No. 23-40582

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HONORABLE TERRY PETTEWAY; HONORABLE DERRICK ROSE; HONORABLE PENNY POPE,
Plaintiffs-Appellees,
v.
GALVESTON COUNTY, TEXAS; MARK HENRY, IN HIS OFFICIAL CAPACITY AS GALVESTON COUNTY JUDGE; DWIGHT D. SULLIVAN, IN HIS OFFICIAL CAPACITY AS GALVESTON COUNTY CLERK,
Defendants-Appellants.

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.

DICKSON 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; GALVESTON COUNTY COMMISSIONERS COURT; MARK HENRY, IN HIS OFFICIAL CAPACITY AS GALVESTON COUNTY JUDGE,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION
CIVIL ACTION NOS. 3:22-cv-57-JVB, 3:22-cv-93-JVB, & 3:22-cv-117-JVB

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEES

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February 21, 2024

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies, pursuant to Fed. R. App. P. 26.1 and 5th Cir. R. 28.2.1, *amicus curiae* NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a nonprofit, non-partisan corporation. LDF has no parent corporation, and no publicly held corporation holds ten percent of its stock. The undersigned counsel of record certifies that, in addition to the persons and entities listed in the parties' Certificate of Interested Persons, the following persons and entities as described in the fourth sentence of 5th Cir. R. 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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Dated: February 21, 2024

/s/ Stuart Naifeh
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INTEREST OF *AMICUS CURIAE*[1]

LDF is the nation's first and foremost civil rights law organization. Founded in 1940 under the leadership of Thurgood Marshall, LDF's mission is to achieve racial justice and to ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other people of color. Because the franchise is "a fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), LDF has worked for over 80 years to combat threats to Black people's right to vote and political representation.

LDF has represented Black voters as parties in nearly every precedent-setting case relating to voting rights and representation before the U.S. Supreme Court, the Fifth Circuit, and other federal courts. *See, e.g., Allen v. Milligan*, 599 U.S. 1 (2023); *Shelby County, Ala. v. Holder*, 570 U.S. 529 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Mobile v. Bolden*, 446 U.S. 55 (1980); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Beer v. United States*, 425 U.S. 130 (1976); *White v. Regester*,

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or person or entity other than *amicus curiae*, *amicus curiae*'s members, and their counsel, contributed money intended to fund preparing or submitting this brief.

422 U.S. 935 (1975) (per curiam); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023); *Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Miss. State Chapter, Operation PUSH, Inc. v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *South Carolina State Conf. of the NAACP v. Alexander*, 649 F. Supp. 3d 177 (D.S.C. 2023) (three-judge court), *probable jurisdiction noted* 143 S. Ct. 2456 (2023) (mem); *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983) (three-judge court).

ARGUMENT

For decades, the Supreme Court and the Fifth Circuit have considered vote dilution claims under the Voting Rights Act of 1965 ("VRA") on behalf of citizens comprised of a coalition of two or more racial groups. Fully aware of these cases, Congress has repeatedly declined to disturb these holdings or otherwise limit the availability of coalition claims. For decades, the viability of a coalition claim has turned on an intensely local factual question: whether the two racial groups prefer the same candidates in elections, whether their candidates are usually defeated by a majority's bloc voting, and whether the groups can be drawn into a reasonably configured remedial district. For example, under the first *Gingles* precondition, a Section 2 plaintiff must show that the voters they seek to join in an illustrative district share common "needs and interests" based on "socio-economic status, education,

employment, health, and other characteristics[.]" *LULAC v. Perry*, 548 U.S. 399, 424 (2006) (citations omitted). This Court has consistently and rigorously applied this same standard in coalition claims involving more than one racial minority group. *See, e.g.*, *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988).

Here, Defendants-Appellants request that the en banc Court overturn the panel's decision, the district court's decision, and decades of precedent, setting itself against the weight of this Court's own authority, the plain text of Section 2, the unambiguous legislative history, and the "special force" of statutory *stare decisis*, *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 298 (2014). Defendants-Appellants seek to turn a carefully crafted factual inquiry into a legal question that reduces different groups to their U.S. Census Bureau categories rather than examining groups' actual common interests.

Defendants-Appellants' cramped approach is not only inconsistent with basic legal principles; it disregards the realities of discrimination that the VRA is designed to remedy. Consider, for example, a residentially segregated town where state-sponsored redlining and housing segregation have forced most Black and Latino residents to live in a single neighborhood. The town council is elected at-large by a substantial Anglo-majority. Because of this electoral system, the town council often ignores the needs of the Black and Latino neighborhood, resulting in their limited access to sanitation, paved roads, and other public services. The town council has

also discriminated against members of both groups, limiting their access to high-quality educational and employment opportunities. And, because of these groups' longtime proximity, this neighborhood now includes many people who are both Black and Latino. These Black and Latino neighbors tend to vote overwhelmingly for the same candidates who seek to be responsive to their needs, but the Anglo majority votes as a bloc to control all five seats on the town council. This minority neighborhood could easily form the core of a reasonably configured majority-minority district, but neither Black, nor Latino voters would themselves be a majority in the district. Under Defendants-Appellants' approach, the VRA provides no remedy for this textbook case of vote dilution, and indeed, permits the complete exclusion of Black and Latino voters from the political process. That is not, and cannot be, the law.

