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, Case Nos. 3:22-cv-57, 3:22-cv-93, and 3:22-cv-117

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF APPELLEES THE UNITED STATES AND PRIVATE PLAINTIFFS AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

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

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INTEREST OF AMICUS CURIAE

Formed at the request of President John F. Kennedy in 1963, Amicus Curiae Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. Since its inception, the Lawyers' Committee has had an active voting rights practice and has fought to ensure all Americans have an equal opportunity to participate in the electoral process.

1. Section 2 of the Voting Rights Act of 1965 is a major tool used by the Lawyers' Committee to fight against voting discrimination. The Lawyers' Committee has litigated significant voting rights cases including *Shelby County v. Holder*, 570 U.S. 529 (2013), *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), *Young v. Fordice*, 520 U.S. 273 (1997), *Clark v. Roemer*, 500 U. S. 646 (1991), *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), and *Thomas v. Bryant*, 938 F.3d 134 (5th Cir. 2019). The Lawyers' Committee has filed dozens of cases under Section 2 of the Voting Rights Act in the last decade and currently has several active Section 2 cases. Currently, the Lawyers' Committee is litigating a statewide redistricting case in Texas, *LULAC v. Abbott*, Case No. 3:21-cv-00259 (W.D. Tex 2021) (consolidated cases), which brings several Section 2 coalition claims.

Additionally, the Lawyers' Committee has participated as Amicus Curiae in numerous voting rights cases before the United States Supreme Court, including cases that have defined the contours of Section 2 of the Voting Rights Act, including *Thornburg v. Gingles*, 478 U.S. 30 (1986), *Bartlett v. Strickland*, 556 U.S. 1 (2008), *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), and *Allen v. Milligan*, 599 U.S. 1 (2023), among others.

The Lawyers' Committee has also published numerous reports on the history of voting discrimination, many of which have been cited by members of Congress in various committee reports and legislative documents in connection with reauthorizations and amendments to the Voting Rights Act. For all these reasons, Amicus Curiae has a direct interest in this case because it raises important voting rights issues central to the organization's mission.

In accordance with Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29(a)(4)(A), the Lawyers' Committee is a nonpartisan, nonprofit membership organization with no parent corporations in which any person or entity owns stock.

Under Federal Rule of Appellate Procedure 29(a)(2) and Fifth Circuit Rule 29(e), the undersigned counsel of record certifies that it authored the brief in whole and that no party, or party's counsel, or person other than amicus, its members, or its counsel in this case contributed money intended to fund preparing or submitting the brief.

INTRODUCTION

For decades, this Court has accepted the logical premise that there is no reason to distinguish vote dilution claims under Section 2 of the Voting Rights Act brought by members of multiple minority groups from claims brought by members of a single minority group. Defendants and their supporting amici seek to convince this Court to reject this settled precedence, pressing variations on themes that have been rejected by this Court and the Supreme Court over the years. In this brief, the Lawyers' Committee addresses two of those arguments*: first,* that a coalition of more than one minority group is an inherently political alliance and nothing more, Defs.' Br. 17–18, 22–24; Judicial Watch Br. 25; NRRT Br. 17, and *second*, that coalition claims result in the application of unmanageable standards and require courts to make "highly political judgments" and get into the "sordid business of divvying us up by race." Defs.' Br. 38; Judicial Watch Br. 25, 18–19; NRRT Br. 20–23, 24–25.

First, the brief dispels the notion that coalitions are nothing more than political alliances by tracing the history of coalition claims and how they came to be. In providing this Court with the historical context behind coalition claims, the brief demonstrates that coalition claims are no different from any other Section 2 claim. All are founded on the sorry foundation of a shared history of discrimination experienced by the members of minority groups.

