No. 23-40582

United States Court of Appeals
for the Fifth Circuit

Honorable Terry Petteway; Honorable Derrick Rose; Honorable Penny Pope,
Plaintiffs-Appellees

v.

Galveston County, Texas; Mark Henry, *in His Official Capacity as Galveston County Judge*; Dwight D. Sullivan, *in his official capacity as Galveston County Clerk*
Defendants-Appellants

United States of America,
Plaintiff-Appellee

v.

Galveston County, Texas; Galveston County Commissioners Court; Mark Henry, *in his official capacity as Galveston County Judge*
Defendants-Appellants

Dickinson Bay Area Branch NAACP; Galveston Branch NAACP; Mainland Branch NAACP; Galveston LULAC Council 151; Edna Courville; Joe A. Compian; Leon Phillips,
Plaintiffs-Appellees

v.

Galveston County, Texas; Mark Henry, *in his official capacity as Galveston County Judge*; Dwight D. Sullivan, *in his official capacity as Galveston County Clerk*,
Defendants-Appellants

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

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The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is set for November 7, 2023 at 9:00 a.m. *Petteway* Appellees intend to participate at oral argument.

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STATEMENT OF ISSUES

1. Whether the district court was correct to follow binding *en banc* Circuit precedent authorizing coalition claims under Section 2 of the Voting Rights Act.

2. Whether the district court did not clearly err in concluding that the first *Gingles* precondition was satisfied because the evidence showed that Black and Latino voters were sufficiently numerous and geographically compact to comprise the majority of eligible voters in a reasonably configured alternative precinct.

3. Whether the district court's decision to afford less weight to primary elections than to general elections in assessing the second *Gingles* precondition—which all parties' experts agreed it should—was not clearly erroneous and whether the district court's factual findings that race explained voting patterns in Galveston County were not clearly erroneous.

4. Whether the district court correctly concluded that Section 2 is not unconstitutional because the County contends it lacks "temporal limits."

INTRODUCTION

Judge Jeffrey Vincent Brown presided over a two-week trial and, in a carefully reasoned 157-page opinion, observed that

> [t]his is not a typical redistricting case. What happened here was stark and jarring. The commissioners court transformed Precinct 3 from the precinct with the highest percentage of Black and Latino residents to that with the lowest percentage. The circumstances and effect of the enacted plan were mean-spirited and egregious given that there was absolutely no reason to make major changes to Precinct 3. Looking at the totality of the circumstances, it was a clear violation of §2 of the Voting Rights Act. And it must be overturned.

ROA.16029 (internal quotation marks and citation omitted). Later, the Court observed that it was "stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court during 2021's redistricting." ROA.16028.

Although the district court's Section 2 ruling rendered it unnecessary for it to formally decide Plaintiffs' intentional discrimination claim, the court's lengthy factual findings under the *Arlington Heights* intentional discrimination framework illustrate in detail why the district court found the circumstances of this case "[a]typical," "stark," "jarring," "mean-spirited," "egregious," and "stunning."

The County challenges none of these factual findings. Nor could it. Instead, it has presented an "emergency" appeal and sought a stay of the district court's injunction because it disagrees with *en banc* precedent that has been the settled, binding law of this Circuit for over three decades. The County announced in its brief

that it intends to devote its oral argument time to this issue—despite this Circuit's rule of orderliness that forecloses the relief the County seeks.

The County's claim of irreparable harm in its stay motion is deeply ironic. The district court's injunction permits the County to use its *own* map—Map 1—as the remedy in this case. The County's entire theory of the case at trial was that it was *Commissioner Holmes's* fault that Map 1 was not adopted because a majority of the commissioners would have apparently approved it if only Commissioner Holmes had sufficiently lobbied them. *See, e.g.*, ROA.16149-16150, 18317, 18579-18580, 18581, 18597, 18681, 18950-18951, 19578. The County cannot claim harm from a map that it drew, says is lawful, and contends would have become law if only the sole Black commissioner had lobbied his white colleagues more fervently not to enact a discriminatory map.

The district court's decision should be expeditiously affirmed and the County's stay motion denied. A case involving a "jarring," "mean-spirited," and "egregious" "extinguish[ment]" of minority voting rights is a particularly poor vehicle for the County's campaign to upend three decades of settled precedent.

STATEMENT OF THE CASE

I. Factual Background

Between 2010 and 2020, Galveston County's total population increased by more than 20 percent, with the Black total population increasing from 39,229 to

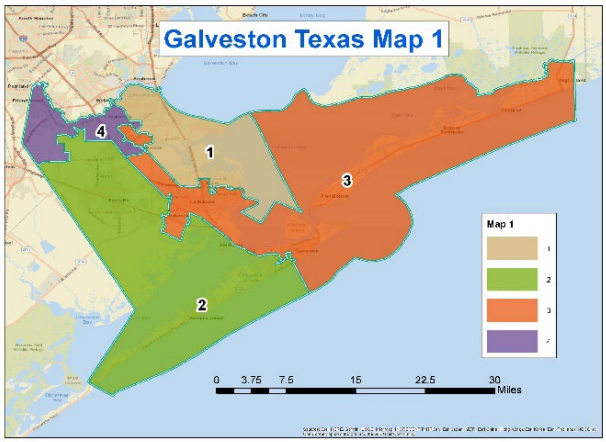
43,120 and the Latino total population increasing from 65,270 to 88,636. ROA.8168. As a result of substantial growth in the County's minority population, the white share of the County's total population fell from 59.3 percent in 2010 to 54.6 percent in 2020. ROA.8167. According to the 2020 Census, Galveston County now has a total population of 350,682—54.6 percent white, 25.3 percent Latino, and 13.3 percent Black, with the combined Black and Latino population representing approximately 38.6 percent of the countywide population. ROA.8167. In addition to a shift in demographics, the 2020 Census revealed population imbalances among the Galveston County Commissioners Court precincts. ROA.8168.

Commissioner Precinct 3, which historically covered portions of Dickinson, La Marque, Texas City, and the city of Galveston, existed as the only majority-minority Commissioners Court precinct in Galveston County for thirty years—from 1991 to 2021. ROA.15911 (citing ROA.35188, 35252-35253). As the district court recognized, "[t]he historic core of Precinct 3 was the product of advocacy by Black and Latino activists to create a majority-minority precinct in which they could elect a candidate of choice in the 1991 redistricting cycle," and "[o]ver time, Precinct 3 became an important political homebase for Black and Latino residents." ROA.15911 (citing ROA.35251-35256); *see also* ROA.15950. While Black and Latino voters' candidate of choice "was always a lonely voice on the court," the very presence of that commissioner "'meant that 'minority voices [were] heard in a

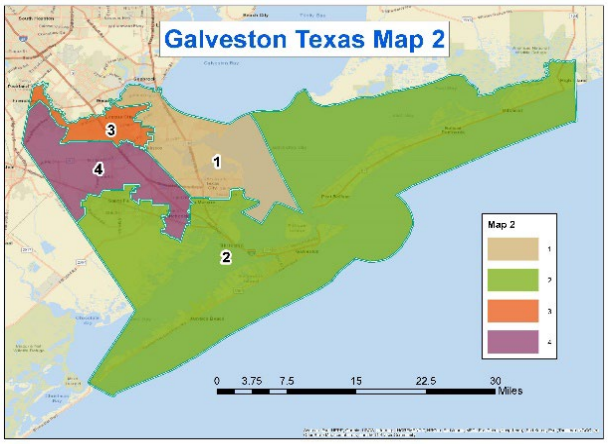
meaningful way.'" ROA.16028 (quoting *Johnson v. Waller Cnty.*, 593 F. Supp. 3d 540, 608 (S.D. Tex. 2022)). By 2020, the citizen voting age population ("CVAP") of Precinct 3 in the Benchmark Plan—the plan used for Commissioners Court elections from 2012 to 2021—was 58.31 percent Black and Latino. ROA.15911 (citing ROA.35193).

During the 2021 redistricting process, the Commissioners Court proposed two redistricting maps to the public on October 29, 2021. ROA.15960. The first proposal, Map 1, largely maintained the same lines as the Benchmark Plan, but added the Bolivar Peninsular to Commissioner Precinct 3. Under this proposal—which Defendants' legal consultant, Dale Oldham, testified was legally defensible and had been drawn without consideration of race—Precinct 3 would have retained its status as a majority-minority precinct, and Black and Latino voters would have constituted over 55 percent of the precinct's CVAP. ROA.15912. At trial, the County contended

the Commissioners Court would have adopted Map 1 had Commissioner Holmes advocated more aggressively for it. *See, e.g.*, ROA.16149-16150.



Proposed Map 1



Proposed Map 2 (Enacted Plan)

The second proposal, Map 2 ("Enacted Plan"), which was ultimately adopted, dismantled Precinct 3 and fragmented Galveston County's minority population evenly among all four precincts. *See, e.g.*, ROA.16028 (explaining that the Enacted Plan "summarily carved up and wiped off the map" historic Precinct 3). As the district court explained, "after the 2021 redistricting, Precinct 3 now includes the lowest Black and Latino CVAP proportion of any precinct—about 28%—and the Black and Latino population is evenly distributed throughout the remaining precincts—with each one containing a range of 32% to 35% Black and Latino CVAP." ROA.15938 (citation omitted). The Enacted Plan thus ensured that "minority voters have been subsumed in majority-Anglo precincts in a county with legally significant racially polarized voting," such that "Black and Latino voters, as

a coalition of like-minded citizens with shared concerns [are] . . . 'shut out of the process altogether.'" ROA.15887, 16028 (citation omitted).