I. THIS COURT IS BOUND BY STATUTORY *STARE DECISIS* AND THE VRA'S LEGISLATIVE HISTORY, WHICH REVEAL CONGRESS'S AWARENESS OF AND ACQUIESCENCE IN COALITION CLAIMS.

A. The Supreme Court, and almost every court, have acknowledged coalition claims.

There is nearly unanimous circuit court consensus on coalition claims, holding that "[t]wo minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner." *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*., 906 F.2d 524, 526 (11th Cir. 1990); *see, e.g.*, *Pope v. County of Albany*, 687 F.3d 565, 572 n.5 (2d Cir. 2012); *Bridgeport*

Coal. for Fair Representation v. City of Bridgeport, 26 F.3d 271, 275-76 (2d Cir. 1994), *vacated on other grounds*, 512 U.S. 1283 (1994); *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992).[2] Likewise, for decades, this Court has recognized that "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics." *Campos*, 840 F.2d at 1244; *see, e.g.*, *LULAC v. Clements,* 999 F.2d 831, 864 (5th Cir. 1993) (en banc); *LULAC v. Midland I.S.D.*, 812 F.2d 1494, 1500-02 (5th Cir.), *vacated on state law grounds*, 829 F.2d 546 (5th Cir. 1987); *Jones v. City of Lubbock*, 727 F.2d 364, 383-84 (5th Cir. 1984); *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1981).

The Supreme Court has repeatedly implicitly permitted coalition claims. *Cf. Growe v. Emison*, 507 U.S. 25, 41 (1993) (assuming, without deciding, that it is "permissible" to aggregate "distinct ethnic and language minority groups" under Section 2). In the landmark decision *White v. Regester*, 412 U.S. 755 (1973), the Court affirmed a finding that Black and Mexican-American voters had successfully demonstrated that Texas unconstitutionally diluted their votes through the use of multimember districts in Bexar and Dallas Counties. *Id*. at 765. Initially, Black

[2] The sole outlier is *Nixon v. Kent County*, where the Sixth Circuit concluded that Section 2 does not permit plaintiffs of different racial groups to bring claims together. 76 F.3d 1381, 1390 (6th Cir. 1996). But the court in *Nixon* did not consider the widespread judicial acceptance of coalition claims, nor discuss Congress's awareness of these claims in amending the VRA. *See infra* Sec. I.B.i-iii. Moreover, even after *Nixon*, every other circuit has stayed the course, *Pope*, 687 F.3d at 572 n.5, and, when Congress again amended the VRA in 2006, it did so without questioning coalition claims, nor did it accept *Nixon*'s reasoning. *See infra* Sec. I.B.iv.

voters challenged the Dallas County district, *id*. at 766, and Latino voters challenged the Bexar County district, *id*. at 767-69. On remand, the district court considered an additional challenge to a multimember district in Tarrant County on behalf of a coalition of "black and brown voters" voters. *See Graves v. Barnes*, 378 F. Supp. 640, 644-48 (W.D. Tex. 1974) (three-judge court) ("*Graves I*"), *vacated*, 412 U.S. 755 (1973). Among its extensive findings, the district court concluded that Black and Latino voters were "concentrated in identifiable geographic areas," *id*. at 644; that both Black and Latino candidates failed to win elections because of white opposition, despite support from voters of both groups, *id*. at 645-46; and that Texas has "a history pockmarked by a pattern of racial discrimination that has stunted the electoral and economic participation of the black and brown communities in the life of the state," *id*. at 644-46 (describing Texas's various discriminatory acts, and the resulting socioeconomic and voting disparities). Ultimately, the court adopted a remedial Black and Latino majority district in Tarrant County, a ruling the Supreme Court declined to disturb. *See Graves v. Barnes*, 408 F. Supp. 1050, 1052 (W.D. Tex. 1976) (three-judge court) ("*Graves II*"), *stay denied sub. nom Escalante v. Briscoe*, 424 U.S. 937 (1976).[3]

[3] After Texas passed another law adopting a new legislative plan, the Supreme Court reversed and remanded the *Graves I* decision for reconsideration. *White v. Regester*, 422 U.S. 935 (1975). On remand, however, the district court readopted its earlier findings regarding the coalition claim against the multimember district in Tarrant County and created a single-member coalition district as a remedy. *See Graves II*, 408 F. Supp. at 1052.

