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

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SUPPLEMENTAL BRIEF FOR PLAINTIFFS-APPELLEES DICKINSON BAY AREA BRANCH NAACP; GALVESTON BRANCH NAACP; MAINLAND BRANCH NAACP; GALVESTON LULAC COUNCIL 151; EDNA COURVILLE; JOE A. COMPIAN; AND LEON PHILLIPS

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No. 23-40582

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Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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.

Defendants-Appellants

1. Galveston County, Defendant-Appellant
2. Honorable Mark Henry, in his official capacity as Galveston County Judge, Defendant-Appellant
3. Dwight D. Sullivan, in his official capacity as Galveston County Clerk, Defendant-Appellant
4. Commissioner Joseph Giusti, in his official capacity as Galveston County Commissioner
5. Commissioner Darrell Apffel, in his official capacity as Galveston County Commissioner
6. Commissioner Robin Armstrong, in his official capacity as Galveston County Commissioner
7. Commissioner Stephen Holmes, in his official capacity as Galveston County Commissioner
8. Randy Ray Howry, Counsel for Commissioner Stephen Holmes
9. J. Christian Adams, Counsel for Defendants-Appellants
10. Jason Brett Torchinsky, Counsel for Defendants-Appellants
11. Maureen S. Riordan, Counsel for Defendants-Appellants
12. Robert Barron Boemer, Counsel for Defendants-Appellants
13. Shawn T. Sheehy, Counsel for Defendants-Appellants
14. Angela Olalde, Counsel for Defendants-Appellants
15. Dallin Brockbank Holt, Counsel for Defendants-Appellants
16. Dalton L. Oldham, Counsel for Defendants-Appellants
17. James Edwin Trainor, III, Counsel for Defendants-Appellants
18. Jordan Raschke Elton, Counsel for Defendants-Appellants
19. Joseph M. Nixon, Counsel for Defendants-Appellants

20. Joseph R. Russo, Jr., Counsel for Defendants-Appellants

21. Paul A. Ready, Counsel for Defendants-Appellants

NAACP/LULAC Plaintiffs

22. Dickinson Bay Area Branch NAACP, Plaintiff-Appellee

23. Galveston Branch NAACP, Plaintiff-Appellee

24. Mainland Area Branch NAACP, Plaintiff-Appellee

25. LULAC Council 151, Plaintiff-Appellee

26. Edna Courville, Plaintiff-Appellee

27. Joe A. Compian, Plaintiff-Appellee

28. Leon Phillips, Plaintiff-Appellee

29. Richard Mancino, Counsel for Plaintiffs-Appellees

30. Diana C. Vall-llobera, Counsel for Plaintiffs-Appellees

31. Michelle Polizzano, Counsel for Plaintiffs-Appellees

32. Andrew Silberstein, Counsel for Plaintiffs-Appellees

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34. Kathryn Garrett, Counsel for Plaintiffs-Appellees

35. Hilary Harris Klein, Counsel for Plaintiffs-Appellees

36. Adrianne M. Spoto, Counsel for Plaintiffs-Appellees

37. Hani Mirza, Counsel for Plaintiffs-Appellees

38. Sarah Xiyi Chen, Counsel for Plaintiffs-Appellees

39. Joaquin Gonzalez, Counsel for Plaintiffs-Appellees

40. Christina Beeler, Counsel for Plaintiffs-Appellees

41. Nickolas Anthony Spencer, Counsel for Plaintiffs-Appellees

42. Aaron E. Nathan, Counsel for Plaintiffs-Appellees

Petteway Plaintiffs

43. Honorable Terry Petteway, Plaintiff-Appellee

44. Honorable Penny Pope, Plaintiff-Appellee

45. Constable Derrick Rose, Plaintiff-Appellee

46. Mark Gaber, Counsel for *Petteway* Plaintiffs-Appellees

47. Valencia Richardson, Counsel for *Petteway* Plaintiffs-Appellees

48. Simone Leeper, Counsel for *Petteway* Plaintiffs-Appellees

49. Alexandra Copper, Counsel for *Petteway* Plaintiffs-Appellees

50. Bernadette Reyes, Counsel for *Petteway* Plaintiffs-Appellees

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52. Neil Baron, Counsel for *Petteway* Plaintiffs-Appellees

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54. Alamdar S. Hamdani, Counsel for the United States

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February 14, 2024

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is scheduled for the week of May 13, 2024.

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INTRODUCTION

Appellants ask this Court to discard decades of binding precedent to excuse their "egregious" and "stunning" conduct in "dismantling" Galveston's "historic and sole majority-minority commissioners precinct." ROA.15887, 16028-29.[1] After a 10-day bench trial, Judge Jeffrey Vincent Brown of the Southern District of Texas found Appellants' conduct to be a "clear violation" of and "fundamentally inconsistent with § 2 of the Voting Rights Act" ("VRA"). ROA.15886, 16029. This was not a close call. And so, Appellants want to circumvent liability by seeking to require minority voters experiencing vote dilution on account of race to allege membership in a class limited to a single racial minority group—essentially to overcome a "single-race requirement"—to assert their claims.

Appellants' single-race requirement is unmoored from § 2's text, which affords broad protections to individuals (not groups) who are part of a class of voters experiencing a common discriminatory electoral practice within a given jurisdiction. It is also unsupported by the VRA's legislative history, which reflects Congress's explicit recognition of the common harms experienced by Black and Latino voters and refusal to impose any single-race requirement despite including express limitations in other sections. And Appellants' theory would dramatically upend

[1] Record citations are to the district court's October 13, 2023, Findings of Fact and Conclusions of Law unless otherwise specified.

longstanding precedent without any good reason. The "consequences" they claim will result from recognizing minority coalition claims are belied by actual experience in the decades in which courts have recognized exactly those claims. This sky-is-falling approach cannot justify such a dramatic deviation from *stare decisis*, a bedrock of our system of rule of law.

Appellants' arguments—and this entire appeal—are "not about the law as it exists," but "about [their] attempt to remake . . . § 2 jurisprudence anew." *Allen v. Milligan*, 599 U.S. 1, 23 (2023). The Supreme Court has consistently rejected such attempts. This Court should do the same.

COUNTERSTATEMENT OF THE ISSUES

1. Did the district court err in holding, consistent with binding Fifth Circuit decisions, that § 2 of the VRA does not impose a single-race requirement under the first precondition for results claims set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986)?

2. Did the district court commit clear error in finding the second *Gingles* precondition satisfied when statistical evidence from both plaintiff and defense experts demonstrated that the minority group votes consistently for the same candidates across a series of general and primary elections?

3. Did the district court commit clear error in finding the third *Gingles* precondition satisfied when it is undisputed that minority voters will have no opportunity to elect a candidate of choice in any commissioners precinct of the enacted plan due to undisputed high levels of Anglo bloc voting, and when the opinion was accompanied by detailed factual findings establishing that race rather than politics explained the polarized voting patterns?

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Minority voters in Galveston County's historic majority-minority commissioners Precinct 3 have been electing their candidate of choice since 1991. ROA.15950. But in 2021, following a redistricting process rife with unjustified procedural and substantive departures and a "disregard" for minority input, *see generally* ROA.15963-77, the commissioners court passed a new map that "summarily carved up and wiped off the map" Precinct 3 in a "textbook" racial gerrymander. ROA.15886, 16028. By submerging every one of Galveston's Black and Latino voters into four new Anglo-majority precincts, ROA.15938-39, the enacted plan "shut out" from the political process a compact, cohesive, and distinct minority community with shared experiences of discrimination and deprived them of any opportunity to again elect their candidate of choice to the County's governing body. ROA.16028.

The district court found that, far from the ephemeral, opportunistic collaboration that Appellants seek to portray, Galveston County's Latino and Black community has long voted together to support the same candidates of choice for the commissioners court, reaching back to the development of the majority-minority Precinct 3 decades ago. ROA.15911, 15925. Indeed, the "historic core of Precinct 3" was itself "the product of advocacy" by the Latino and Black community.

ROA.15911. Over its history, this majority-minority precinct "became an important political homebase for Black and Latino residents" as well as a source of "great pride." ROA.15911. The area covered by historic Precinct 3 continues to reflect a community of interest, as "substantial quantitative evidence, supported by lay-witness testimony" shows this community sharing similar needs and interests and jointly confronting "issues of ongoing discrimination." ROA.16010.

Galveston's Latino and Black community is bound together by a shared history of segregation and discrimination (including in voting), present-day racial bloc voting, discrimination and barriers to voting, shared substantial socioeconomic disparities, a relative lack of electoral success, the presence of racial appeals in recent campaigns, and a lack of responsiveness on the part of Galveston County's officials. ROA.15940-41, 16019, 16022-27. Historically, Black and Latino residents of the County were subjected to segregation and restrictive laws in the post-Civil War period, including poll taxes and Anglo-only primaries. ROA.15940-41. Today, voter ID requirements, voter roll purges, polling place closures in predominantly Black and Latino neighborhoods, and the County's failure to operate the minimum required number of polling places act as contemporary barriers to voting for Black and Latino residents alike. ROA.15984-86. "Discrimination against minorities in Galveston County" and "[r]acial and ethnic disparities in education, income, housing, and public health," which "are partly the result of past and present discrimination," harm

Latino and Black voters' "ability to participate equally in the electoral process." ROA.15984. Overall, "[t]he 2021 redistricting process for commissioners precincts occurred within a climate of ongoing discrimination affecting Black and Latino voter participation." ROA.15983.