The Enacted Plan enables the County's white majority to vote together to block the growing minority community from electing its preferred candidates. In most recent general elections, "over 85% of Anglos across Galveston County voted for candidates running against the minority-preferred candidates" and "[s]imilarly high levels of bloc voting are present at the individual-precinct level in the enacted commissioners precincts." ROA.15933. Under the Enacted Plan, Anglo bloc voting will defeat the candidate of choice of Black and Latino voters "in every election in every commissioners precinct." ROA.15932.

Black and Latino voters in Galveston County likewise demonstrate a high level of political cohesion, based on a long history of shared political and social interests. *See, e.g.*, ROA.16016 (concluding that "there are distinctive minority interests that tie the two communities together"). Indeed, undisputed evidence from Plaintiffs' experts shows that, on average, 85 percent of Black and Latino voters have voted for the same candidate countywide and within the illustrative Precinct 3 plans offered by Plaintiffs, and most Black and Latino voters have separately voted for the same candidate in almost all general elections. ROA.15925. Further, both Plaintiffs' and the County's experts agreed that Black and Latino voters support the same candidate in primary contests. *See* ROA.15929 (noting that even primary elections

"show a steady presence of inter-group cohesion between Black and Latino voters," with Black and Latino voters voting cohesively in nine out of ten primary elections studied, and "[b]etween Drs. Oskooii and Alford, the analyzed results show that Blacks and Latinos usually support the same top-choice candidate in primary contests."). Accordingly, as the district court recognized, there is a direct relationship "between a precinct's demographic composition and a specific candidate's likelihood of success in any given election": "[a]s the minority percentage moves up or down, the performance of minority-preferred candidates moves in direct proportion." ROA.15933.

Galveston County's Enacted Plan thus impedes minority voters' effective participation and representation in the political process. Indeed, from Galveston County's founding in 1838, it took 133 years before a Latino candidate—the only Latino ever to serve—was elected to the Commissioners Court, and it took 150 years before a Black candidate won a seat. ROA.16028. As the district court recognized, the dearth of minority representation on the Commissioners Court is connected to Galveston County's long history of racial discrimination, which extends to voting and redistricting in particular, and persists today in the form of: contemporary barriers to voting that weigh more heavily on Black and Latino voters; a continued lack of electoral success for minority candidates; unresponsiveness by Galveston County officials to the needs of the minority community; racial appeals in recent

local political campaigns; and enduring discrimination and racial disparities in areas including education, income, employment, housing, and public health. *See* ROA.15940-15947, 15982-16000, 16023-16026. Lasting negative effects of these conditions, in turn, have contributed to the minority community's disproportionately low voter turnout rates. ROA.15984.

Galveston County's 2021 redistricting process itself exemplified a lack of transparency and public input and included substantial procedural and substantive departures from past redistricting cycles. For example, in past redistricting cycles, the Commissioners Court held several hearings at various locations around the county to solicit public input on map proposals, including seven public hearings during the 2011 redistricting cycle. ROA.15970. In 2021, in contrast, the only opportunities for public input were an online public comment portal[1] and one public meeting on November 12, 2021—held at the League City Annex, a small and inaccessible facility located twenty-seven miles from the city of Galveston (the county seat and where the Commissioners Court holds its regular meetings), and just one day before the deadline to submit enacted plans to the Texas Secretary of State. ROA.15971-15974. Thirty-five of the thirty-six members of the public who spoke

[1] County Judge Mark Henry admitted that he reviewed fewer than a dozen of the 446 public comments that were submitted. ROA.15974. Instead, he relied on a breakdown of those comments provided by his staff, which the district court found disregarded "public commentary expressing concern over the discriminatory impact of redistricting on Galveston County's minority community." ROA. 15974.

at the November 12 meeting opposed Map 2, and the remaining comments "noted the inconvenience of the meeting and the lack of public transparency in the process." ROA.15975-15976. Only Commissioner Holmes, the sole minority member of the Commissioners Court, attempted to respond to the audience's concerns. ROA.15976. As the district court recognized, the other three members of the Commissioners Court present nevertheless adopted the Enacted Plan without addressing any public comments received at the meeting or publicly debating either of the proposed redistricting plans. ROA.15976. Other procedural departures during the 2021 redistricting process that the district court identified include the County's: (1) failure to adopt a redistricting timeline; (2) failure to adopt any publicly available redistricting criteria to guide the process; (3) lack of transparency in engaging redistricting counsel; (4) lack of public notice; (5) conduct surrounding the November 12 special meeting; (6) disregard for minority input; and (7) exclusion of the sole minority commissioner, Commissioner Holmes, from the redistricting process. ROA.15963; *see generally* ROA.15950-15982.

In addition to the discriminatory circumstances and effect of the Enacted Plan, *see* ROA.16029, the district court, following the framework of the *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), made several factual findings suggesting it was indeed the intent of the

Defendants to dilute the votes of the County's Black and Latino voters, although the district court found it unnecessary to ultimately decide the issue. ROA.15940.

For example, the County had received six objection letters from the Attorney General since 1976. The County most recently received an objection letter in 2012 from the U.S. Attorney General that noted several procedural deficiencies in the 2011 redistricting process that raised concerns of intentional discrimination, including the failure to adopt redistricting criteria and the deliberate exclusion of Commissioner Holmes. ROA.15963-15964. As the district court recognized, "[t]he 2012 objection letter put Judge Henry on notice of procedural defects that could raise concerns about the exclusion of minority stakeholders and lack of transparency"—lapses the court found to have occurred once again in 2021 and which "could be viewed as evidence of intentional discrimination." ROA.15964; *see also* ROA.15965, 15976-15977.

In addition to the deficiencies mimicking those outlined in the 2012 objection letter, the district court found several other deficiencies in the County's 2021 redistricting process. For example, even with delays in the release of census data caused by the COVID-19 pandemic, the County moved unusually slowly in their map drawing process. The County waited until October 14 to contact a demographer, ROA.15952, 15954-15955, even though a map feasibly could have been drawn

immediately following the release of 2020 Census data in August 2021.[2] ROA.15968. Similarly, there is no evidence of the County publicly announcing the drawing of draft maps, aside from a post on Judge Henry's Facebook page and a repost by Commissioner Giusti. ROA.15960-15961. The limited information the County released omitted any quantitative data about the population and demographic makeup of the proposed districts. ROA.15967.

The map-drawing process itself also proved suspect. Shortly after engaging Dale Oldham as the County's legal consultant, Judge Henry and the county's general counsel, Paul Ready, contacted Oldham to ask whether the county "had to draw a majority[-]minority district." ROA.28546. Subsequently, Mr. Oldham—who was the "lead person" responsible for providing instructions about configuring the County's proposed redistricting plans and told the County's demographer exactly "where to place the lines," ROA.15955-15956—provided a chart to Mr. Ready, "to distribute to the commissioners," reflecting each precinct's racial demographic changes from 2010 to 2020, ROA.15952. Mr. Oldham himself reviewed this racial data, as well as racial-shading maps of Galveston County after the 2020 Census was released, "to identify where Black populations were concentrated." ROA.15953. The district court found that Mr. Oldham's understanding was "generally consistent with

[2] As a result of this delay, demographer Thomas Bryan was forced to draw maps for the County on a flight back from vacation and forgo his usual practice of visiting and researching the jurisdiction prior to drawing a map. ROA.15969.

Judge Henry and Commissioners Apffel and Giusti's understanding that Galveston County's Black and Latino population was centered around Precinct 3, which had consistently elected Commissioner Holmes." ROA.15952 (citing, *e.g.*, ROA.18350-18352, 18999-19000, 19221)). Nevertheless, Judge Henry told Mr. Oldham directly that he wanted "the configuration that ultimately became Map 2," ROA.15954, a configuration that entirely dismantled Precinct 3. Mr. Oldham likewise testified that Map 2 was "'the visualization of the instructions' Judge Henry had provided." ROA.15956 (citation omitted).

The district court found that all three of the commissioners who approved the Enacted Plan understood, before voting, that the Enacted Plan would have a racially discriminatory impact on Galveston's Black and Latino residents, fracturing the core of historic Precinct 3 across all four districts such that minority voters could no longer elect their candidate of choice. ROA.15939.

Ultimately, none of the County's litigation counsel's purported justifications explained the configuration of the Enacted Plan. *See* ROA.15977-15982. Based on Mr. Oldham's and the commissioners' denial of a partisan motivation, the district court found that partisanship did not explain the configuration of the map. ROA.15955. Similarly, the goal of creating a coastal precinct was not one that was backed by public support nor initially raised with the demographer, Thomas Bryan. ROA.15956, 16026. Even when drawing a map with a coastal precinct, Bryan was

given virtually no discretion. ROA.15956 (highlighting that Oldham provided "very specific instructions about how he wanted Map 2 to look"). Indeed, the district court found the creation of a coastal precinct did not actually require the dismantling of the majority-minority precinct nor did it explain the adoption of the Enacted Plan. ROA.15957.