In *United Jewish Organizations of Williamsburgh, Inc. v. Carey* ("*UJO*"), the Supreme Court similarly concluded that Section 5 of the VRA required New York's creation of a majority Black and Latino congressional district and precluded white voters' constitutional challenge to New York's congressional plan. 430 U.S. 144 (1977) (plurality). The U.S. Attorney General had determined that New York's original plan illegally fragmentated a cohesive Black and Puerto Rican community in violation of the VRA. *Id*. at 148-50 & n.6. The Supreme Court accepted that the court below, the Attorney General, and intervenors, had "classified Puerto Ricans in New York together with blacks as a minority group entitled to the protections of the [VRA]." *Id*. at 150. The Court also endorsed the Attorney General's finding that New York's cracking of a cohesive Black-Latino community had violated the VRA. *Id*. at 163 (holding that New York's redrawn remedial districts were "reasonably related to the constitutionally valid statutory mandate of maintaining nonwhite voting strength"). And the Court explicitly held that it was "reasonable for the Attorney General to conclude in this case that a substantial nonwhite [Black and Latino] population majority in the vicinity of 65% would be required [by the VRA] to achieve a nonwhite majority of eligible voters." *Id*. at 164.

This holding is important insofar as, at that time, it was understood that minority voters needed to constitute at least 65% of a remedial district's total population to be an effective majority, *Ketchum v. Byrne*, 740 F.2d 1398, 1415-16

(7th Cir. 1984); but, in *UJO*, the necessary 65% majority could only be achieved by combining Black and Latino voters. 430 U.S. at 149-50 & n.5. That is, only the cohesive coalition of groups were able to exercise their rights under the VRA. Indeed, a coalition of Black and Latino private litigants had initially sued New York to ensure it submitted its redistricting plan for preclearance, and this group later intervened in *UJO* to defend the New York congressional plan as a valid remedy to the VRA violation, *id*. at 149-50; *see also United Jewish Orgs. of Williamsburg, Inc. v. Wilson*, 510 F.2d 512, 516-17 & n.6 (2d Cir. 1975). Tellingly, the Court in *UJO* affirmed that the VRA required New York's creation of Black and Latino coalition districts over the dissent's explicit objection to the VRA reaching coalition claims. *See* 430 U.S. at 185 (Burger, C.J., dissenting).

The Supreme Court has taken a functional approach to interpreting the scope of Section 2. Notably, the Supreme Court has recognized that litigants may rely on the "Any Part Black" metric in defining the class of voters seeking protection under the VRA. *See Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003). This metric is inherently inclusive of Black people who are Hispanic and people who are Black and one or multiple other races. *Id*; *see, e.g.*, *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1570 (N.D. Fla. 1992) *aff'd in part, rev'd in part sub nom. on other grounds Johnson v. De Grandy*, 512 U.S. 997 (1994) (noting that a substantial number of Hispanic people from the Dominican Republic and Puerto Rico are Black). In

Milligan, the Supreme Court affirmed a Section 2 violation in which the plaintiffs had relied on the "Any Part Black" metric to identify the "class of citizens" who are subject to protection under Section 2. *See Milligan v. Merrill*, 582 F. Supp. 3d 924, 1001-04 (N.D. Ala. 2022) (three-judge court) *aff'd sub nom. Allen v. Milligan*, 599 U.S. 1 (2023). And this Court has also accepted the use of the "Any Part Black" metric in Section 2 cases. *See Robinson v. Ardoin*, 37 F.4th 208, 216-17 (5th Cir. 2022). The Supreme Court's acceptance of the "Any Part Black" metric demonstrates that attempts to draw stark lines between VRA claims on behalf of Black voters and those on behalf of multiple groups is impractical and ignores the complex reality of race. The Black community itself constitutes a "coalition" of the descendants of enslaved people from numerous cultures, immigrants from dozens of African, Caribbean, and other nations, and people with multiple composite identities.

Relatedly, in *Bartlett v. Strickland*, the Court carefully distinguished coalition districts—made up of two or more racial minority groups—from crossover districts—involving districts where minorities are less than the majority but may still have some influence an election because a sufficient number of white voters may "cross over" to support minority voters' candidates of choice. 556 U.S. 1, 13-14 (2009) (plurality). The Court expressly declined to address coalition districts. *Id*.

Defendants-Appellants misleadingly assert that the Supreme Court addressed coalition claims in *Perry v. Perez*, 565 U.S. 388 (2012). *See* Defs.-Appellants' Supp.

Br. at 20 (suggesting that "where the district court appeared to have intentionally drawn a 'minority coalition opportunity district,' . . . the Court held it had no basis for doing so") (citing *Perez*, 565 U.S. at 398). The Court in *Perez* does not suggest that Section 2 precludes coalition claims. Rather, the Court was critical of the factual basis for the district court's remedial plan and concluded that the district court lacked a factual basis for drawing certain districts. *See Perez*, 565 U.S. at 398 (explaining that the challenged district was "subject to strong challenges" but that an "ambiguous" basis for the remedial plan raised "concern[s] with the path the District Court followed"). Indeed, the Court in *Perez*, 565 U.S. at 399, cites to the portion of *Strickland*, 556 U.S. at 13-15, that expressly declined to address the viability of coalition claims. The fact that the Supreme Court has been confronted with coalition districts and addressed them as a factual, not legal, matter indicates that the issue cannot be resolved as a purely legal question as Defendants-Appellants urge.

