry*, 548 U.S. 399 (2006), but the Black plaintiffs challenging that district concededly did not satisfy the *Gingles* requirements. *Id.* at 443. *LULAC*'s fact-bound determination that they lacked the opportunity to elect

their preferred candidate under the district's prior configuration, *id.* at 444-446, has no bearing here. Plaintiffs proved that Precinct 3 was a functioning opportunity district for three decades before the County took it apart.

Perry v. Perez, 565 U.S. 388 (2012) (per curiam), was a short, fact-specific opinion in a stay posture—reviewing a district court's interim plan while Section 5 preclearance was ongoing—that never said it was finally resolving the legal question the Court had twice reserved. The County seizes (Supp. Br. 20) on a comment limited to a single Texas congressional district; the Court said nothing about the numerous Texas House districts that a district-court dissenter had argued were inappropriate coalition districts. *See Perez v. Perry*, 835 F.Supp.2d 209, 224-226 (W.D. Tex. 2011) (Smith, J., dissenting).

Finally, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), holding partisan gerrymandering non-justiciable, cuts in plaintiffs' favor. The Court viewed partisan gerrymandering as "far more difficult to adjudicate" than claims of racial discrimination. *Id.* at 2496-2497. Plaintiffs just want to proceed under the standard *Gingles* framework, which "has governed our Voting Rights Act jurisprudence since it was decided 37 years ago." *Milligan*, 599 U.S. at 19.

2. Lower-court authority favors taking coalition claims on their facts, as this Court's cases prescribe. Only *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc), has rejected coalition claims categorically. By contrast, the Second

Circuit affirmed an injunction requiring the creation of a coalition city-council district. *See Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275-276 (2d Cir.), *vacated on other grounds*, 512 U.S. 1283 (1994). It has continued evaluating coalition claims on their facts since *Bartlett*. *See Pope v. County of Albany*, 687 F.3d 565, 572-574 & n.5 (2d Cir. 2012).

In addition, the Eleventh Circuit held that "[t]wo minority groups (in this case blacks and hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive manner," though the plaintiffs there did not manage to make that showing. *Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 526-527 (11th Cir. 1990). And other circuit courts have treated coalition claims as a question of fact. *See Frank v. Forest County*, 336 F.3d 570, 575-576 (7th Cir. 2003) (holding coalition plaintiffs did not prove political cohesion); *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 890-891 (9th Cir. 1992) (same).

Recent district-court decisions not controlled by circuit authority also have allowed coalition claims. *See, e.g.*, *Holloway v. City of Virginia Beach*, 531 F.Supp.3d 1015, 1051-1053 (E.D. Va. 2021), *vacated as moot*, 42 F.4th 266 (4th Cir. 2022); *Huot v. City of Lowell*, 280 F.Supp.3d 228, 233-236 (D. Mass. 2017). None viewed *Bartlett* as decisive or *Nixon* as persuasive.

The County continues to overread dicta in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), rather than acknowledge its holding's limits. *See* Supp. Br. 28. Like *Bartlett*, *Hall* dealt only with crossover claims, holding that Section 2 does not protect minorities' "alliance with other voters in a district *who do not share the same statutory disability as the protected class*." 385 F.3d at 431 n.13 (emphasis added). But coalition claims involve voters who all allege the same statutory disability. Accordingly, as a Fourth Circuit opinion recently explained, that court "ha[s] not yet decided whether such 'coalition claims' are permissible to prove a Section 2 violation." *See Holloway*, 42 F.4th at 292 (Gregory, C.J., dissenting).[6]

E. The policy arguments against coalition claims are unfounded.

The County repeatedly casts coalition claims as purely political, not racial, and thus improper. It also rehearses old predictions about the consequences of allowing coalition claims, which time has not borne out. This Court should reject these atextual policy arguments.