II. Procedural Background

In August 2023, the district court held a 10-day bench trial where it heard live testimony from several lay and expert witnesses. *See* ROA.15890-15892. On October 13, 2023, the court issued a 157-page order finding "defendants' actions to be fundamentally inconsistent with § 2 of the Voting Rights Act." ROA.15886. As the district court explained, "[t]his is not a typical redistricting case. What happened here was stark and jarring. The Commissioners Court transformed Precinct 3 from the precinct with the highest percentage of Black and Latino residents to that with the lowest percentage. The circumstances and effect of the enacted plan were 'mean-spirited' and 'egregious' given that 'there was absolutely no reason to make major changes to Precinct 3.'" ROA.16029 (citations omitted). Accordingly, the court concluded that the Enacted Plan was a "clear violation" of Section 2 and "must be overturned." ROA.16029. The district court also concluded—despite finding a number of facts that would support a finding of intentional discrimination, *see, e.g.*, ROA.15964-15967 (noting the procedural irregularities in the redistricting process,

including the lack of a redistricting timeline, lack of redistricting criteria, lack of transparency in engaging redistricting counsel, and lack of public involvement)—that it "need not determine the outcome of the intentional-discrimination or racial-gerrymandering claims," because the relief Plaintiffs sought for those claims is not broader than that to which they are entitled under Section 2. ROA.16032-16033.

The district court found that Plaintiffs established the three *Gingles* preconditions for Section 2 liability. Plaintiffs satisfied the first *Gingles* precondition by submitting over a dozen illustrative maps showing that Galveston County's minority community is "sufficiently large and geographically compact to constitute a majority in a single commissioners precinct that is both reasonably configured and comports with traditional redistricting principles." ROA.15922; *see also generally* ROA.15914-15922, 16007-16013.[3] Indeed, as the court recognized, "defendants do not dispute that Galveston County's Black and Latino communities, when considered as a coalition, are sufficiently large to satisfy the first *Gingles* precondition." ROA.16007. The district court also recognized that, while Plaintiffs "do not need to consider specific communities of interest when drawing illustrative

[3] The district court found "widespread shortcomings" in Defendants' *Gingles* I expert, Dr. Owens, and thus assigned "little to no weight" to his opinions on traditional redistricting principles, the geographic dispersion of minority populations, and the first *Gingles* precondition. ROA.15902. Even still, Dr. Owens generally agreed that Plaintiffs' illustrative plans were "about as reasonably compact as the enacted plan" and did not dispute that Plaintiffs' experts used non-racial traditional redistricting criteria. ROA.15919.

maps," their illustrative plans "sufficiently preserve communities of interest—namely the Black and Latino communities in benchmark Precinct 3." ROA.16009 at 129 (citation omitted); ROA.15919.

Plaintiffs also established the second and third *Gingles* preconditions because "Black and Latino voters in Galveston County are cohesive in that a large majority of these voters have consistently favored the same candidates across a series of elections," and "voting in Galveston County is racially polarized such that Anglo voters usually vote as a bloc to defeat the candidate of choice of Black and Latino voters." ROA.15923, 15934; *see also generally* ROA.16014-16020. The district court credited Plaintiffs' experts' analyses and testimony showing that Black and Latino voters vote cohesively, as the undisputed results of their analyses show that "on average, over 85% of Black and Latino voters have voted for the same candidate countywide" and "Latinos and Blacks have separately voted for the same candidate in almost all general elections." ROA.15925. All the experts—including Defendants' expert, Dr. Alford—"agreed that general elections are more probative than primary elections in this case" to determine cohesion between Black and Latino voters, for a variety of reasons. ROA.15928. Even recognizing their lower probative value, the district court found that the analyses of Plaintiffs' expert Dr. Oskooii and Defendants' expert Dr. Alford nevertheless "show that Blacks and Latinos usually support the same top-choice candidate in primary contests," with Black and Latino

voters voting cohesively in nine out of ten primary elections Dr. Oskooii studied. ROA.15929.

Likewise, even Defendants' expert Dr. Alford testified that it would be hard to find "a more classic pattern of what polarization looks like in an election" than what exists in Galveston County. ROA.15927 (quoting ROA.19311-19312). Accordingly, the district court found that "[a]ll experts agree that Anglo bloc voting usually defeats the Black and Latino candidate of choice in Galveston County elections in every precinct analyzed in the enacted plan." ROA.15934; *see also generally* ROA.16017-16020. The district court also recognized that, "[t]o the extent that partisanship explains the voting patterns in the county, it still does not change the fact that the data unerringly points to racially polarized voting." ROA.15934; *see also generally* ROA.15935-15938. Indeed, the levels of cohesion between Black and Latino voters versus white voters, and the racial composition of Galveston County's political parties, confirm that the County's electorate is racially polarized. ROA.15936-15937, 16018-16019.

The district court further concluded that the totality of circumstances supported Section 2 liability. ROA.16020-16029. In particular, the court evaluated the factors that guide the totality analysis, enumerated in *Thornburg v. Gingles*, 478 U.S. 30, 36-38, and concluded that "most of the Senate factors support § 2 liability." ROA.16022-16027.

SUMMARY OF ARGUMENT

The district court's decision should be affirmed. It follows decades of settled precedent and correctly enjoins a redistricting map that arose from a "jarring," "egregious," and "mean-spirited" process.

First, the County's plea that this Court overturn binding *en banc* precedent is a nonstarter. A panel of this Court cannot do that. Moreover, the settled precedent is correct—the plain text of Section 2 protects a class of voters who share a common characteristic—experiencing a minimized opportunity to participate in the electoral process on account of their race. A jurisdiction's voting maps violate Section 2 when they result in an unequal opportunity to participate in the electoral process for minority voters—whatever their skin color. That shared discriminatory experience—and not the color of one's skin—defines the class that Section 2's plain text protects. Every circuit but one has so concluded.

Second, the County offers no basis to disturb the district court's factual finding that the first *Gingles* precondition is satisfied. On appeal, the County mimics the positions advanced by their expert—that the minority population in Galveston County is too dispersed or lacks shared interests. But the district court correctly gave this testimony little to no weight—a determination the County does not challenge on appeal. Its effort to repackage its failed expert testimony into appellate arguments likewise fails.

Third, the district court did not err—much less clearly so—by affording primary elections less weight than general elections in its *Gingles* 2 analysis nor in rejecting the County's contention that partisanship, not race, explains the racially polarized voting in the county. The County's own expert agreed with the district court's weighing of primary elections, and the County has not shown clear error in the district court's findings with respect to the racial basis for polarized voting.

Fourth, the County's contention that Section 2 is unconstitutional for lack a "temporal limit" is foreclosed by Supreme Court precedent and is nonsensical. The statute itself limits liability to jurisdictions *currently* experiencing the effects of discrimination. Like this one. Congress does not offend the Constitution by designing a statute that remedies *present day* discriminatory effects.

STANDARD OF REVIEW

This Court reviews the district court's legal conclusions *de novo* and its factual findings for clear error. *Harding v. Cnty. of Dallas, Tex.*, 948 F.3d 302, 306-07 (5th Cir. 2020). Under the clear error standard, "'If the district court's findings are plausible in light of the record viewed in its entirety, we must accept them, even though we might have weighed the evidence differently if we had been sitting as a trier of fact.'" *Veasey v. Abbott*, 830 F.3d 216, 229 (5th Cir. 2016) (citing *Price v. Austin Indep. Sch. Dist*., 945 F.2d 1307, 1312 (5th Cir. 1991)).

ARGUMENT

I. Binding Circuit precedent forecloses Appellants' challenge to Section 2 coalition claims.

A coalition of two or more politically cohesive minority groups may seek relief under Section 2. Applying Section 2 to protect minority coalitions is "necessary and appropriate to ensure full protection of the Fourteenth and Fifteenth Amendments rights," because voting discrimination is just as problematic when it prejudices one minority group as when it harms several. *See Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring). This Court's binding precedent, as well as persuasive authority in the Supreme Court and other circuits, confirm that Section 2 permits minority coalition claims. Section 2's plain text and legislative history confirm as much.

A. This Court and the vast majority of other courts have held that Section 2 protects coalition districts.

Under this Court's rule of orderliness, one panel may not overturn another panel's decision—let alone a prior *en banc* decision—"absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court." *Martinelli v. Hearst Newspapers, L.L.C.*, 65 F.4th 231, 234 (5th Cir. 2023) (citation and internal quotation marks omitted); *see also, e.g.*, *United States v. Avants*, 367 F.3d 433, 441 (5th Cir. 2004) ("Of course, we must follow precedent established by an earlier panel, not to mention a decision by our *en banc* court.")

