IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § §	Case No. 3:21-cv-00259 [Lead Case]
ROSALINDA RAMOS ABUABARA, AKILAH BACY, ORLANDO FLORES, MARILENA GARZA, CECILIA GONZALES, AGUSTIN LOREDO, CINIA MONTOA, ANA RAMÓN, JANA LYNNE SANCHEZ, JERRY SHAFER, DEBBIE LYNN SOLIS, ANGEL ULLOA, MARY URBIE, AND LUZ MORENO, *et al.*, *Plaintiffs,* V. GREG ABBOTT, *et al.*, *Defendants.*	§ § § § § § § § § § § §	Case No. 1:21-CV-00965-RP-JES-JVB [Consolidated Case]

MOTION TO DISMISS
ABUABARA PLAINTIFFS' SUPPLEMENTAL COMPLAINT

Table of Contents

INTRODUCTION

Despite Plaintiff's allegations that House Bill 1 and Senate Bill 6 cause "dilution of the electoral strength" of the state's minority voters, these dilution claims should be dismissed as these claims lack "judicially discoverable and manageable standards" and because Plaintiffs have not alleged facts that would establish a right to a remedy cognizable to the federal courts. ECF 613; *see Alexander v. South Carolina State Conf. of NAACP*, No. 22-807, 2024 WL 2335243 at *20, *23 (U.S. May 23, 2024) (Thomas, J., concurring in part). They have instead alleged only that current maps prevent a *coalition* of protected groups from banding together "to elect candidates of their choice." ECF 613. Such claims are effectively nonjusticiable partisan gerrymandering claims dressed up as racial gerrymandering claims. As Judge Higginbotham explained over thirty years ago, the Fifth Circuit's decision in *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), which allowed such claims, was a "disturbing reading of a uniquely important statute" supported by "no authority" and "no reasoning." 849 F.2d 943, 944–45 (5th Cir. 1988) (per curiam) (Higginbotham, J., dissenting from denial of rehearing).

The en banc Fifth Circuit recently heard argument on whether to revisit so-called coalition claims. *See Petteway v. Galveston Cnty.*, 86 F.4th 1146 (5th Cir. 2023) (per curiam). Regardless of how *Petteway* is decided, adjudication of Plaintiffs' claims would raise grave constitutional concerns. But should the en banc court abandon the erroneous *Campos* decision, Plaintiffs' Section 2 claims cannot prevail even as a statutory matter. Plaintiffs are demanding that the Texas legislature adopt—or, rather, that this Court impose—electoral districts that give an upper hand to political cohorts with no shared history of discrimination. The Constitution does not permit the courts to engage in such an exercise. And Section 2 was never meant to guarantee minorities "the maximum possible point of power" in elections. *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994). It addresses a "special wrong"—"when a minority group has 50 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." *Bartlett v. Strickland*, 556 U.S. 1, 19 (2009). That "special wrong" is simply not implicated by Plaintiffs' allegations.

ARGUMENT

I. The Voting Rights Act Protects the Ability of a Minority, not a Coalition of Minorities, to Elect its Preferred Candidate.[1]

"[I]n an unbroken line of decisions stretching four decades," *Id.* at 38, the Supreme Court has examined compliance with Section 2 of the Voting Rights Act under the multi-factor test first announced in *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). But it has consistently stopped short of allowing people of different races, ethnicities, or languages to insist that their collective vote is being diluted. *Bartlett*, 556 U.S. at 19; *Growe v. Emison*, 507 U.S. 25, 40–41 (1993). Acting in the immediate aftermath of *Gingles*, the Fifth Circuit has not been so cautious. *See Campos*, 840 F.2d at 1241. "[C]it[ing] no authority and offer[ing] no reasoning to support its fiat," the *Campos* decision held that "'nothing in the law . . . prevents . . . plaintiffs from identifying [a] protected aggrieved minority to include both Blacks and Hispanics.'" 849 F.2d at 944–45 (Higginbotham, J., dissenting from denial of rehearing) (quoting panel opinion).

