No. 23-40582

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TERRY PETTEWAY, ET AL.,

Plaintiffs-Appellees,

v.

GALVESTON COUNTY, TEXAS, ET AL.

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Galveston
Division, No. 3:22-cv-57-JVB (consolidated cases Nos.
3:22-cv-117-JVB and 3:22-cv-93-JVB)

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF APPELLEES THE UNITED STATES AND PRIVATE PLAINTIFFS AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS

In accordance with Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 29(a)(4)(A), the Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit membership organization with no parent corporations in which any person or entity owns stock.

Under Federal Rule of Appellate Procedure 29(a)(2), the undersigned counsel of record certifies that it authored the Brief in whole and that no party, or party's counsel, or person other than Amicus, its members, or its counsel in this case contributed money intended to fund preparing or submitting the Brief.

The undersigned counsel of record further certifies that all parties to this case, the Petteway Plaintiffs, the NAACP Plaintiffs, the United States, and the Defendants have consented to this filing.

INTEREST OF AMICUS CURIAE[1]

Formed at the request of President John F. Kennedy in 1963, Amicus Curiae Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. Since its inception, the Lawyers' Committee has had an active voting rights practice and has fought to ensure all Americans have an equal opportunity to participate in the electoral process.

Section 2 of the Voting Rights Act of 1965 is a major tool used by the Lawyers' Committee to fight against voting discrimination. The Lawyers' Committee has litigated significant voting rights cases including *Shelby County v. Holder*, 570 U.S. 529 (2013), *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), *Young v. Fordice*, 520 U.S. 273 (1997), *Clark v. Roemer*, 500 U. S. 646 (1991), and *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016). On behalf of private plaintiffs, the Lawyers' Committee has filed dozens of cases under Section 2 of the Voting Rights Act in the last decade and currently has several active Section 2 cases.

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[1] Pursuant to 5th Cir. R. 29(e), counsel for Amicus Curiae represent that they authored this Brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than Amicus or their counsel, made a monetary contribution intended to fund the preparation or submission of this Brief.

Additionally, the Lawyers' Committee has participated as Amicus Curiae in numerous voting rights cases before the United States Supreme Court, including cases that have defined the contours of Section 2 of the Voting Rights Act, including *Thornburg v. Gingles*, 478 U.S. 30 (1986), *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021), and *Allen v. Milligan*, 599 U.S. 1 (2023), among others. The Lawyers' Committee has also published numerous reports on the history of voting discrimination, many of which have been cited by members of Congress in various committee reports and legislative documents in connection with reauthorizations and amendments to the Voting Rights Act. For all these reasons, Amicus Curiae has a direct interest in this case because it raises important voting rights issues central to the organization's mission.

INTRODUCTION

The district court's decision applied settled law of this Circuit to the abundant factual record to reach its conclusion that Galveston County Commissioner maps denied Black and Latinx voters the equal opportunity to participate in the political process in violation of Section 2 of the Voting Rights Act ("VRA"). On appeal, Defendants-Appellants ("Defendants") seek not only to have this Court overrule this precedent, but also to have this Court jettison Section 2 in its entirety. Amicus writes to aid this Court in examining certain arguments raised by Defendants and to demonstrate how at odds they are with this Court's and the Supreme Court's VRA jurisprudence.

First, Defendants argue that Section 2 is limited to claims brought by a single minority voting group at a time. Nothing in the plain language or legislative history of Section 2 supports this construction. That this Court and virtually every other Circuit Court to address the issue have endorsed the availability of "coalition" claims under Section 2 is therefore neither surprising, nor—more important—subject to challenge.

Second, Defendants ask this Court to overturn the district court's findings as "clear error" as to the first *Gingles* precondition—which requires plaintiffs to produce an illustrative, reasonably configured, majority-minority plan—on the basis that the court approved an illustrative plan that included minority populations that

were located at different areas of the County. But Defendants fail to address that the plan accepted by the district court was "least changed" from the County's own plan of the last decade.

As to the second and third *Gingles* preconditions, which require a demonstration of voting cohesion of the relevant minority populations and of white voters voting as a bloc to usually defeat the candidates of choice of the minority populations, Defendants add a new wrinkle. Plaintiffs, they submit, must also demonstrate that it is race, not partisanship that is driving the voting cohesion. This is contrary to this Circuit's authority and no Supreme Court precedent even hints at the stringent new standards that Defendants press.

Finally, Defendants argue Section 2 is unconstitutional because it has no temporal limit. The idea that Section 2 must have a "temporal limit" to sustain its constitutionality makes little sense, when the statute is intended to implement the guarantees of the Fourteenth and Fifteenth Amendments, which themselves have no "temporal limit."

