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

On appeal from the United States District Court
for the Southern District of Texas
USDC Nos. 3:22-CV-00057, 3:22-CV-00093, 3:22-CV-00117

APPELLANTS' CONSOLIDATED REPLY BRIEF

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Appellants file this consolidated brief in response to Appellees' three Opening Briefs. *See* Docs. 67, 69, 72.

Appellant's brief provides a clear and accurate depiction of the underlying facts of this case, to which Appellants refer the panel. Appellees' factual statements warrant clarification of certain questionable assertions.

First, Appellees allude to intentional discrimination claims and the district court's *Arlington Heights* analysis. But this appeal concerns no finding of intent. *See generally* ROA.15881; ROA.16034 ¶430.

Second, Petteway Appellees assert "contemporary barriers to voting that weigh more heavily on Black and Latino voters" and "lasting negative effects of these conditions, in turn, have contributed to the minority community's disproportionately low voter turnout rates." *See* Appellee Brief [Doc. 72] at 21. The record clearly establishes that voting in Galveston County is easier than it has ever been. Several witnesses testified it is easier now to vote now in Galveston County than ever. ROA.15942 ¶164. Residents can vote anywhere in the County on election day or during early voting. *Id*. It is relatively easy to register to vote, and early voting lasts two weeks. *Id*. The County Clerk testified that "if a mail-in ballot required postage and the voter failed to affix it, the clerk's office would pay for the postage because it "want[s] every vote to count." ROA.15942 ¶165. Election materials are

provided in both English and Spanish for all elections. ROA.15942 ¶166. The County also "collaborates with LULAC and allows them to use [C]ounty property for its Cinco de Mayo event" which is also a "get-out-the-vote effort." ROA.15942 ¶168.

Third, the DOJ and NAACP Appellees cite the district court's finding that Commissioner Holmes was excluded from the process. DOJ Appellees boldly assert that Commissioner Holmes was not included in meetings, although every commissioner and Judge Henry were. Appellee Brief [Doc. 67] at 16. This allegation is contradicted by even a cursory review of the record. Commissioner Holmes' personal notes document the numerous meetings he had with redistricting counsel and other commissioners. ROA.24430 (JX 23). His notes document his extensive involvement in the process, and they have not been interpreted otherwise. *See* ROA.24430 (JX 23).

Next, Petteway and NAACP Appellees criticize the Commissioner Court's response to public comments on the map proposals. *See* Appellee Brief [Doc. 72] at 23; *see also* Appellee Brief [Doc. 69] at 26. First, the NAACP Appellees assert that the November 12, 2021 public meeting was the "sole opportunity for public comment." Appellee Brief [Doc. 69] at 26. This ignores the public's opportunity and submission of four hundred and forty (440) public comments received at the time of the November 12, 2021 meeting. *See* ROA.21103 (DX 149); *see also* ROA.24502

(JX 42). The Commissioners Court received more public comments than anything else previously posted. ROA.18292. The County Judge read the breakdown of public comments to the attendees at the November 12, 2021 meeting. *See* ROA.21103-21104. Of those responses that discussed a particular map, seventy-six percent (76%) favored Map 2 and twenty-three percent (23%) favored Map 1. ROA.21103-21104.

Finally, Dr. John Alford, while acknowledging the role of general election data, also expressed the importance of primary election data in performing a racially polarized voting analysis. ROA.19319-19320. Additionally, through limited disclosure, Appellees present Dr. Alford as admitting to racial polarization by citing the following statement: "I don't think you could see a more classic pattern of what polarization looks like in an election." ROA.15927; ROA.19311-19312. Appellees conveniently omit that he continued: "I would say it's partisan polarization." ROA.19312.

I. The VRA Does Not Protect Minority Coalitions: The question of binding precedent in the Fifth Circuit is properly before the panel, and en banc hearing has been requested which would avoid this argument altogether.

A. Close inspection suggests some doubt over formal adoption of minority coalitions.

While it may appear as though the Fifth Circuit expressly ruled that VRA coalition claims are permissible since the 1980s, a closer examination indicates that the direct question of whether the VRA is meant to protect coalition claims has not

been squarely addressed; instead, whether such claims should proceed under the VRA (as opposed to whether they meet the factual analysis of a VRA claim) has been refuted in dissenting and concurring opinions:

- *Brewer v. Ham*, 876 F.2d 448, 453-56 (5th Cir. 1989) (panel opinion, no direct question on viability of VRA coalition claims; held coalition of Black, Hispanic and Asian plaintiffs could not show cohesion, evidence showed that efforts were being made to form non-white minority political coalitions and Court ultimately concluded "[t]here is only speculative merit but nearly certain mischief possible from creating single-member districts simply to ensure a plurality election possibility for a minority group");