The record also reflects that Galveston's Black and Latino community has engaged in longstanding joint efforts to advocate for their voting power. This includes the March 22, 2012 email attaching an objection letter sent by Appellee Joe Compian (JX-8) that Appellants highlight but blatantly mischaracterize in their supplemental brief. Appellants contend this exhibit shows that "Galveston County's Latino community was outraged" about a proposed new map, and that Compian was writing on "their behalf" alone. Appellants' Supplemental Brief ("Supp. Br.") at 6, Dkt. 193-1 at 20. What Appellants fail to mention, however, is that Mr. Compian was expressing the view of "The Galveston County Collaborating Organizations," a coalition of Latino *and African American* citizens and advocacy groups (including the NAACP/LULAC Appellees in this matter) who jointly submitted the objection letter and cover email. ROA.17910-11 (Compian testimony), ROA.24372-81 (JX-8). This exhibit demonstrates the Black and Latino community's *unified* concern that the proposed map did "not recognize the growth of the Latino population" in the County and thus "diminishes the voting strength of Latinos/African-Americans," affecting "their ability to elect and influence the election of candidates of their

choice." ROA.24372-78. This exhibit is just one of many pieces of evidence adduced at trial substantiating the deep, longstanding cohesion within Galveston's Black and Latino community.

Quantitative analysis likewise demonstrates this cohesion. "[S]tatistical analyses from general elections, statistical analyses from primary elections, and non-statistical evidence of cohesion all support the conclusion that Black and Latino voters in Galveston County act as a coalition for purposes of the second *Gingles* precondition because '[B]lack-supported candidates receive a majority of the [Hispanic] vote [and] Hispanic-supported candidates receive a majority of the [Black] vote.'" ROA.16016 (quoting *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989)). In general elections, "on average, over 85% of Black and Latino voters have voted for the same candidate countywide and within the illustrative Precinct 3 plans" provided by Appellants. ROA.15925. As for primary elections, "[b]etween [Appellees' expert] Oskooii and [Appellants' expert] Alford, the analyzed results show that Blacks and Latinos usually support the same top-choice candidate," including in "nine out of ten primary elections" analyzed by Oskooii, ROA.15929, and in 13 out of 14 primary elections analyzed by Alford. ROA.24001 (DX-305, Alford Report at 18-19, Tables 3 and 4).

Elections were thus *not* characterized by Black voters and Latino voters each running their own preferred candidate in the primary and then settling for whichever

candidate advanced to the general election. Rather, the qualitative and quantitative evidence supported the district court's finding that "distinctive *minority* interests" tie the Black and Latino community together, and that "if this cohesive group constitutes a majority of eligible voters in a county-commissioner precinct, it can elect a candidate of their choice." ROA.16015-17 (emphasis added). This evidence of cohesion was also supported by specific evidence of strong, unified support for Precinct 3's Commissioner Stephen Holmes, who often ran uncontested and whose last contested election "featured a highly cohesive Black and Latino electorate." ROA.15929; *see also* ROA.15988 (Holmes "has served continuously" since 1999).

By contrast, "Anglo voters in Galveston County vote cohesively and for candidates opposing those supported by a majority of Black and Latino voters" and "do so at a rate sufficient to defeat the minority-preferred candidate consistently in each of the enacted commissioners-court precincts." ROA.16017. In "most of the recent general elections, over 85% of Anglos across Galveston County voted for candidates running against the minority-preferred candidates." ROA.15933. "Similarly high levels of bloc voting are present at the individual-precinct level" in the enacted plan. *Id.* Even Appellants' expert testified that it would be hard to find "a more classic pattern of what polarization looks like in an election." ROA.15927 (quoting Alford).

Judge Brown considered Appellants' arguments that this polarization was merely political, not racial, and concluded that "a partisan explanation for voting patterns in Galveston County does not overcome the weighty evidence of racially polarized voting on account of race." ROA.15938. Appellants' expert "based his conclusions regarding the role of partisanship versus race primarily on one election: the 2018 Senate race between Senator Ted Cruz and Beto O'Rourke." ROA.15935-36. By contrast, in reaching its conclusion that the enacted plan "thwarts a distinctive minority vote at least plausibly on account of race," ROA.16019 (quoting *Milligan*, 599 U.S. at 19), the district court gave "considerable weight" to multiple race-specific facts present in Galveston County, including the lack of successful minority candidates emerging from Republican primaries, the "extreme degree" of Anglo bloc voting for candidates running against minority-preferred candidates, the tendency for minority candidates to only be elected from majority-minority areas, continued racial appeals in county politics, lay witness accounts of discrimination, persistent racial disparities across a wide range of measures, and the overwhelming rates at which Anglo and minority voters choose to participate in different primaries. ROA.16019.

Judge Brown also found that "Anglo commissioners are evidently not actively engaged in specific outreach to Galveston County's minority residents," ROA.15990, and noted that this lack of responsiveness by Anglo-preferred elected

officials to minority communities "'is intimately related'" to the legal significance of bloc voting because bloc voting "'allows those elected to ignore [minority] interests without fear of political consequences.'" ROA.16018 (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 857 (5th Cir. 1993) (*en banc*)).

In view of the totality of the circumstances, Judge Brown found it "stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court during 2021's redistricting." ROA.16028. The "result" of 2021 redistricting, and the enacted plan, is Black and Latino voters "being shut out of the process altogether." ROA.16028 (internal quotation and citations omitted). Judge Brown found that "[w]hat happened here was stark and jarring," and that the circumstances and effect of the enacted plan were "mean-spirited" and "egregious" given that "there was absolutely no reason to make major changes to Precinct 3." ROA.16029. Based upon these findings, and its consideration of all of the trial evidence, the trial court concluded that the 2021 redistricting process "was a clear violation of § 2 of the Voting Rights Act" and the enacted plan "must be overturned." *Id.*

B. Relevant Procedural Background

The district court decision followed a ten-day bench trial in August of 2023 featuring live testimony from thirty witnesses. ROA.15890-92. Judge Brown's

conclusion that Appellants engaged in an egregious and clear VRA violation was based on a 157-page decision with detailed factual findings relating to each of the *Gingles* preconditions and Senate Factors. ROA.15881-16037.

The district court held that it did "not need to make findings on [Appellees'] intentional discrimination or racial gerrymandering" claims in light of its finding for Appellees on § 2, which afforded full relief. ROA.16032-34. Thus, consistent with common practice, the district court "decline[d] to reach" the remaining claims. ROA.16034.

Following an expedited appeal and oral argument, a panel of this Court affirmed on November 10, 2023, ruling that the district court "did not clearly err" in applying the *Gingles* test and that it "appropriately applied precedent" in assessing *Gingles* I compliance based on a minority group that comprised Latino and Black voters. Dkt. 118-1 at 5. The panel nonetheless "call[ed] for this case to be reheard *en banc*" to reconsider "this court's precedent permitting aggregation." *Id.* On November 28, 2023, the full Court granted en banc review, vacated the panel decision pursuant to Fifth Circuit Rule 41.3, and set oral argument for May 2024. Dkt. 136. On December 7, 2023, the Court stayed the judgment on *Purcell* grounds. Dkt. 171-1.

STANDARD OF REVIEW

"This court reviews *de novo* the legal standards the district court applied to determine whether Section 2 has been violated." *Sensley v. Albritton*, 385 F.3d 591, 595 (5th Cir. 2004). "However, because Section 2 vote dilution disputes are determinations 'peculiarly dependent upon the facts of each case that require an intensely local appraisal of the design and impact of the contested electoral mechanisms,' [this Court] review[s] the district court's findings on the *Gingles* threshold requirements and its ultimate findings on vote dilution for clear error." *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986)). Under that clear error standard, if the district court's findings are "plausible in light of the record viewed in its entirety," this Court "must accept them, even though [it] might have weighed the evidence differently if [it] had been sitting as a trier of fact." *Veasey v. Abbott*, 830 F.3d 216, 229 (5th Cir. 2016) (en banc) (quoted citation omitted).

SUMMARY OF ARGUMENT

Appellants' arguments for creating a single-race requirement are unpersuasive. Without any textual basis, they contend that the term "class" implicitly refers to predefined bureaucratic groups. They ignore that the text in fact defines "a class of citizens" to include any individuals who are protected by VRA § 2(a) against discrimination "on account of" race, color, or ethnic language-minority status—in other words, their ancestry. Text, logic, and Supreme Court precedent compel the

conclusion that two or more voters may experience a common § 2 violation "on account of" ancestry-based discrimination even if they do not each belong to the same minority group (and even if some individual voters belong to multiple minority groups). This is because § 2 is violated just as much when dilution occurs because voters are *not* of a particular race as when it occurs because they *are*.

And even accepting arguendo that "class" means a single, predefined racial group, it would still not answer the question of whether the first *Gingles* precondition—a judicially created scheme to assess causation and redressability—imposes a single-race requirement where, as here, the facts show that an electoral structure interacting with racially polarized voting strips away the established, longstanding ability of minority voters (even if considered in two "classes") to elect their candidate of choice.

