No. 23-40582

In the United States Court of Appeals for the Fifth Circuit

HONORABLE TERRY PETTEWAY; HONORABLE DERRICK ROSE; HONORABLE PENNY POPE, PLAINTIFFS-APPELLEES

v.

GALVESTON COUNTY, TEXAS; MARK HENRY, *in his official capacity as Galveston County Judge*; DWIGHT D. SULLIVAN, *in his official capacity as Galveston County Clerk*, DEFENDANTS-APPELLANTS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GALVESTON COUNTY, TEXAS; GALVESTON COUNTY COMMISSIONERS COURT; MARK HENRY, *in his official capacity as Galveston County Judge*, DEFENDANTS-APPELLANTS

DICKINSON BAY AREA BRANCH NAACP; GALVESTON BRANCH NAACP; MAINLAND BRANCH NAACP; GALVESTON LULAC COUNCIL 151; EDNA COURVILLE; JOE A. COMPIAN; LEON PHILLIPS, PLAINTIFFS-APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
USDC CASE NOS. 3:22-CV-00057, 3:22-CV-00093; 3:22-CV-00117
(THE HONORABLE JEFFREY VINCENT BROWN, J.)

CONSENT MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND ASIAN AMERICAN LEGAL DEFENSE AND EDUCATON FUND IN SUPPORT OF PLAINTIFFS-APPELLEES

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The undersigned counsel of record certifies that the following listed persons and entities, as described in the fourth sentence of 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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FEBRUARY 21, 2024

Pursuant to Fed. R. App. P. 27 and 29 and Fifth Circuit Rule 29.1, proposed *amici curiae* the Brennan Center for Justice at New York University School of Law (the "Brennan Center") and Asian American Legal Defense and Education Fund ("AALDEF") respectfully move for leave to file the attached *amicus curiae* brief in support of Plaintiffs-Appellees. Undersigned counsel to *amici* contacted counsel to the parties to obtain their position on this motion. Counsel to all parties, including Plaintiffs-Appellees, Defendants-Appellants, and the United States, responded that they consent to the filing of this *amicus* brief.

IDENTITY AND INTERESTS OF PROPOSED *AMICI* CURIAE AND AUTHORITY TO FILE[1]

Proposed *amicus* the Brennan Center for Justice at New York University School of Law[2] is a nonprofit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. Through

[1] No counsel for a party authored the proposed *amicus* brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund its preparation or submission. No person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

[2] This brief does not purport to convey the position of New York University School of Law.

its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including by working to ensure fair and non-discriminatory redistricting practices and to protect the right of all Americans to vote. The Brennan Center has submitted *amicus curiae* briefs in a number of Supreme Court cases involving redistricting and/or the Voting Rights Act of 1965 ("VRA"), including *Allen* v. *Milligan*, 599 U.S. 1 (2023); *Brnovich* v. *Democratic National Committee*, 141 S. Ct. 2321 (2021); *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017); *Alabama Legislative Black Caucus* v. *Alabama*, 575 U.S. 254 (2015); *Shelby County* v. *Holder*, 570 U.S. 529 (2013); *Northwest Austin Municipal Utility District No. One* v. *Holder*, 557 U.S. 193 (2009); and *LULAC* v. *Perry*, 548 U.S. 399 (2005).

Proposed *amicus* Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a New York-based national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has documented the continued need for protection under the VRA. AALDEF has litigated cases around the country under the language access provisions of the VRA and seeks to protect the voting rights of language

minority, limited English proficient, and Asian American voters. AALDEF has also litigated cases that implicate the ability of Asian American communities of interest to elect candidates of their choice, including in coalition with Black and Hispanic communities, and also including lawsuits involving constitutional challenges to redistricting plans. *See, e.g.*, *OCA-Greater Houston* v. *Texas*, 867 F.3d 604 (5th Cir. 2017); *N.Y. Cmtys. for Change* v. *Cnty. of Nassau*, No. 602316/2024 (Nassau Cnty. Super. Ct., Feb. 7, 2024); *LULAC* v. *Abbott*, 3:21-cv-00259-DCG-JES-JVB (W.D. Tex. Nov. 16, 2021); *La Union Del Pueblo Entero* v. *Abbott*, 5:21-cv-00844-XR (W.D. Tex. Sept. 30, 2021); *Detroit Action* v. *City of Hamtramck*, No. 2:21-cv-11315 (E.D. Mich. June 3, 2021); *All. of South Asian Am. Labor* v. *Bd. of Elections in the City of New York*, No. 1:13- cv-03732 (E.D.N.Y. July 2, 2013); *Favors* v. *Cuomo*, 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Chinatown Voter Educ. All.* v. *Ravitz*, No. 1:06-cv-0913 (S.D.N.Y. Feb. 6, 2006); *Diaz* v. *Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997).