Second, the brief shows how for decades courts have easily applied the judicially manageable *Gingles* standards to coalition claims brought under Section 2 without any issue. Indeed, failure to meet the stringent demands of *Gingles* has often proved the undoing of such claims, underscoring the effectiveness of the *Gingles* standards in eliminating weaker claims. The brief further explains that the argument that Plaintiffs' claims here improperly infuse race into districting is not new and has been rejected by our highest court. It has no more salience in cases brought by members of multiple minority groups than it has in cases brought by members of a single minority group. In all instances, the *Gingles* framework, including the overarching totality of the circumstances standard, provides an effective guardrail against the improper elevation of race into districting.

For these reasons as well as others raised by Plaintiffs and their supporting amici, this Court should affirm the judgment of the district court.

ARGUMENT

I. SECTION 2 COALITION CLAIMS ARE LEGALLY INDISTINGUISHABLE FROM ANY OTHER SECTION 2 CLAIM.

Defendants and their supporting amici argue that coalition-district claims are inherently different from single-race district claims because coalitions are necessarily simply political alliances and nothing more. Defs.' Br. 17–18, 22–24; Judicial Watch Br. 25; NRRT Br. 17. But Section 2 coalition claims are legally

indistinguishable from any other Section 2 claim. Nothing in the language, logic, or history of Section 2 contradicts that simple truth.

A. The Statutory Language of Section 2 Supports that Coalition Claims Are No Different from Other Section 2 Claims.

Section 2's focus on harm to the individual as a member of a minority group supports the conclusion that there is no legal distinction between a claim brought by a member of a single minority group or a claim brought by members of more than one minority group, challenging the same law or policy. Subsection (a) of Section 2 makes clear that the injury, i.e., the denial or abridgment of the right to vote "on account of race," belongs to the individual, i.e., "any citizen of the United States," not the group. 52 U. S. C. § 10301(a). Subsection (b) sets out what must be shown to prove a violation of Subsection (a). 52 U. S. C. § 10301(b). Subsection (b) requires that the individual injured under Subsection (a) prove, based on "the totality of circumstances," that "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by *members* of a class of protected citizens" to which the individual belongs. *Id.* (emphasis added). Thus, by focusing on the individual's membership in a protected group, Section 2's language centers on the electoral harms faced by the individual on account of that individual's identifying with a particular category or class of protected citizens.

Defendants' argument that the reference to "class," rather than "classes," in Section 2(b) of the VRA evinces congressional intent to limit Section 2 to a single racial group, Defs.' Br. 27, proves the opposite. Black's Law Dictionary defines "class" as "a group of people, things, qualities, or activities that have common characteristics or attributes." Class, Black's Law Dictionary (11th ed. 2019). That is precisely what a "class" of members of minority groups is for purposes of a vote dilution claim under Section 2 of the VRA: a group of persons, that have common characteristics—most prominently being members of protected minority groups that can show the requisite cohesion required by the *Gingles* standards—therefore constituting a unit for the purpose of vindicating their rights under Section 2.

Further, nothing in the plain language of Section 2 suggests that a claim under the statute is limited to those brought by members of a single group. Certainly, in Section 2 vote denial cases, the same law could constitute a violation of the rights of a Black voter and the rights of a Hispanic voter. *See, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 264 (5th Cir. 2016) (en banc) (affirming district court's finding that Texas's photo ID law "acted in concert with current and historical conditions of discrimination to diminish African Americans' and Hispanics' ability to participate in the political process" in violation of Section 2); *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2325 (2021) (considering whether two laws governing ballots cast in wrong-precinct and ballot-collection restriction had adverse and

disparate effect on Arizona's Indian, Hispanic, and Black citizens in violation of Section 2). Defendants and their supporting amici offer no reasonable explanation as to why the same law must be construed differently when applied to Section 2 vote dilution cases to limit its application to single-race claims. Just as in vote denial cases, the same law can constitute a violation of the rights of a Black voter and the rights of a Hispanic voter as "members" of a "protected class." As the Court has observed, "the right to an undiluted vote does not belong to the minority as a group, but rather to its individual members." *LULAC v. Perry*, 548 U.S. 399, 437 (2006) (internal citations omitted).