- *Overton v. City of Austin*, 871 F.2d 529, 534-40 (5th Cir. 1989) (per curiam) (panel opinion affirming district court's *Gingles*[1] analysis dismissing Black and Mexican-American plaintiffs' challenge to at-large voting system; plaintiffs were not cohesive and, among other things, "Austin politics are influenced by factions who form constantly shifting coalitions motivated by issues other than racial exclusivity");

- *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (panel opinion affirming district court's finding that Black and Mexican plaintiffs were politically cohesive in a challenge to at-large voting system, vacating and remanding to await preclearance);

- *LULAC Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1499 (5th Cir. 1987) (upholding trial court finding that, at least in Midland, Black and Hispanic voters were cohesive and "The evidence presented bears out this fact. Testimony presented showed that Blacks and Hispanics worked together and formed coalitions when their goals were compatible"), vacated *en banc League of United Latin American Citizens, Count No. 4386, et al v Midland Independent School District* 29 F.2d 546 (5th Cir. 1987);

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

- *LULAC v. Clements*, 999 F.2d at 894 n.1 ("Although the *en banc* majority opinion *adopts* the minority coalition theory for certain aspects of its analysis, those points are not essential to its result and simply demonstrate that the plaintiffs' own arguments are self-contradictory") (Jones, J., concurring).

Rather, coalition claims have so far been reviewed as presenting as "a question of fact," and the "aggregation of different minority groups" has been allowed "where the evidence suggests that they are politically cohesive . . . ." *Clements*, 999 F.2d at 863-64.

The Court's tolerance thus far conflicts with analyses from other United States Courts of Appeals. *See Hall*, 385 F.3d at 431; *Frank v. Forest County*, 336 F.3d 570, 575-76 (7th Cir. 2003); *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (same). *Hall* defined "[c]rossover" voters as persons outside a minority group who support the minority group's candidate in an election. *Hall*, 385 F.3d at 425 n.6. It later stated that a "'coalition' claim alleges that minorities can, in fact, elect a candidate of their choice with the support of crossover voters from other racial or ethnic groups." *Id*. at 428 n.11. *Hall* further explained that, "[f]undamentally, the plaintiffs contend that Section 2 authorizes a claim that an election law or practice dilutes the voting strength of a multiracial coalition." *Id*. at 426. The same is true of Appellees' case here, where they must assert that a multiracial coalition's vote is diluted, not that a minority group's vote is diluted.

Due to the likelihood that either side will seek en banc rehearing of any panel decision, and to promote efficiency in this appeal which presents a question of critical importance, Appellants have requested en banc hearing in the first instance. But a closer inspection of Fifth Circuit case law does not reveal a square address of the viability of minority coalition claims in a majority opinion. *See Clements*, 999 F.2d at 894 n.1 & 894-95 (Jones, J., concurring) (noting majority opinion adopted coalition theory for certain asptects of its analysis but those points were not essential to its result, and discussing *Campos*' unsupported or explained statement on minority coalitions).

B. There is support for Supreme Court precedent implicit rejection of minority coalitions.

1. Sub-majority districts are rejected as is judiciary control of the political process

Since *Clements* was decided in 1993, the Supreme Court has expressly rejected each sub-majority class, like a minority coalition, seeking to bring a VRA claim despite not being able to form a majority-minority district without others. Specifically, the Court rejected influence districts[2] where a minority group sought to pursue a VRA claim on the theory that the group was numerous enough to influence a favorable outcome in a proposed district. The Court then squarely rejected

[2] *See LULAC v. Perry*, 548 U.S. 399, 446 (2006) (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003)).

crossover claims, citing to rationale from a Fourth Circuit case that disfavored **coalition** claims like the one Appellees present in this case. *See Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009) (quoting *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004)). In rejecting this sub-majority class, the Supreme Court made very clear that a sub-majority class cannot be considered a majority for purposes of *Gingles* I if it is necessary to include potential members of a majority group who might "cross-over" and vote with the sub-majority. *Id*. at 14. These decisions provide a clear indication of the Supreme Court's view of a sub-majority group being able to pursue a VRA claim.

In addition to rejecting sub-majority claimants, the Supreme Court also made clear that partisan vote dilution claims are not actionable. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019). A coalition of different minority groups who join together to elect a Democratic candidate presents just such a partisan claim. In deciding these cases, the Supreme Court has implicitly overturned *Clements* to the extent it permits minority coalitions claims to proceed. *See Gahagan v. U.S. Citizenship & Immigration Servs.*, 911 F.3d 298, 302 (5th Cir. 2018). Accordingly, this panel can resolve the issue for the 5th Circuit consistent with Supreme Court precedent.