The Brennan Center and AALDEF have an interest in the proper interpretation of Section 2 of the Voting Rights Act and their proposed *amicus* brief

would be useful and relevant to this Court's reconsideration of the panel's decision *en banc*.

THE PROPOSED *AMICUS* BRIEF WOULD BE USEFUL AND RELEVANT

Whether to permit or deny *amicus* briefing "lies solely within the court's discretion." *United States ex rel. Gudur* v. *Deloitte Consulting LLP*, 512 F. Supp. 2d 920, 927 (S.D. Tex. 2007), *aff'd*, 2008 WL 324400 (5th Cir. Aug. 7, 2008) (citation omitted). Relevant factors for consideration "include whether the proffered information is 'timely and useful' or otherwise necessary to the administration of justice." *Id.* (quoting *Waste Mgmt., Inc.* v. *City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995)); *see Canamar* v. *McMillin Tex. Mgmt. Servs., LLC*, No. 08-CV-0516, 2009 U.S. Dist. LEXIS 108986, at *2 (W.D. Tex. Nov. 20, 2009) ("factors to consider when determining an amicus request include whether the information offered" is "useful" and "whether the amicus has unique information or perspective beyond what the parties can provide").

Proposed *amici curiae* the Brennan Center and AALDEF respectfully submit that the attached *amicus* brief would be useful in considering the issues raised in this appeal. Subsection (a) of Section 2 of the Voting Rights Act prohibits policies that result "in a denial or abridgement of the right of any citizen

of the United States to vote on account of race or color," or membership in a language minority group. 52 U.S.C. §§ 10301(a); 10303(f)(2). A violation is shown if "members of a class of citizens protected by subsection (a) . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

The proposed *amicus* brief explains why the text, legislative history, and purpose of Section 2 are consistent with Plaintiffs-Appellees' claims and legal theory. A multiracial class of plaintiffs may vindicate their rights under the VRA if its members suffer a common *injury* to their voting rights on account of race, color, or language minority status—even if all plaintiffs do not share a common racial *identity*. The brief highlights case law consistently finding that plaintiffs from multiple different race groups can suffer common injury from the same discriminatory practices, including in the voting rights context. The brief also discusses why the legislative history of the VRA supports plaintiffs' theory of liability and why permitting multiracial plaintiff classes under Section 2 is most consistent with the VRA's "broad remedial purpose of ridding the country of racial discrimination in voting." *Chisom* v. *Roemer*, 501 U.S. 380, 403 (1991) (cleaned up).

Finally, the brief discusses why claims brought by a multiracial class of voters under Section 2 are compatible with the robust and fact-intensive framework that Congress and the courts have established to evaluate Section 2 claims. *See Thornburg* v. *Gingles*, 478 U.S. 30 (1986). In particular, the brief explains why such claims do not contravene the Supreme Court's decision in *Bartlett* v. *Strickland*, 556 U.S. 1 (2009).

CONCLUSION

For the foregoing reasons, proposed *amici curiae* the Brennan Center and AALDEF respectfully request that this Court grant leave to file the attached *amicus* brief.

Respectfully submitted,

/s/ Paul D. Brachman

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FEBRUARY 21, 2024

CERTIFICATE OF COMPLIANCE

I, Paul D. Brachman, a member of the Bar of this Court and counsel for proposed *amici* Brennan Center for Justice and Asian American Legal Defense and Education Fund, certify, pursuant to Federal Rule of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B) and Fifth Circuit Rule 32(a)(g), that this motion is proportionately spaced, has a typeface of 14 points or more, and contains 2,118 words.

/s/ Paul D. Brachman
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FEBRUARY 21, 2024

CERTIFICATE OF SERVICE

I, Paul D. Brachman, hereby certify that on February 21, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Paul D. Brachman
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S. Rep. No. 97-417 (1982) 5, 10, 14

THE *AMICI*[1]

Amicus the Brennan Center for Justice at New York University School of Law[2] is a nonprofit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including by working to ensure fair and non-discriminatory redistricting practices and to protect the right of all Americans to vote. The Brennan Center has submitted *amicus curiae* briefs in a number of Supreme Court cases involving redistricting and/or the Voting Rights Act of 1965 ("VRA"), including *Allen* v. *Milligan*, 599 U.S. 1 (2023); *Brnovich* v. *Democratic National Committee*, 141 S. Ct. 2321 (2021); *Cooper* v. *Harris*, 137 S. Ct. 1455 (2017); *Alabama Legislative Black Caucus* v. *Alabama*, 575 U.S. 254 (2015); *Shelby County* v. *Holder*, 570 U.S. 529 (2013); *Northwest Austin*

[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund its preparation or submission. No person, other than the *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparing or submitting the brief.