The unsupported limitation of Section 2's reach pressed by Defendants and their supporting amici not only runs afoul of the plain language of the statute, but also is contrary to congressional intent. In setting out to eradicate the blight of racial discrimination across the country, Congress thought it necessary to enact prophylactic legislation to effectuate the guarantees of the Fourteenth and Fifteenth Amendments. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966). The Voting Rights Act is that legislation.

From early on, Congress made it clear that it intended the VRA to redress all discrimination in voting, whether suffered by members of a single minority group or by members of a combination of minority groups. For example, the 1975 Reauthorization of the VRA—which at the time was expanded to include language

minority voters—specifically highlighted Black and Hispanic voters as one "substantial minority population" in Texas experiencing discrimination in similar ways. S. Rep. No. 94-295 at 25 (1975). The 1975 Senate Report noted "[e]vidence before the Subcommittee documented that Texas also has a long history of discriminating against members of both minority groups in ways similar to the myriad forms of discrimination practiced, against [B]lacks in the South." *Id.*

In 1982, when Congress amended Section 2 to include a results test to "enforce the substantive provisions of the 14th and 15th amendments," it again reiterated that Section 2 "remains the major statutory prohibition of all voting rights discrimination" and "prohibits practices, which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members." S. Rep. No. 97-417 at 30 (1982). The Senate Report observed the importance of codifying the results standard, noting that it was only after "the adoption of the results test and its application by the lower federal courts [that] the minority voters in many jurisdictions finally began to emerge from virtual exclusion from the electoral process." *Id.* at 31. Thus, by centering the remedy around the exclusion of minority voters generally—nowhere limited to a single minority group at a time—Congress evinced its clear intent to make Section 2 available as a tool for eradicating all harm that flowed from such exclusion,

whether brought by members of a single minority group or members of multiple minority groups challenging the same law.

B. Focus On a Shared History of Discrimination to Support Coalition Claims Is in Full Accord with the Language of and Intent Behind Section 2.

By focusing on the shared harms experienced by individual members as a result of discrimination, based on their membership in a protected racial category, Section 2 jurisprudence requires "an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986). In certain contexts, that local appraisal of the conditions impacting voters of colors in a jurisdiction has demanded that courts treat a coalition of two racial groups as a cohesive unit for the purpose of assessing the impact of electoral mechanisms. That view tracks with the text and broad remedial purpose of the statute discussed above and explains the advent of coalition cases in the demographic settings of Texas and other states with a similar history of intersectional discrimination against multiple racial groups living intermixed in the same community.

The first courts to consider claims brought by two racial groups in the aggregate centered their analysis around minority voters' shared experience of harm flowing from their virtual exclusion from political processes. These cases treated the

issue of coalition plaintiffs versus single-race plaintiffs as a distinction without a difference.

Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984), was the first Section 2 coalition claim to make its way to this Court, indeed it appears to be the first ever coalition claim adjudicated by any circuit court of appeals. Even so, neither this Court nor the litigants saw a need to address the issue as to whether a coalition claim was actionable under Section 2. That proposition was so clear that it was taken as a given. This Court's analysis focused on whether the electoral impediments operated to submerge the political strength of Black and Hispanic voters as a combined group. *Id.* at 383–84.

In Lubbock, the impediments —at-large districts, majority vote requirements, staggered terms, numbered posts, and lack of a subdistrict residency requirement— allowed residents of "predominantly anglo areas" to dominate city offices to the combined detriment of both Black and Mexican-American residents. *Id.* For example, that Black and Mexican-American residents lived "concentrated [in] neighborhoods in the eastern and northeastern parts of the City" meant that the at-large system prevented members of this community from electing a candidate of choice. *Id.* And prior to 1970, the panel observed, no Mexican-American or Black candidate had ever run or been elected for a seat on the city council. *Id*. These facts, coupled with the history of discrimination against the community, including facts

that tended to show that the city may not have been responsive to the community through its furnishing of municipal services to these neighborhoods and in its hiring of individuals from these neighborhoods, persuaded the Court that the city's minority community, as a whole, was left out of the political processes leading to the nomination and election of candidates. *Id.* at 381–82, 386.