As Judge Higginbotham explained over thirty years ago, *Campos* reached the wrong result because it "ask[ed] the wrong question." *Id.* at 945. "A statutory claim cannot find its support in the absence of prohibitions," so the operative question was not (as *Campos* posited) whether Section 2 "intended to *prohibit* such coalitions," but whether Congress acted to "*protect* those coalitions." *Id.* The plain text of Section 2, history, precedent, and the canon of constitutional

[1] Defendants recognize that a "three-judge court is bound by apposite decisions of the Court of appeals for its circuit." *Russell v. Hathaway*, 423 F. Supp. 833, 835 (N.D. Tex. 1976) (three-judge panel). *But see* Joshua A. Douglas & Michael Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 Geo. L.J. 413, 452 (2018) (arguing that three-judge courts are not bound by circuit precedent). For that reason, Defendants also recognize that, at present, this panel is bound by the Fifth Circuit's conclusion that Section 2 provides a private right of action, *Vote.org v. Callanen*, 89 F.4th 459, 475 (5th Cir. 2023), and that coalition claims are cognizable in such an action, *Campos*, F.2d at 1241. Defendants include their arguments regarding coalition districts here because oral argument was held in *Petteway v. Galveston Cnty.*, 86 F.4th 1146 (5th Cir. 2023), on May 15, and an opinion may issue while this motion is pending. Defendants expressly reserve the right, however, to argue that both *Campos* and *Vote.org* were wrong and should be revisited in an appropriate forum.

avoidance provide one resounding answer: No. The text of the Voting Rights Act, as interpreted by *Gingles*, aims to protect the collective voting power of a cohesive class of voters with a shared history of discrimination. Yet under *Campos*, a plaintiff minority group need not belong to any class as that term would ordinarily be understood by members of a legislative body. And as for cohesion, all that is required is that plaintiffs can define a coalition of minorities whose political interests might—however briefly—align to elect a candidate of their mutual choice. 840 F.2d at 1244–45. Rather than reducing discrimination because of race or language, this interpretation of Section 2 permits coalitions that encourage the very same race-based decision-making that Section 2 was enacted to eradicate. It also effectively asks this Court to engage in partisan gerrymandering by another name—a process that was thought permissible when *Campos* was decided but has now *twice* been declared to present a nonjusticiable political question. *Alexander*, *supra*, slip op. at 16; *Rucho v. Common Cause*, 588 U.S. 684, 718 (2019).

That has been the effect of coalition claims in Texas. Texas redistricting litigation is notoriously complicated as plaintiffs embroil courts like this one in deciding whether, when, which, and to what extent minorities should be grouped or split, all to protect partisan interests, not combat racial animus. Litigation regarding the 2010 redistricting cycle did not finally end until September 2019[2]—just in time for the next redistricting cycle to begin. Once again, in this litigation the State is facing claims that various districts should be redrawn to create districts wherein multiracial voter coalitions "would form a majority and have the opportunity to elect their representatives of choice" ECF 613 ¶¶ 3, 4. Neither state actors nor federal courts have any business making such blatantly race-based decisions to serve such facially partisan goals. After all, "[e]liminating racial discrimination means eliminating all of it." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.* (*SFFA*), 600 U.S. 181, 206 (2023).

A. *Campos* was flawed statutory interpretation.

[2] Redistricting History: 2010, Texas Redistricting, https://redistricting.capitol.texas.gov/history.

1. The plain text of Section 2(b) cannot support coalition claims.

The Supreme Court has repeatedly reaffirmed that "[t]he preeminent canon of statutory interpretation requires us to 'presume that the legislature says in a statute what it means and means in a statute what it says.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (alteration omitted)). This imperative is magnified when "federal law overrides the usual constitutional balance of federal and state powers," *Bond v. United States*, 572 U.S. 844, 858 (2014) (quotation marks omitted), or abuts the limits of Congress's constitutional authority, *e.g.*, *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 546 (1992) (Scalia, J., concurring in part).