Appellants' theory would dramatically upend longstanding principles of how courts assess VRA claims, wiping away the "intensely local appraisal" required for decades. *See Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). It would paradoxically require comparing the opportunity of minority voters experiencing a common harm to each other, rather than to the majority thwarting their ability to elect a candidate of choice. As Judge Brown's detailed holding demonstrates, the current majority-minority requirement rule serves the "need for workable standards and sound judicial and legislative administration," and avoids the disfavored "race-based

assumptions," *Bartlett v. Strickland*, 556 U.S. 1, 17 (2009), a single-race requirement would impose. It is Appellants' single-race requirement that would "require [courts] to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of . . . § 2 jurisprudence," *id.* at 16, a step the Supreme Court has repeatedly declined to take.

Finally, in their limited challenges to the factual findings, Appellants fail to substantiate any clear error in Judge Brown's careful, intensely local appraisal. Appellants suggest the district court failed to properly consider primary elections even though it *did* consider primary election evidence, accorded it weight consistent with the testimony of *every expert* (including Appellants'), and found it consistent with racially polarized voting. Similarly, Appellants ignore the district court's extensive findings regarding the distinct role of race in voting behavior in Galveston. Judge Brown's appraisal is due substantial deference on appeal, and Appellants have failed to show any error, much less the clear error required to disturb careful and detailed factual findings of a trial court assessing VRA claims. *Sensley v. Albritton*, 385 F.3d 591, 595 (5th Cir. 2004).

ARGUMENT

I. The VRA's Text and Structure Establish that Appellees Have Stated a Viable Vote Dilution Claim.

A. A VRA § 2 "Class" Means Citizens Protected Against a Common Discriminatory Practice in a Given Jurisdiction.

By its unambiguous terms, VRA § 2(a) sets forth a federal protection afforded to *individuals*, prohibiting governments from imposing any voting practice that "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 [protections for language minorities]. 52 U.S.C. §§ 10301(a) (emphasis added). Section 2(a) thus protects "[i]ndividuals," not groups. *Milligan*, 599 U.S. at 25. Much like the non-race-specific language of the Fourteenth and Fifteenth Amendments it enforces, § 2 protects *any* individual citizen against discrimination regardless of their specific ancestral makeup. *See, e.g.*, *Prejean v. Foster*, 227 F.3d 504, 519 (5th Cir. 2000) ("Under the Fifteenth Amendment voters are treated not as members of a distinct race but as members of the whole citizenry.") (quoting *Rice v. Cayetano*, 528 U.S. 495, 523 (2000)).

Section 2(b) further instructs that a discriminatory result under subsection (a) can be shown if:

> 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).

The ordinary meaning of "class" is a "group of people . . . that have common characteristics or attributes." Black's Law Dictionary (11th Ed. 2019). Here, the common characteristic is expressly provided in § 2(b)'s text: "citizens protected by subsection (a)." Thus § 2's plain text forbids the conclusion that a "class of citizens" under subsection (b) turns on the class's common membership in a predefined bureaucratic racial classification about which subsection (a) is silent. Rather, a class of citizens protected by subsection (a) means a class of citizens who have a shared protection against ancestry-based discrimination in a State or political subdivision, as subsection (a) itself states.[2]

This is the only interpretation of "class" consistent with the individual protection afforded under § 2(a). That provision protects individuals who experience racial vote dilution because they are *not* members of a particular (majority) racial/ethnic group just the same as it protects those who experience injury because they *are* members of a particular (minority) racial/ethnic group. Both types of rights-

[2] Importantly, at the time of § 2(b)'s drafting, the legal concept of a "class" was already established as consisting of individuals who had "questions of law or fact common to the class," i.e., common questions relevant to alleged harm, rather than identical characteristics among members. *See* Fed. R. Civ. Pr. 23(a) (1976 Edition v.8 Titles 28-31 388, as amended January 1, 1977).

denials are "on account of race" in the well-established § 2 sense of "with respect to race," *Milligan*, 599 U.S. at 25. A "Whites Only" sign discriminates against non-White individuals on the basis of race *regardless of their particular race*, and non-white voters of any racial group would thus constitute a "class" of voters experiencing a common race-based harm. Individuals seeing that sign who are Afro-Latino would not, for example, need to specify whether the sign discriminates because of their African ancestry or because of their Latino ancestry to belong to the class of discriminated-against individuals.

This understanding of "class" under § 2(b) is required to effectuate the protection provided under § 2(a) because the nature of alleged ancestry-based discrimination is a fact question. *See, e.g.*, *Hernandez v. State of Tex.*, 347 U.S. 475, 478 (1954) ("[C]ommunity prejudices are not static . . . . Whether such a group [needing the same protection] exists within a community is a question of fact."). Individuals may be discriminated against because of their specific identity as, for example, in the Chinese exclusion acts. *See, e.g.*, *United States v. Ju Toy*, 198 U.S. 253, 274 (1905) (Brewer, J., dissenting) ("[T]he Chinese exclusion acts prohibit[] persons of the Chinese race . . . from coming into the United States."). But the law has always recognized protection from discrimination on account of minority status, including because nonwhite minorities may be discriminated against for being nonwhite rather than for being one specific minority. *See, e.g.*, *Wards Cove Packing*

Co. v. Atonio, 490 U.S. 642, 647, 658 (1989) (recognizing a "class of nonwhite cannery workers" and ordering the lower court to require "a demonstration that specific elements of the petitioners' hiring process have a significantly disparate impact on nonwhites"), *superseded by statute on other grounds as stated in Smith v. City of Jackson*, 544 U.S. 228, 240 (2005); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 150 & n.5 (1977) (classifying Puerto Rican and Black citizens as a minority group protected under VRA § 5 and using the term "nonwhite" to refer to them collectively); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 198 (1973) (holding that Black and Hispanic students, despite being "of different origins, . . . suffer identical discrimination in treatment when compared with the treatment afforded Anglo students"); *Nixon v. Condon*, 286 U.S. 73, 83 (1932) (sustaining right of action where petitioner was "[b]arred from voting at a primary . . . for the sole reason that his color is not white.").[3] Nor is the statute's race-neutral language limited to White/nonwhite distinctions. Section 2 could equally apply if the facts show, for example, that in a Black-majority jurisdiction Whites and Latinos are identically discriminated against for being not-Black.

In drafting the effects test, Congress *could* have narrowed its protections with a single-race requirement in myriad ways—for example, "members of a single race,

[3] Elsewhere in the VRA, Congress explicitly acknowledged this dynamic by using "white" versus "nonwhite" voter registration rates as a metric for determining when federal election observers were warranted. 52 U.S.C. §§ 10305(a)(2)(B), 10309(b).

color, or language minority protected by subsection (a)." The absence of such a limitation is striking, since elsewhere the VRA does limit certain language protections to jurisdictions where "more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a *single language minority*." 52 U.S.C. § 10303(f)(3) (emphasis added). "[W]hen Congress includes particular language in one section of a statute but omits it in another," Congress presumptively "intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (internal quotations and citations omitted).

The statute implements a broad phrase—"on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title." This language encompasses protection for individuals broadly against ancestry-based discrimination. The additional protections afforded language minority groups pursuant to the "guarantees set forth in section 10303(f)(2)" do not narrow the broadly phrased "race or color," but rather ensure there is no loophole whereby a jurisdiction avoids liability by claiming a practice discriminates because of language rather than race or color. *Cf. NAACP v. New York*, 413 U.S. 345, 359-60 (1973) (describing the State's argument that "it was never the practice of administering the [English literacy] tests to discriminate against any person on account of race or

color."), *superseded by statute as stated in United States v. American Tel. & Tel. Co.*, 714 F.2d 178, 180-81 (1983).[4]

After all, race, color, and language minority are overlapping rather than exclusive characteristics, and members of the language minority groups defined elsewhere in statute are also protected against discrimination on the basis of "race or color." *See, e.g.*, *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (describing a curfew for people of Japanese ancestry as "discrimination based on race" and that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people"); *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970) (holding that literacy tests that discriminated against "Spanish surname populations" and "Indians" in Arizona and "Puerto Ricans in New York" justified the VRA's prohibition on such tests under the Fifteenth Amendment); *White v. Regester*, 412 U.S. 755, 756, 768-70 (1973) (finding multi-member districting was "invidiously discriminatory" against Mexican-Americans as a "cognizable racial or ethnic group"); *Rice v. Cayetano*, 528 U.S. 495, 514-15 (2000) (defining "racial discrimination" under the Fifteenth Amendment as discrimination against individuals "solely because of their ancestry or ethnic characteristics") (internal quotations and citation omitted); *Coal. for Educ. in Dist. One v. Bd. of Elections of*

[4] Similarly, the Fifteenth Amendment includes the phrase "or previous condition of servitude" to prevent false "on account of race" workarounds, not to somehow suggest the two forms of discrimination are mutually exclusive.