[2] This brief does not purport to convey the position of New York University School of Law.

Municipal Utility District No. One v. *Holder*, 557 U.S. 193 (2009); and *LULAC* v. *Perry*, 548 U.S. 399 (2005).

Amicus Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a New York-based national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF has documented the continued need for protection under the VRA. AALDEF has litigated cases around the country under the language access provisions of the VRA and seeks to protect the voting rights of language minority, limited English proficient, and Asian American voters. AALDEF has also litigated cases that implicate the ability of Asian American communities of interest to elect candidates of their choice, including in coalition with Black and Hispanic communities, and also including lawsuits involving constitutional challenges to redistricting plans. *See, e.g.*, *OCA-Greater Houston* v. *Texas*, 867 F.3d 604 (5th Cir. 2017); *N.Y. Cmtys. for Change* v. *Cnty. of Nassau*, No. 602316/2024 (Nassau Cnty. Super. Ct., Feb. 7, 2024); *LULAC* v. *Abbott*, 3:21-cv-00259-DCG-JES-JVB (W.D. Tex. Nov. 16, 2021); *La Union Del Pueblo Entero* v. *Abbott*, 5:21-cv-00844-XR (W.D. Tex. Sept. 30, 2021); *Detroit Action* v. *City of*

Hamtramck, No. 2:21-cv-11315 (E.D. Mich. June 3, 2021); *All. of South Asian Am. Labor* v. *Bd. of Elections in the City of New York*, No. 1:13- cv-03732 (E.D.N.Y. July 2, 2013); *Favors* v. *Cuomo*, 881 F. Supp. 2d 356 (E.D.N.Y. 2012); *Chinatown Voter Educ. All.* v. *Ravitz*, No. 1:06-cv-0913 (S.D.N.Y. Feb. 6, 2006); *Diaz* v. *Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997).

INTRODUCTION

No longer subject to preclearance under Section 5 of the VRA, Galveston County used the 2021 redistricting process to dismantle a district in which Black and Latino voters had the opportunity to elect candidates of their choice. The trial court found that the County's 2021 redistricting process violated the VRA for the "stark" and "egregious" extent to which it denied Black and Latino voters equal voting rights. Applying long-standing Circuit precedent, a panel of this Court affirmed. The *en banc* Court should do the same. Plaintiffs are "members of a class of citizens" whose right to vote has been "deni[ed] or abridge[d] . . . on account of race or color, or [language minority status]." 52 U.S.C. § 10301. Accordingly, they may seek relief under Section 2 of the VRA.

The County argues that Section 2 does not protect the Black and Latino voters of Galveston, no matter how egregious the County's discrimination, because the plaintiffs do not share a common racial identity and therefore do not constitute a "class of citizens" protected by the VRA. That is incorrect. The text, legislative history, and purpose of the VRA all show that a "class" of voters may seek relief under Section 2 if they suffer a common ***injury***—deprivation of an equal opportunity to participate in the political process on account of race, color, or language minority status—even if the members of that class do not share a common racial ***identity***.

The County and its *amici* urge the Court to adopt an unduly narrow interpretation of Section 2, purportedly to prevent a forecasted flood of vote

dilution claims based on politics, not race. But the time-tested, rigorous, and fact-intensive judicial standards that courts have long used to evaluate Section 2 claims already serve that purpose, and work equally well whether the class at issue is multi- or monoracial. The factual inquiries embedded in those judicial standards are the proper mechanisms for separating claims based on race from claims based on politics, not the County's erroneous interpretation of the VRA. Indeed, in the 36 years that this Circuit has expressly authorized Section 2 claims brought by a multiracial class of citizens, the County's concerns have not been realized.

There is, in short, no legal or practical justification for the County's arguments. Congress intended the VRA to end racial discrimination in voting "comprehensively and finally." S. Rep. No. 97-417, at 5 (1982). Depriving plaintiffs of protection from a districting scheme that robs cohesive Black and Latino voters of an equal opportunity to elect candidates of their choice would frustrate that purpose. The *en banc* Court should reject the County's effort to uproot decades of VRA jurisprudence and affirm the district court's judgment.