Although Section 2 indisputably places limits on the States' traditional power to set electoral lines, nothing in its text makes it "unmistakably clear" that Congress intended to compel the creation of coalition districts. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Section 2 has been amended on numerous occasions over the last 50 years, but its mandate remains the same: to "prohibit[] any practice or procedure that, 'interact[ing] with social and historical conditions,' impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (first alteration added) (quoting *Gingles*, 478 U.S. at 47). A "violation" of this mandate "is established if, based on the totality of circumstances," a voting process is "not equally open to participation by members of a class of citizens protected by subsection (a) in that *its members* have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b) (emphasis added).

By homing in on the ability of the members of *a* protected class—rather than a coalition of protected class*es*—to elect a preferred candidate, Congress limited the circumstances in which a violation can be deemed established to those in which a particular protected group is denied the opportunity to form a majority. The failure to create a district in which two or more classes could band together to elect their preferred candidate does not suffice. "[T]he central element necessary

to establish a violation is a showing that '*its* members have less opportunity than other members of the electorate' . . . not that '*their* members have less opportunity.'" *Nixon v. Kent County*, 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc) (quoting 52 U.S.C. § 10301(b)). As Judge Jones observed, Congress could have "chosen explicitly to protect minority coalitions . . . by defining the 'results' test [of subsection (b)] in terms of protected *classes* of citizens." *LULAC v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc) (Jones, J., concurring). But "[i]t did not." *Id.*

This conclusion is reinforced by Congress's declaration that "[t]he extent to which members of *a protected class* have been elected" is "one circumstance which may be considered." 52 U.S.C. § 10301(b) (emphasis added). "[I]f Congress had intended to authorize coalition suits, the phrase would more naturally read: '[t]he extent to which members of the *protected classes* have been elected.'" *Nixon*, 76 F.3d at 1387.

In reaching the opposite conclusion, *Campos* noted that "[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both blacks and Hispanics," 840 F.2d at 1244, and that "[t]he key is the minority group as a whole," *id.* at 1245. But, as Judge Higginbotham aptly put it, a statutory claim for affirmative relief "cannot find its support in the *absence* of prohibitions," *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing) (emphasis added), particularly when the claim seeks to "[p]lay[] with the structure of local government in an effort to channel political factions," *id.*

2. Coalition claims are incompatible with historic and statutory context.

"Context is a primary determinant of meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012). "To strip a word from its context is to strip that word of its meaning." *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring). A statute should therefore be read in both "its statutory and historical context." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001).

History could not be clearer: Congress enacted Section 2 to combat invidious discrimination against identified (and identifiable) minority groups—not to allow minority parties

to obtain from the courts what they were denied at the ballot box. Each expansion of Section 2's reach has involved specific groups that Congress determined are entitled to special protection from disenfranchisement based on past discrimination. *Nixon*, 76 F.3d at 1390. At the time of its passage, Section 2 was primarily meant as "protective legislation for disenfranchised African Americans in the Deep South." *Nixon*, 76 F.3d at 1389 (citing Angelo N. Ancheta & Kathryn K. Imahara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L. Rev. 815, 815 & n.2 (1993)). It has since been expanded to also protect language minorities as well as persons of Spanish, American Indian, Asian, and Alaskan descent. *Clements*, 999 F.2d at 894 (Jones, J., concurring).[3] The coalitions of such groups created by plaintiffs for purposes of an election year or litigation, however, are accompanied by no similar congressional finding of past discrimination.

Where an election district could be drawn in which a single class of protected minority voters could form a majority, a legislature's failure to draw that district is said to constitute a "discernible wrong that is not subject to [a] high degree of speculation and prediction." *Bartlett*, 556 U.S. at 18–19. Where no one protected group could make up a majority of the voting population in any district, by contrast, all that can be said—absent "allegations of intentional and wrongful conduct"—is that the protected groups have "the same opportunity to elect their candidate as any other political group with the same relative voting strength." *Id.* at 20. And "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *De Grandy*, 512 U.S. at 1020.