(citation omitted); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 21 n.9 (5th Cir. 1974) (a panel "could hardly decide that the en banc decision was subject to later revision"). No intervening change in law exists here; accordingly, this panel is bound to follow existing Circuit precedent, which recognizes that Section 2 permits coalition claims. *See LULAC v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) ("*Clements*"); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989) (per curiam); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988); *LULAC, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500-02 (5th Cir. 1987) ("*LULAC I*").[4] This alone should end the matter.

This Court has made clear 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. Indeed, "Congress itself recognized 'that voting discrimination against citizens of language minorities is pervasive and national in scope,' and similar discrimination against Blacks is well documented." *Id.* (citation omitted). Consequently, if together, Black and Latino voters "are of such numbers residing geographically so as to constitute a majority in a single member

[4] Although the *en banc* court vacated the *LULAC I* panel decision on other grounds, *see* 829 F.2d 546 (5th Cir. 1987) (en banc), the Fifth Circuit subsequently reinforced the panel's ruling and adopted its reasoning to allow coalition claims, *see, e.g.*, *Brewer*, 876 F.2d at 453; *Campos*, 840 F.2d at 1244.

district, they cross the *Gingles* threshold as potentially disadvantaged voters." *Id.* Plaintiffs need only prove—as has occurred here—that "the minorities so identified actually vote together and are impeded in their ability to elect their own candidates by all of the circumstances, including especially the bloc voting of a white majority that usually defeats the candidate of the minority." *Id.*; *see also id.* at 1244-45 (recognizing that the most persuasive evidence of inter-minority political cohesion for Section 2 purposes is to be found in voting patterns).

Consistent with this Court's precedent, the vast majority of courts to consider the issue have held that Section 2 prohibits vote dilution against minorities, whether alone or in combination. While the Supreme Court has not expressly resolved the issue, it has assumed that Section 2 allows coalition claims. *Growe v. Emison*, 507 U.S. 25, 41 (1993); *White v. Regester*, 412 U.S. 755, 767 (1973); *see also Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009) (plurality op.) (declining to address whether minority coalition claims are cognizable); *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (explaining in the context of § 2 that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups"). In *Houston Lawyers' Association v. Attorney General of Texas*, for example, the Court entertained a Section 2 challenge pursued by "a statewide organization composed of both Mexican-American and African-American residents." 501 U.S. 419, 421 (1991). Similarly, in *Wright v. Rockefeller*, the Court

accepted that a coalition of Black and Puerto Rican voters brought a constitutional vote dilution challenge but rejected the merits. *See* 376 U.S. 52, 54 (1964). The Supreme Court also recognizes coalition claims in the vote denial context. Indeed, just two years ago, the Court evaluated a coalition of Black, Hispanic, and Native American voters' Section 2 vote denial claims. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2322 (2021). Courts in the First, Second, Ninth, and Eleventh Circuits agree even more clearly with this Court in recognizing that Section 2 protects minority voter coalitions.[5]

Nevertheless, the County urges this Court to depart from its own precedent and from the majority rule, and instead follow a single outlier, the Sixth Circuit. *See Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc). But the *Nixon* majority misinterpreted Section 2's text to reach its conclusion foreclosing coalition claims, detaching the word "class" from its context to mean a single racial group. *Id.* at 1386-87. This is contrary to the plain text, as discussed *infra* at Part I.B The Sixth Circuit's decision also depends on questionable "policy concerns," suggesting that even if

[5] *See, e.g.*, *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 235-36 (D. Mass. 2017) (applying *Latino Political Action Comm., Inc. v. City of Boston*, 784 F.2d 409 (1st Cir. 1986)); *NAACP, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist*., 462 F. Supp. 3d 368, 379-80 (S.D.N.Y. 2020) (applying *Bridgeport Coal'n for Fair Representation v. City of Bridgeport*, 26 F.3d 271 (2d Cir. 1994)); *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist*., 984 F.3d 213 (2d Cir. 2021); *Badillo v. City of Stockton, Cal.*, 956 F.2d 884 (9th Cir. 1992) (holding that factual record did not demonstrate the coalition's cohesion); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990) (same).

there is proven discrimination against minority groups, "there is no basis for presuming such a finding regarding a group consisting of a mixture of both minorities." *Id.* at 1391. But as the *Nixon* dissent emphasized, the more problematic "policy concern" is that rejecting coalition claims "requires the adoption of some sort of racial purity test" that is inconsistent with Section 2's goal to eliminate racial divisions in voting. *Id.* at 1401 (Keith, J., dissenting) (reasoning that if courts "are to make these [racial] distinctions, where will they end? Must a community that would be considered racially both Black and Hispanic be segregated from other Blacks who are not Hispanic?"). *Nixon* is thus a significant outlier based on dubious textual and policy interpretations.

In claiming a broader circuit split, the County also points, Br. at 31, to *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004) and *Frank v. Forest County*, 336 F.3d 570 (7th Cir. 2003) as holding that the VRA does not protect minority coalitions, or at least indicating "strong concerns" with coalition claims. But both cases are inapposite. *Hall* does not proscribe coalition claims as the County contends, because it concerned only an alleged crossover district including "black and white voters," not a minority coalition district. 385 F.3d at 430. Far from limiting Section 2 minority coalitions, the *Hall* court "noted that '[t]here are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups'" and seek to enforce their rights. *Id.* at 431 n.13 (quoting *Georgia v. Ashcroft*, 539

U.S. 461, 483 (2003)). The court's nuanced discussion of coalitions simply concluded that Section 2 does not "create an *entitlement* for minorities to form an alliance with [white crossover] voters in a district who do not share the same statutory disability as the protected class." *Id.* (emphasis added). But the inverse of this observation is that Section 2 *does* recognize a claim when minority voters *can prove* they "form an alliance with other voters" who *do* "share the same statutory disability" of discriminatory vote dilution. *See id. Hall* reinforces that a coalition must be composed of cohesive, statutorily protected minority groups; it "does not stand for the proposition that minority groups cannot be combined." *See NAACP, Spring Valley Branch*, 462 F. Supp. 3d at 380 n.11.

Frank likewise did not proscribe minority coalitions. *See* 336 F.3d at 575-76. *Frank* turned solely on the lack of cohesion between Black and Native American voters, where evidence of their voting patterns was "limited to voting in Presidential elections—a far cry from voting in county board elections," and where the "only thing" that Black residents of a Job Corp Center had in common with Native American voters in the proposed district "is that they are not Caucasian," *id.* The plaintiffs even admitted that they had "no evidence that the Job Corps residents have any interests in county government that are in common with those of" Native American voters, *id.* at 576—a far cry from the voluminous record here of common

interests shared by Galveston County's Black and Latino residents, *see, e.g.*, ROA.15982-16000.

In sum, this Court and every other circuit to consider the issue, save one, have concluded that Section 2 protects coalition districts. This panel is bound by existing Fifth Circuit precedent to conclude the same. *See, e.g.*, *Avants*, 367 F.3d at 441.

B. Section 2's plain text and legislative history, as well as the broader remedial purpose of the VRA, support coalition claims.

While the County largely eschews analysis of Section 2's text in favor of reliance on legislative history, *see* Br. at 24-28, Section 2's plain language authorizes coalition districts. Its legislative history and the VRA's broad remedial purpose confirm as much.

Section 2, like other civil rights statutes, is "written in starkly broad terms," *see Bostock v. Clayton Cnty., Ga.*, 140 S. Ct. 1731, 1753 (2020), and should be interpreted in "the broadest possible scope," *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (citation omitted). It empowers "any citizen" to challenge any "qualification or prerequisite to voting or standard, practice, or procedure" that discriminatorily "deni[es] or abridge[s]" the right to vote. 52 U.S.C. § 10301(a). Section 2's "broad language" does not limit its protections to a single minority group bringing claims seriatim; it instead reflects "Congress's presumed point to produce general coverage." *Bostock*, 140 S. Ct. at 1749 (internal quotation marks omitted). Accordingly, the absence of any express reference to coalition claims in the text of

Section 2 is not dispositive to interpretation of the provision. *See Bostock*, 140 S. Ct. at 1747 ("[T]here [is no] such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.").

Section 2(a) of the VRA prohibits any voting standard or practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," or language-minority status. 52 U.S.C. §§ 10301(a), 10303(f). Section 2(b) sets forth how a violation of Section 2(a) is established, and notes that it applies to "a class of citizens protected by subsection (a)." *Id.* § 10301(b). The "class of citizens" to which Section 2(b) refers is not a singular minority group, but rather those "protected by subsection (a)"—*i.e.*, "any citizen" subject to a denial or abridgment of voting rights "on account of race or color, or" language-minority status. *Id.* § 10301(a), (b). Nothing in the text of Section 2 requires every member of the "class of citizens" to share the same race, as opposed to the same experience of being politically excluded "on account of race," whatever their race is. *Id.* Section 2 protects all minority voters and reading it to protect only one at a time defeats its broad textual mandate.