2. The Supreme Court has never "assumed" coalitions are permissible

The statement that the Supreme Court has assumed the permissibility of minority coalitions is baseless. Appellee Br. [Doc. 72] at 21. Neither *Growe*, *White*, nor *Bartlett* even approach such a conclusion. The *Growe* Court simply confirmed that cohesion cannot be presumed among a distinct minority group. *Growe v. Emison*, 507 U.S. 25, 41 (1997). *White* is a pre-"results" case that required invidious discrimination under the constitution and the court separately analyzed distinct minority groups. *White v. Regester*, 412 U.S.755, 767 (1973). Finally, *Bartlett* certainly did not assume the legitimacy of minority coalitions, instead pointing out that as a political, rather than a judicially imposed, remedy, "African-Americans . . . have the opportunity to join other voters - ***including other racial minorities*** . . . to reach a majority and elect their preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 14 (2009)(emphasis added). Moreover, Appellees completely ignore that when *De Grandy* acknowledges that "there are communities in which minority citizens are able to form coalitions,"[3] the Court is alluding to the political means of electing a candidate, not assuming that the VRA protects minority coalitions. *Johnson v De Grandy*, 512 U.S. 997, 1020 (1994) ("minority voters are not immune from the obligation to pull, haul, and trade to find common political ground"). Appellees

[3] Appellee Br. [Doc. 72] at 21.

simply refuse to acknowledge that the VRA cannot be used as a substitute for political process. None of their cited cases support the contention that the Supreme Court assumes minority coalitions are protected by the VRA.

C. Minority coalitions should be rejected regardless of statutory construction or interpretation

Relying on *Chisom v. Roemer*,[4] Plaintiffs declare that the VRA must be broadly intepreted. Appellee Br. [Doc. 72] at 25. *Chisom* resulted in clarification that the VRA to applied to "representatives" who include elected judges, just as the pre-1982 version of the VRA had. *See Chisom v. Roemer*, 501 U.S. 380, 403 (1991). But tAppellees seek a minority coalition in his case, and there is no support for a view that the VRA ever permitted minority coalitions. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1389 (6th Cir. 1996). Indeed, "that certain types of elections are within Section 2 is a definitional exercise ... [b]ut it is a remedial exercise to decide whether to apply the results test to a minority coalition united not by race or language but only by their desire to advance a particular agenda." *Clements,* 999 F.2d at 896 (Jones, J., concurring). Stated otherwise, interpreting the VRA in a broad sense does not mean reading terms into it that never existed. It is one thing to assume that by not saying

[4] Plaintiffs also cite colorful language in the Title VII *Bostock* case regarding a nonexistent "canon of donut holes." *Bostock v. Clayton Cnty. Georgia*, 140 S.Ct. 1731, 1747 (2020). *Bostock* is consistent with *Chisom's* definitional inclusion of judicial elections; however, rejecting remedial minority coalition claims under the VRA does not depend on an exception of any particular "class" from the statute.

anything, Congress excluded a previously covered group of the electorate in amending the VRA.[5] It is another thing to interpret the same inaction as creating a previously non-existent right. The latter is inappropriate. *See Nixon*, 76 F.3d at 1389. More pragmatically, including judicial elections in the VRA neither complicates application of *Gingles* principles, nor is in tension with the VRA's warning against an expectation of proportionality. Simply put, courts have to do drastically more than "broadly interpret" the VRA to expand it to include minority coalitions. Such a reading is unsupported given the Supreme Court's approach in interpreting Section 2; courts should avoid sub-majority theories which tend to "unnecessarily infuse race into virtually every redistricting raising serious constitutional questions." *LULAC v. Perry*, 548 U.S. 399, 446 (2006) ("*LULAC I*").

Ironically, Appellees cite *Yates v. United States,* 574 U.S. 528 (2015) for the proposition that the term "class" should not be determined in isolation, and then do exactly what *Yates* counsels against, which is look at a textbook definition without considering the *context*.[6] 574 U.S. 528, 537-38 (2015). Regardless, *Yates* does not support the argument that the VRA means "classes" when it says "class". Additionally, the "last antecedent" rule does not apply to the specific language used[7]

[5] Appellee Br. [Doc. 72] at 31.
[6] Appellee Br. [Doc. 72] at 27.
[7] *Id*. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), does not apply as there is no last antecedent phrase.

in the VRA and citation to the singular-plural canon equally fails to resolve the issue here.[8]

Organizational Appellees' suggestion that rejection of minority coalition claims creates an "incongruity" between vote dilution and "time, place and manner" ("vote denial") claims is unmerited. *See* Appellee Br. [Doc. 69] at 25-26. As reason would suggest vote denial claims have been differentiated by the Supreme Court and do not implicate the *Gingles* preconditions, aggregation, proportionality, polarized voting and other factors that are key in vote dilution cases. *Brnovich v. Democratic Nat'l. Comm.*, 141 S.Ct. 321, 2340 (2021).