As Judge Higginbotham has shown, coalition claims make a hopeless muddle of the first *Gingles* condition because they "risk[] that ephemeral political alliances having little or no necessary connection to discrimination" on the grounds specified by Congress "will be confused

[3] Redistricting litigation relies on self-reported census data. U.S. Census Bureau, *About the Topic of Race* (Mar. 1, 2022). Because the census permits people to report more than one race to indicate their racial mixture, an individual of both African and Hispanic dissent could be grouped with *either* Hispanics or African Americans to make out a vote-dilution claim under Section 2. Such individuals would thus be protected from racial animus towards either group.

with cohesive political units joined by a common disability of chronic bigotry." *LULAC v. Midland ISD*, 812 F.2d 1494, 1504 (5th Cir. 1987) (Higginbotham, J., dissenting), *vacated on reh'g on other ground*, 829 F.2d 546 (5th Cir. 1987) (per curiam). "A group tied by overlapping political agendas but not tied by the same statutory disability is," after all, "no more than a political alliance or coalition." *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing). And "the remedy afforded to the coalition may easily cross the line from protecting minorities against racial discrimination to the prohibited, and possibly unconstitutional, goal of mandating proportional representation." *Clements*, 999 F.2d at 896 (Jones, J., concurring).

3. Congressional silence does not alter the analysis.

The Supreme Court has sometimes read congressional reenactment of a statute to suggest acquiescence to a settled judicial interpretation of the statute's meaning. *See e.g.*, *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988). That principle is inapplicable here for two reasons. *First*, Congress has not revisited Section 2 since *Campos*, and the Supreme Court has also said that when "Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a court's] statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted); *accord AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 81 (2021).

Second, recognition of coalition claims is far from settled. Congress's silence may just as well be understood to acquiesce in the judgment of circuits that read Section 2 to be *in*consistent with coalition claims. *Cf. Reading Law* at 325 (explaining that the Prior-Construction Canon applies when "the uniform weight of authority is significant enough that the bar can justifiably regard the point as settled law"). Though some circuits have assumed that coalition claims are cognizable, the two circuits to have directly confronted the issue since *Campos* have declined to follow *Campos* based on the text and purpose of the Voting Rights Act.

The en banc Sixth Circuit rejected coalition claims in *Nixon v. Kent County*, concluding that

"[e]ven the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually." 76 F.3d at 1386. Instead, the court explained, the text of Section 2 "consistently speaks of a 'class' in the singular" and "protects a citizen's right to vote from infringement because of, or 'on account of,' that *individual's* race or color or membership in a protected language minority." *Id.* Moreover, subsection (b), which describes the proof necessary to establish a violation, requires a showing "that the political processes . . . are not equally open to participation by members of *a class* of citizens protected by subsection (a)." *Id.* at 1385. The *Nixon* court further noted potential practical and constitutional problems with interpreting Section 2 to include coalition claims, which "provide minority groups with a political advantage not recognized by our form of government, and not authorized by the constitutional and statutory underpinnings of that structure." *Id.* at 1392; *see also id.* at 1391–92.

Although it arrived by a different road, the Fourth Circuit also rejected multiracial claims as completely divorced from Section 2's purpose of combating invidious discrimination. *See Hall*, 385 F.3d at 430. The Hall court explained that "[a]ny claim that the voting strength of a minority group has been 'diluted' must be measured against some reasonable benchmark of 'undiluted' minority voting strength," such as "[t]he electoral ability of [the] group concentrated within a hypothetical single-member district." *Id.* at 428–29. A baseline that instead established vote dilution based on the possibility that group could form political alliances with other groups "would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined." *Id.* at 431.

B. This case demonstrates why *Campos* was wrongly decided.

1. Coalition claims dilute minority votes.

Members of the Fifth Circuit have warned that coalition claims might actually "limit the protections of the Voting Rights Act" by disqualifying from Section 2 relief the very groups it is meant to protect. *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing). For example, in a statutory scheme allowing for coalition claims, a group of Hispanics may be unable to prove that other Hispanic voters were improperly excluded from their district if sufficient

African Americans were included to bring the total potential minority-coalition population above 50%. *See Clements*, 999 F.2d at 896 (Jones, J., concurring); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups-When Is the Whole Greater Than the Sum of the Parts?*, 20 Tex. Tech L. Rev. 95, 124 & n.195–97 (1989).