Defendants-Appellants fail to acknowledge the weight of this precedent, which almost universally accepts coalition claims, and offer no justification for disregarding it.

B. In repeatedly amending the VRA, Congress acknowledged and drew from nearly unanimous judicial consensus about coalition claims.

When Congress amended the VRA in 1975, 1982, 1992, and 2006, it did so with the understanding that courts have permitted plaintiffs comprised of multiple racial groups to assert coalition claims under Section 2 and other provisions of the

VRA. Each time, Congress expressly relied on cases with coalition claims to amend and expand the VRA's protections. And each time it amended the VRA, rather than limit or preclude coalition claims, Congress instead chose to preserve the language that courts have continually understood to permit such claims.

i. 1975 Amendments

In 1975, Congress amended the VRA to make clear that its protections extended to language minorities. *See, e.g.*, 52 U.S.C. §§ 10304(f)(2), 10310(c)(3). In the 1975 Senate Report, Congress favorably cited two cases brought by coalitions of racial groups: *Graves v. Barnes*, 378 F. Supp. 640, 644 (W.D. Tex. 1974) (three-judge court), and *Coalition for Education in District One v. Board of Elections of the City of New York*, 495 F.2d 1090, 1091 (2d Cir. 1974). *See* S. Rep. No. 94-295, at 27-32 & n. 32 (1975).

The 1975 Senate Report explicitly cites both *White v. Regester* and the lower court's 1972 opinion in *Graves* for the proposition that Texas's at-large election "structures effectively deny Mexican Americans and black voters in Texas political access in terms of recruitment, nomination, election and ultimately, representation." *Id*. at 27-28. Based on these cases and others—including the district court's remand opinion in *Graves I* where the court considered a claim on behalf of a coalition of Black and Latino voters—Congress found that Texas has a "substantial minority population, comprised primarily of Mexican Americans and blacks" and that it has

a "long history of discriminating against members of both minority groups." *See id*. at 25, 30 (citing and quoting from *Graves I*, 378 F. Supp. at 643, as well as collecting various other cases ranging from white primaries to restrictive registration laws, which disparately impacted Black and Latino voters). Similarly, Congress identified *Coalition for Education in District One*, in which Black, Latino, and Chinese American voters together challenged voter identification rules and restrictions on voter assistance, 495 F.2d at 1092, as evidence that court orders requiring extensive voter assistance were necessary in New York and other states with a "substantial non-English-speaking population." S. Rep. No. 94-295, at 32.

Rather than question the propriety of these coalition claims, Congress in 1975 embraced these cases and relied on their findings and legal conclusions as sound bases for expanding the scope of the VRA. *See generally* S. Rep. No. 94-295. Congress was unquestionably aware of coalition claims and its amendments served to protect the ability of racial and language minorities to pursue vote dilution claims.

ii. 1982 Amendments

The 1982 Senate Report is the "authoritative source for legislative intent" in analyzing the amended Section 2. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *accord Milligan*, 599 U.S. at 10, 30 (referencing the Senate Report); *Brnovich v. DNC*, 141 S. Ct. 2321, 2333 (2021) (same).

In adopting the 1982 amendments, Congress again demonstrated its acute awareness of coalition claims. *First*, Congress amended Section 2 of the VRA based on the language from *White v. Regester*, a case involving coalition claims. *See Milligan*, 599 U.S. at 40. The Court in *White* held that the Black and Latino plaintiffs bore the burden of proving that their groups have "less opportunity" than "other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S. at 766. Congress incorporated this language nearly verbatim into Section 2(b). *See* 52 U.S.C. § 10301(b). Given the centrality of *White* to Congress's 1982 amendments, Congress was certainly aware of its factual context, including that the plaintiffs came from two different racial groups, 412 U.S. at 767, and that, on remand, the plaintiffs had succeeded on a coalition claim, *see Graves I*, 378 F. Supp. at 644-48. Because Congress adopted the standards set forth in *White* and did not question the validity of coalition claims of which it was undoubtedly aware—even when it made other significant changes to the law—it acquiesced to the courts' interpretation that coalition claims were permitted. *Cf. Milligan*, 599 U.S. at 39-40 (explaining that Congress is "undoubtedly aware" of VRA caselaw and that the details of *White* were "not lost on anyone when § 2 was amended").