ARGUMENT

I. SECTION 2 PROTECTS VOTERS WHO SUFFER A COMMON INJURY TO THEIR VOTING RIGHTS ON ACCOUNT OF RACE, COLOR, OR LANGUAGE MINORITY STATUS.

Subsection (a) of Section 2 of the VRA prohibits policies that result "in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color," or membership in a language minority group. 52 U.S.C. §§ 10301(a), 10303(f)(2). A violation is shown if "members of a class of citizens protected by subsection (a) . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). The County argues that "members of a class of citizens" must share the same identity or "possess homogenous characteristics" in order to seek relief under Section 2. Br. at 32 (citation omitted). That requirement is found nowhere in the statute, as this Court has long recognized. *Campos* v. *City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) ("There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."). To the contrary, the text, legislative history, and purpose of Section 2 show that "members of a class of citizens protected by subsection (a)" may sue together if they share a common *injury* to their voting rights caused by discrimination

on account of race, color, or language minority status—even if they do not share a common *identity*.

A. Section 2 permits claims by a class of voters who share a common injury, not necessarily a common identity.

Nothing in the text of Section 2 bars a class comprised of voters from different racial or ethnic groups from seeking relief from policies that deprive them of the ability to elect their candidate of choice for reasons prohibited by the VRA. To the contrary, so long as the voting rights of the class members are "deni[ed] or abridge[d]... on account of race or color" or language minority status, their claims fall squarely within the scope of Section 2.

A class comprised of members of multiple racial or ethnic groups can, for example, suffer common injury on account of their race (because they are nonwhite), on account of their color (because they do not pass for white), or on account of their language status (because they speak a common language other than English). The County's contrary interpretation assumes limiting language that Congress did not use. Congress did not prohibit only policies that abridge the rights of a "single racial group on account of its race" nor limit Section 2's scope to only those practices that result in a "class of one race of voters" having less opportunity to elect the candidates of their choice.

Congress knew how to—and did—use such limiting language where it intended to do so. Certain of VRA's language minority protections, for exam-

ple, apply where "more than five per centum of the citizens of voting age residing in [a] State or political subdivision are members of a *single* language minority." 52 U.S.C. § 10303(f)(3) (emphasis added). That Congress did not use such limiting language in subsections (a) and (b) of Section 2 refutes the County's unduly narrow interpretation of "class." *See Loughrin* v. *United States*, 573 U.S. 351, 358 (2014) (Congress presumptively "intended a difference in meaning" when it "include[d] particular language in one section of a statute but omit[ted] it in another" (citation omitted)).

Absent such limiting language in subsection (b), the word "class" is most naturally understood to refer to plaintiffs who "possess the same interest and suffer the same injury"—specifically, a common discriminatory injury. *See Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 348-49 (2011) (citation omitted). And Courts have long recognized that a multiracial group of nonwhite plaintiffs can suffer a common discriminatory injury when they are disadvantaged in the same way relative to whites. In *Keyes* v. *School District No. 1*, for example, the Supreme Court held that Black and Latino students challenging Denver's segregated school system "suffer[ed] identical discrimination in treatment when compared with the treatment afforded Anglo students." 413 U.S. 189, 198 (1973). Likewise, in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, the Court considered whether a redistricting plan "had been created with the purpose or effect of diluting the voting strength of

nonwhites (blacks and Puerto Ricans)" relative to white voters. 430 U.S. 144, 149-50 & n.5 (1977) (classifying Puerto Rican and Black citizens collectively as a "nonwhite" group).

Interpreting Section 2 to permit suits by multiracial groups of nonwhite minority voters who are disadvantaged relative to white majority voters is thus entirely consistent with the common understanding of the word "class" and judicial practice. *See FAA* v. *Cooper*, 566 U.S. 284, 292 (2012) ("[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." (cleaned up)). Employing that common understanding, courts analyzing voting policies have long recognized that members of a multiracial group of voters share a common injury when they encounter common forms of discrimination. *See, e.g.*, *Coal. for Educ. in Dist. One* v. *Bd. of Elections of City of N.Y.*, 370 F. Supp. 42, 55-56 & n.38 (S.D.N.Y. 1974), *aff'd*, 495 F.2d 1090 (2d Cir. 1974) (considering Black, Latino, and Asian voters a single class because of "similarities in the problems incurred by these groups with respect to voting rights").