The very act of combining disparate races into one voting bloc entails prioritizing the interests of a coalition of minorities over those of disparate minority groups—even though, for example, Black and Hispanic voters may prefer different candidates from the same political party. Frank Newport, *Race, Ethnicity Split Democratic Vote Patterns*, Gallup (Jan. 31, 2008), http://tinyurl.com/Gallup2008. Thus, minority coalitions increase the risk that "members of one of the minority groups will increase their opportunity to participate in the political process at the expense of members of the other minority group." *LULAC v. Clements*, 986 F.2d 728, 785 n.43 (5th Cir. 1993).

Governmental bodies can also point to minority coalitions as a defense to claims that they have diluted the votes of a single minority group. A legislator could "pack" minorities into one district and provide evidence that this district is a minority coalition district and thus satisfies Section 2. *Nixon*, 76 F.3d at 1391 (citing *Campos*, 849 F.2d at 946 (Higginbotham, J., dissenting from denial of rehearing)). But that process submerges the interests of the individual groups. *See id*. It also threatens vote dilution when particular minorities are at odds with the minority coalition.

2. Both experience and the facts alleged here demonstrate how coalition districts emphasize race-based distinctions among voters.

Experience—including the facts alleged both in the supplemental complaint and the consolidated cases—demonstrates that these are not idle concerns. By aligning voters with differing racial and ethnic backgrounds—as well as different experiences of past and present-day discrimination—the *Campos* standard elides non-racial distinctions in favor of race-based stereotypes. Take, for example, the NAACP's effort to maintain a putative coalition among African Americans, Hispanics, and Asians in SD 10 in Tarrant County. ECF 646 ¶¶ 257–58, 276–77.

True, *Campos* requires coalition plaintiffs to prove that "the minority group together votes in a cohesive manner for the minority candidate." *Campos*, 840 F.2d at 1245. But that is hardly an antidote to racial stereotyping. The SD 10 plaintiffs claim that they are cohesive largely based on their agreement in the 2016 and 2020 presidential elections. *See* ECF 646 ¶¶ 257–58, 276–77. And Abuabara plaintiffs appear to be relying on data from the 2020 presidential election to argue the same. ECF 613 ¶ 210. "The mere fact that 'members of a racial group tend to prefer the same candidates' is not license to treat that correlation as an absolute truth." *Alexander*, *supra*, slip op. at 62 (Thomas, J., concurring in part). That is even more apparent here where the alleged coalitions are made up of groups with vastly different cultural, linguistic, religious, and economic backgrounds. To the contrary, the only thing such reasoning demonstrates is that coalition districts are either (1) based on a form of disparate-impact theory that is non-cognizable under the Fourteenth Amendment, and any law passed to enforce it, *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 372 (2001); or (2) an effort "to sidestep [the Supreme Court's] holding in *Rucho* that partisan-gerrymandering claims are not justiciable in federal court," *Alexander*, *supra*, slip op. at 26.

Whatever the situation in 1965, modern demographic data reflects that it is no safer to lump together all members of a race for purposes of evaluating voting under the Fifteenth Amendment (or Voting Rights Act) than it is to do so for any of these other purposes. For example, although "Hispanics generally have more positive attitudes toward the Democratic Party than the Republican Party," within that group there are fairly sharp differences across religions and countries of origin. Jens Manuel Krogstad et al., *Hispanics' views of the U.S. political parties*, Pew Research Center (Sept. 29, 2022), http://tinyurl.com/PewHispanic2022. So too with Asian Americans. Katherine Schaeffer, *Asian voters in the U.S. tend to be Democratic, but Vietnamese American voters are an exception*, Pew Research Center (May 25, 2023), http://tinyurl.com/PewAsian2023. Even when racial groups share a political party and will ultimately vote together in the general election, they may prefer different primary candidates. A 2008 study showed that black Democrats preferred Barack Obama to Hilary Clinton, while Clinton was preferred by Hispanic

voters by a margin of almost 30 points. Newport, *supra*, http://tinyurl.com/Gallup2008.