Finally, Petteway Appellees creatively paraphrase *Allen v. Milligan* suggesting that not only does the Supreme Court entertain minority coalition claims, but that Congress is perfectly aware of that fact, can change it, and that stare decisis requires the Supreme Court stay the course enforcing minority coalition claims. Appellee Br. [Doc. 72] at 32. Plaintiffs greatly stretch the value of *Milligan* here. *Milligan* did not involve a minority coalition under the VRA, much less address the legitimacy of such claims. *Allen v. Milligan*, 599 U.S. 1 (2023).

[8] The simplistic application of singular-plural construction is unworkable. The phrase "class of citizens" already contemplates multiple citizens within any given class, and the construction provides no instruction that separate "classes" may be aggregated. *See F.D.I.C. v. RBS Sec. Inc.*, 798 F.3d 244, 258-9 (5th Cir. 2015).

D. Concerns noted with minority coalitions and the express limits of proportionality are highlighted by the facts of this case.

Contrary to Appellees' view, this case demonstrates the significant concern that minority coalitions provide opportunities to overreach the VRA's express proportionality limitations. The VRA is not a tool to force proportional representation. *Milligan*, 599 U.S. at 28-29. Petteway Appellees maintain that the two distinct minority groups in this case together make up 38% of Galveston County's population. Appellee Br. [Doc 72] at 36. Notably, the Black population in Galveston County is roughly 13% and Latino population is roughly 25%. ROA.15910 ¶68. Yet, because of the configurations of the Appellees' proposed Precinct 3, Black CVAP within proposed Precinct 3 is consistently greater than the proposed Latino CVAP. ROA.33923 (Table 6 - PX 337) (Fairfax Proposed Map: Black CVAP is 30.7%; Hispanic CVAP is 24.4%); ROA.17202-17203. For all practical purposes then, the Black voting population, which makes up 13% of the County population, controls the candidate to be elected in Precinct 3, as they outnumber the rest of the Democrat voters[9] and can dictate results of primaries in proposed Precinct 3.[10] There are few checks on this problem under *Gingles*, particularly in light of the District Court's view that primaries need not be given

[9] The Court found that experts agree that few Anglo voters participate in Democratic primaries. ROA.15936 ¶148. As such, Anglo voters are unlikely to defeat the candidate of choice of Black voters.

[10] LULAC representatives publicly complained about a very similar issue in 2013. *See* Appellant's Br. [Doc. 47] at p. 41, n. 15.

much weight.[11] Again, minority coalitions unquestionably create significant issues by providing opportunities to force proportionality beyond permissible limits and to manipulate political results, contrary to law.

Based on all of the above, there can be little question that Section 2 of the VRA does not protect any sub-minority group, including minority coalitions as Appellees have formed here.

II. The district court applied an improper standard in its *Gingles* I findings.

Importantly, the first *Gingles* precondition asks whether the minority group is sufficiently numerous, as measured by CVAP, and looks for compactness, meaning the Court considers whether it is reasonably configured. *Milligan*, 599 U.S. at 18. A district is reasonably configured when it complies with traditional redistricting criteria (*id.*), such as contiguity, compactness, and when it encompasses a community of interest as measured by common socioeconomic factors. *Robinson v. Ardoin*, 37 F.4th 208, 218 (5th Cir. 2022) (per curiam).

A. By not considering the varied concentrations of the different minority groups the court failed to consider compactness and communities of interest.

The district court did not assess the compactness of each minority group. Limiting the compactness analysis to one or the other minority group in coalition

[11] According to the District Court, primary elections have "limited probative value in determining inter-group cohesion." ROA.15928 ¶122.

cases provides no check on whether each group can satisfy *Gingles* I. Again, "the Latino community is evenly dispersed throughout" the County. ROA.15912 ¶73. This Court recently stated that *Gingles* I "relates to the compactness of the minority population in the proposed district, not the proposed district itself." *Robinson*, 37 F.4th at 218. And *Milligan* reiterates that communities of interest are also part of the review. *Milligan*, 599 U.S. at 21. It is difficult to see how a community of interest can exist inside a proposed precinct 3 for Latinos, when 66.4% of Latinos[12] in Galveston County reside outside that proposed area. In contrast, only 43.3% of Blacks would reside outside proposed precinct 3. While *Campos* held that the population outside of the proposed district is irrelevant, the Court there did not appear concerned with communities of interest. *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988). In any event, because two populations of distinct minority groups are not, together, compact, and one of the coalition groups is "evenly dispersed throughout" the County (ROA.15912 ¶73), the district court's findings that illustrative plans are somehow compact and form a community of interest amount to clear error. Absent close consideration of each group, the Court cannot be assured the proposed districts are reasonably configured and comply with traditional redistricting criteria.