The County's sole engagement with Section 2's text is a brief, strained statutory interpretation of "class" in subsection (b) to mean only a single harmed minority group. Br. at 34. But this reading improperly plucks "class" from its

statutory context. *See Yates v. United States*, 574 U.S. 528, 537 (2015) (the "meaning of a word cannot be determined in isolation") (citation omitted)). "Class" instead means "[a] *group of people* . . . that have common characteristics or attributes," Black's Law Dictionary (11th ed. 2019) (emphasis added), and refers to the plural of "citizens" listed as protected groups in subsection (a): racial, ethnic, *and* language-minority citizens. Accordingly, "class of citizens" means the class members must merely share the common characteristic of being a Section 2 protected racial, ethnic, or language minority voter experiencing vote dilution. Reading "class of citizens" to include a combination of protected minority citizens accords with both the last antecedent grammatical rule, *see Barnhart v. Thomas*, 540 U.S. 20, 26 (2003), and the singular-plural canon of statutory interpretation, *see, e.g.*, *F.D.I.C. v. RBS Sec. Inc.*, 798 F.3d 244, 258 (5th Cir. 2015) (applying 1 U.S.C. § 1).

Even if it were ambiguous whether Section 2's text protects minority coalitions, its legislative history and the broad remedial purpose of the VRA both support recognizing such claims. Courts may "consult[] the understandings of the law's drafters as some (not always conclusive) evidence," *Bostock*, 140 S. Ct. at 1750, and the Supreme Court often relies on Section 2's legislative history, *see, e.g.*, *Brnovich*, 141 S. Ct. at 2332-33; *Gingles*, 478 U.S. at 43 & n.7.

The 1975 amendment to Section 2—which the County ignores entirely—added language-minority protections because Congress sought to address "pattern[s]

of racial discrimination that ha[ve] stunted . . . black *and* brown communities." S. Rep. No. 94-295, at 30 (1975) (citation omitted; emphasis added); *see also generally id.* at 22-31. Congress knew that Texas, for example, had a substantial minority population "comprised primarily of Mexican Americans and [B]lacks" and "has a long history of discriminating against members of *both* minority groups." *Id.* at 25 (emphasis added).[6] Congress thus sought to protect together all "racial or ethnic groups that had experienced appreciable prior discrimination in voting," noting that Latinos "suffered from many of the same barriers to political participation confronting [B]lacks," including "'invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others'"—like that present here. *Salas v. Sw. Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1549 & n.19 (5th Cir. 1992) (quoting S. Rep. No. 94-295, at 30). Indeed, the Senate stressed that "racial discrimination against language minority citizens seems to follow density of minority population" overall, citing examples of jurisdictions and electoral systems that have "den[ied] Mexican Americans *and* [B]lack voters in Texas political access." S. Rep. No. 94-295, at 27-28.

Importantly, in its discussion of the history of discrimination and the need for expanded Section 2 protection, the Senate was aware of "at least one case in which

[6] The 1975 House Report included identical language regarding patterns of discrimination, including in Texas, against both racial and ethnic minorities. *See* H.R. Rep. No. 94-196, at 17, 25, 30 (1975).

African-Americans and Hispanics brought a joint claim" under the VRA. *Nixon*, 76 F.3d at 1395 (Keith, J., dissenting) (citing *Wright*, 376 U.S. 52). The Senate also repeatedly referenced another case—*Graves v. Barnes*, affirmed by *White v. Regester*—in which several voting rights claims involving Black and Latino voters were consolidated in one action with their rights evaluated collectively. *See* S. Rep. No. 94-295, at 27 ("In January, 1972, a three-judge Federal court ruled that the use of multi-member districts for the election of state legislators in Bexar and Dallas counties, Texas, unconstitutionally diluted and otherwise cancelled the voting strength of Mexican Americans *and* [B]lacks in those counties.") (emphasis added); *see also id.* at 30. "If Congress was thus aware that more than one minority group could be considered to constitute one plaintiff class in determining the availability of Voting Rights Act protection, certainly the absence of an explicit prohibition of minority coalition claims compels a construction of Section 2 which allows them." *Nixon*, 76 F.3d at 1395 (Keith, J., dissenting).

When Congress amended Section 2 in 1982 it was no less aware of coalition claims. In its Report on the 1982 amendments, the Senate Judiciary Committee twice referenced *Wright*—involving a coalition of Black and Hispanic voters, just as here. S. Rep. No. 97-417, at 19 n.60, 132 (1982) (citing *Wright*, 376 U.S. at 52-54). The Senate likewise again repeatedly cited to *Graves* as affirmed by *White*, describing *White* as "the leading pre-*Bolden* vote dilution case" and among "the leading cases

involving multi-member districts." *Id.* at 2, 22.[7] The Senate made clear its understanding that, in that case, multimember districts "'operated to dilute the voting strength of racial *and* ethnic minorities.'" *Id.* at 21 (quoting *White*, 412 U.S. at 767) (emphasis added); *see also id*. at 130 (noting that the Supreme Court relied upon evidence that included "a long history of official discrimination against *minorities*") (emphasis added).

Beyond citation to cases involving coalition claims, the 1982 Senate Report spoke repeatedly of the need to protect racial and ethnic minorities together, explaining that "the amendments would make racial and ethnic groups the basic unit of protection." *Id.* at 94; *see also, e.g.*, *id.* at 122 (local electoral arrangements are expected to conform with guidelines "established to maximize the political strength of racial *and* ethnic minorities") (emphasis added).[8] For example, in recounting an

[7] The House Report on the 1982 amendments likewise cited to *White*. H.R. Rep. No. 97-227, at 20 (1981).

[8] The Senate Report also includes dozens of references to minorities plural, without differentiating each time between protections for racial and ethnic minority groups. *See, e.g.*, S. Rep. 97-417, at 27 (plaintiffs must prove either intent or that the challenged system "results in *minorities* being denied equal access to the political process") (emphasis added); *id.* at 16 (the "crucial question" for judicial inquiry is "whether *minorities* have equal access to the electoral process") (emphasis added).

The House Report likewise repeatedly discusses minorities plural, without distinguishing between different racial and ethnic groups. *See, e.g.*, H. Rep. No. 97-227, at 3 ("The Voting Rights Act of 1965 was primarily designed to provide swift, administrative relief where . . . racial discrimination continued to plague the electoral process, thereby denying *minorities* the right to exercise effectively their franchise."), 7 (describing "progress in increasing registration and voting rates for

illustrative list of municipalities "in jeopardy of court-ordered change under the new results test," the Senate spoke of the overall minority population in each, without differentiating among Black, Latino, or other groups—including in jurisdictions like New York City, where its 40 percent minority population necessarily encompassed multiple minority groups. *See id.* at 154-57. The Senate thus reinforced that minority groups, together, must have "a fair chance to participate" and "equal access to the process of electing their representatives." *Id.* at 36. Just as in 1975, if Congress meant to exclude coalitions, "Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment." *Chisom*, 501 U.S. at 396 (holding that the absence of exclusion of judicial elections from Section 2's statutory text meant they were within Section 2's ambit).

The County nevertheless insists, Br. at 26-27, that Congress in 1982 "nowhere references the concept of a multiracial . . . fusion claim," but rather only ever cites to "a single minority, as opposed to in plural terms." But this ignores entirely: the myriad references to protections for minorities plural; the discussion of racial and ethnic groups together as "the basic unit" (singular) of protection; the repeated cites

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minorities" and "improvements in the election of minority elected officials," citing registration and election rates for both Blacks and Latinos); *see also id.* at 28, 34-35 (noting the "overwhelming evidence of a continuing pattern and practice of voting discrimination against racial *and* language minorities" and that the VRA sought to extend protections "to all minorities") (emphasis added).

to cases upholding challenges by coalitions of minority voters; and the discussion of the combined total minority populations of jurisdictions "in jeopardy of court-ordered change." It is thus clear that Congress, in both 1975 and 1982, was aware of and approved of coalition claims in its extension of protections for minority voters.

Moreover, while the County urges that "[p]ermitting different racial minority groups to ban together" would "vastly overstep[] the VRA's intended purpose," Br. at 26, this is not true. Recognizing coalition claims is wholly consistent with the VRA's broad remedial purpose, of "rid[ding] the country of racial discrimination in voting." *Chisom*, 501 U.S. at 403 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966); *see also id.* ("The VRA should be interpreted in a manner that provides the broadest possible scope in combating racial discrimination.") (cleaned up).

To paraphrase the recent Supreme Court, "Congress is undoubtedly aware [that the Supreme Court and nearly every circuit entertains coalition claims]. It can change that if it likes. But until and unless it does, statutory stare decisis counsels our staying the course." *Allen v. Milligan*, 599 U.S. 1, 31 (2023) (citing *Kimble v. Marvel Entm't, LLC,* 576 U. S. 446, 456 (2015)).

Section 2's text and legislative history confirm that Congress contemplated statutory protection for minority coalitions, which advance the broad remedial purpose of the VRA.

C. Recent Supreme Court cases do not indicate that coalition claims are improper.

As explained *supra* and as the County acknowledges, Br. at 28, 34, the Supreme Court has explicitly reserved judgment on the legality of coalition claims. And none of the Court's recent precedent indicates that such claims are improper.