Second, Congress in the 1982 Senate Report favorably cited the Court's plurality opinion in *UJO*, 430 U.S. at 149. *See* S. Rep. No. 97-417, at 121. Although

UJO arose under Section 5, as explained *infra*, Sec. I.A, the Supreme Court in *UJO* acknowledged the viability of coalition claims in endorsing a finding by the Attorney General that the cracking of a cohesive Black-Latino community violated the VRA. The Senate Report's reliance on *UJO* demonstrates Congress's awareness and endorsement of coalition claims during the legislative process in 1982 that produced Section 2's effects test.

Third, the Senate Report favorably cites to *Jones v. City of Lubbock*, 640 F.2d 777 (5th Cir. 1981), a Section 2 case, and the Attorney General's 1981 objection to the New York City Council map,[4] both of which involve violations of the rights of coalitions of Black and Latino voters. *See* S. Rep. No. 97-417, at 11, 26. Regarding *Jones*, the Senate Report endorsed Judge Goldberg's concurrence, where he discussed the nature of vote dilution claims in a case brought by a coalition of "Black and Mexican American citizens."[5] 640 F.2d at 777. Similarly, in listing VRA violations that Congress found "illustrative" of the "sophisticated devices that dilute minority voting strength," the Senate Report cites New York City's "gerrymandered districts," which had "discriminated against Black and Hispanic voters." S. Rep. No. 97-417, at 10-11; *see also Herron v. Koch*, 523 F. Supp. 167, 175 (E.D.N.Y. 1981)

[4] Letter from Wm. B. Reynolds to F. Palomino (Oct. 27, 1981), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/NY-1040.pdf.

[5] Although the Court in *Jones* remanded the matter for reconsideration in light of the Supreme Court's opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980), after Congress adopted the 1982 amendments, this Court subsequently affirmed the finding that the coalition of Black and Mexican-American voters had proven a violation of the amended Section 2. *See Jones*, 727 F.2d at 383-86.

(three-judge court) (enjoining the 1981 city council plan until the Attorney General reviewed it under Section 5 in a case filed by Black and Latino voters).

The Senate Report's repeated favorable references to cases and administrative decisions involving coalition claims shows that Congress was aware of these claims and approved of them in the 1982 amendments.

iii. 1992 Amendments

In 1992, Congress amended other portions of the VRA and once again had an opportunity to limit coalition claims but chose not to do so.[6] The 1992 Amendments reaffirmed that Section 2 of the VRA, 52 U.S.C. § 10301(a), protects "language minority groups," including "American Indian[s]" and "Asian American[s]." 52 U.S.C. § 10503(e). The 1992 Senate Report acknowledges that, for example, "Asian American" can encompass a broad array of racial and ethnic groups, including Chinese, Filipino, Vietnamese, and Japanese voters. S. Rep. No. 102-315, at *6, *12. Indeed, Congress's decision to allow dilution claims to be brought by "language minority groups"—without differentiating among specific racial or ethnic groups within these broad categories—shows that Congress affirmatively intended the definition of "class" to encompass coalitions of multiple protected racial or ethnic groups.

[6] Congress broadened the number of jurisdictions subject to the language-access requirements under Section 203 and extended the timeframe for the language-access provisions until 2007. 52 U.S.C. § 10503(b)(2)(A).

iv. 2006 Amendments

In 2006, Congress amended Section 5, so that the language of Section 5 would more closely mirror the language of Section 2, and one of its goals in doing so was to clarify that Section 5—like Section 2—encompasses coalitions of voters in different racial groups. Specifically, Congress added Section 5(b), which states that "Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section." 52 U.S.C. § 10304(b). This language closely tracks the language of Section 2, which states in relevant part: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.]" 52 U.S.C. § 10301(a). In the House Report accompanying this amendment, Congress made clear that these Section 5 amendments were intended to ensure that "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or *when coalesced with other voters*, cannot be precleared under Section 5." H.R. Rep. No. 109-478, at 71 (emphasis added). In other words, to make clear that Section 5 applies

to coalition claims, Congress added language to Section 5 that closely mirrors Section 2's text. *Compare* 52 U.S.C. § 10301(a) *with* 52 U.S.C. § 10304(b). And the House Report again cited *Johnson v. De Grandy*, 512 U.S. 997, 1020 (recognizing the existence of "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups"), again revealing Congress's awareness of coalition claims. H.R. Rep. No. 109-478, at *35 & n.71 (2006).