City of New York, 495 F.2d 1090, 1091 (2d Cir. 1974) (pre-1975-amendment case recognizing a challenge by "black, Hispanic and Chinese" voters under the VRA and Fourteenth Amendment); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 243-44 (D.D.C. 2008) ("[W]hen [Congress] adopted the Act's protections for language minorities in 1975 and extended them in 2006, it could have relied solely on its Fifteenth Amendment authority."), *rev'd sub nom. on other grounds*, *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009). Section 2(a) thus does not pigeonhole individuals, but rather provides expansive coverage to ensure that any citizen is protected against ancestry-based discrimination they might experience.

Appellants' arguments for understanding class as restricted to a single racial/ethnic group are unpersuasive.

1. Injecting a single-race requirement into the term "class" under § 2(b) would create a host of internal inconsistencies. It would create tension with the protections afforded members of ethnic language groups, which can encompass different racial groups or groups that speak multiple different languages. *See* 52 U.S.C. § 10310(c)(3) ("The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."). It is illogical that a language minority group that includes people of many racial backgrounds who speak many different languages could be considered a single

"class" under § 2(b) for purposes of language discrimination but be prohibited from other protections under the same statutory language. And the practical consequences would be absurd: Pakistani and Japanese voters, for example, could be considered a single class because they fit under the language minority designation "Asian American," but Blacks and Latinos could not because they do not share an arbitrary government classification.

Furthermore, Appellants' erroneous theory of § 2 vote dilution claims would create an unwarranted inconsistency with time, place, and manner claims, brought under the same statutory provision, without any textual basis. As demonstrated in *Brnovich v. Democratic Nat'l Comm.*, the Supreme Court evaluates time, place, and manner challenges under § 2 brought by multiple racial and ethnic minority voters ("Arizona's American Indian, Hispanic, and African American citizens") by considering the "disparate impact on minority voters" as compared to "non-minority voters;" it does not compare one racial minority against another. 141 S. Ct. 2321, 2334, 2344-46 (2021). Section 2's text is fixed in writing and does not vary based on the circumstances of its application, and such inconsistencies weigh heavily against adopting Appellants' concept of "class" and reinventing the first *Gingles* precondition for vote dilution claims. *Cf. Clark v. Martinez*, 543 U.S. 371, 382 (2005) ("We find little to recommend the novel interpretive approach advocated by

the dissent, which would render every statute a chameleon, its meaning subject to change. . . .").

2. Appellants' assertion that § 2 needs to have specifically "authorized" coalition claims within the text, Supp. Br. at 18, contravenes standards of statutory interpretation. "[T]here [is no] such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020). Instead, the broad concept of protections, and use of the word "class of citizens protected under Section 2(a)" without any indication that such a class is limited to a single racial group, accord with the "broad remedial purpose" of the VRA and "cannot justify a judicially created limitation on the coverage of the broadly worded statute." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991).

3. Appellants' contention that use of the singular "class" instead of "classes" imparts a single-race requirement overlooks basic principles of language usage. If one shows that members of "classes" have less opportunity, one will necessarily have shown that members of *at least* one class have less opportunity. Hence, when one phrases a condition in the singular, it goes without saying that proving the condition in multiple ways also suffices. That is why the Dictionary Act states that "words importing the singular include and apply to several persons, parties, or

things," 1 U.S.C. § 1—not because it is some specialized rule for statutory interpretation, but because it accords with how language is ordinarily used.

And in any event, if subsection 2(b) required proof that political processes were not "equally open to participation by members of **classes** of citizens protected by subsection (a), in that **their** members have less opportunity," it would still say nothing about requiring a "class" to be a single racial minority. It would, if anything, just imply that members of at least two classes (however class is defined) must suffer distinct injuries in a jurisdiction for a violation to occur, which nobody suggests. Congress's decision not to use a nonsensical alternative thus provides no support for Appellants' theory.

4. Finally, even if there were multiple plausible meanings of "class" in § 2(b), the canon of constitutional avoidance favors a meaning that does not itself pose constitutional dilemmas. The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). Here, Appellants would read the statute as invoking particular racial classifications without regard to the jurisdiction-specific harm identified, an argument that "ignores the dangers presented by individual classifications, dangers that are not as pressing when the same ends are achieved by more indirect means." *Parents Involved in Cmty. Sch.*

v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 797 (2007). It is far more problematic to assume that Congress pre-defined certain racial groups into classes and "considered members of each group and the group itself to possess homogenous characteristics," Supp. Br. at 32 (citing *Clements*, 999 F.2d at 894 (Jones, J., concurring)), than to assume that Congress simply protected "any citizen" against ancestry-based discrimination, the nature of which is determined as a factual matter in the challenged jurisdiction. Appellants' textual reading *imposes* de jure classifications whereas the race neutral understanding of "class" *combats* de facto classifications.

The current understanding of "class" as "citizens protected by subsection (a)" experiencing harm from a challenged electoral practice in a given jurisdiction avoids these textual hang-ups and best accords with the jurisdictionally fact-specific "totality of the circumstances" analysis rather than imposing bureaucratically defined groups.

B. Even if the Court Accepts Appellants' Understanding of "Class," There Would Still Be No Textual Basis for Adding a Single-Race Requirement to the First *Gingles* Precondition.

Appellants assume without explanation that interpreting "class" as a single, predefined group directly translates to a *Gingles* I single-race requirement. Not so. Rather, one should begin by considering the nature of *Gingles* I itself. After all, the VRA statutory text nowhere mentions a hypothetical 50+1% minority CVAP

district; "the *Gingles* framework is not the same thing as a statutory provision, and it is a mistake to regard it as such." *Milligan*, 599 U.S. at 103 (Alito, J., dissenting).

In *Gingles*, the Supreme Court set forth certain preconditions plaintiffs must satisfy to prove a § 2 vote dilution claim. 478 U.S. at 47-51. It established these principles as a judicial mechanism for assessing causation and redressability—that an "electoral structure operates to minimize or cancel out [minority voters'] ability to elect their preferred candidates" in an environment in which "minority and majority voters consistently prefer different candidates." *Id.* at 48; *see also Growe v. Emison*, 507 U.S. 25, 40-41 (1993) ("Unless these points are established, there neither has been a wrong nor can be a remedy.").

In setting forth this standard, the Supreme Court never expressly or implicitly linked the first *Gingles* precondition to the word "class" in § 2(b) and never indicated that the first *Gingles* precondition could not be met if a group of minority voters of more than one racial/ethnic background is harmed in the same way by the same redistricting plan with racialized voting and could have their injury redressed by the same remedy. *See generally*, 478 U.S. at 47-51. The term "class" does not appear once in this portion of *Gingles* nor does an implication that the first *Gingles* precondition must be satisfied by "single" racial groups.

The *Gingles* I concept did not appear in the *Whitcomb-White* framework that Congress codified and was not discussed in legislative history, nor did courts

applying § 2 to vote dilution claims between 1982 and 1986 contemplate it. *See, e.g.*, *Jones v. City of Lubbock*, 727 F.2d 364 (5th Cir. 1984) (affirming that Blacks and Mexican-Americans as "minority citizens" suffered a § 2 vote dilution injury without suggesting a majority-minority requirement). Indeed, Justice Brennan's only citation for the first precondition was not the text, but rather a post-1982-amendment journal article criticizing the *Whitcomb-White* framework that Congress had codified. *Gingles*, 478 U.S. at 51, n.17 (1986) (citing Blacksher & Menefee, *From* Reynolds *v.* Sims *to* City of Mobile *v.* Bolden, 34 Hastings L. J. 1, 55-56 (1982)).

Gingles I thus is not strictly rooted in the concept of "class" referenced in § 2(b)'s operative language, which focuses on the "totality of circumstances" inquiry that follows the *Gingles* preconditions. Unlike the *Gingles* I majority-minority requirement, "the totality of the circumstances" focuses on all the circumstances in the actual "State or political subdivision" as it exists, not one circumstance in a hypothetical district. The statute, in plain, unambiguous language, instructs courts to consider all the circumstances in evaluating whether members of one group of voters have less opportunity than another.

Considering the structure of this statutory language, Appellants' assumption that a singular "class" translates to a single-race requirement under *Gingles* I hardly makes sense. If Appellees have established as a factual matter that members of the

combined group "Black and Latino voters" have less opportunity than "other members of the electorate," they have necessarily established that members of the subgroups "Black voters" and "Latino voters" have less opportunity than "other member of the electorate." The members of the group "Black and Latino voters" are identical to the members of the subgroups "Black voters" and "Latino voters." And that is what the district court found as a factual matter (and a panel of this Court affirmed): that members of the group "Black and Latino voters in Galveston County," as a factual matter, have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." ROA.16029.

Instead, *Gingles* I is meant to determine, in a judicially administrable way, whether that unequal opportunity is caused by the challenged plan and redressable by an alternative—or in other words, whether the challenged practice "results" in the injury. Taken together with *Gingles* II and III, the framework determines whether the challenged plan "results in" a voting rights injury "on account of" race under § 2(a). "[O]n account of . . . incorporates the simple and traditional standard of but-for causation," and "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1739 (2020) (internal citation and quotation marks omitted). There is nothing in these concepts that forecloses minority voters who

happen to not all be lumped together into a single bureaucratic category from experiencing common racial vote dilution that can be redressed by a common remedy.