The County, points for support to *Bartlett v. Strickland*, 556 U.S. 1 (2009), Br. at 34-37, but such reliance is misplaced. First, the Court in *Bartlett* explicitly did not address coalition districts, *see* 556 U.S. at 13-14 (plurality op.), and its reasoning does not apply to minority coalitions. The *Bartlett* plurality was concerned only that factually distinct *crossover* claims by minority *and white voters* would pose a "serious tension" with Section 2's racially polarized voting precondition. *Id.* at 15-16. That tension is not present for coalition claims, which require proof that a cohesive minority coalition is stifled by oppositional white-bloc voting. Whereas crossover voting by its nature represents a division within the majority bloc, *see id.* at 16, coalition claims do not. Coalition claims thus do not involve any "serious tension" with the third *Gingles* prong and, consequently, are distinct from the purely "political coalitions" that crossover claims necessarily entail. *Id.* at 15.[9]

Second, coalitions of minority groups go beyond merely "political alliances" because coalition claims depend on all minority claimants necessarily proving that

[9] The County's reliance on *Hall* is misplaced for the same reason. S*ee Hall*, 385 F.3d at 430.

they suffer from discrimination because of their minority status. Vindication of the rights of minority coalitions thus addresses discriminatory treatment not based on political alliance but rather on being historically disadvantaged on account of race—the underlying motivation for passage of Section 2. *See id.* at 10. Indeed, contrary to the County's assertion, Br. at 26, that recognizing coalition claims "contradicts the [VRA]'s intent to eliminate racially discriminatory structures," coalition claims actually *reduce* racial distinctions. Allowing coalitions to sue advances Section 2's goal to address the lasting effects of discrimination without "produc[ing] boundaries [that] amplify[] divisions between" voting groups. *See Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017). Having an arbitrary limitation requiring minority groups to sue separately would discount that varying minority groups—as here—may face the same impediment to vote for their preferred candidates as a result of their race.

The *Bartlett* Court was also concerned with abandoning the majority requirement of *Gingles* prong one, which it thought would leave jurisdictions uncertain of when Section 2 obligations might arise. 556 U.S. at 17 (plurality op.). But no such administrability issue exists here; Plaintiffs do not advocate jettisoning the majority-minority requirement. Accordingly, while the County contends, Br. at 36, that coalitions are unworkable because they could involve "any combination or

number of minority voter groups," addition is not too steep an administrative hurdle.[10]

Finally, the County insists, Br. at 36, 39, that coalition claims, like crossover voting, invite speculation and force courts to make decisions based on political judgments. But this is not so. A court assessing a coalition claim need not try to predict political variables of any sort. Instead, a court—as the district court did here—must only ask whether a jurisdiction has an aggregated minority population that makes up over 50 percent of the voting population, whether that minority group votes cohesively together, and if minority voters have regularly been defeated in electing candidates of their choice due to high levels of majority bloc voting. This is a simple and straightforward analysis, regardless of the County's insistence otherwise.

D. Coalition claims do not sanction proportional representation.

The County finally contends, Br. at 23-34, 37-38, that allowing coalition claims amounts to impermissible proportional representation of minority voters. But the Supreme Court foreclosed that argument this year. In *Milligan*, the Supreme

[10] The County contends, Br. at 40, that an "objective, numerical test" that asks whether minorities make up more than 50 percent of the voting-age population in the relevant geographic area would be "much less fraught." It fails to acknowledge however that this is already the test; coalition claims require only basic arithmetic by courts, to assess whether cohesive groups of minority voters make up a majority in a given district.

Court rejected Alabama's argument that Section 2 "inevitably demands racial proportionality in districting," reasoning that "the *Gingles* framework itself imposes meaningful constraints on proportionality." 599 U.S. at 26. This was so, the Court explained, because the first *Gingles* precondition includes limitations—such as requiring reasonably compact districts and respect for traditional districting principles—that prevent the types of districts that seek proportional representation. *Id.* at 28. The County does not explain how coalition claims are any different. The same *Gingles* 1 constraints with respect to compactness and traditional districting principles apply to coalition claims, and here the district court correctly found as a matter of fact that Plaintiffs satisfied those requirements. *See infra* Part II.

Here, the combined Black and Latino population of Galveston County is 38.6 percent. Prior to the Enacted Plan's adoption, the Black and Latino community was able to elect their candidate of choice to 25 percent of the precincts—less than their proportional share. The County sought to make that number 0 percent of the precincts, and the district court's injunction returns it to 25 percent. Anglo residents, who are 54.6 percent of the population, will be able to elect their candidates of choice in 75 percent of the precincts as a result of the district court's injunction. This is hardly a recipe for proportional representation for Galveston's minority voters.

II. The district court did not clearly err in finding *Gingles* 1 satisfied.

The district court did not clearly err in finding *Gingles* 1 satisfied. There is no genuine dispute that Galveston County's Black and Latino community is sufficiently large and geographically compact as to constitute a majority in a Commissioners Court precinct, and the district court did not clearly err by so finding. The County is correct, Br. at 16, that "neither compactness nor traditional redistricting principles can be assumed based on race alone," which is why neither Plaintiffs nor the district court made those assumptions. Rather, Plaintiffs presented numerous illustrative maps which the district court found to be "but a few examples of a multitude of potential districts that are reasonably configured and that contain a majority Black and Latino population by CVAP." ROA.16008-16009. In so finding, the district court considered the illustrative maps themselves as well as the credible testimony and analyses presented by Plaintiffs' three experts regarding each plan's compliance with traditional redistricting criteria. ROA.15914-15920, 16010-16013. Moreover, the Commissioners Court itself proposed a plan, Map 1, containing a majority Black and Latino CVAP district which the commissioners' legal consultant for redistricting testified was legally defensible and had been drawn without any regard to race, and which the district court found to be "reasonably compact." ROA.15912-15913 (citing ROA.18613-18614).

The County contends, Br. at 41-42, that *Gingles* 1 cannot be met because while Black voters are concentrated in the central portion of the County in benchmark Precinct 3, Latino voters are "evenly disbursed throughout the County." Although the County obviously wishes Section 2 did not protect coalitions of minority voters, this Court has held that it does. The relevant inquiry is thus whether—in proposed *Gingles* 1 demonstrative alternative precincts—there is a geographically compact minority population that constituted a majority of eligible voters. The district court correctly found that there was—based on a multitude of such demonstrative maps, including one drawn by the County *itself.* The County's argument goes awry because it shifts the focus from the compactness of the combined minority population within the proposed demonstrative precinct to the distribution of Latino voters in the remainder of the precincts countywide.

Neither the distribution of the minority population in Galveston County nor the characteristics of that population prevent Plaintiffs from meeting the compactness requirement of the first *Gingles* precondition. In *LULAC v. Perry*, the Supreme Court held that one of six Latino opportunity districts, which contained "a 300-mile gap between the Latino communities . . . and a similarly large gap between the needs and interests of the two groups," was not "reasonably compact." 548 U.S. 399, 430, 432, 434 (2006). The district court cited to this precedent, noting the Supreme Court's "critical caveat" that "'it is the enormous geographical distance

separating the [two] communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders [the district] noncompact for § 2 purposes.'" ROA.16010 (quoting 548 U.S. at 435). The district court found that, in this case, "[t]he Black and Latino areas joined in the plaintiffs' illustrative maps are marked by neither 'enormous geographical distance' nor 'disparate needs and interests.' [] To the contrary, there is substantial quantitative evidence, supported by lay-witness testimony, that the needs and interests of communities included in the plaintiffs' illustrative plans are similar." ROA.16009-16010 (internal citation omitted).[11]

In any event, the County's reliance on *Perry* is misplaced because in that case the two geographically distant Latino populations were necessary in order for the district to be majority minority. 548 U.S. at 424. Here, the County objects, Br. at 43, primarily to the inclusion of League City in Plaintiffs' illustrative plans, contending that Black and Latino voters have different socioeconomic statuses. But the various illustrative Precinct 3 configurations proffered by Plaintiffs contain few League City residents and their inclusion is not necessary to satisfy the *Gingles* 1 majority-minority requirement. *See* ROA.17112, 35576-35623. Moreover, the district court

[11] In light of this finding, it is no surprise that even the Enacted Plan contains two precincts—Precincts 1 and 4—that combine portions of Texas City and League City, two of the municipalities which the County now puzzlingly claims share no commonalities such that their grouping necessarily offends traditional redistricting principles. ROA.24459.

specifically concluded that the County's *Gingles* 1 expert, Dr. Mark Owens, who proffered the same opinions that the County now asserts as its arguments on appeal, had such "widespread shortcomings" in his testimony and analysis that it assigned "little to no weight to [his] opinions on traditional redistricting principles, the geographic dispersion of minority populations, and the first *Gingles* precondition." ROA.15902. The County does not appeal that determination, but its identical arguments on appeal suffer from the same shortcomings.