Rather than reject that basic concept, Congress has embraced it. In 1982, Congress amended Section 2 of the VRA to codify aspects of the Supreme Court's holding in *White* v. *Register*, a case that arose in the context of Texas's unfortunate history of discriminating against both Black and Latino

voters, 412 U.S. 755 (1973). S. Rep. 97-417, at 21-22. And courts applying *White*'s standards, prior to 1982, had concluded that districting policies in Tarrant County, Texas, had worked "to 'cancel and minimize' minority voting strength" of Black and Latino voters. *Graves* v. *Barnes*, 378 F. Supp. 640, 644-48 (W.D. Tex. 1974); *see also Graves* v. *Barnes*, 408 F. Supp. 1050, 1052 (W.D. Tex. 1976) (reaffirming 1974 findings). Congress was thus well aware that discriminatory voting practices could impair the rights of Black and Latino voters alike when it amended the VRA in 1982. Section 2 is properly understood in that context.

B. The legislative history of Section 2 shows that Congress intended Section 2 to protect multiracial minority coalitions.

Congress has long understood that voting policies can discriminate against multiple minority groups, and long been aware of precedent allowing multiracial classes of voters to challenge such policies. Yet Congress has never amended the VRA to foreclose those claims. That is strong evidence that Congress intended to permit Section 2 claims by minority voters of different racial backgrounds who nevertheless suffer a common discriminatory injury.

Congress understood in 1975 that minorities of different racial groups often face the same discrimination in voting, causing common injury to their voting rights on account of race. Specifically, the Senate highlighted that Texas had "a substantial minority population, comprised primarily of Mexican

Americans and blacks[,]" and a "long history of discriminating against members of both minority groups." *See* S. Rep. No. 94-295, at 25 (1975). The Senate recognized that "[e]lection law changes which dilute ***minority*** political power" had "effectively den[ied] Mexican American and black voters in Texas political access." *Id.* at 27-28 (emphasis added); H. Rep. No. 94-146, at 18-20 (1975) (same); *see also Salas* v. *Sw. Tex. Jr. College Dist.*, 964 F.2d 1542, 1549 & n.19 (5th Cir. 1992) ("The Committee noted that Mexican Americans suffered from many of the same barriers to political participation confronting [B]lacks."). It makes no sense that Congress would identify these issues as a basis for extending the VRA if, as the County argues, such discrimination were beyond the reach of the VRA's protections. This Court should reject such a strained interpretation of the VRA's legislative history.

Further, at the time that Congress reauthorized the VRA in 2006, at least two courts of appeal, including this Court, had explicitly held that Section 2 protects a multiracial class of citizens. *See LULAC* v. *Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1499-1502 (5th Cir.), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc); *Concerned Citizens of Hardee Cnty.* v. *Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990). Multiple federal district courts had done the same. *See, e.g.*, *Arbor Hill Concerned Citizens Neighborhood Ass'n* v. *Cnty. of Albany*, 281 F. Supp. 2d 436, 445 (N.D.N.Y. 2003), *rev'd in part on other grounds*, 357 F.3d 260 (2d Cir. 2004) ("[I]t was

entirely appropriate for the Magistrate Judge to combine black and Hispanic populations in his analysis."); *LULAC* v. *N. E. Indep. Sch. Dist.*, 903 F. Supp. 1071, 1092 (W.D. Tex. 1995) ("There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."). And two other circuits had implicitly accepted that a multiracial class could bring a vote dilution claim. *See Bridgeport Coal. for Fair Representation* v. *City of Bridgeport*, 26 F.3d 271, 275-77 (2d Cir.) (upholding district court finding that Black and Latino voters satisfied their burden under *Gingles*), *vacated on other grounds*, 512 U.S. 1283 (1994); *Badillo* v. *City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992) (concluding that vote dilution claim brought by Black and Latino voters failed because the minority voters were not politically cohesive, a finding that would be unnecessary if such claims were impermissible as a matter of law). No members of Congress raised concerns about such claims, and Congress did not amend Section 2 to preclude such claims.

In 1975 and 1982, Congress also was aware of and endorsed the application of Section 5 of the VRA to multiracial classes. Prior to 1982, the Department of Justice regularly enforced Section 5 on behalf of multiple racial groups. *See, e.g.*, Letter from J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, to Stanley E. Michels, Chairman, Law Committee,

Democratic Party, New York County (Sep. 3, 1975), *available at* http://tinyurl.com/3b833smv, Letter from Wm. Bradford Reynolds, Assistant Attorney General, Civil Rights Division, to Hon. David Dean, Texas Secretary of State, Elections Division (Jan. 25, 1982), *available at* http://tinyurl.com/3b833smv. The Supreme Court took no issue with this practice, explicitly using the term "nonwhite" to refer to a group of voters that included both Black and Puerto Rican citizens. *Carey*, 430 U.S. at 150 & n.5. And Congress used parallel language in Sections 2 and 5 when defining the populations protected by those provisions. *Compare* 52 U.S.C. § 10301(a) ("which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color [or language minority]"), *with id.* § 10304(b) ("that has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color [or language minority status]"). It is implausible that Congress intended that Section 5 would reach multiracial classes but Section 2, which contains parallel language, would not. *See Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language . . . indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." (citation omitted)).