These differences are playing out in Texas elections. Abuabara plaintiffs, like others in this consolidated litigation, allege that, per the 2020 census, the vast majority of Texas's growth over the past 10 years has been from communities of color. *E.g.*, ECF 613 ¶ 2 ("Ninety-five percent of Texas's population growth between 2010 and 2020 came from communities of color. Black, Latino, and Asian communities all grew far faster than Texas's white population, with the Latino community growing fastest of all"); ECF 613 ¶ 39 ("Texas's growth came overwhelmingly from communities of color. Texas's white population grew by just 187,252 between 2010 and 2020. In contrast, Texas's Latino population grew by 1,980,796; Texas's Asian population grew by 613,092; and Texas's Black population grew by 557,887."). But while pundits have for years heralded a change in political fortunes favoring Democrats to coincide with this demographic shift, the reality has been more complicated. *Cf. Alexander*, *supra*, slip op. at 23 (Thomas, J., concurring in part) (criticizing a district court's redistricting decision "that securing the rights of Hispanic voters required replacing some of those voters with non-Hispanic Democrats" as symptomatic of the kind of "race-obsessed jurisprudence" that "'balkanize[s] us into competing racial factions'"). "The long-anticipated purpling of Republican Texas that was supposed to come as more Latinos joined the electorate was certainly nowhere in evidence on Election Day" in 2020, for example. Weiyi Cai & Ford Fessenden, *Immigrant Neighborhoods Shifted Red as the Country Chose Blue*, N.Y. (Dec. 20, 2020), http://tinyurl.com/2du4kkzz. Indeed, one of the most remarked-upon aspects of the 2020 election was the swing of Hispanic voters toward the Republican Party. *Id.* "Across Texas, the red shifts were most pronounced in precincts with the highest proportion of Latinos." *Id.* And heavily Hispanic districts along the southern border gave Donald Trump his second-most sizable gains—between ten and thirty points—compared to the 2016 election, as illustrated by the New York Times figure attached as Appendix A.

The Supreme Court has long rejected the assumption that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."

Schuette v. Coal. to Def. Affirmative Action, 572 U.S. 291, 308 (2014) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Coalition claims compound that fraught assumption by applying it across racial groups.

3. Coalition claims create needless, resource intensive litigation.

The complications arising from minority-coalition claims also engender increased litigation—as again this litigation demonstrates. The tension between separate minorities and minority coalitions forces courts like this one to step in and mediate between them. That is, as *Nixon* explained, "[i]f district lines are drawn pursuant to a plan to enhance the political impact of minorities separately, the plan faces potential challenge by a coalition of minorities claiming that greater influence could have been achieved had the minorities been 'lumped' together." *Id.* But if "the lines are drawn to accommodate all minorities together, the plan faces potential challenge by an individual minority group on the ground that its influence could have been enhanced had it been treated separately." *Id.* The end result is a "puzzle which is impossible to solve," and one which forces "courts and legislatures . . . to 'choose' between protected groups when drawing district lines." *Id.* This turns the purpose of the VRA—designed to get government out of the business of choosing racial winners and losers—on its head.

In addition, courts can expect the number of potential plaintiffs to continue increasing because any district could be challenged not simply by the minority group with the greatest chance of satisfying the traditional *Gingles* test, but any minority group that believes it could have formed a coalition of minorities but for the way the districts were drawn by the legislature. *See* Strange, supra, at 113.

Other than lawyers, few benefit from such litigation. It is beyond peradventure that "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy," which is undermined by "[c]ourt orders affecting elections," which "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006) (per curiam). Moreover, "[t]he least

representative branch must take care when it reforms the most representative branch" lest it undermine the faith of the public in the courts themselves. Strange, *supra*, at 125 & n.202 (quoting *Marshall v. Edwards*, 582 F.2d 927, 934 (5th Cir. 1978)). The more that federal courts insert themselves into insoluble policy debates regarding which racial groups have the most in common, the greater those risks become—particularly when the exercise is undertaken without explicit authorization from Congress.