A few years after its decision in *Jones*, this Court heard its second ever coalition case, arising out of Midland, Texas, challenging the county's school board election. In *LULAC, Council No. 4386 v. Midland ISD*, 812 F.2d 1494 (5th Cir. 1987), the defendants explicitly raised the issue that two racial groups could not be aggregated to bring a Section 2 claim. *Id.* at 1499–1500. In rejecting this argument, this Court again looked at indicia of a history of discrimination shared by the members of the Black and Hispanic minority groups in West Texas, affirming the trial court's fact-finding that the two groups "share[d] common experiences in past discriminatory practices," *id.* at 1500, relying on such factors as a common experience of segregation in the schools, *id.* at 1496, 1500 n.13, and the concentration of multiple "definable ethnic groups" in a geographically discrete area" encompassed by three precincts in the county in which they were the overwhelming majority, *id.* Notably, the Fifth Circuit observed, "the prejudice of the majority is not narrowly focused," as the "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." *Id.* That was certainly the case in *LULAC v. Midland ISD*, where the Fifth Circuit explicitly noted, "here an experienced trial judge, familiar with local conditions, found as a fact that in Midland, Texas, the two groups found as a fact that in Midland, Texas, the two groups "share[d] common experiences in past discriminatory practices." *Id.*

While the first coalition claims originated in Texas, these claims are not unique to Texas. In *NAACP, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368 (S.D.N.Y. 2020), Black and Hispanic plaintiffs challenged the election system for the school board of education in East Ramapo, a "highly segregated" political subdivision of New York. *Id.* at 374. Most white residents lived in majority-white neighborhoods and most Black and Hispanic residents lived intermixed in majority-minority neighborhoods of Hillcrest, Spring Valley, and Nanuet. *Id.* at 375. The school board was responsible for approving district personnel, establishing policies, setting the budget, and evaluating the community's needs. *Id.* at 375–76. The district court found evidence of extremely high levels of bloc voting by the white majority to prevent Black and Hispanic voters from electing candidates of choice to further policies that helped the public schools. *Id.*

To that end, the court took note of the fact that East Ramapo had two school communities, the "public school community" composed of 92% Black and Hispanic

students and the "private school community" comprised of 98% white students. *Id.* at 395. According to the court, there was a "perfect concordance between race and the populations of public and private schools that cannot be ignored." *Id.* The court observed that the "policies benefitting private schools or reducing expenditures on public education benefit the white community," and the "policies benefitting public schools or reducing expenditures on private education benefit the black and Latino communities." *Id.* "If the white community votes down a budget because the budget increases taxes," the district court observed, "minority children lose access to services." *Id.* The court also relied on evidence that influential members of the white community participated in a slating process by which they selected, endorsed, and promoted their own candidates intentionally leaving Black and Hispanic members out of the process. *Id.* at 402–03.

This overwhelming evidence of the white majority's attempt to shut out the "public school community" from the school board elections required the court to treat the racial groups as a cohesive unit that had been subjected to the same exclusionary practices. Had the district court refused to consider Black and Hispanic residents as a coalition, they would not have been able to prove a Section 2 violation because each group individually made up less than 50% of the district, and therefore could not meet the first *Gingles* precondition. *Id.* at 375 (noting district's population approximately 65.7% white, 19.1% black, 10.7% Latino, and 3.3% Asian); *see also*

Huot v. City of Lowell, 280 F. Supp. 3d 228, 232 (D. Mass. 2017) (recognizing a coalition of Hispanic and Asian-American voters who lived in intermixed in three neighborhoods in the city and had never elected their candidates of choice).