Finally, interpreting the VRA to permit multiracial classes is consistent with other civil rights laws enacted by Congress, all of which likewise protect multiracial groups of plaintiffs who suffer common discriminatory injuries. For example, Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, plaintiffs can establish injury when discriminatory practices target Black and Latino neighborhoods alike. *See Bank of Am. Co.* v. *City of Miami*, 581 U.S. 189, 200 (2017). And plaintiffs bringing suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, may form a single class even if they have different racial identities, because they suffer the same injury based on discrimination against "nonwhites . . . on the basis of race." *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642, 647-48 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k); *see also Loc. No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 504-05 (1986) (suit brought by Black and Hispanic firefighters).

C. Permitting a multiracial class to bring suit under Section 2 comports with the broad remedial purposes of the VRA.

Courts use a "non-blinkered" approach to statutory interpretation that considers the "purpose" of a statute. *Gundy* v. *United States*, 139 S. Ct. 2116, 2126 (2019). Remedial statutes like the VRA must be interpreted broadly. *See Chisom* v. *Roemer*, 501 U.S. 380, 403 (1991) ("Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of ridding the country of racial discrimination in voting." (cleaned up)); *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 565-67 (1969).

Congress has specifically stated that the purpose of the VRA is to deal with "voting discrimination, not step by step, ***but comprehensively and finally.***" S. Rep. No. 97-417, at 5 (emphasis added). Dealing with voting discrimination comprehensively, as Congress intended, requires acknowledging that discrimination may target and injure multiple minority groups in the same way, because they are nonwhite. In voting, as in other areas of American life, laws and policies frequently draw sweeping and invidious distinctions between whites, on the one hand, and nonwhites, on the other. For example, early naturalization law limited the right to citizenship to "free white persons," without identifying individual minorities that would be excluded from the right. Naturalization Act of 1790, 1 Stat. 103, § 1; *see also* Ga Const. of 1777, art. IX; S.C. Const. of 1778, arts. XIII, XV; Ala. Const. of 1819, art. III, § 4; Ark. Const. of 1836, art. IV, § 2. Interpreting one such statute, the Supreme Court observed that the words "white person" did not merely exclude specific categories of minorities known to the authors of the statute, such as "[Blacks] and Indians," but more straightforwardly included "only free white persons" *to the exclusion of everyone else*. *Ozawa* v. *United States*, 260 U.S. 179, 195 (1922) (denying a Japanese person the right to naturalization); *see also United States* v. *Thind*, 261 U.S. 204, 215 (1923) (same for a person from India of "high-caste"); *United States* v. *Balsara*, 180 F. 694, 696 (2d Cir. 1910) ("We

think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races . . . .").

So, too, in other contexts. In an equal protection challenge to state-mandated school segregation, the Supreme Court framed the question as whether "a state can be said to afford . . . the equal protection of the laws by giving [a Chinese child] the opportunity for a common school education in a school which receives only *colored children of the brown, yellow, or black races*." *Gong Lum* v. *Rice*, 275 U.S. 78, 85 (1927) (emphasis added); *see also id.* at 82 (describing the challenged provision of the Mississippi Constitution as divid[ing] the educable children into those of the pure white or Caucasian race, on the one hand, and the brown, yellow, and black races, on the other"). Anti-miscegenation laws often "prohibit[ed] only interracial marriages involving white persons"—but not interracial marriages between nonwhite minorities—in order "to maintain White Supremacy." *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). In those statutes, the term "white persons" was used in "oppos[ition] to [Black] and also the red, yellow, and brown races." *Scott* v. *Epperson*, 284 P. 19, 20 (Okla. 1930). This well-established history shows that *amicus* for the County is simply wrong to argue that "[n]on-Whiteness, of course, is neither a race nor a color." Brief of Judicial Watch as *Amicus Curiae* at 17.

To achieve the VRA's broad remedial purpose, Section 2 must be capable of addressing the practical reality of discrimination against minority voters because they are not white—including through suits brought by multiracial groups of nonwhite voters.