C. The view of Section 2 that *Campos* endorsed raises serious constitutional questions.

Coalition suits raise at least two serious constitutional concerns, one going to the power of Congress to enact Section 2 as envisioned by Plaintiffs, the other going to the power of the courts to adjudicate their claims.

First, Section 2 is already at or outside the outer bounds of when the Constitution permits Congress—or a State—to legislate based on race. The Supreme Court "ha[s] time and again forcefully rejected the notion that government actors may intentionally allocate preference to those 'who may have little in common with one another but the color of their skin.'" *SFFA*, 600 U.S. at 220. But that is precisely what Section 2 encourages: In the name of protecting the ability of minority voters to act collectively, "Section 2 itself 'demands consideration of race.'" *Allen*, 599 U.S. at 30–31 (quoting *Perez*, 138 S. Ct. at 2315). Indeed, just last year, the Supreme Court reaffirmed that "the question whether additional majority-minority districts can be drawn . . . involves a 'quintessentially race-conscious calculus.'" *Id.* at 31 (quoting *DeGrandy*, 512 U.S. at 1020).

Courts have permitted Section 2 to stand where other supposedly benign race-based legislation could not because "the Voting Rights Act is premised upon congressional 'findings' that each of the protected minorities is, or has been, the subject of pervasive discrimination and exclusion from the electoral process." *Nixon*, 76 F.3d at 1390. But they have acknowledged the "concern" that the Act "may impermissibly elevate race in the allocation of political power within the States." *Allen*, 599 U.S. at 41–42. For good reason: "[t]he government can plainly remedy a

race-based injury that it has inflicted," but the remedies it selects "must be meant to further a colorblind government, not perpetuate racial consciousness." *SFFA*, 600 U.S. at 249 (Thomas, J., concurring) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989)). Moreover, because the Act "imposes current burdens," it must be "justified by current needs." *Shelby County v. Holder*, 570 U.S. 529, 536 (2013). The congressional findings underlying traditional Section 2 claims have not been revisited since 1982, leaving an open question whether "the authority to conduct race-based redistricting [can] extend indefinitely into the future." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring) (reserving the issue).

Coalition claims constitute a step backward, rather than forward, on the road to equality. Courts should eschew an interpretation of Section 2 that excludes just one race from its protective sweep and does not justify that exclusion with any compelling interest in remedying past discrimination. Traditional Section 2 claims are at least supported by Congressional findings. But coalition claims exacerbate the constitutional concerns inherent in Section 2 because "[a] coalition of protected minorities is a group of citizens about which Congress has not made a specific finding of discrimination." *Nixon*, 76 F.3d at 1391. Here we have a government benefit—not unlike a public drinking fountain—that for no discernable reason is made available to all racial groups but one. Over time, Congress has extended VRA protections to multiple individual groups; by aggregating those protections, coalitions wield the VRA as a newfound instrument of discrimination.

Second, in addition to raising questions about the authority of Congress, coalition districts push the outer boundaries of Article III. As Judge Higginbotham explained in 1988, coalition districts are effectively a form of partisan gerrymandering: "[i]f a minority group lacks a common race or ethnicity, cohesion must rely principally on shared values, socio-economic factors, and coalition formation." *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing) (quoting *Midland ISD*, 812 F.2d at 1504). And the "easiest and most likely alliance for a group of minority voters is one with a political party." *Bartlett*, 556 U.S. at 22. Since *Campos*, the Supreme Court has unequivocally held that, when pleaded as a separate claim, partisan gerrymandering presents a nonjusticiable political question. *Rucho*, 588 U.S. at 718. Thus, by

asserting that Section 2 protects coalition districts, Plaintiffs ask courts to arrogate power the Constitution does not provide.