[12] The percentages are an average of Hispanic and Black voting age population outside the proposed precinct 3 for Fairfax's plan, and Coopers plans 1, 2 and 3. ROA.33958 (PX 337); ROA.34885 (PX 349); ROA.34893 (PX 350); ROA.34901 (PX351).

B. Compactness cannot be assumed based on race and cannot be established on this record.

Appellees seek to distinguish *LULAC I*[13] because the distance between two distant Latino populations was much larger there. Appellee Br. [Doc 69] at 34; Appellee Br. [Doc. 72] at 39. However, the distance is relative in any given case. Illustrative plans that "lump[] together" minority populations "separated by considerable distance," *Sensley v. Albritton*, 385 F.3d 591, 598 (5th Cir. 2004), or "combin[e] 'discrete communities of interest'" that differ "'in socio-economic status, education, employment, health, and other characteristics'" cannot satisfy the first *Gingles* precondition. *Robinson*, 37 F.4th at 218 (quoting *LULAC I*, 548 U.S. at 432).

Sensley rejected long, narrow jurisdictions drawn for the purpose of connecting disparate minority communities. *Sensley*, 385 F.3d at 597. Yet, those are the facts present here. Appellee expert Cooper presented maps that were just as long (18 miles) to connect minority populations— he connected communities in the northern part of Galveston County with those on Galveston Island, effectively running through the entire County. ROA.16823; *see also* ROA.16813-16814. It is difficult to square the district court's conclusion that "the plaintiffs do not need to consider specific communities of interest when drawing illustrative maps to satisfy

[13] *LULAC I*, 548 U.S. at 432-33.

the first *Gingles* precondition." ROA.16009 ¶371. That statement is an error of law, and its findings based on this erroneous statement are clearly wrong. *See Milligan*, 599 U.S. at 19.

Findings of no 'enormous geographical distance" or "disparate needs" are unsupported and based on an erroneous standard. Appellee Br. [Doc. 72] at 39. Just because a district will perform does not mean courts can fail to account for compactness. *LULAC I,* 548 U.S. at 441. The district court relied on *LULAC I* in determining what was "enormous", which in *LULAC 1* was several hundred miles. ROA.16009 ¶371. However, it can be improper to join geographical areas that are much closer, such as the 18 miles considered improper in *Sensley*. *See* 385 F.3d at 597. In short, joining "farflung" segments of a racial minority group as was proposed here is unacceptable under the first *Gingles* precondition; the district court misapplied the distance consideration. *See Sensley*, 385 F.3d at 597.

III. The district court failed to give credence to primary elections and erred by failing to consider whether reasons other than race, such as politics, causes white bloc voting in Galveston County.

This Court reviews legal conclusions de novo, and reviews a district court's findings for clear error. *Robinson*, 37 F.4th at 216. Findings are "clearly erroneous where, after reviewing the entire record," the Court is "'left with the definite and firm conviction' that the district court erred." *Id*. (quotation omitted). A district

court's "[f]indings that rest upon erroneous views of the law must be set aside." *Clements*, 999 F.2d at 877.

A. *Gingles* II cohesion was not met, and the relevance of primary elections was erroneously discounted.

The district court therefore erred in finding cohesion, and in adopting the analysis of the Coalition Claimants' experts.

"[T]he relative legal significance of general and primary elections remains undecided" in the Fifth Circuit. *LULAC v. Abbott*, 601 F. Supp. 3d 147, 169 n.10 (W.D. Tex. May 4, 2023) ("*Abbott* I"). Primary election results show, particularly in a coalition case, whether different minority groups select the same candidates. *See Abbott* I, 601 F. Supp. 3d at 169 n.10; *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421 (S.D.N.Y.) (per curiam) (three-judge court) (concluding that divergence in primaries defeats a showing of political cohesion), *aff'd*, 543 U.S. 997 (2004) (mem.). The *Abbott* I Court found Dr. Alford's analysis of that primary "relevant and helpful," as it showed that Hispanic voters favored the Hispanic candidate, while Black and Anglo voters preferred the Anglo candidate. *Id.* at 166-67.