The 2006 House Report also repeatedly and favorably cites reports summarizing voting rights litigation, many of which discuss coalition claims. For example, the House Report cites Laughlin McDonald, *The Case For Extending and Amending the Voting Rights Act* (Mar. 2006) (the "2006 ACLU Report"). H.R. Rep. No. 109-478, at nn.49, 54, 82, 87. Among other cases, the 2006 ACLU Report discussed the details of *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271 (2d Cir. 1994), noting that the plaintiffs challenged Bridgeport's redistricting plan as "as diluting Hispanic and black voting strength[.]" 2006 ACLU Report at 65. The House Report also favorably cites Juan Cartagena, *Final Report on the State of Voting Rights in New York City* (Feb. 2006), H.R. Rep. No. 109-478, at nn.40, 92, 113, 119, which cites *Herron v. Koch*, 523 F. Supp. 167 (E.D.N.Y. 1981), a Section 5 coalition claim brought by Black, Hispanic, and Puerto Rican voters. And MALDEF submitted an extensive report to Congress highlighting Texas's recent history of discrimination, including *Campos v. City of Baytown*, 840

F.2d 1240 (5th Cir. 1988), a case involving a coalition claim. Nina Perales, Luis Figueroa, & Criselda G. Rivas, *Voting Rights in Texas 1982-2006* 27, MALDEF (June 2006).

Each time Congress amended the VRA, it was aware of and acquiesced to court interpretations of the statute permitting coalition claims.

C. Statutory *stare decisis* demands lower courts adhere to prior interpretations of Section 2 permitting coalition claims, until and unless Congress amends Section 2.

Defendants-Appellants ask the Court to eliminate coalition claims. But that invitation runs headlong into the Supreme Court's and this Court's past treatment of coalition claims and the "enhanced" *stare decisis* protection applied in statutory cases. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015); *accord Ramos v. Louisiana*, 140 S. Ct. 1390, 1413 (2020) (Kavanaugh, J., concurring). Congress has amended the VRA with overwhelming bipartisan majorities four times since its passage, yet deliberately left untouched the Supreme Court and lower courts' interpretations of the VRA as encompassing coalition claims. Under the doctrine of statutory *stare decisis*, this Court cannot now overrule this long-established precedent. The legislative history of the 1975, 1982, 1992, and 2006 amendments to the VRA show that "Congress is undoubtedly aware" of the Supreme Court's consideration of coalitions claims, as well as this Court's interpretation of the VRA to encompass such claims. *See Milligan*, 599 U.S. at 39. Congress "can change that

if it likes. But until and unless it does, statutory *stare decisis* counsels [courts] staying the course." *Id*.

Statutory *stare decisis* carries "special force." *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258, 274 (2014). In a case involving courts' construction of statutory language, "unlike in a constitutional case," "Congress can correct any mistake it sees." *Kimble*, 576 U.S. at 456. Courts interpreting a statute is a "ball[] tossed into Congress's court, for acceptance or not as that branch elects." *Id*. Where, as here, Congress "acquiesce[s]" to this Court's interpretation by leaving a holding undisturbed, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008), its action or inaction "enhance[s] even the usual precedential force" of *stare decisis*. *Shepard v. United States*, 544 U.S. 13, 23 (2005).

While Congress may sometimes struggle to "find[] room in a crowded legislative docket" to correct judicial misinterpretations, *Ramos*, 140 S. Ct. at 1413 (Kavanaugh, J., concurring), Congress has closely monitored the VRA and has not hesitated to step in when courts misconstrue it. Congress is aware that courts have construed the VRA to encompass coalition claims, and for this reason, "statutory *stare decisis* counsels [this Court] staying the course until and unless Congress acts." *Milligan*, 599 U.S. at 39; *see also id.* at 42 (Kavanaugh, J., concurring) ("[T]he *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict."). The Court "appl[ies] statutory

stare decisis even when a decision has announced a 'judicially created doctrine' designed to implement a federal statute." *Kimble*, 576 U.S. at 456. "All [the Court's] interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects." *Id*. Where, as here, "Congress has spurned multiple opportunities to reverse" a statutory decision, the Supreme Court demands a "super-special justification" to change course. *Id*. at 456, 458; *cf. Milligan*, 599 U.S. at 42 (Kavanaugh, J., concurring) ("In the past 37 years, however, Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act."). Defendants-Appellants cannot clear that high hurdle.

II. COALITION CLAIMS ARE BROUGHT ONLY RARELY—AND FACE A HIGH BAR—BECAUSE THE *GINGLES* FRAMEWORK CONSTRAINS SUCH CLAIMS TO APPROPRIATE CIRCUMSTANCES.

The *Gingles* Preconditions serve as significant threshold requirements that must be met in any racial vote dilution claim under Section 2. *Gingles*, 478 U.S. 30. The Preconditions are difficult to satisfy when claims concern a single racial group and are especially onerous when claims concern two racial groups in coalition. The consequences of these constraints are evident in practice: Coalition claims are very rare and are difficult for plaintiffs to prove, and claims involving three or more racial groups are exceptionally rare. *Cf. Milligan*, 599 U.S. at 28 (noting that the *Gingles*

Preconditions serve as effective gatekeepers, which bar insubstantial claims and prevents Section 2 from inappropriately forcing racial proportionality). Yet at the same time, in some parts of the country, including Galveston County, coalition districts are a critical way for multiracial communities with shared interests to gain equal access to the political process and elect representatives of their choice.