* * *

Last term Justice Kavanaugh forecast his agreement with Justices Thomas, Gorsuch, and Barrett that "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future." *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring) (citing a section of Justice Thomas's dissenting opinion joined by Justices Gorsuch and Barrett). The continued vitality of traditional Section 2 claims is thus unclear. But what is clear is that today's federal courts should not extend Section 2 beyond its textual and historical foundation to judicially "transform[] the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities." *Clements*, 999 F.2d at 894 (Jones, J., concurring). Nor may it do so in a way that ignores the limits of justiciability under the political-question doctrine. Because Plaintiffs' Section 2 claim relies on such coalitions, it should be dismissed either under Rule 12(b)(6) for failure to state a claim or Rule 12(b)(1) for presenting a non-justiciable political question.

CONCLUSION

Defendants respectfully move for dismissal of Abuabara Plaintiffs' supplemental complaint.

Date: June 5, 2024

Respectfully submitted.

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CERTIFICATE OF CONFERENCE

I hereby certify that on June 5, 2024, I conferred with all counsel by email, and none were opposed to this motion.

/s/ Ryan G. Kercher
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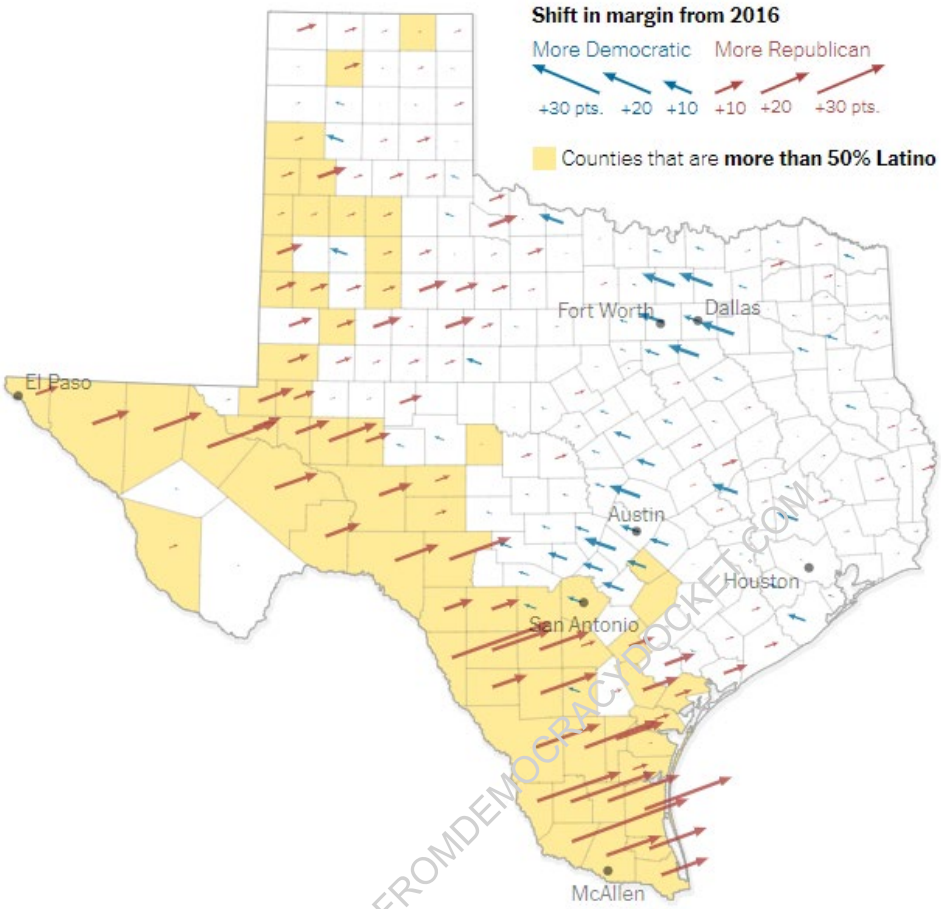
CERTIFICATE OF SERVICE

I certify that a true and accurate copy of the foregoing document was filed electronically (via CM/ECF) on June 5, 2024, and that all counsel of record were served by CM/ECF.

/s/ Ryan G. Kercher
RYAN G. KERCHER

Appendix A



SWeiyi Cai & Ford Fessenden, *Immigrant Neighborhoods Shifted Red as the Country Chose Blue*, N.Y. (Dec. 20, 2020), http://tinyurl.com/2du4kkzz.