That a shared history of racial and ethnic discrimination is key to the actionability of a Section 2 coalition claim undercuts the argument by Defendants and some of their amici that coalitions of minority groups are merely political alliances. The evidence in these cases supports no conclusion that the discrimination was based on the political beliefs or connections of the members of these minority groups. Rather, these coalition claims were based firmly on the artifacts of the sort of pernicious behavior that the Fourteenth and Fifteenth Amendments—and their enabling legislation—were intended to rectify: a shared history of racial and ethnic discrimination by members of minority groups.

II. THE *GINGLES* FRAMEWORK PROVIDES MANAGEABLE STANDARDS TO ADJUDICATE SECTION 2 CLAIMS BY COALITION PLAINTIFFS.

Defendants and some amici suggest that there are no judicially manageable standards for governing coalition claims because these claims compel courts to make "political judgments" and impermissibly "infuse race" into every decision, which leads to inherently standardless applications of the law. Defs.' Br. 23–24; Judicial Watch Br. 17–18; NRRT Br. 20, 25. First, not only—as demonstrated above—is proof of a shared history of racial or ethnic discrimination the essence of a Section

2 coalition claim, but the *Gingles* standard provide stringent, judicially manageable guides for courts to assess such claims. Courts have proven themselves adept at ferreting out weaker claims using the *Gingles* standard. *See* discussion *infra* Section II.A. Second, courts have declined to hear cases that have placed political questions at front and center, and coalition cases have not fallen into this category because the essence of the *Gingles* inquiry is not for whom members of minority groups vote, but whether and to what degree they vote cohesively, regardless of the identity of the candidates. Third, the concern that Section 2 requires courts to elevate racial considerations over all others has been rejected by the Supreme Court in *Allen v. Milligan*, 599 U.S. 1, 18 (2023).

A. *Gingles* Provides Judicially Manageable Standards for All Section 2 Vote Dilution Claims.

For decades courts have applied the *Gingles* test requiring plaintiffs pressing vote dilution claims under Section 2 of the VRA to establish that they do not have the same opportunities as other members of the electorate to participate in the political process and elect candidates of choice. *Milligan*, 599 U.S. at 25. Such plaintiffs must first prove three "necessary preconditions." *Gingles*, 478 U.S. at 48. "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . .

Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances . . . — usually to defeat the minority's preferred candidate." *Id.* at 50–51. The extent to which voting is racially polarized in the affected jurisdiction is essential to proof of the second and third preconditions. *Id.* at 55–56.

Above and beyond the *Gingles* preconditions, courts must hold plaintiffs to their burden of proof on the totality of the circumstances to demonstrate that the drawing of the challenged district resulted in a political process that is not "equally open" to voters of all races. *Milligan*, U.S. at 26; *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994). As the First Circuit has explained, the *Gingles* factors "give rise to an inference that racial bias is operating . . . to impair minority political opportunities," but do not always conclusively prove it. *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995). The "totality of circumstances" inquiry requires courts to consider such factors as the history of discrimination in voting in the challenged jurisdiction, the degree of racially polarized voting in the district, historical socio-economic discrimination that could impact voter registration and turnout among members of the minority groups in question, the history of the election of members of the minority groups to offices. *Gingles*, 478 U.S. at 48. In addition to proportionality concerns, traditional districting principles, and "any circumstance that has a logical bearing on whether voting is equally open and affords equal

opportunity. . . .” *Brnovich*, 141 S. Ct. at 2338 (cleaned up). No one factor or consideration is dispositive, and the inquiry recognizes the ultimate determination of a Section 2 vote dilution case is “peculiarly dependent upon the facts of each case.” *Milligan*, 599 U.S. at 19 (citing *Gingles*, 478 U.S. at 79).