Dr. Alford concluded that cohesion did not exist between Black and Latino voters. He found only 2 of 24 primary elections where Black and Latino voters supported the same candidate with 75% or more of their vote. ROA.23997-24002 (DX 305); ROA.15575-15578 ¶¶432, 436-439. Using a lower threshold for cohesion (60%) promoted by one of Appellees' experts, Dr. Trounstine, Dr. Alford found only

a one-third cohesion rate, which is not cohesion, as a matter of law. *See Abbott I*, 601 F. Supp. 3d at 166.

Dr. Trounstine's found that one out of eight result primary elections in Galveston County showed cohesion between African Americans and Latinos. ROA.19331. Dr. Barreto did not conduct racially polarized voting analyses for Democratic primaries, and he did not consider nonpartisan general elections. ROA.16924:16-22.

While the district court found Dr. Alford's testimony, analyses, and opinions credible (ROA.15906 ¶55), and "[r]ecognizing Dr. Alford's concerns about the reliability of the wide confidence intervals" between Black and Latino voting patterns evident in primary elections, the court still found cohesion. ROA.15926 ¶117. Further, the Court ignored the large Latino confidence intervals which spanned between 20 points and 34.4 points, and became even broader when adjusted for Spanish surname turnout—to consistently 40 points wide. ROA.15563-15564 ¶383. Appellee expert Dr. Oskooii "also had broad confidence intervals for Latino voters." ROA.15926 ¶117.[14] The court, however, found primary elections had "limited probative value in determining inter-group cohesion." ROA.15928 ¶122.

[14] Dr. Oskooii similarly limited his primary-election analysis to ten Democratic Party primary elections with two candidates, without considering Republican Party or multi-candidate primary elections. ROA.17372, 17375, 17382. Dr. Oskooii also excluded Anglo voters from his cohesion analysis in ten primary elections, where Anglo voters voted in alignment with Hispanic and Black voters. ROA.17391-17392, 17394, 22949 (DX 217).

B. The Court did not require Appellees to establish race as a cause for voter behavior under *Gingles* III before considering partisanship.

Gingles III is not met if the reason for voting behavior is partisanship. Here, the district court found that "partisanship undoubtedly motivates voting behaviors in Galveston County . . . ." ROA.15936 ¶147.[15] Discrimination on the basis of party affiliation is not actionable. *See Brnovich*, 141 S. Ct. at 2349 ("[P]artisan motives are not the same as racial motives"). The third *Gingles* precondition requires proof "that the challenged districting thwarts a distinctive minority vote at least plausibly on account of race.'" *Milligan*, 599 U.S. at 19 (quoting *Growe*, 507 U.S. at 40).

The facts cited by the Court relating to its review of *Gingles* III and partisanship do not prove votes are race-driven. The Court noted that Plaintiffs argue race and politics are "inextricably intertwined" and that the minorities preferred candidate is usually a Democrat. ROA.15935, 15937 ¶¶144, 149. What is more, the Court's citation to evidence that 93% of the time Black and Latino voters supported the *Democrat* candidate and Anglo voters supported the *Republican* candidate is no evidence of voting on the basis of race. ROA.15936 ¶147; ROA.17347 at line 3-19. At best the evidence is completely ambiguous.

[15] Unlike for the second precondition, *Gingles* III looks to the *challenged* map. *LULAC v. Abbott*, No. 1:21-CV-1038-RP-JES-JVB, 2022 WL 4545754, at *5 (W.D. Tex. Sept. 28, 2022).

A plaintiff must "present evidence of racial bias operating in the electoral system by proving up the *Gingles* factors" and only then will a defendant be burdened with rebutting that evidence "by showing that no such bias exists in the relevant voting community." *Teague v. Attala Cnty*, 92 F.3d 283, 290 (5th Cir. 1996). If Plaintiffs cannot do that or "[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns" among white and minority voters, Section 2's "rigorous protections" do not apply because the VRA only protects against "defeats experienced by voters 'on account of race or color.'" *Clements*, 999 F.2d 850. Courts must look "into the circumstances underlying unfavorable election returns" to determine whether results are discriminatory, or just losses at the polls. *Id*.

Again, Appellees' repeated contention that the minorities' candidate of choice will be a Democrat (*see* ROA.16197, 16367-16368, 16548-16549), and the district court's finding that the Appellees rest on the premise that race and politics are "inextricably intertwined" should bar Appellees from meeting their burden. ROA.15935, ROA.15937 ¶¶144, 149. Conversely on the County's side, Dr. Alford unequivocally concluded that partisanship is the "main" driver of Galveston County voting behavior. ROA.15935 ¶144.