The facts here prove the point because they confirm that causation—the fundamental concern of *Gingles*—is established. Under the benchmark plan, minority voters were in a majority-minority district and were for decades electing their representative of choice in both primary and general elections, expressing a "distinctive minority vote." ROA.16014-19 (quoting *Milligan*, 599 U.S. at 19). A fortiori, a majority-minority district *can* be drawn that redresses Appellees' injury, and Appellees *can* elect their representative of choice in such a district. The "but-for" cause of their new inability is the challenged redistricting scheme interacting with legally significant racially polarized voting. *Id.* Absent the redistricting plan or the racially polarized voting—for which the district court specifically found that "a partisan explanation . . . does not overcome the weighty evidence of racially polarized voting on account of race"—Appellees could again elect a representative. ROA.15938.

Adding a single-race requirement to the *Gingles* test, with no textual basis for doing so, would thus deny relief to minority voters suffering racial vote dilution who have otherwise proved causation and redressability.

II. Legislative History Does Not Support a Single-Race Requirement for the First *Gingles* Precondition.

The VRA's legislative history underscores that Congress intended to effectuate broad protections against ancestry-based discrimination for individual citizens without imposing a single-race requirement. In instances where Congress limited the VRA's protections—such as by disclaiming a right to proportionality or limiting non-English language requirements to specified circumstances—it did so expressly and not by implication. Neither the statute nor its legislative history supports an implied single-race requirement to state a vote dilution claim. To the contrary, the legislative history indicates that Congress intended the broad provisions of § 2's results test to protect individuals of different racial groups experiencing common discrimination.

The Voting Rights Act of 1965 was "designed primarily to enforce the 15th amendment to the Constitution of the United States." H. Rep. No. 493, 89th Cong., 1st Sess., 1965, reprinted in 1965 U.S.C.C.A.N. 2437, 2437. In 1975, Congress added specific protections to the VRA to address the "systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English." S. Rep. No. 295, 94th Cong., 1st Sess. 8 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 790 ("1975 Senate Report"). Inter alia, the 1965 definition of "test or device" was expanded to include the practice of providing any election information, including ballots, only in

English in jurisdictions where members of a single language minority constituted more than five percent of the citizens of voting age. 52 U.S.C. § 10303(f)(3).

In adding more specific protections for language minority groups, Congress was not implying that members of these groups did not face racial discrimination; it was merely recognizing that people of these ancestries faced particular additional barriers arising from limited English proficiency. Indeed, Congress characterized these groups as "*racial minorities* whose primary language is other than English." 1975 Senate Report, 1975 U.S.C.C.A.N. at 789 (emphasis added). Congress also acknowledged that persistent vote dilution was an issue of *racial* discrimination that impacted language minorities within the greater minority population: "Testimony indicated that *racial discrimination against language minority citizens* seems to follow density of minority population." 1975 Senate Report, 1975 U.S.C.C.A.N at 793 (emphasis added).

Congress also repeatedly acknowledged the common discriminatory harm inflicted on voters of more than one racial or ethnic group (predominantly Black and Latino citizens) in a given jurisdiction, and sought to combat that with the VRA:

> The State of Texas, for example, has a substantial minority population, comprised primarily of Mexican Americans and blacks. . . . Election law changes which *dilute minority political power* in Texas are widespread in the wake of recent emergence of minority attempts to exercise the right to vote. . . . In January, 1972, a three-judge Federal court ruled that the use of multimember districts for the election of state legislators in Bexar and Dallas counties, Texas, unconstitutionally diluted and otherwise cancelled the voting strength of *Mexican*

> *Americans and blacks* in those counties. . . . These [at-large] structures effectively deny *Mexican Americans and black voters* in Texas political access in terms of recruitment, nomination, election and ultimately, representation.

1975 Senate Report, 1975 U.S.C.C.A.N. at 791-94 (emphasis added, citing *White v. Regester*, 412 U.S. 755 (1973)).

Yet Congress did not enact any express provision limiting minority voters of different racial groups from asserting rights under § 2, despite including other express limitations elsewhere. In addressing the provision of election materials "only in the English language," Congress explicitly included protections for language minority citizens only in jurisdictions in which "more than five per centum of the citizens of voting age . . . are members of a *single language minority.*" 52 U.S.C. §10303(f)(3) (emphasis added). By contrast, nowhere in the legislative history to the 1975 amendment to the VRA, or its text, is there any indication that Congress intended to bar minority citizens from joining to challenge the same discriminatory practice inflicting a common discriminatory harm under § 2.

The 1982 Amendments followed the same trend of expanding the VRA's protections without prohibiting different minority groups from jointly challenging discriminatory electoral practices. Congress amended § 2 to "make clear that proof of discriminatory intent is not required to establish a violation of Section 2" and thereby "restor[ed] the legal standards . . . which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*," S. Rep. No. 97-417, at 2

(1982)—that is to say, the legal standard in *White v. Regester*, 412 U.S. 755 (1973), which itself was part of a procedural line that included joint claims by Black and Latino voters in Tarrant County, Texas, *see Graves v. Barnes*, 378 F. Supp. 640, 644-48 (W.D. Tex. 1974), *vacated on other grounds*, *White v. Regester*, 422 U.S. 935 (1975).

The record again indicates that Congress did not intend any single-race requirement. Congress repeatedly refers to minority voters collectively, observing that a results test would "permit plaintiffs to prove violations by showing that *minority voters* were denied an equal chance to participate in the political process." S. Rep. No. 97-417, at 16 (emphasis added). In crafting the results test language, incorporated from *White*, Congress intended make clear that plaintiffs can show the "challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in *minorities* being denied equal access to the political process." *Id.* at 27 (emphasis added). The harm addressed was that "racial bloc voting and other factors . . . can deny *minority voters* equal opportunity to participate meaningfully elections." *Id.* at 33 (emphasis added).

The Senate Judiciary Committee's Report also indicates Congress was aware that voters from different racial/ethnic groups were jointly challenging racial vote dilution. The 1982 Report cites to the Supreme Court's decision in *Wright v. Rockefeller*, in which plaintiffs alleged vote dilution on behalf of Black and Puerto

Rican voters. *See* S. Rep. No. 97-417 at 19 n.60 (citing *Wright v. Rockefeller*, 376 U.S. 52 (1964)). But despite this demonstrated awareness that minority voters of different racial and ethnic groups were joining as one plaintiff class to pursue VRA claims, Congress did not add any single-race qualifier to the term "class" when amending the statute. *Cf. Nixon v. Kent County*, 76 F.3d 1381, 1395 (6th Cir. 1996) (Keith, J., dissenting) ("If Congress was thus aware that more than one minority group could be considered to constitute one plaintiff class in determining the availability of Voting Rights Act protection, certainly the absence of an explicit prohibition of minority coalition claims compels a construction of Section 2 which allows them."). This omission is even more striking given Congress did include specific language disclaiming a right to proportional representation in the 1982 Amendment. 52 U.S.C. §10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

Amicus Judicial Watch erroneously suggests that Congress intended to prohibit coalition districts in Section 5 during its 2006 reauthorization. Brief for Judicial Watch as Amicus Curiae at 14-15, Dkt. 224-1 at 21-22. To the contrary, Congress expressed concerns about crossover districts where minority voters must join with *majority* voters to elect candidates of choice. S. Rep. No. 295, 109th Cong., 2d Sess. 18-21 (2006). But its discussion recognizing multi-racial majority-minority

districts supports the current legal framework: "Naturally occurring majority-minority districts have long been the historical focus of the Voting Rights Act. They are the districts that would be created if legitimate, neutral principles of drawing district boundaries . . . were combined with the existence of a large and compact minority population to draw a district in which *racial minorities* form a majority." *Id.* (emphasis added).

The legislative history thus shows Congress was aware of and intended to protect voters of multiple races against discriminatory effects.

III. Appellants' Theory Would Upend Longstanding Principles Governing § 2 Claims, as Recently Affirmed in *Allen v. Milligan*.

1. Courts considering § 2 claims must conduct an "intensely local appraisal" of the challenged law. *Milligan*, 599 U.S. at 19 (*quoting Gingles*, 478 U.S. at 79); *White*, 412 U.S. at 769 (endorsing the trial court's "intensely local appraisal"). Importantly, this approach prohibits courts from making race-based assumptions about voting behavior. Even if harmed voters are all identified as a single race, they are still never *assumed* to be politically cohesive; plaintiffs must instead prove this fact in the specific region or proposed district. *See, e.g.*, *Growe*, 507 U.S. at 41 (noting "a court may not presume bloc voting within even a single minority group"); *cf.* ROA.16014-17. Nor are majority voters *assumed* to engage in bloc voting because of their racial identity, and plaintiffs must further show (as in Galveston)

that polarization thwarts minority opportunity "at least plausibly on account of race." *Milligan,* 599 U.S. at 19; ROA.16017-19.

A single-race requirement directly contravenes this longstanding principle by forcing courts to make the quintessentially race-based assumption that minority voters from different census groups can *never* be cohesive, exist as a community of interest, or experience a common harm of vote dilution, in *any jurisdiction*, under *any circumstances* nationwide and across all time. It thus requires highly disfavored "[d]istinctions between citizens solely because of their ancestry," *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208 (2023) (internal quotations omitted), regardless of what local evidence shows about factual discrimination in a particular jurisdiction.