III. The district court did not clearly err in finding *Gingles* 2 and 3 satisfied.

A. The district court did not clearly err in its assessment of primary elections in its *Gingles* 2 analysis.

The district court did not clearly err in its assessment of primary elections in its *Gingles* 2 cohesion analysis. The district court found, based upon the agreement among the County's and Plaintiffs' experts, that general elections were more probative of voting patterns in Galveston County than primary elections. ROA.15928, 16015-16016. Indeed, Dr. Alford—the County's expert—testified that general elections provide the "clearest picture" of voting patterns and that general election results should be afforded greater weight. ROA.19440-19442 (Dr. Alford testifying that if evidence from "the primary . . . contradicted what we found in the general . . . in my view, it would be the general [that] is more important"). Accordingly, the district court afforded general elections greater weight and primary elections lesser weight. The County's brief skips past this point entirely. But the

district court could not have erred—much less clearly so—by assigning probative weight to the various elections consistent with the unanimous expert testimony. In any event, the district court *did* consider primary elections, and while the court assigned them less weight, it concluded that they too support a finding of cohesive voting.

Based upon an intensely local appraisal of conditions, the district court determined that primary elections were not as probative as general elections. ROA.15928, 15930. In Galveston County in particular, primary elections provide limited information. Galveston County Commissioners Court elections are usually uncontested. ROA.15928, 16904.[12] Moreover, all racial groups rarely participate in such elections, with Black and Latino voters participating in exceptionally low levels. ROA.15928, 16904, 17340-17341; *see also generally* ROA.34913-34942, 35459-35483. Significantly, the County's appellate position regarding primary elections was disclaimed several times by its own expert. *See, e.g.*, ROA.19440, 19441-19442, 19443.

[12] According to election records before the Court, Precinct 3 had no contested primary elections over the last decade. *See* ROA.35465-35466. On the Democratic side where an overwhelming 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. ROA.35465-35466.

Despite the limited value of primary elections, the district court credited Plaintiffs' expert Dr. Oskooii's analysis of recent primary elections, concluding that it illustrated cohesion between Black and Latino voters in Galveston County in nine out of those ten elections. The County relegates this to a footnote, Br. at 50 n.16, and dismisses the district court's factual findings because the candidates supported by Black and Latino voters were also supported by white primary voters. But on cross examination, the County's expert, Dr. Alford, testified that the behavior of the small number of white Democratic primary voters is irrelevant to the question of *Gingles* 2 cohesion between Black and Latino voters. ROA.19421-19422, 15929-30. White voter behavior is relevant at *Gingles* 3, and in this case in the general election, a conclusion that flows directly from *Gingles* itself. The district court did not clearly err adhering to Supreme Court precedent and the County's own expert's position.[13]

The County next highlights various results of Dr. Trounstine's, Br. at 48, but omits that the County itself—through the report and testimony of Dr. Alford—established that Dr. Trounstine had run an outdated statistical code in producing her results. ROA.19327, 19394, 19412, 23999. Dr. Alford agreed with Plaintiffs' experts Dr. Barreto and Dr. Oskooii that a more modern approach should now be used, and he re-ran the primary elections examined by Dr. Trounstine using that method.

[13] Likewise, the County's fleeting reference to a 75 percent threshold for cohesion, Br. at 48, omits that Dr. Alford testified on cross examination that utilizing a threshold is methodologically unsound. ROA.19394-19397, 19456-19457.

ROA.19320-19322. As the district court correctly found, Dr. Alford's analysis shows cohesion between Black and Latino voters in those primary elections. Under his replications, five out of eight exogenous primary elections, ROA.19323-19324, and four out of six[14] endogenous primary elections show Latino and Black cohesion in voting for the same candidates, ROA.19434-19435.

Further, as the district court concluded, several of the endogenous primary elections examined by Dr. Trounstine, some from as far back as 2002, are too far removed temporally to be probative. *See* ROA.19433. The most recent, and thus most probative endogenous primary election—the 2012 primary for Precinct 3—shows overwhelming cohesion between Black and Latino Voters in Galveston County. *See* ROA.19434, 24002.

The County's concerns about broad confidence intervals for estimating Hispanic voter patterns are similarly undermined by the testimony of their own expert. Dr. Alford testified that these intervals did not affect the ultimate conclusions he drew—the "same overall conclusion from the general elections that all of the experts have testified here draw." ROA.19358-19359. Further, the County's claim that Plaintiffs' expert Dr. Barreto "agreed his analysis did not show Hispanic voter

[14] Dr. Alford's testimony that only one out of eight exogenous primary elections and zero out of the six endogenous primaries analyzed exhibited racial polarization was again based upon his own admittedly irrelevant inclusion of the White voting patterns in his primary analysis. *See* ROA.19431-19432, 19434-19435.

cohesion levels 'consistently above 75%,'" is similarly false. Br. at 49.[15] Rather, Dr. Barreto testified that his Bayesian Improved Surname Geocoding ("BISG")[16] analysis showed Hispanic cohesion levels in the 80 percent range. ROA.16901-16902.

The County correctly asserts that the significance of primary elections is a question for the district court's factual determination. Here, the district court, based upon testimony and significant agreement between the parties' experts, determined that primary elections provided limited probative value. Nonetheless, even if primary elections needed to be considered, the district court fulfilled this obligation reviewing the results of primary analysis by all experts that demonstrated significant cohesion between Black and Latino voters in Galveston County.

B. The district court did not clearly err in rejecting the County's partisanship arguments.

The district court did not clearly err in rejecting the County's partisanship arguments. Plaintiffs alleging Section 2 vote dilution claims have no affirmative duty, in the first instance, to "attempt to eliminate, as a causative factor, the impact

[15] The County's citation points to Dr. Barreto describing the BISG process.

[16] In a thorough analysis the district court concluded that "BISG is particularly useful for narrowing in on the vote choices of Latino voters," ROA.15924, and concluded that "the court finds that BISG is a reliable methodology for assessing racially polarized voting patterns," ROA.15925. The County does not challenge that finding on appeal.

of politics on voting patterns." Br. at 53. Rather, Plaintiffs are first only required to prove racial bias through satisfying the *Gingles* preconditions. *Teague v. Attala Cnty., Miss*. 92 F.3d 283, 290 (5th Cir. 1996). If Plaintiffs satisfy the *Gingles* preconditions, the burden shifts to Defendants to "rebut the plaintiffs' evidence by showing that no such bias exists in the relevant voting community." *Id*. Here, the County misunderstands[17] the burden shifting required in showing that white bloc voting is driven by racial, not political motives. *Id.* Plaintiffs satisfied their burden in presenting sufficient evidence of racial bias in voting patterns of Galveston County by proving the three *Gingles* preconditions with expert and lay witness testimony. *See generally* ROA.16004-16020. The burden thus shifted to the County to show some evidence that partisanship, not racial bias caused the voting patterns. *Teague*, 92 F.3d at 290. The County failed to do so.

The record is devoid of evidence from the County showing that partisanship, not racial bias, is the cause of Galveston County's divergent voting patterns. Instead, the County propounded "general statements that race played no role at the polls." *Id*. at 291. For example, the County cites the fact that during the pendency of this litigation, a Black man was appointed to the Commissioners Court as evidence that

[17] The County seems to deliberately misread *Teague*, which expressly explains the burden shifting does not require Plaintiffs to face the "insurmountable burden of coming forward with evidence disproving all nonracial reasons that can explain election results in spite of the fact that the defendant itself produced no real evidence that factors other than race were at work." 92 F.3d at 291.

race and partisanship are not "inextricably intertwined." Br. at 52. The County similarly attempts to support its position by noting that Dwight Sullivan, a Hispanic Republican, was successfully elected to County Clerk of Galveston County for several terms. Br. at 53. However, Sullivan was unopposed in almost all of his elections, ROA.19555-19556, and the County presented no evidence of Sullivan, whose first and last names present as Anglo, running openly as a Hispanic candidate or being the minority candidate of choice,[18] *see* ROA.17859. Rather than "scuttle over" the reality of minority elected officials in Galveston County, the district court thoroughly considered the very limited number of minority officials and the exceptional circumstances surrounding their election, finding this minimal evidence unpersuasive. ROA.15988-15989.

Similarly, Dr. Alford failed to show that "race played no role at the polls." Dr. Alford simply made broad statements that partisanship explains Galveston County voting patterns without conducting any reliable analysis to support this claim. *See* ROA.19401-19402 (denying doing any analysis to determine whether the candidates' positions on issues had racial components that led to the voting patterns, and denying conducting any sort of survey to determine if election results were related to race.); *see also* ROA.19405-19406. Similarly broad and unsupported

[18] The same is true for Judge Patricia Grady, a Hispanic Republican judge in Galveston County whom the County also cite in their brief. *See* ROA.17860.

statements by Dr. Alford have been rejected by several courts as "speculative and unreliable." *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 587 F. Supp. 3d 1222, 1305-07 (N.D. Ga. 2022) (listing seven other courts discounting Dr. Alford's testimony regarding the cause of voter behavior). Indeed, Dr. Alford himself agreed with these criticisms by prior courts. ROA. 19381-19382. These speculative and unreliable statements by Dr. Alford are insufficient to meet the County's burden. *See Teague*, 92 F.3d at 291.