Whether being involved in an uncontested election or not, the Court ignored testimony that Commissioner Dr. Armstrong (a Black Republican) was elected by

Republican Party chairs over several other Anglo candidates. ROA.19491-19492. The Republican Party seeking out minority candidates is an indication that politics and race are not intertwined. *Clements*, 999 F.2d at 861. Moreover, Dr. Alford pointed out specific keys in several elections demonstrating his conclusion that partisanship drives votes. ROA.19313-19314 at 19:5-20:6; 53:1-16.

Appellees highlight that Galveston County elections are usually uncontested. Appellee Br. [Doc. 72] at 41. "On the Democratic side where a majority of Galveston Black and Latino voters vote, there has not been a single competitive primary election for any County Commissioners' Court Precinct or County Judge from 2012 to 2022." *Id.*, at n.12. Voter behavior based on politics is the explanation for so many uncontested races; however, ignoring uncontested races deprives the County of evidence of partisanship driving voter behavior. Republican candidates often run unopposed in general elections—the County is mostly Republican. ROA.15935, 15937 ¶¶144, 149. According to Ms. Pope, the situation has been ongoing since 2010, when "a slate of Republicans [...] ran and won". ROA.16371 (Pope). Politics is the primary motivator of Galveston County voters, not race.

Courts permitting minority coalitions facilitate claims by various groups, some of which absolutely share political ideologies and which sometimes is the only reason for cohesive voting. For this reason alone—that Appellees' experts utterly failed to rule out any potential causes for polarized voting—Appellees failed to carry

their burden or to defeat the County's evidence and affirmative defense that politics, rather than race, explains the reasons for Galveston County voting.

IV. Temporal limitations are required for Section 2 of the VRA.

Appellees assert that the County first raised the issue of a temporal limitation on Section 2 after trial. Appellee Br. [Doc. 67] at 49. However, the County raised this issue with the Court no later than opening statements. ROA.16116-117. Moreover, the District Court considered, but rejected, the argument. The argument has been preserved.

Redistricting plans that "sort voters on the basis of race 'are by their very nature odious' and "cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." *Wis. Legisl. v. Wis. Elections Comm'n.*, 595 U.S. 398, 401-03 (quoting *Shaw I*, 509 U.S. at 643 and *Miller*, 515 U.S. at 904). As expressed by numerous opinions, "all governmental use of race must have a logical endpoint", and Section 2 is no exception. *See Grutter v. Bollinger*, 539 U.S. 306, 341-342 (2003) ("all governmental use of race must have a logical endpoint"); *Milligan*, 599 U.S. at 88 (Thomas, J., dissenting).

Appellees initially propose that despite its requirement of segregating segments of society based on race, Section 2 needs no limits, but then pivot and claim that Section 2 has built-in temporal limits by requiring consideration of the totality of circumstances. Appellee Br. [Doc. 72] at 53; Appellee Br. [Doc. 69] at 45.

It is further suggested that protections exist from the "intensely local appraisal of the electoral mechanism" as well as a "searching practical evaluation of the past and present reality." *Allen v. Milligan*, 599 U.S. at 19. However, these arguments fall short.

The totality of circumstances test is "particularly dependent on the fact of each case." *Id*. It is not an appraisal of the continuing existence of facts that Congress believes necessitated enactment of the statute. Moreover, the totality test is not designed specifically to be either "continuing oversight" or a logical endpoint, which is compelled in racial classification cases as "there are serious problems of justice connected with the idea of racial preference itself." *Students for Fair Admissions, Inc. v. Pre. And Fellows of Harvard,* 600 U.S. at 212 (citing *Grutter*, 539 U.S. at 341). Additionally, using a totality of circumstances as a measure for the need for a statute provides too much uncertainty in an area of the law that demands certainty. Indeed, the absence of a temporal limit facilitated Section 2's unconstitutional application here, where, for example, the district court's examples of discrimination draw from the "Antebellum era" while conceding it is "easier to vote now than it has ever been in Galveston County." ROA.15940-15942 ¶¶160-164.

The Supreme Court has long recognized the need to avoid interpretations of § 2 that "'would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.'" *Milligan*, 599 U.S. at 78 (Thomas, J., dissenting)

(citing *Bartlett,* 556 U.S. at 21 (plurality op.) (quoting *LULAC I*, 548 U.S. at 446 (Kennedy, J.)). "To justify a statute tending toward the proportional allocation of political power by race throughout the Nation, it cannot be enough that a court can recite some indefinite quantum of discrimination in the relevant jurisdiction." *Id*. at 1541 (Thomas, J., dissenting). "If it were, courts 'could uphold [race-based] remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.'" *Id*. (citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 276 (1986)). And, contrary to Appellees' view, Section 2 absolutely ***confers benefits and burdens based on race*** and seeks a measure of racial proportionality. *Students* is not distinguishable on that ground. *See Students*, 600 U.S. at 218-20.