1. The County contends (Supp. Br. 13) that a coalition claim "raises a political, not racial, challenge." This is a false dichotomy. "The objection that the subject-matter of the suit is political is little more than a play upon words." *Nixon*

[6] Because *Arkansas State Conference NAACP v. Arkansas Board of Reapportionment*, 86 F.4th 1204 (8th Cir. 2023), did not address coalition claims, it does not enter the circuit split.

v. Herndon, 273 U.S. 536, 540 (1927) (rejecting similar argument against voting-rights claim). The *Gingles* framework means Section 2 vote-dilution claims are viable only when "intensive racial politics" already exist. *Milligan*, 599 U.S. at 30 (quoting Senate Report 34). *Gingles*' third precondition requires majority bloc voting that defeats plaintiffs' preferred candidates. Without it, coalition claims fail. *See, e.g.*, *Overton v. City of Austin*, 871 F.2d 529, 538 (5th Cir. 1989) ("[T]he white majority in Austin did not vote sufficiently as a bloc to enable it to defeat the minorities' preferred candidates.").

The false dichotomy in the County's framing is evident when transposed to other contexts. It is not mere politics when parents of multiple races complain about segregation in their schools or workers of multiple races complain about discrimination by their employer. *See* pp.26-27, *supra*. Discrimination is unlawful whether it affects individuals of one group or several, and it does not cease to be discriminatory just because the context is electoral.

The falsity in the County's framing also is readily seen through a slight modification to this case's facts. Suppose the County's decisionmakers agreed to dismantle the longstanding Precinct 3 because "we want white voters to control every seat." If Black and Latino voters challenged that invidious discrimination together, their suit would patently involve both political stakes and racial discrimination: preserving their voting strength against racially motivated dilution.

Importantly, Section 2's results test does not require that sort of smoking gun. "Congress has used the words 'on account of race or color' in [Section 2] to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Milligan*, 599 U.S. at 25 (quoting *Gingles*, 478 U.S. at 71 n.34 (plurality opinion)). The fundamental question is whether the challenged "electoral structure operates in a manner that 'minimize[s] or cancel[s] out the[ir] voting strength.'" *Ibid.* (quoting *Gingles*, 478 U.S. at 47). Coalition claimants can satisfy that test just as well as single-group claimants.

2. The County raises supposedly intractable analytical problems entailed by coalition claims. Its assertion (Supp. Br. 43) that *Gingles* "does not test for homogeneity of a coalition" distorts the purposes underlying the *Gingles* preconditions. The second precondition, cohesion, exists to test homogeneity. Defendants also are free to argue coalition plaintiffs' respective groups differ on any totality-of-the-circumstances factors, such as differing effects of discrimination or success at gaining office.

The County also repeats criticisms of the cohesion showings in particular cases. *See* Supp. Br. 13-18 (citing Judge Higginbotham's dissents in *Midland* and *Campos*). Whatever those criticisms' merit as to those long-ago factual records, sufficient showings can be made to support coalition claims. *Clements* recognized the evidence of certain plaintiffs' cohesion as "overwhelming." 999 F.2d at 865

n.29. Likewise, this case's detailed record, subjected to the *Gingles* framework, established a "clear violation" of Section 2. ROA.16029.

The County gives away its intractability argument when it notes (Supp. Br. 15) that coalition claims often fail and Section 2 claims win infrequently overall. This shows the *Gingles* framework can filter out deficient coalition suits. *See, e.g.*, *Rollins*, 89 F.3d at 1214-1215 & n.21 (rejecting two-group coalition claim for lack of cohesion); *Badillo*, 956 F.2d at 890-891 (same); *Brewer*, 876 F.2d at 453 (same, for three-group coalition). The district court's comprehensive findings establish that this simply is not one of those deficient cases.

The rarity of successful coalition claims also answers the County's worry that coalition claims' "complications . . . 'in our increasingly multi-ethnic society will be enormous.'" Supp. Br. 43 (quoting *Clements*, 999 F.2d at 896 (Jones, J., concurring)). Time has disproved that dire forecast. If it were true, the County could muster more than the hypotheticals and abstractions that fill its brief.

The County does not support its other speculations any better. It offers no evidence that coalition claims ever "create or increase racial animosity among their members." Supp. Br. 44. It provides no examples of coalition claims unfairly disadvantaging certain voters within the coalition or "be[ing] a cruel hoax" on minority voters with divergent views. Supp. Br. 45 (quoting *Clements*, 999 F.2d at 897 (Jones, J., concurring)). If enough minority voters with divergent views exist,

the coalition claim will fail for lack of cohesion. Otherwise, such voters can protect their interests through intervention. The County warns against defendants' strategic misuse of coalition districts, but courts can police that practice by disregarding purported but unfounded coalition districts. *See, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F.Supp.2d 840, 857-858 (E.D. Wis. 2012) (rejecting defendants' argument that challenged district was proper coalition district). These issues should be left to the adversarial process.