A. The *Gingles* Preconditions impose significant constraints on the availability of coalition claims.

i. Under *Gingles* Precondition 1, illustrative districts must be sufficiently compact and reflect communities that share interests beyond their protected class membership.

Protected class members must be reasonably compact to enable the drawing of illustrative districts for the purpose of satisfying the first *Gingles* Precondition ("*Gingles 1*"). This compactness analysis includes an evaluation of both geographic compactness as well as consideration of the extent to which protected class members have shared interests such that drawing them together will "enhance the[ir] ability … to elect the candidates of their choice." *Abbott v. Perez*, 585 U.S. 579, 617 (2018). These requirements meaningfully limit the availability of coalition claims.

First, with respect to geographic compactness, the Supreme Court has established a threshold requirement that the protected class must be "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50; *see also Strickland*, 556 U.S. at 18 (protected class members must "make up more than 50 percent of the voting-age population in the

relevant geographic area"). This bright-line rule forecloses coalition claims whenever different racial groups are not sufficiently geographically compact to comprise a majority in a single-member district. For instance, in *France v. Pataki*, plaintiffs could not draw an illustrative remedial plan in which Black and Latino voters would constitute the majority in a reasonably compact district without race predominating. 71 F. Supp. 2d 317, 324-25 (S.D.N.Y. 1999); *see also Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 375-76 (S.D.N.Y.) (three-judge court), *aff'd*, 543 U.S. 997 (2004). Racial groups may live in different geographically dispersed communities, particularly when they have not been subject to shared experiences of housing segregation, and the requirement of adducing an illustrative majority-minority district imposes a significant limitation on coalition claims. *Cf. Milligan*, 599 U.S. at 28-29 (noting that as residential segregation decreases, it will become even harder to draw compact majority-minority districts).

Second, the Supreme Court has emphasized that courts must undertake a fact-specific analysis to evaluate whether protected class members share interests. In *LULAC v. Perry*, the Court admonished the district court for failing to analyze whether the Latino community near Austin, Texas and the Latino community near the Mexican border were sufficiently similar when analyzing whether the Legislature's district was compact under *Gingles* 1. 548 U.S. 399, 434 (2006). The Court rejected an illustrative district that connected two different Latino

communities, emphasizing that "it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes." *Id*. at 435.

This same principle applies in cases concerning coalition districts: Whether the minority population is comprised of a single racial group or more than one group, courts must undertake a fact-specific analysis of whether the coalition groups share sufficient interests when evaluating whether the first *Gingles* precondition has been satisfied. When plaintiffs demonstrate that coalition members share interests such that they would have an equal opportunity to elect candidates of choice if they are joined together in a single district, coalition claims should be permitted to proceed.

When considering coalition claims, "proof of minority political cohesion is all the more essential*." Growe*, 507 U.S. at 41; *see also Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (cautioning "against reaching conclusions about inter-minority cohesion absent a *diligent inquiry* into the political dynamics of the particular community") (emphasis added). Coalition claims often fail because plaintiffs cannot meet this high bar. For instance, in *Concerned Citizens of Hardee County*, the Eleventh Circuit rejected a coalition claim after finding "little evidence that [B]lacks and [H]ispanics in Hardee County worked together and formed political coalitions." 906 F.2d 524, 527 (11th Cir. 1990); *see also Meek v. Metropolitan Dade County*,

985 F.2d 1471, 1481-82 (11th Cir. 1993), *abrogated on other grounds, Dillard v. Chilton Cnty. Comm'n*, 495 F.3d 1324 (11th Cir. 1993) (observing that Black and Latino residents in Dade County maintained a "keen hostility" between each other).

The Supreme Court has further defined the requirements for groups of voters to constitute classes for Section 2 purposes. In *LULAC v. Perry*, the Supreme Court explained that class members must share "needs and interests" based on, among other things, "socio-economic status, education, employment, health, and other characteristics[.]" 548 U.S. at 402, 424. The class in this case satisfies that standard: Among other things, the district court explained that there was "overwhelming evidence that [Black and Latino voters in Galveston County] share similar socio-economic struggles countywide and in Precinct 3." *Petteway v. Galveston County*, 2023 WL 6786025 (S.D. Tex Oct. 10, 2023) at *15. The lay-witness testimony on the similar discrimination faced by both groups also supports the conclusion that these groups appropriately constitute a class. *Id*.

Defendants-Appellants argue that coalition claims should be barred as a matter of law because different groups will "lose their unique identities and are subsumed into a broader, larger coalition[.]" Defs.-Appellants' Supp. En Banc Br. at 12. They assert that coalitions "cannot proclaim lasting unity—there are too many differences when distinct groups are joined, including where people live, what they value most, who they prefer as a candidate in primary elections, and even what

language they speak." *Id*. Defendants-Appellants miss the mark—these objections are not legal barriers to coalitions but factual considerations that courts can and should take into account when evaluating whether to permit a coalition claim.

ii. Under *Gingles* Preconditions 2 and 3, the "cohesion" requirement imposes an important limiting principle on coalition claims.