Even if Plaintiffs did have the burden of proving that race, not partisanship, motivated voting patterns in Galveston County, the district court found a series of facts establishing that race explained the divergent voting patterns. ROA.15936-15937. In *Clements*, 999 F.2d 831, the court considered the following evidence for determining whether partisan politics predominated racial concerns for polarized voting: the racial composition of membership of the political parties in the jurisdiction at issue and the extent to which a political party recruits minority persons as candidates or nominees. *Id.* at 861. Here, the district court found that the racial composition of political parties was starkly along racial lines. Indeed, "all experts agree that relatively few Anglo voters in Galveston County participate in Democratic Party primaries" ROA.15936-15937 (citing ROA.35461-35462); *see also* ROA.17341, 19402-19403. Similarly, "relatively few Black and Latino voters in Galveston County participate in the county's Republican primaries." ROA.15936;

see also ROA.17341, 19404. Further, it is clear that the political party that Anglo voters associate with in Galveston, specifically the Republican party, has not recruited nor nominated minority persons as their candidates or nominees for county elected positions. Tellingly, "[n]o Black or Latino *Republican* has ever won a primary election to be the Republican Party's nominee for county judge or a county commissioner." ROA. 15936. The County cannot and did not dispute this evidence nor adduce any contrary evidence.

Additionally, the *Clements* court viewed factors such as history of lack of access to the political process and whether there is a lack of responsiveness by elected and public officials to be probative in assessing whether polarized voting was on account of race. *Clements*, 999 F.2d. at 853, 857-58. In Galveston County, there is a lengthy history of lack of access to the political process for both Black and Latino voters. *See, e.g.*, ROA.15941; s*ee also* ROA.33885. Based on a thorough appraisal of the County, the district court found that "the history of discrimination resulting in ongoing socio-economic disparities and barriers to voting along racial lines also contributes to a finding that race, not partisanship alone drives the voting patterns seen in Galveston County." ROA.15937.

The district court also found, based on testimony from the County Judge and Commissioners themselves, that there was a lack of responsiveness by elected and public officials. ROA.15990 ("Anglo commissioners are evidently not actively

engaged in specific outreach to Galveston County's minority residents . . . Commissioner Apffel could not identify any wants, needs, or desires that African American and Latino constituents have."); *see generally* ROA.15990-15992. These findings were also informed by the testimony of three of Plaintiffs' expert witnesses, Drs. Burch, Rocha and Krochmal, *see, e.g.*, ROA.16427-16432, and the lay testimony of several Galveston County residents detailing the discrimination they face and the failure of the local government to address the needs of their community, *see, e.g.*, ROA.16362-16364 (detailing the failure of Galveston to rebuild public housing following Hurricane Ike.)

The County identifies no clear error in the district court's conclusion that race explains the polarized voting patterns in Galveston County.

IV. Section 2 does not have an unconstitutional temporal scope.

Faced with sound factual findings and legal conclusions, the County attempts to fall back on a new defense, raised only after trial, that Section 2 is unconstitutional on its face for lack of temporal limits. This novel theory defies precedent and ignores Section 2's self-limiting terms and operation.

No court has conditioned Section 2's validity on its eventual termination. Rather, the Supreme Court has long upheld and recently reaffirmed Section 2's nationwide ban on discriminatory results as an appropriate means of enforcing the Fifteenth Amendment. *See City of Rome v. United States*, 446 U.S. 156, 173 (1980)

("We hold that . . . the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment], outlaw voting practices that are discriminatory in effect."); *Milligan*, 599 U.S. at 41 (reaffirming the same). In *City of Rome*, the Court "ma[de] clear" that Congress could "prohibit state action that . . . perpetuates the effects of past discrimination." 446 U.S. at 176.[19] This Circuit has likewise held that Section 2, in its current form, is an appropriate "prophylactic measure[]" to ensure compliance with the Fourteenth and Fifteenth Amendments. *Jones v. City of Lubbock*, 727 F.2d 364, 375, 373-74 (5th Cir. 1984).

The County's cases lend no support for imposing a time limit on Section 2. *Shelby County v. Holder* expressly disclaimed any effect on Section 2, holding that the VRA's preclearance coverage formula no longer matched current conditions and could not be justified under a principle of "equal [state] sovereignty" that is irrelevant to Section 2, which applies nationwide. 570 U.S. 529, 550-51, 557 (2013).

[19] The Court has since held up the VRA as an exemplar of congruent and proportional enforcement of the Fifteenth and Fourteenth Amendments. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) ("[M]easures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures place [] on the States."); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 373 (2001) ("[T]he [VRA is] a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified."); *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 738 (2003) (likening Family and Medical Leave Act to VRA as a "valid exercise[] of Congress' § 5 power" under the Fourteenth Amendment).

The Supreme Court's latest affirmative action decision in *Students for Fair Admissions, Inc. v. Pre. & Fellows of Harvard Coll.*, 600 U.S. 181 (2023) ("*Students*"), is also inapplicable. There, applying strict scrutiny and a 25-year durational limit already imposed in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the Court struck down university affirmative action programs that allocate admission preferences based on race and lack an endpoint beyond achievement of some measure of racial proportionality. *Students*, 600 U.S. at 218-20. Section 2, by contrast, is not an affirmative action program: it neither confers benefits or burdens based on race nor seeks any measure of racial proportionality. It is, rather, an antidiscrimination statute, a purely defensive or prophylactic measure that *prohibits* voting discrimination based on race. *See* 52 U.S.C. § 10301. Like other federal antidiscrimination statutes, Section 2 permits only those remedies that are tailored to eliminate the offending practice. *See Veasey*, 830 F.3d at 253.

As such, Section 2 does not "demand exception to equal protection" and is not subject to strict scrutiny in its application to redistricting. Br. at 54. Indeed, Section 2 was enacted *pursuant* to the Fourteenth and Fifteenth Amendments to *enforce* those amendments. "[T]he mere fact that race [is] given some consideration in the districting process, and even the fact that minority-majority districts were intentionally created, does not alone suffice in all circumstances to trigger strict scrutiny." *Chen v. City of Houston*, 206 F.3d 502, 506 (5th Cir. 2000) (citing *Shaw v.*

Hunt, 517 U.S. 899 (1996) ("*Shaw II*")). Strict scrutiny applies only when it is shown that race was the *predominant* factor in drawing district lines, subordinating race-neutral criteria. *See id.*; *Milligan*, 599 U.S. at 33 ("The line we have long drawn is between consciousness and predominance."). While Section 2 compliance may require race consciousness in certain places under limited circumstances to avoid discriminatory results, it does not demand that race predominate in redistricting. Indeed, in cases where it is proven that race predominated in a given redistricting, compliance with Section 2 is a compelling justification *only* if the government had a strong basis in evidence for concluding that the three *Gingles* preconditions exist. *See Clark v. Calhoun Cnty., Miss.*, 88 F.3d 1393, 1405-06 (5th Cir. 1996); *Cooper v. Harris*, 583 U.S. 285, 301 (2017); *Shaw II*, 517 U.S. at 915 (assuming compliance with Section 2 is a compelling interest distinct from a "generalized" interest in remedying past discrimination without any "identified discrimination").

Thus, Section 2 would be appropriately tailored without any temporal limitation because its application is "confine[d] . . . to *actual* racial discrimination." S. Rep. 97-417, at 43 (emphasis added). Far from requiring an end to Section 2, the Supreme Court has only confirmed its enduring necessity, noting recently that the law "provides vital protection against discriminatory voting rules, and *no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated*." *Brnovich*, 141 S. Ct. at 2343 (emphasis added).

In any event, the County's misguided search for a sunset provision overlooks the obvious fact that Section 2 already has temporal limitations embedded in its text and operation. On its face, Section 2 requires courts to consider "the totality of the circumstances" in determining whether election districts interact with social and historical conditions to deny minority voters equal opportunity to elect candidates of choice. 52 U.S.C. § 10301(b); *see Brnovich*, 594 U.S. at 2341 (preventing Section 2 from becoming a "freewheeling disparate-impact regime"). This inquiry demands "'an intensely local appraisal of the electoral mechanism at issue, as well as a 'searching practical evaluation of the past *and present* reality.'" *Milligan*, 599 U.S. at 19 (emphasis added). For example, courts must consider not only historical voting-related discrimination in the jurisdiction but also the extent to which the minority groups *presently* bear the effects of past discrimination in areas that hinder their ability to participate effectively in the political process. This test necessarily incorporates temporal limitations. If the intensely local appraisal reveals that past discrimination no longer causes discriminatory effects in the present, the claim fails. *See, e.g.*, *Meza v. Galvin*, 322 F. Supp. 2d 52, 74 (D. Mass. 2004).

Finally, the County has also "failed to shoulder [its] heavy burden to demonstrate that the Act is 'facially' unconstitutional." *United States v. Salerno*, 481 U.S. 739, 745 (1987). A facial challenge is "the most difficult . . . to mount successfully" because the County must show that "no set of circumstances exists

under which [Section 2] would be valid." *Id.* The County does not and cannot argue that the passage of time has rendered Section 2 invalid in *all* its applications. The "stark and jarring" incident of discrimination found here in Galveston County is a case in point. ROA.16029.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed and the County's motion for a stay pending appeal denied.

November 2, 2024

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