Rather than using quantitative and qualitative evidence to inform a local appraisal of whether minority voters with different ancestries are cohesive, as is current practice, Appellants' proposal would condition a federal right of action on how voters fit within arbitrary census classifications set by a federal agency. Courts cannot use bureaucratic classifications that "rest on incoherent stereotypes" to determine the availability of claims under federal law. *See id.* at 291 (Gorsuch, J., concurring). As Justice Gorsuch explained, the federal government's "Black or African American" designation "covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy

Nigerian immigrants, to a Black-identifying applicant with multiracial ancestry whose family lives in a typical American suburb." *Id.* at 292 (Gorsuch, J., concurring). Likewise, the Census Bureau's classification of "Asian" lumps together people with Japanese and Indian ancestry. *Id.* at 291-92 (Gorsuch, J., concurring). It makes no sense to conclude that those individuals constitute a single "class" protected by § 2, but Black and Latino individuals categorically cannot. Section 2 does not impose that result.

This Court's existing § 2 framework, which rejects a single-race requirement, appropriately respects the need to avoid insidious racial stereotypes. This Court has "treated the issue as a question of fact, allowing aggregation of different minority groups" for *Gingles* I "where the evidence suggests that they are politically cohesive." *Clements*, 999 F.2d at 864. This approach recognizes the inherent possibility that, in any given jurisdiction, "the prejudice of the majority is not narrowly focused" against merely one racial group. *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500 (5th Cir. 1987) (noting "records in too many cases show that Anglos do discriminate against both Blacks and Mexican-Americans for anyone to deny that these two groups may ever be aggregated in a voting dilution case"), *vacated on state law grounds*, 829 F.2d 546 (5th Cir. 1987).

Moreover, this Court's current approach has worked effectively to distinguish racial vote dilution from mere politics. As Appellants acknowledge, successful coalition claims are rare. Supp. Br. at 15. Contrary to their arguments, that is not a reason to make bringing these claims entirely impossible. The Supreme Court expressly rejected that logic in *Milligan*, which cited the relative infrequency of successful § 2 suits as a reason to reject defendants' attempt to "remake" the *Gingles* standard; the existing standard limited judicial intervention "to those instances of intensive racial politics where the excessive role of race in the electoral process denies minority voters equal opportunity to participate." 599 U.S. at 23, 29-30 (internal quotation and alterations omitted). By the same logic, the relatively rare success of § 2 coalition claims in this Circuit supports that the current framework adequately limits judicial intervention.

2. Appellants' theory would pervert judicial evaluation of discriminatory effects. Appellants would have courts compare the opportunity of different minority census groups to *each other* instead of to the majority within the jurisdiction. *See* Supp. Br. at 33 (contending that § 2 vote dilution requires comparing minority voters' opportunity to elect a candidate against "other coalitional plaintiffs in a different minority group"). But it makes no sense to determine whether the members of one minority group suffer an injury by comparing their opportunity to that of other minority groups who also allege the same injury. This would allow jurisdictions to

deny opportunity to any minority group so long as they did so equally to every minority group. It cannot be the case that if Black voters and Latino voters each have less opportunity than White voters, there is no violation because Black voters have the same non-existent opportunity as Latino voters. This further evidences why Appellants' understanding is flawed, and why the Supreme Court, in both dilution and time/place/manner claims, assesses the opportunity of the "minority vote" compared to the "nonminority voter." *See, e.g.*, *Milligan*, 599 U.S. at 25; *cf. Brnovich*, 141 S. Ct. at 2344-46.

There is no dispute that Black and Latino voters are, separately and together, minority voters within Galveston County. ROA.15910. Neither can be considered part of the majority. Appellants theorize that unlawful dilution of minority votes is fine if it impacts more than one census group. *Milligan* (and common sense) require rejecting this illogical result.

IV. Neither Supreme Court Precedent nor Appellants' Parade of Horribles Justifies Their Proposed Remake of § 2.

Stare decisis is "a foundation stone of the rule of law," *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014), and "contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). It carries "special force in respect to statutory interpretation because Congress remains free to alter what [courts] have done." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 274 (2014) (cleaned up).

This Circuit has declined to impose a single-race requirement as part of the first *Gingles* precondition for nearly four decades, as have most Circuits considering the question.[5] That precedent is en banc, not simply the view of a prior panel. Yet Congress has amended and reauthorized the VRA without confining § 2 to a single racial group. As in *Allen v. Milligan*, "statutory *stare decisis* counsels our staying the course." 599 U.S. at 39.

Even if members of this Court disagree with that established precedent, "[r]especting *stare decisis* means sticking to some wrong decisions" since it is "more important that the applicable rule of law be settled than that it be settled right," and overturning it requires "a special justification – over and above the belief that the precedent was wrongly decided." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446*,* 455-56 (2015) (internal quotations omitted).

All extratextual considerations here warrant adherence to *stare decisis*, and an affirmance of this Circuit's decades-long en banc precedent. This is especially true in the absence of Supreme Court precedent supporting the dramatic shift Appellants seek or any demonstrated problems administering the current standard.

[5] As set forth in our principal brief, the Sixth Circuit is a distinct outlier. *See* Dkt. 69 at 28 & n.8.

A. The Supreme Court Has Clearly Distinguished Majority-Minority Coalition Claims from "Sub-Majority" Vote Dilution Claims.

Appellants rightly acknowledge that the Supreme Court has repeatedly declined to impose a single-race requirement. Supp. Br. at 19. The precedent they cite supports maintaining the established majority-minority standard and not the new standard they desire.

In *Bartlett v. Strickland*, the Supreme Court set forth a bright line "majority-minority requirement" to satisfy the first *Gingles* precondition: "[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." 556 U.S. 1, 3, 12-20 (2009) (plurality). In doing so, it held that § 2 does not require "crossover" districts "in which minority voters make up less than a majority of the voting-age population" and rely on White cross-over voters to elect a candidate of choice. *Id.*

The *Bartlett* plurality took great care to make clear it was not addressing minority coalition claims, *id*. at 13-14, and its primary justifications for establishing a majority-minority threshold do not translate to a single-race requirement. Crossover claims were rejected due to (*i*) a concern that requiring such districts would result in protecting mere political alliances (contravening § 2's mandate to remedy only racial harms); (*ii*) administrability concerns; and (*iii*) "tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-

preferred candidates." *Id.* at 14-18. Galveston illustrates why these issues do not exist for coalition claims.

First, Black and Latino voters have successfully elected a candidate of their choice for decades in the county's sole majority-minority precinct, ROA.16028, "based on their own votes and without assistance from others." *Bartlett*, 556 U.S. at 14. Thus, the *Bartlett* plurality's concern with crossover districts—that "*minorities* in crossover districts could not dictate electoral outcomes independently"—is not present. *Id.* at 14–15 (emphasis added) (internal quotations omitted). Further, Judge Brown specifically rejected a mere political explanation for racial voting patterns in Galveston, allaying any concerns about protecting a mere "advantageous political alliance." *Id.*

Second, allowing minority coalition claims is consistent with the *Bartlett* plurality's preference for bright-line tests. *Bartlett* noted that, "[u]nlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on 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 (emphasis added). That test applies easily to coalition claims. No speculation about future White crossover voting is necessary. ROA.15933. Finally, allowing Black and Latino minorities in Galveston to join their votes creates no tension with the third *Gingles* condition of majority bloc voting.

Nor do any of the other Supreme Court cases cited by Appellants or their amici support a single-race requirement. The Court's opinion in *Growe v. Emison*, 507 U.S. 25 (1993), merely emphasized the importance of proving cohesion as a factual matter. *Id.* at 41 (holding that for coalition claims under § 2, "proof of minority political cohesion is all the more essential"). In *LULAC v. Perry*, 548 U.S. 399, 445-46 (2006), the Court reinforced that § 2 protects minority voters' ability to elect a candidate of choice, not merely "influence" who the candidate is. Importantly, the Court rejected plaintiffs' § 2 claims on behalf of African American voters after finding they "do not vote cohesively with Hispanics" and would not have an opportunity to elect their candidate of choice in the proposed district, *id.* at 443, i.e., exactly the *opposite* facts as in Galveston.

And *Perry v. Perez*, 565 U.S. 388, 394 (2012) (per curiam), merely articulated the well-established principle that courts must pay deference to local policymakers' preference when adopting remedial plans, an issue not in question here. Nor would it be at issue, given the district court found *none* of Appellants' purported districting principles explained the destruction of the sole majority-minority district. *See, e.g.*, ROA.16029 ("The circumstances and effect of the enacted plan were mean-spirited and egregious given that there was *absolutely no reason to make major changes to Precinct 3*." (emphasis added, internal quotations omitted)); ROA.15977-79 (finding evidence "inconsistent" with purported redistricting criteria used, none of which

justified destroying Precinct 3); ROA.16026-27 (finding purported single-coastal precinct objective unsupported by evidence and "neither require[d] nor justifie[d] cracking the county's minority population.").

Similarly, Appellants' reliance on *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), is inapposite given the district court found "all members of the commissioners court who voted for the enacted plan disclaimed partisanship as a predominating consideration," and their redistricting counsel "denied there was any such partisan motivation." ROA.15981. And the district court concluded that "a partisan explanation for voting patterns in Galveston County does not overcome the weighty evidence of racially polarized voting on account of race." ROA.15937-38. This is not, and never has been, a partisan gerrymandering case.