The requirement that plaintiffs must be "cohesive" in their voting patterns imposes another natural limiting principle on coalition claims. Among other requirements, *Gingles* requires that protected class members must be "politically cohesive." *Gingles*, 478 U.S. at 51. The Court has explained that this requirement serves an important purpose because it "shows that a representative of its choice would in fact be elected." *Milligan*, 599 U.S. at 19.

In the context of coalition claims, all courts that permit them—including this Circuit—require plaintiffs to prove that both protected classes are politically cohesive with each other. Courts demand that plaintiffs show that the class "generally unite[s] behind or coalesce[s] around particular candidates and issues." *LULAC v. Clements*, 986 F.2d at 744. This Circuit has found that "the most persuasive evidence of inter-minority political cohesion for Section 2 purposes is to be found in voting patterns[.]" *Brewer*, 876 F.2d at 453.

The cohesion requirement poses an exceedingly high bar when claims concern two racial groups acting in coalition. Different racial groups will often support

different candidates, making it rare that plaintiffs can prove that two different racial groups share cohesive political preferences. Courts regularly reject Section 2 claims brought on behalf of two racial groups because the evidence often does not support a finding of cohesion between the two groups. For example, in *Badillo v. City of Stockton* the Ninth Circuit held that "plaintiffs had not presented sufficient evidence to establish that [B]lacks and [H]ispanics would vote together or separately as a politically cohesive group" to satisfy the standard under *Gingles*. 956 F.2d 884, 887 (9th Cir. 1992). Similarly, in *Concerned Citizens of Hardee County*, the Eleventh Circuit rejected a Section 2 claim in part because Black and Hispanic voters were not cohesive. 907 F.2d at 525; *see also Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 406 (2nd Cir. 2004) (finding that the plaintiffs cannot prove cohesion between Black and Hispanic voters).

B. Although coalition claims have been available in nearly every circuit for over 50 years, coalition claims are only brought rarely, and are difficult to prove.

Coalition claims, though widely available under existing precedent, are extremely rare in practice: Out of 456 Section 2 cases that have been filed since 1982, only 28 involve a coalition claim.[7] Of these 28 cases brought, only 8 were successful. In its amicus brief, Judicial Watch baselessly argues that coalition claims

[7] *See* Michigan Law Voting Rights Initiative, *Section 2 Cases Database*, University of Michigan, https://voting.law.umich.edu/database/ (last accessed Feb. 21, 2024).

lack a limiting principle and could therefore result in an overwhelming flood of litigation. Amicus Curiae Br. of Judicial Watch at 15-18. Judicial Watch also raised fears of a flood of coalition claims involving three or more racial groups. *Id.* But these concerns are belied by the actual history and practice of Section 2 litigation. Coalition claims have existed for nearly fifty years but are rarely brought and are more rarely successful because of the constraints imposed by the *Gingles* framework. *Cf Milligan*, 599 U.S. at 29 (noting that "§ 2 litigation in recent years has rarely been successful").

Claims involving three or more racial groups are exceptionally rare. In the half century since the first successful coalition claim, *Graves I*, 378 F. Supp. at 644-48, Judicial Watch was unable to identify a single successful coalition claim asserted under Section 2 on behalf of three or more racial groups. Indeed, the only example in Judicial Watch's brief concerned compliance with Section 5, not Section 2, and it was never litigated to a final judgment. *See* Amicus Curiae Br. of Judicial Watch at 15 (citing *Texas v. U.S.*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013) (vacating a district court decision that Texas's state House map and its congressional map violated Section 5 in light of *Shelby County v. Holder*, 570 U.S. 529 (2013)). The constraints on coalition claims already imposed by the *Gingles* framework have had significant practical consequences—coalition claims are brought rarely, and successful claims are rarer still. However, where the particular

facts demonstrate that a multi-racial, multi-ethnic community faces discrimination in common and tends to vote cohesively for the same candidates, the availability of coalition claims are crucial to ensure that these communities have an equal opportunity to participate in the political process and elect representatives of their choice.

CONCLUSION

For the foregoing reasons, the en banc Court should reject Defendants-Appellants' challenge and affirm the panel and district court's rulings.

Dated: February 21, 2024

Respectfully submitted,

/s/ Stuart Naifeh

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CERTIFICATE OF SERVICE

I certify on this 21st day of February, 2024, that I electronically filed this motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF filing system. I further certify that all participants in this case are registered CM/ECF users and that all service will be accomplished by the appellate CM/ECF system.

/s/ Stuart Naifeh
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify on this 21st day of February, 2024, that this motion complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 27(d)(2)(A), 32(a)(5) and 32(a)(6). This motion totals 6,446 words and has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

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

Dear Mr. Naifeh,

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,

LYLE W. CAYCE, Clerk

Christina Rachal

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