The *Gingles* preconditions and the totality of circumstances factors provide objective, judicially manageable standards for determining Section 2 vote dilution claims. Like vote dilution claims based on the one person/one vote doctrine, racial vote dilution claims emanate from clear constitutional authority. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964) (explaining why “complex and many-faceted” issues involved in apportionment and “dangers of entering into political thickets and mathematical quagmires” must yield when the states use their power to circumvent a federally protected right).

Indeed, when the Supreme Court found partisan gerrymandering claims to be non-justiciable, it explicitly noted that Section 2 claims, assessed under the guidance of *Gingles* and its progeny, are “grounded in a ‘limited and precise rationale’ and [are] ‘clear, manageable, and politically neutral.’” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019) (quoting Justice Kennedy’s concurring opinion in *Vieth v. Jubelirer*, 541 U.S. 267, 306–08 (2004). The objective preconditions under *Gingles* and the equally objective Senate factors allow courts adjudicating Section 2 vote

dilution claims to "act only in accord with especially clear standards." *Rucho*, 139 S. Ct at 2498.

Since *De Grandy*, Courts have applied the *Gingles* standards as requirements that all plaintiffs must meet to prove a Section 2 violation. In *De Grandy*, for example, although the district court ruled in the plaintiffs' favor on the three *Gingles* preconditions and found "a history of discrimination against Hispanic voters continuing in society generally to the present day," the Supreme Court reasoned that this analysis was legally deficient. 512 U.S. at 1013. According to the Court, this was because the district court "was not critical enough" in asking whether "the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity." *Id.* at 1013–14.

Lower courts have taken equally seriously their responsibility to hold Section 2 vote dilution plaintiffs to proof of their case beyond the *Gingles* preconditions. Repeatedly, courts have denied relief under the totality of circumstances analysis, even where plaintiffs have satisfied the *Gingles* factors.[1] Similarly, in vote dilution

[1] *See, e.g.*, *NAACP v. Fordice*, 252 F.3d 361, 374 (5th Cir. 2001); *Old Person v. Brown*, 312 F.3d 1036, 1042, 1050 (9th Cir. 2002); *United States v. Alamosa Cnty.*, 306 F. Supp. 2d 1016, 1040 (D. Colo. 2004) ("Although the evidence presented at trial is arguably facially sufficient to satisfy the three *Gingles* preconditions, upon consideration of the totality of the circumstances, it does not prove that the at-large method of electing county commissioners in Alamosa County dilutes the vote of Hispanic residents."); *Fusilier v. Landry*, 963 F.3d 447, 459–68 (5th Cir. 2020) (same); *Solomon v. Liberty Cnty. Commr's*, 221 F.3d 1218, 1224 (11th Cir. 2000) (same); *Jenkins v. Manning*, 116 F.3d 685, 699–700 (3d Cir. 1997); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004); *Black Pol. Task Force v. Galvin*, 300 F. Supp. 2d 291, 298 (D. Mass. 2004)

cases where plaintiffs have prevailed, courts have looked beyond the *Gingles* factors and considered the totality of the circumstances before granting relief.[2]

The decisions illustrate that courts have found sufficient guidance from the objective *Gingles* standards and the totality of the circumstances to decide Section 2 cases generally. Thus, contrary to the assertions of Defendants and their supporting amici, Section 2 claims, including coalition claims, do not require courts to make political judgments. Rather, when plaintiffs succeed in these cases, it is because they have proved that the totality of the circumstances demonstrate that the districting plans denied them an equal opportunity to participate in the political process, and that, therefore, the electoral system is not "equally open" to them.

B. The *Gingles* Framework Is Equally Effective in Coalition Claims and Equally Protective Against Involving the Courts in Political Judgments.

Defendants and their supporting amici provide no reasoned justification for the notion that the *Gingles* framework is not equally applicable and effective in Section 2 vote dilution cases brought by members of multiple minority groups as they are in cases brought by members of a single minority group. In all Section 2

(explaining that "[p]laintiffs who satisfactorily complete [*Gingles*'s] three-step pavane are not home free" because they must satisfy the "wide ranging" totality of circumstances analysis).