Finally, it is telling that none of these opinions ever refers to distinct racial or ethnic groups as separate "classes" under § 2.[6]

B. None of the Purported "Consequences" Appellants Assert Have Come to Pass or Can Justify a Single-Race Requirement.

Appellants allege a parade of horribles "[i]f coalitions are allowed." Supp. Br. at 43-45. Of course, coalitions *have been allowed* in the Fifth Circuit for decades.

[6] Amicus Judicial Watch quotes *Voinovich v. Quilter*, 507 U.S. 146 (1993), out of context to imply it endorsed a "specific minority group" standard. Dkt. 200 at 5. The language quoted merely describes *defendants'* chosen methods of crafting majority-minority districts; but nowhere even suggests the "specific minority group" language when articulating the *Gingles* standard. 507 U.S. at 149.

There has never been a single-race requirement in the six decades since the VRA's passage. And yet, across all that time, no one can cite a single example, much less pervasive or consistent examples, of these ills coming to pass. This absence demonstrates these concerns to be mere red herrings.

Appellants warn that "a coalition of two or more minority groups will more likely operate to ignore cultural or racial differences, sacrificing the many for a few," Supp. Br. at 44, an illogical statement without any citation or concrete example. Nor do they cite an example to substantiate that, without a single-race requirement, § 2 could "create or increase racial animosity," or be "used to limit Section 2 protection." Supp. Br. at 44-45. As Galveston shows, the opposite is true: Imposing a single-race requirement would allow jurisdictions across the country to eliminate longstanding majority-minority districts, silence minority voters, and allow racial polarization to continue without any incentive for the racial majority to work across racial lines. *See, e.g.*, Dale Ho, *Two Fs for Formalism*, 50 HARV. C.R.-C.L. L. REV. 403, 406 (2015) (disallowing coalition claims would "reduc[e] the incentive to build coalitions across racial and ethnic lines").

Appellants also contend without support that there are issues "both legislators and courts would have to face to avoid favoring one minority group within a coalition over another, in the name of enforcing the VRA." Supp. Br. at 45 (emphasis added). But legislators and courts have successfully navigated redistricting without

confronting these issues for decades, and Appellants were unable to muster even a single problematic example. *Gingles* II works perfectly well here: Where minorities vote cohesively, minorities of multiple ethnicities support the same candidates, so there is by definition no favoritism; where different minorities vote differently from each other, such that having more of one group in a district might harm the other, those groups cannot prove cohesion. *See, e.g.*, *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (affirming no "inter-minority cohesion" when Black, Hispanic, and Asian voters did not vote the same as each other).

This Court's prior dissenting and concurring opinions, on which Appellants rely, must be examined in light of decades of practical experience assuaging concerns about the many purported ill-consequences of coalition claims. The relative rarity of coalition claimants supports that the *Gingles* standard, and its bright-line majority-minority rule, currently provides the workable and clear standard courts need to distinguish unlawful racial vote dilution from mere political loss, contrary to what was predicted decades ago. The current cohesion analysis does require proof of a "greater nexus" than that two groups "occasional[ly] join their political hands," as Judge Higginbotham advocated in his *Midland* dissent. 812 F.2d at 1505. It already does require "more evidence of the group's homogeneity than the maintenance of a joint lawsuit," and evidence that minority voters prefer candidates "of the coalition group," as Judge Jones urged. *Clements*, 999 F.2d 831, 896-97

(Jones, J., concurring).[7] History has shown that application of the *Gingles* preconditions has successfully weeded out mere political loss from clear racial vote dilution.

It is no wonder that Appellants make no citation to the record in Galveston County in raising these purported "consequences" of worsening racial dynamics. There is no evidence county commissioners ever considered choosing between Latino or Black voting opportunity at any point in the redistricting cycle, and no evidence the district court had to grapple with those issues in finding a "clear violation of § 2 of the Voting Rights Act" either. ROA.16029. As noted above, the 2012 letter Appellants use to manufacture competing interests between Black and Latino voters in fact shows this unified minority community coming together over a decade ago to *jointly* advocate for their collective voting power. *See supra* (Factual Background, discussing JX-8).

By contrast, the risks to minority voters if Appellants prevail are not hypothetical. A restructuring of § 2 to provide group rights to specific, census-designated racial or ethnic groups would subordinate the rights of individuals

[7] Notably, the predominant academic critics Judge Jones relied on in the *Clements* concurrence do not even advocate for the absolute single-race requirement Appellants desire. *See* Butler & Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups*, 21 PAC. L.J. 619, 624, 628 (1990) (arguing coalition claims "should be available" under specific circumstances and that coalition claims under these circumstances "would seem to be within the ambit of Section 2").

experiencing vote dilution on account of their status as racial minority voters. There would be no incentive for the majority voters to reach out across racial divides, thereby reducing racially polarized voting, or for majority-elected officials to be responsive to racial and ethnic minorities, as Galveston's commissioners court fails to be. *See, e.g.*, ROA.15990 (finding "Anglo commissioners are evidently not actively engaged in specific outreach to Galveston County's minority residents"), 15991, 16025-26 (finding the 2021 redistricting process one of many examples of Anglo commissioners failing to be responsive to the minority community of Black and Latino voters).

Galveston illustrates that Appellants' theory would essentially green-light jurisdictions to "summarily carve up and wipe off the map" longstanding and performing majority-minority districts, and thereby "completely . . . extinguish[]" minority political power in a manner "fundamentally inconsistent with §2 of the Voting Rights Act," as the Commissioners Court did in Galveston. ROA.15886, 16028.

C. The Statute's Proviso on Proportional Representation Is Not Implicated.

Appellants' contention that coalitions could be used to "bypass the VRA's express prohibition against a right to proportional representation," Supp. Br. at 45, has not come to pass in the decades that such claims have been recognized. And the concern is particularly not implicated here in Galveston, where a minority population

of 38% is seeking the opportunity to elect just one of five seats on the county commissioners court. *Holder v. Hall*, 512 U.S. 874, 885 (1994), ensures that local governments cannot be forced to change the size of their elected bodies to secure a right to proportional representation.

The current legal framework more than adequately protects against establishing a right to proportional representation. *Gingles* II prevents non-cohesive minority populations from temporarily banding together to use § 2 as a vehicle for proportional representation. *Cf. Perez v. Abbott*, 274 F. Supp. 3d 624, 655 (W.D. Tex. 2017), *rev'd and remanded on other grounds*, 138 S. Ct. 2305 (2018) (rejecting a coalition claim when the evidence showed Black voters and Latino voters opposed each other in primary elections). Likewise, *Gingles* III "'establish[es] that the challenged districting thwarts a distinctive minority vote' *at least plausibly on account of race*." *Milligan*, 599 U.S. at 18-19 (quoting *Growe*, 507 U.S. at 40) (emphasis added); *see also* ROA.16004. And finally, the totality of the circumstances analysis further restricts § 2 claims, allowing courts to assess whether a minority population is truly experiencing a common injury, based on a "searching practical evaluation of the 'past and present reality'" in the jurisdiction. *Gingles*, 478 U.S. at 79 (quoting S. Rep. No. 97-417, at 30 (1982)).

V. Appellants Have Failed to Identify Any Clear Error in the Court's Factual Findings, Which Confirms That Their Single-Race Requirement Would Contravene the Core Purpose of the Voting Rights Act.

The facts in Galveston County illustrate exactly how reading a single-race requirement into § 2 would necessarily frustrate the VRA's core purpose of ensuring all voters have equal opportunity to participate in the political process and elect representatives of choice irrespective of their ancestry. *See Gingles*, 478 U.S. at 44. In Galveston, a longstanding community of minority voters who successfully elected their candidate of choice for decades will now be deprived of *any* opportunity to do so based upon racial, not merely political, voting patterns. *See also supra* Factual Background.

The second and third *Gingles* preconditions establish that a representative of the minority group "would in fact be elected," and that the "'challenged districting thwarts a distinctive minority vote' at least plausibly on account of race." *Milligan*, 599 U.S. at 18-19 (quoting *Growe*, 507 U.S. at 40). Appellants have failed to identify any error that would disturb the trial court's careful consideration and conclusion that both preconditions were satisfied here. An original panel of this Court affirmed the district court's factual findings, and that conclusion does not warrant en banc review. Dkt. 118-1.

A. Galveston's Black and Latino Community Expresses a "Distinctive Minority Vote" That Successfully Elected a Candidate of Choice for Decades.

As explained, Galveston County's Latino and Black community has long been bound by a shared history of discrimination and distinctive minority interest, which has manifested in longstanding and deep political cohesion. In general elections, "on average, over 85% of Black and Latino voters have voted for the same candidate countywide and within the illustrative Precinct 3 plans" provided by Plaintiffs. ROA.15925; *see also* ROA.16015 (finding in general elections "a supermajority of Black voters vote for Latino-preferred candidates and vice-versa"). Likewise, in primary elections, Latino and Black voters usually prefer the same candidate—including in the most recent primary election for Precinct 3, which "featured a highly cohesive Black and Latino electorate." ROA.15929; *compare with Brewer*, 876 F.2d at 453 (5th Cir. 1989) (affirming no "inter-minority cohesion" when Black, Hispanic, and Asian voters did not vote the same as each other).