II. CLAIMS BROUGHT BY MULTIRACIAL CLASSES OF VOTERS ARE CONSISTENT WITH THE JUDICIAL FRAMEWORK FOR EVALUATING SECTION 2 CLAIMS.

Congress and the courts have established a robust and fact-intensive framework for evaluating Section 2 claims that applies equally well to multiracial classes as it does to monoracial classes. The relevant inquiries do not hinge on whether minority voters in a class share an identity, but whether a cohesive minority group has been denied voting rights on account of race. Multiracial classes thus do not run afoul of the Supreme Court's Section 2 jurisprudence. *Cf. Bartlett* v. *Strickland*, 556 U.S. 1, 16-17 (2009) (rejecting proposed crossover district because it would "require [the Court] to revise and reformulate . . . [its] § 2 jurisprudence").

Plaintiffs bringing vote dilution claims under Section 2 of the VRA must (1) show that the relevant class of voters is "sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district"; (2) "the minority group must be able to show that it is politically cohesive"; and (3) "the minority must be able to demonstrate that the white majority votes

sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Allen* v. *Milligan*, 599 U.S. 1, 18 (2023) (citations and quotation marks omitted). Even if these three preconditions are met, a court must still undertake an "'intensely local appraisal' of the electoral mechanism at issue, as well as a 'searching practical evaluation of the past and present reality' to determine whether, under the totality of the circumstances, a violation has been shown." *Id.* at 19 (quoting *Thornburg* v. *Gingles*, 478 U.S. 30, 79 (1986)).

Nothing about claims brought by a multiracial class of voters is inconsistent with that framework. Whether plaintiffs consist of a class of Black voters only or, as in this case, Black and Latino voters together, courts must still examine, at a fact-specific, local level, whether each of the preconditions is satisfied and whether the totality of the circumstances reflects a violation of the VRA. If plaintiffs cannot make the necessary showing because, for example, different racial groups within a district are not politically cohesive, then their claims will fail for that reason. *See, e.g.*, *Overton* v. *City of Austin*, 871 F.2d 529, 536 (5th Cir. 1989); *Brewer* v. *Ham*, 876 F.2d 448, 453 (5th Cir. 1989); *Rollins* v. *Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205, 1214-1215 & n.21 (5th Cir. 1996). But where, as here, a multiracial class of plaintiffs can satisfy each of the *Gingles* preconditions, their claims are viable.

Amici in support of the County argue that the preconditions can *never* be satisfied by a multiracial class because, for example, the Black voters in a

class consisting of Black and Latino voters may not be able to elect their preferred political candidate alone. *See* Brief of National Republican Redistricting Trust and Honest Elections Project as *Amicus Curiae* at 12-13; Brief of Judicial Watch as *Amicus Curiae* at 10. But that is irrelevant. The question for purposes of a multiracial class is whether minority voters who comprise the class can constitute a majority of a district and cohesively prefer and support candidates rejected by the white majority. If so, they satisfy the *Gingles* preconditions.

The "totality of the circumstances" phase of the analysis also is well-suited to testing the claims of a multiracial class. To the extent there is a history of white/nonwhite discrimination in a jurisdiction, that would weigh in favor of claims brought by a multiracial class of voters. For example, in the 2010 redistricting cycle, Texas was denied preclearance in part because the state's congressional and state legislative maps cracked "a tripartite coalition of the Asian-American, Black, and Hispanic communities [that] consistently elect[ed] its candidate of choice." *See Texas* v. *United States*, 887 F. Supp. 2d 133, 173, 178 (D.D.C. 2012), *vacated and remanded on other grounds*, 570 U.S. 928 (2013). Indeed, there is a "long, well-documented history of discrimination" in Texas that has impaired "the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process." *Perry*, 548 U.S. at 439 (quoting *Vera* v. *Richards*, 861 F. Supp. 1304, 1317 (S.D.

Tex. 1994)). In this case, the district court correctly concluded that the totality of the circumstances supported the plaintiffs' claims based in part on "extensive evidence" showing the "pervasive socio-economic disparities" between minority communities, on the one hand, and the white population, on the other. ROA.16022-16024.