[2] *See, e.g.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 237–44 (2d Cir. 2021); *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1207–32 (D. Wyo. 2010); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1017–52 (D.S.D. 2004); *Goosby v. Town Bd. of Hempstead*, 956 F. Supp. 326, 337–48 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999).

vote dilution cases, courts look at whether the members of the minority group or groups demonstrate political cohesiveness. *LULAC v. Midland ISD*, 812 F.2d at 1500.

Despite Defendants' and some amici's characterization of coalition claims as political alliances, judges have not had to make "inherently political judgments" in assessing political cohesiveness of the members of multiple minority groups. Defs.' Br. 23–24; Judicial Watch Br. 17–18; NRRT Br. 20, 25. Political cohesion, contrary to what Defendants and their supporting amici argue, is not about *which* party's candidates are supported by the coalition. Rather, political cohesion focuses on *whether* and to *what degree* members of the coalition support the same candidate of choice, regardless of party. In this regard, there is no substantive difference in the analysis undertaken by courts between that in a single minority group case and a multiple minority group case. In both instances, the court assesses whether and to what degree the voters are supporting the same candidates.

Nor—as is the case with Section 2 vote dilution cases generally—is political cohesion the only factor that determines the success of such a claim. Indeed, if the only thing courts were looking at to support a finding of vote dilution under Section 2 was the voting patterns of minorities under the second and third *Gingles* preconditions, then perhaps the concern raised by Defendants as well as by Judge Higginbotham in his dissents in both *LULAC v. Midland ISD*, 812 F.2d at 1503 (J.,

Higginbotham, dissenting) and *Campos v. Baytown*, 849 F.2d 943, 944–45 (5th Cir. 1988) (J., Higginbotham, dissenting as to denial of rehearing en banc)—that coalition claims risk political judgments by courts—may have been warranted. But, as demonstrated above, *De Grandy* requires more—proof that the totality of the circumstances show that the members of the minority groups have been denied an equal opportunity to participate in the political process. 512 U.S. at 1026–27. And, as also demonstrated above, this Court has applied the totality of the circumstances test in coalition cases to focus on the history of racial discrimination shared by the members of the minority groups in question.

Not surprisingly, then, as is the case with claims brought by members of a single minority group, courts have applied *Gingles* effectively to weed out cases that do not amount to actionable vote dilution, such as where there is insufficient cohesiveness among members of the minority groups, lack of sufficient white bloc voting, or the absence of a majority of the minority group in the proposed illustrative district. *See, e.g.*, *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 898 (5th Cir. 1993) (coalition plaintiffs, Black and Hispanic voters, failed to demonstrate political cohesion); *Brewer v. Ham*, 987 F.2d 448, 451, 453 (5th Cir. 1989) (same); *Overton v. City of Austin*, 871 F.2d 529, 537 (5th Cir. 1989) (coalition plaintiffs failed to show bloc voting by white majority); *Latino Pol. Action Comm., Inc. v. City of Boston*,

784 F.2d 409, 414 (1st Cir. 1986) (no political cohesion Black, Hispanic, and Asian voters); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 277 (2d Cir. 1994) (ruling in favor of Black and Hispanic coalition plaintiffs though judgment vacated in light of *De Grandy*); *Pope v. County of Albany*, 687 F.3d 565, 574 (2d Cir. 2012) (no bloc voting); *Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992) (no political cohesion); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 527 (11th Cir. 1990) (same); *Romero v. City of Pomona*, 883 F.2d 1418, 1427 (9th Cir. 1989) (coalition of Black and Hispanic voters could not form a majority in any district and we not politically cohesive); *Kumar v. Frisco ISD.*, 476 F. Supp. 3d 439, 508–09 (E.D. Tex. 2020) (finding no evidence of political cohesion among Black, Hispanic, and Asian voters in district); *Rodriguez*, 308 F. Supp. 2d at 376 (S.D.N.Y. 2004) (finding coalition of Black and Hispanic voters did not meet first Gingles precondition because there were not majority in proposed district); *Broward Citizens for Fair Dists. v. Broward Cnty.*, No. 12-60317-civ, 2012 WL 1110053, at *6 (S.D. Fla. Apr. 3, 2012) (dismissing complaint because it contained bare assertion that African American and Hispanic voters were politically cohesive).