III. Galveston County fails to justify overturning longstanding precedent.

The County shrinks from dealing directly with *stare decisis*, instead questioning (Supp. Br. 18) whether *Clements* actually determined that coalition claims are permissible. *Clements* decided that Section 2 allows aggregation of "politically cohesive" coalitions, while declining a concurrence's view that Section 2 categorically disallows them. 999 F.2d at 864; *id.* at 894-898 (Jones, J., concurring). Thus, *stare decisis* is strong here, because the en banc Court already has decided this statutory issue.

Clements followed thorough debate within the Court too. The Court first affirmed a coalition claim in *Midland*, 812 F.2d at 1500-1501, *vacated on state-law grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc), over the dissent of *Clements*' eventual author. *See id.* at 1503 (Higginbotham, J., dissenting). The Court then ruled for coalition plaintiffs in *Campos v. City of Baytown, Texas*, 840 F.2d 1240,

1245-1248 (5th Cir. 1988), which the Court declined to rehear, again over his dissent. *See Campos*, 849 F.2d at 944 (Higginbotham, J.). Those dissents raised virtually every argument the County now makes.

That makes this a textbook case for *stare decisis*. It is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *Stare decisis* is especially forceful because this Court already upheld coalition claims in en banc, not panel, proceedings. *See CFPB v. All Am. Check Cashing, Inc.*, 952 F.3d 591, 603 (5th Cir. 2020) (Smith, J., dissenting) (arguing it "undermine[s] the rule of law" for "judges to abandon en banc precedent they dislike"), *vacated*, 33 F.4th 218 (5th Cir. 2022) (en banc).

"What is more, *stare decisis* carries enhanced force when a decision, like [*Clements*], interprets a statute." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015). Courts should be "particularly circumspect in reconsidering decisions interpreting statutes," and they should not play "games . . . in order to escape the force of a fairly resolved issue." *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 585 (5th Cir. 2004) (en banc) (Smith, J., dissenting) (citation omitted). Coalition claims have been a debated issue at least since *Midland* in 1987, acknowledged twice by the Supreme Court. *See Bartlett*, 556 U.S. at 13-14;

Growe, 507 U.S. at 41. Yet Congress has left Section 2 unaltered. That is all the more reason to preserve this Court's precedents.

IV. Plaintiffs are entitled to relief under Section 2.

1. The district court correctly concluded that the County's 2021 districting plan is "a clear violation" of Section 2. ROA.16029. The County conceded at oral argument that its own Map 1 suffices for the first *Gingles* precondition. *See* Supp. Br. 12 n.10; ROA.15912, 15956. Plaintiffs' experts also prepared many "reasonably configured" illustrative plans. ROA.16008-16011. "[U]ndisputed evidence" showed "the combined Black and Latino coalition is highly cohesive," satisfying the second precondition. ROA.16008-16011. And plaintiffs satisfied the third *Gingles* precondition because "more than 85% of Anglos vote cohesively for candidates running in opposition to those supported by more than 85% of Black and Latino voters." ROA.16017. White bloc voting also will consistently defeat minority-preferred candidates in every seat under the County's enacted plan. ROA.16017.

Rather than contest these facts, the County mainly urged partisanship, not race, as the reason minority voters' preferred candidates lost. ROA.15935. But *Milligan* confirms that mere overlap between racial and partisan polarization does not defeat Section 2 claims by plaintiffs who otherwise satisfy *Gingles*. *See Singleton v. Merrill*, 582 F.Supp.3d 924, 1017 (N.D. Ala. 2022) (three-judge court)

(granting relief where "black voters overwhelmingly support[ed] the Democratic candidate and more than a majority of white voters cast[] a ballot for the Republican candidate"), *aff'd sub nom. Milligan*, 599 U.S. at 21-22. Moreover, the record showed "extreme" racial divergence in voting; "overwhelming[]" racial difference between each party's primary voters; few "successful minority candidates emerging from Republican primaries"; minority candidates' rare success outside majority-minority areas; and "continued racial appeals in Galveston County politics." ROA.16019-16020.