The County suggests that *Bartlett* v. *Strickland* shows that claims brought by multiracial classes are inconsistent with the *Gingles* framework, *see* Br. at 22, but that case shows just the opposite. In *Bartlett*, the Supreme Court held that Black voters could not meet the *Gingles* preconditions because they formed "only 39 percent of the voting-age population" in the district, and could not "elect [a preferred] candidate based on their own votes" without assistance from white "crossover" voters. *Bartlett*, 556 U.S. at 14-15. The case establishes only that *minority* voters must constitute a numerical majority of a proposed district in order to satisfy the first *Gingles* precondition. The Court did not rule that multiple groups of minority voters cannot constitute such a majority and was careful to state that it was not reaching that question. *Id.* at 13-14.[3]

[3] For the reasons discussed above, *supra* I.A, members of a multiracial class of citizens who suffer a common injury to their individual voting rights for reasons prohibited by subsection (a) of Section 2 are all qualified to be "members of a class of citizens" for purposes of subsection (b).

The *Bartlett* Court made this distinction for good reason: to the plurality, a rule that allowed Section 2 to protect minority voters who could never form a majority of a new district would call into question the *Gingles* framework. *See id.* at 16. Specifically, the plurality reasoned that "[m]andatory recognition of claims in which success for a minority depends upon crossover majority voters would create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates." *Id.* That tension would exist in the context of crossover voting because "[t]he third precondition, focused on racially polarized voting, establishes that the challenged districting thwarts a distinctive *minority* vote at least plausibly on account of race." *Milligan*, 599 U.S. at 19 (emphasis added) (cleaned up). Thus, properly understood, *Bartlett* holds that *minority* voters do not suffer vote dilution on account of race when their ability to elect the candidate of their choice depends on attracting voters from the white *majority*. 556 U.S. at 20 (concluding that in such crossover districts "minority voters have the same opportunity to elect their candidate as any other political group with the same relative voting strength.").

The concerns identified in *Bartlett* do not arise where, as here, individuals of multiple racial identities form a single class of minority voters, all of whom suffer vote dilution on account of race. Unlike in *Bartlett*, the plaintiffs in this case do not, and need not, rely on members of the white majority to

elect their preferred candidates. *See* ROA.15887; ROA.16015-16017. An effective majority-minority district existed in Galveston for decades, until 2021, when the County redistricted and submerged politically cohesive Black and Latino voters in districts with white majorities and high degrees of racial polarization. *See* ROA.15911; ROA.15949-15950. The *Bartlett* Court recognized that "it is 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." 556 U.S. at 19. That the "minority group" in this action includes Black and Latino voters together makes the County's decision no less a "special wrong."

Nor is there any reason to believe, as the County's *amicus* threatens, that claims brought by multiracial classes of voters will run out of control with "no limiting principle." Brief of Judicial Watch as *Amicus Curiae* at 15. For at least 36 years, the Fifth Circuit has consistently permitted claims brought by multiracial classes. *See Campos*, 840 F.2d at 1244. In the decades since, only a small number of such claims have been advanced. Of those, a smaller number have been successfully sustained, owing to the challenges of meeting the *Gingles* factors and the searching totality of the circumstances inquiry. *See, e.g.*, *Midland*, 812 F.2d at 1494; *Campos*, 840 F.2d at 1240; *N. E. Indep. Sch. Dist.*, 903 F. Supp. at 1071. In other words, just because claims brought

by a multiracial class of voters are permitted as a matter of law does not guarantee that such claims will succeed as a matter of fact.

In sum, the *Gingles* preconditions and totality of the circumstances analysis can be faithfully applied to determine whether a multiracial class has satisfied the requirements of Section 2, and that time-tested judicial framework provides the appropriate "limiting principle" for such claims. There is thus no justification for the *en banc* Court to categorically impose an artificial legal limitation on the classes of voters that may bring vote dilution claims. Particularly not where, as here, the text, legislative history, and purpose of the VRA all show that Congress intended no such limitation.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

/s/ Paul D. Brachman

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FEBRUARY 21, 2024

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I, Paul D. Brachman, a member of the Bar of this Court and counsel for *amici* Brennan Center for Justice and Asian American Legal Defense and Education Fund, certify, pursuant to Federal Rule of Appellate Procedure 29(a)(5), 32(a)(5), 32(a)(6), and 32(a)(7)(B) and Fifth Circuit Rule 32(a)(g), that the attached Brief of *Amicus Curiae* Brennan Center for Justice at NYU School of Law and Asian American Legal Defense and Education Fund in Support of Plaintiffs-Appellees is proportionately spaced, has a typeface of 14 points or more, and contains 5,206 words.

/s/ Paul D. Brachman
PAUL D. BRACHMAN

FEBRUARY 21, 2024

CERTIFICATE OF SERVICE

I, Paul D. Brachman, hereby certify that on February 21, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Paul D. Brachman
PAUL D. BRACHMAN

FEBRUARY 21, 2024