This documented experience of the courts in adjudicating cases such as that at bar belies any notion that coalition claims are not actionable under Section 2 because they require courts to make political judgments. Contrary to Defendants and

their supporting amici, *Bartlett v. Strickland*, 556 U.S. 1 (2008), does not suggest otherwise. There, the plurality rejected a Section 2 vote dilution claim brought by plaintiffs seeking a "crossover" district, i.e., one that would not meet the first *Gingles* precondition of an illustrative majority-minority district. *Id.* at 16. The plurality rejected the claim, most prominently on the basis that the third *Gingles* precondition—proof of white bloc voting that prevents the election of the minority group's candidate—could not possibly be met. *Id.* Obviously, no such concern exists with claims brought by members of multiple minority groups seeking a majority-minority district.

Indeed, as to claims brought by members of multiple districts seeking a majority-minority district, the plurality in *Bartlett* said "we do not address that type of coalition district here" leaving it to lower courts to continue adjudicating coalition claims under *Gingles*. *Bartlett*, 556 U.S. at 13–14. Far from finding that *Gingles* itself was judicially unmanageable as applied to coalition-district claims, the plurality in *Bartlett* noted that the "majority-minority rule" in *Gingles* had "its foundation in principles of democratic governance" and that "[t]he special significance, in the democratic process, of a majority means it is a special wrong when a minority group has fifty percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district." *Id.* at 19. This reasoning applies as much to claims

brought by members of multiple minority groups who share a history of racial discrimination as it does to claims brought by members of a single minority group.

C. Coalition Claims, No Less than Other Vote Dilution Claims, Do Not Authorize Unconstitutional Race-Based Redistricting

In this context, there is no basis to lend credence to amici's suggestion that adjudication of Section 2 claims brought by multiple minority groups somehow lead courts into the "sordid business of divvying us up by race" and "promote racial hostility." Judicial Watch Br. at 18–19; *see also* NRRT Br. 24–25. Indeed, this argument was raised and flatly rejected by the Court as to Section 2 generally:

> Alabama further argues that, even if the Fifteenth Amendment authorizes the effects test of §2, that 'Amendment does not authorize race-based redistricting as a remedy for §2 violations. But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of §2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate §2. . . . In light of that precedent, . . . we are not persuaded by Alabama's arguments that §2 as interpreted in Gingles exceeds the remedial authority of Congress.

Milligan, 599 U.S. at 41.

As the Court went on to explain, the concern that Section 2 "may impermissibly elevate race in the allocation of political power" is a fact-specific issue to be dealt with on a case-by-case basis. *Id.* at 42. There is nothing about vote dilution claims brought by members of multiple minority groups, per se, that renders

them more susceptible to the impermissible elevation of race in the allocation of political power than claims brought by a single minority group. Strict adherence to the judicially manageable *Gingles* framework provides the necessary guardrail against a misapplication of Section 2 for all vote dilution claims.

CONCLUSION

For all the reasons set forth in Plaintiffs' Briefs, and for the reasons in this Brief, the En Banc Court should reject Defendants' arguments regarding coalition-claim districts and rule, as a matter of law, that such claims are permissible and not prohibited under Section 2 of the Voting Rights Act.

Date: February 21, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 6,073 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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/s/ *Pooja Chaudhuri*
Pooja Chaudhuri

CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2024, I electronically filed Lawyers' Committee's amicus brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. In addition, I certify that any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13, the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1, and the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

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

Dear Ms. Chaudhuri,

You must submit the 22 paper copies of your 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,

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