The totality of the circumstances supported plaintiffs, including "pervasive socio-economic disparities" (Senate Factor 5); limited success for minority candidates (Senate Factor 7);[7] and the commissioners court's "[un]responsiveness to minority concerns" (Senate Factor 8). ROA.16022-16026. The County's justification for dismantling Precinct 3 also was tenuous. ROA.16026-16027. The County expressly denied partisan motivations, claiming it merely aimed to consolidate the County's coastal and island areas in one precinct, but a coastal precinct could be made without altogether dismantling Precinct 3. ROA.15955,

[7] The County's handful of examples (Supp. Br. 2-3 & n.3-4) do not show clear error. The three Hispanic Republicans lack Spanish surnames. Robin Armstrong gained his office through appointment after this suit began and concededly is not minority voters' candidate of choice. U.S. Br. 9. The other minority officeholders nearly all won in majority-minority districts, not countywide.

15981, 16026-16027. Finally, the County's rushed, predetermined adoption of its discriminatory plan favored plaintiffs. ROA.15950, 15963-15969. The County committed many "procedural deviations" from past redistricting cycles, which it scarcely tried to justify. ROA.15950, 15963-15969, 15973.

2. The County does not show clear error in the district court's comprehensive findings. If it means to rely on its panel-stage arguments, the panel correctly rejected them. *See Petteway v. Galveston County, Tex.*, 86 F.4th 214, 218 (5th Cir. 2023); U.S. Br. 17-36.

The County's brief rehashes certain points about the district court's cohesion findings (Supp. Br. 46-48), none of which comes close to clear error. The Court should reject them as the panel did. The district court prioritized general elections over primaries because both sides' cohesion experts viewed them as more probative. U.S. Br. 24. Black and Latino voters were cohesive in both anyway, so the relative weight makes no difference. U.S. Br. 24, 26-27.

The County's claim (Supp. Br. 47) that plaintiffs "fail[ed] to explore primary results" is incorrect. The record showed that Black and Latino voters were highly cohesive in the 2012 primary for Precinct 3, the last time the seat was contested, and were cohesive in 22 of 24 primaries analyzed overall. U.S. Br. 24-25. The County omits that the district court credited the primary analysis of the County's

own expert, which found Black and Latino voters consistently had the same top-choice candidate. U.S. Br. 24-25, 28-29.

The County's other points, unsupported by legal authority, lack merit. It applies a threshold for cohesion in primaries (Supp. Br. 48 n.25) that its expert did not endorse and that cannot be justified on its own terms. U.S. Br. 27-28. And it hypothesizes (Supp. Br. 47) that voters' voting patterns should change based on candidates' race, but Black and Latino voters exhibited cohesion across all sorts of candidate matchups, including in primaries. ROA.23997, 24001-24002. Such durable cohesion bolsters plaintiffs' claims; it is counterintuitive to think it undercuts them.

Lastly, the County faults (Supp. Br. 48) plaintiffs' experts for its own inability to prove that non-racial factors caused racial polarization in County elections. That "showing is for the defendants to make." *Teague v. Attala County, Miss.*, 92 F.3d 283, 290 (5th Cir. 1996). The district court correctly rejected the County's proof (*see* U.S. Br. 30-31) to which the County has no response.

CONCLUSION

This Court should affirm the district court's judgment. If it reverses, it should remand for further proceedings on plaintiffs' unadjudicated claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On February 14, 2023, I filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

s/ Matthew N. Drecun
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,998 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 5th Cir. Rule 32.2. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Matthew N. Drecun
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Date: February 14, 2023

United States Court of Appeals

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February 14, 2024

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No. 23-40582 Petteway v. Galveston County
USDC No. 3:22-CV-57
USDC No. 3:22-CV-93
USDC No. 3:22-CV-117

Dear Mr. Drecun,

You must submit the 22 paper copies of your supplemental en banc brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Gardner

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