Appellants mischaracterize the district court's findings in stating it failed to "give credence" to primary election results. Supp. Br. at 46. To the contrary, the district court weighed primary election evidence and found the analyses of NAACP/LULAC Appellees' expert Dr. Kassra Oskooii and Appellants' expert Dr. John Alford "show that Blacks and Latinos usually support the same top-choice candidate in primary contests." ROA.15929. As for primary elections, "[b]etween

[Appellees' expert] Oskooii and [Appellants' expert] Alford, the analyzed results show that Blacks and Latinos usually support the same top-choice candidate," including in "nine out of ten primary elections" analyzed by Oskooii, ROA.15929, and in 13 out of 14 primary elections analyzed by Alford. ROA.24001 (DX-305, Alford Report at 18-19, Tables 3 and 4). Every expert, *including Appellants*', agreed primary elections were less probative than general elections here. ROA.15928-30, 16015. The district court did not clearly err by assigning primary elections exactly the weight that experts unanimously agreed on. *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 365 (5th Cir. 2001). Regardless, the result would not change even if greater weight had been afforded the primary elections because they, too, demonstrated cohesion.

Similarly, the district court fully considered and rejected Appellants' arguments regarding confidence intervals and candidates' race, Supp. Br. at 47-48. *See* ROA.15926 ("Recognizing Dr. Alford's concerns about the reliability of the wide confidence intervals, the court still finds it to be probative evidence of Latino voter cohesion and attributable to the smaller sample sizes of Latino voters"), 15936 ("Black and Latino voters were cohesive behind their preferred candidate in about 93% of racially contested elections, while Anglo voters were cohesive behind the Anglo-preferred candidate."). Here, too, Appellants fail to show clear error.

Based on quantitative and qualitative evidence, the district court found that "distinctive minority interests" tie the Black and Latino community together, and

that "if this cohesive group constitutes a majority of eligible voters in a county-commissioner precinct, it can elect a candidate of their choice." ROA.16015-17.

B. The Enacted Plan Thwarts This Distinctive Minority Vote at Least Plausibly on Account of Race.

Legally significant *racially* polarized voting was well established at trial. The basic voting patterns in Galveston County were undisputed: "Anglo voters in Galveston County vote cohesively and for candidates opposing those supported by a majority of Black and Latino voters" and "do so at a rate sufficient to defeat the minority-preferred candidate consistently in each of the enacted commissioners-court precincts." ROA.16017; *see also* ROA.15932-33.

Appellants' only contention, already rejected by the initial appellate panel, is that Judge Brown "erred by failing to consider whether reasons other than race, such as politics, causes White bloc voting in Galveston County" and implying the district court did not consider it "plaintiff's burden to prove" vote dilution occurred on account of race. Supp. Br. at 46-48. A quick glance at the district court's findings proves both false: the district court spent over three pages considering Appellants' arguments that polarization was political instead of racial, ROA.15934-15938, and specifically held that "plaintiffs must [] show 'that the challenged districting thwarts a distinctive minority vote at least plausibly on account of race," and did so here. ROA.16018-20 (quoting *Milligan*, 599 U.S. at 19).

Voluminous factual findings supported Judge Brown's conclusion that "a partisan explanation for voting patterns in Galveston County does not overcome the weighty evidence of racially polarized voting on account of race." ROA.15938. This evidence included: (1) lack of successful minority candidates emerging from Republican primaries, (2) extreme degree of Anglo bloc voting for candidates running against minority-preferred candidates, (3) minority candidates tending to only be elected from majority-minority areas even in nonpartisan elections, (4) continued racial appeals in Galveston County politics, (5) lay witnesses' testimony of discrimination in Galveston County, (6) persistent racial disparities across a wide range of measures in Galveston County, and (7) Anglo voters in Galveston County overwhelmingly participating in Republican primaries, while Black and Latino voters in Galveston County overwhelmingly participate in Democratic primaries. *See* ROA.15934-38, 16019. The first two factors the district court listed—lack of successful minority candidates emerging from Republican primaries and extremity of Anglo bloc voting—are precisely the two factors that the Fifth Circuit highlighted in *LULAC v. Clements* as being most important to distinguish between legally significant racially polarized voting and mere partisan voting. 999 F.2d at 861 ("We instead focus on the same two factors cited by the Court in *Whitcomb* and the concurring Justices in *Gingles*"). Far from reflecting a short-lived, political alliance, the facts supporting a race-based explanation for voting patterns in the County came

from data spanning multiple election cycles as well as community members' "lengthy residences in the county." ROA.15923, 15927, 15937.

Overall, Appellants' evidence of a political explanation for racial bloc voting was sparse. Their expert "based his conclusions regarding the role of partisanship versus race primarily on one election." ROA.15935-36. And Appellants failed to articulate, much less adduce evidence of, any non-racial "political" divide that would better explain the County's racially polarized voting. To the contrary, the evidence tended to show that political ideology could not explain the divergent voting patterns. *See, e.g.*, ROA.18319 (Henry testimony) (County Judge Mark Henry describing Commissioner Holmes as "the second most fiscally conservative guy on the Commissioners Court," after Henry himself).[8] Even now, in their briefing, they fail to articulate any specific race-neutral "political" divide that could account for the deep racial divides in voting patterns in the county.

C. The Process of Electing County Commissioners in Galveston County is Not Equally Open to Minority Voters Under the Enacted Plan.

Section 2 requires political processes in a jurisdiction to be "equally open" such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect a representative of their choice." *Milligan*, 599 U.S. at 25 (quoting § 2(b)). By submerging every minority

[8] Commissioners Giusti and Apffel's testimony also supported this. *See* ROA.18933 (Giusti testimony), 19171 (Apffel testimony).

voter in all majority-Anglo districts, the enacted plan allows minority voters *zero* opportunity to elect a candidate of choice. As set forth above, it is the "textbook cracking" of minority voters under the enacted plan, paired with racially polarized voting whereby Anglo voters will defeat the minority candidate of choice in *every* new precinct, that is the "but for" cause of the minority population's now-inability to elect a representative. *Supra* p. 4; *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1739 (2020). And the district court determined that "the totality of the circumstances shows that Black and Latino voters in Galveston County have 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice,'" (ROA.16029) showing the enacted plan "renders a minority vote unequal to a vote by a nonminority voter," *Milligan*, 599 U.S. at 25. And Appellants are not challenging the district court's totality of the circumstances findings on appeal.

The facts of this case are "egregious," and it is no wonder the district court deemed Appellants' actions "fundamentally inconsistent" with and a "clear violation" of the VRA. ROA.15886, 16029. And while Appellees have available on remand intentional discrimination and racial gerrymandering claims under the VRA and the Fourteenth and Fifteenth Amendments (rendering Appellants' "take-

nothing" request entirely inappropriate),[9] it is all the more important that the Court affirm the § 2 ruling, given § 2 was expressly enacted to allow courts to avoid the "unnecessarily divisive" finding of discriminatory intent that would likely result from any reversal. *Gingles*, 478 U.S. at 71.

The enacted plan will render minority voters "shut out of the process altogether," their voice on the commissioners court "completely . . . extinguished," ROA.16028, allowing "those elected to ignore [minority] interests without fear of political consequences." ROA.16022-23 (quoting *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (alterations in original). These are the precise harms that § 2 seeks to prevent: use of an electoral structure that "'operates to minimize or cancel out' minority voters' 'ability to elect their preferred candidates.'" *Milligan*, 599 U.S. at 17-18 (quoting *Gingles*, 438 U.S. at 48). To bar Galveston's Latino and Black community from relief under § 2 based on an extratextual single-race requirement

[9] In declining to reach Appellees' alternative claims, the district court followed the common practice rendering these claims available on remand. *See, e.g., Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 765 (2012) ("Because the District Court did not reach plaintiffs' claims under the West Virginia Constitution and the issue has not been briefed by the parties, we leave it to the District Court to address the remaining claims in the first instance"); *Gingles v. Edmisten*, 590 F. Supp. 345, 350 (E.D.N.C. 1984) ("Because we uphold plaintiffs' claim for relief under Section 2 of the VRA, we do not address their other statutory and constitutional claims seeking the same relief"), *aff'd in relevant part sub nom. Thornburg v. Gingles*, 478 U.S. at 38, 80.

would unjustifiably conflict with § 2's core purpose. The single-race requirement Appellants seek must be rejected.

CONCLUSION

For the reasons stated above, the judgment of the District Court should be affirmed.

Respectfully submitted.

February 14, 2024

s/ Hilary Harris Klein

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CERTIFICATE OF SERVICE

I certify that on February 14, 2024, this brief was served on counsel for all parties via the ECF system. I further certify that all parties required to be served have been served.

s/ Hilary Harris Klein

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief contains 12,942 words, as determined by the word-count function of Microsoft Word 2016, and was prepared in a proportionally spaced 14-point Times New Roman font.

s/ Hilary Harris Klein

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USDC No. 3:22-CV-57
USDC No. 3:22-CV-93
USDC No. 3:22-CV-117

Dear Ms. Klein,

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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