The District Court incorrectly framed the issue when it concluded that compliance with the VRA is inherently narrowly tailored to a compelling interest and that the intentional creation of race-based voting districts does not suffice in all cases to trigger strict scrutiny, citing *Chen v. City of Houston*, 206 F.3d 502, 506 (5th Cir. 2000). ROA.16031-32 ¶¶424-25.

Chen relies on *Shaw*, and both cases consider the constitutionality of the actions of **a state or local government** creating a majority-minority district. *See Chen*, 206 F.3d at 505 (considering whether "race was the predominant factor in the City's redistricting decisions"); *Shaw v. Hunt,* 517 U.S. 899, 905 (1996). Irrespective of whether the VRA can justify state or local government actions, the

VRA cannot be its own constitutional justification or the logic becomes circular and it would never be subject to any scrutiny at all.

Chen also relies on *Miller v. Johnson*, 515 U.S. 900 (1995). With respect to the question of when strict scrutiny is triggered in this context, "statutes are subject to strict scrutiny under the Equal Protection Clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object." *Miller* 515 U.S. at 913. The VRA clearly falls into the second category.

Section 2 cannot survive strict scrutiny because it lacks any temporal limitations. Generalized past discrimination is not sufficient to survive strict scrutiny under the most basic reading of *Shaw II*. 517 U.S. 909 (1996).

V. Stay of a replacement remediation plan is appropriate as the County and its voters will suffer irreparable harm, while impacts on Plaintiffs can be mitigated.

In stating that the County will suffer no irreparable harm without a stay, Appellees ignore that "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *See e.g., Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J. concurring).

Appellees argue that the County has been provided options on adopting other maps. These plans will not work. The Fairfax plan prevents incumbent,

Commissioner Apffel, from running for his seat as his residence is not included in his proposed district. *See* TEX. CONST. Art. 16, Sec. 14 (candidates for the Commissioners Court must live in the precinct which he or she will represent). Implementing the Fairfax Plan would render incumbent Commissioner Apffel ineligible to seek reelection.

Additionally, the Court paradoxically suggests it may implement Map 1 when that map, created under the same process of the 2021 Plan, presumably suffers from the same procedural problems as the 2021 Plan.

Further, the primary candidate filing window opens November 11, 2023 and closes December 11, 2023 in order to have candidates set before the primary races in March of 2024. *See* Tex. Elections Code § 172.023(a). If the 2021 Plan is replaced by the District Court to favor a Democrat, there will be no reversing course for the 2024 election. If the District Court's injunction remains in place and the 2021 Plan is replaced with Map 1 during that candidate filing window, likely Republican primary candidates for Precinct 3 under the 2021 Plan would be irreversibly prevented from participating in the 2024 election, even if the 2021 Plan is ultimately vindicated on appeal, because the Republican areas of Precinct 3 in the 2021 Plan are excluded under Map 1's Precinct 3. The inverse is not true.

Appellees and the District Court have concluded that Democrat Commissioner Stephen Holmes, the incumbent in Precinct 3, is the candidate of

choice of coalition voters. *See* ROA 15953 ¶ 198 (stating Commissioner Holmes was consistently elected in Precinct 3). Holmes resides in both versions of Precinct 3 under the 2021 Plan and Map 1. Accordingly, Holmes would be eligible to run for re-election in Precinct 3 whether or not the injunction stands and no matter what the result is of this appeal. The same is not true for potential Republican primary candidates for both Map 1 and the 2021 Plan.

Appellees will not suffer irreparable harm from keeping the 2021 Plan in place, as once the case is finally decided, regardless of the plan put in place. This fact is particularly true if the parties get a final determination prior to the November 2024 election. In that event, Appellee's claimed candidate of choice can remain a candidate for office in Precinct 3 under either plan. Finally, changing the 2021 Plan now is more likely to cause voter confusion. That is because county residents have been under the map since January of 2022; a change now invites problems. Moreover, replacing the 2021 Plan would require reconfiguration of voting districts by the Tax Office. These problems are exactly why in considering harm to other parties, the "maintenance of the status quo is important." *Louisiana by & through Landry v. Biden*, No. 22-30087, 2022 WL 866282, at *3 (5th Cir. Mar. 16, 2022).

Respectfully Submitted,

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Dated: November 6, 2023

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CERTIFICATE OF SERVICE

I certify that, on November 6, 2023, this document and its attachments were electronically served on all counsel of record in this case in accordance with the Federal Rules of Appellate Procedure.

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