Whether viewed as a facial or "as applied" constitutional challenge, Defendants' argument fails. Section 2 does not itself create any suspect classification that would trigger strict scrutiny. To the contrary, Section 2 is designed to protect against racial discrimination against any member of any demographic group, and can be enlisted by white voters as well as voters of color to secure equal

opportunity in the political process. Section 2 easily meets the rational basis test as recently reaffirmed by the Supreme Court in *Allen v. Milligan*, 599 U.S. 1 (2023).

For these reasons, as more fully set forth below, this Court should affirm the district court's order.

I. A COALITION of BLACK AND HISPANIC VOTERS MAY BRING A SECTION 2 CLAIM.

Defendants ask this Court to revisit its past decisions and rule that coalition claims, i.e., claims involving two or more groups of minority voters forming a coalition to elect the coalition's candidate of choice, are impermissible under Section 2. Defs.' Br. at 18. They have not provided a compelling reason for this Court to abandon its longstanding legal interpretation authorizing such claims.

A. The Fifth Circuit Has Established Long-Standing Precedent Authorizing Coalition Claims Under the VRA.

The Fifth Circuit, including an en banc panel, has consistently ruled that coalition claims are authorized under Section 2 of the VRA. *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993) (en banc) ("If blacks and Hispanics vote cohesively, they are legally a single minority group, and elections with a candidate from this single minority group are elections with a viable minority candidate."); *LULAC, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500–02 (5th Cir. 1987) (finding no "clear error" in record on cohesiveness of Black and Hispanic coalition); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir.

1988) (finding Hispanic and Black voters "a protected aggrieved minority" under Section 2), *reh'g denied*, 849 F.2d 943 (1988); *Brewer v. Ham*, 876 F.2d 448, 453–54 (5th Cir. 1989) (assessing political cohesion of Black, Hispanic, and Asian voters); *Overton v. City of Austin*, 871 F.2d 529, 536 (5th Cir. 1989) (assessing political cohesion of Black and Mexican-American voters).

B. All But One Circuit Has Recognized the Viability of Coalition Claims Under Section 2.

Beyond the Fifth Circuit, virtually every circuit court to consider the issue, has held multi-member minority coalitions cognizable under Section 2 of the VRA.[2]

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[2] *See Latino Pol. Action Comm., Inc. v. City of Bos.*, 784 F.2d 409, 414 (1st Cir. 1986) (rejecting Section 2 claim because of lack of evidence of cohesion, "particularly if Blacks, Hispanics and Asians are treated as a single group"); *Black Pol. Task Force v. Galvin*, 300 F. Supp. 2d 291, 294 n.1 (D. Mass. 2004) (holding district lines must be redrawn for Black voters in coalition claim involving Black and Hispanic voters); *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 235–36 (D. Mass. 2017) (endorsing coalition claims); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 29 F.3d 271, 276 (2d Cir. 1994) (explaining a coalition claim of Black and Hispanic voters may be considered under Section 2 if *Gingles* factors are met), *vacated on other grounds*, 512 U.S. 1283 (1994); *Pope v. Cnty. of Albany*, 687 F.3d 565, 572 n.5 (2d Cir. 2012) (reviewing Section 2 claims of Hispanic and Black voters); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 405 (S.D.N.Y. 2004) (following "Second Circuit in assuming blacks and Hispanics can be combined in a section 2 claim"); *Page v. Bartels*, 248 F.3d 175, 198 (3d Cir. 2001) (remanding to district court for three-judge panel to hear Section 2 claims of Black and Hispanic voters); *Emison v. Growe*, 782 F. Supp. 427, 438, 448 (D. Minn. 1992) (assessing coalition claim of Black, native, Asian, and white voters), *overruled on other grounds by Growe v. Emison*, 507 U.S. 25 (1993); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989) (considering Section 2 coalition claim by Black and Hispanic voters), *overruled on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (en banc); *Ariz. Minority Coal. for Fair*

See Defs.' Br. at 29, 32. Only one circuit has ruled otherwise. *Nixon v. Kent*, 76 F.3d 1381, 1386–92 (6th Cir. 1996).

Contrary to Defendants' argument, Defs.' Br. at 38–39, *Bartlett v. Strickland*, 556 U.S. 1 (2009), does not suggest otherwise. There the Court emphasized that claims concerning "coalitions" of minority voting groups are analytically distinct from claims concerning "coalitions" of white and minority voters (also known as

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Redistricting v. Ariz. Indep. Redistricting Comm 'n, 366 F. Supp. 2d 887, 904 (D. Ariz. 2005) (recognizing viability of coalition claims under Section 2); *Large v. Fremont Cnty.*, 709 F. Supp. 2d 1176, 1195–1202 (D. Wyo. 2010), *aff'd*, 670 F.3d 1133 (10th Cir. 2012) (finding permissible coalition between members of two tribes, Eastern Shoshone and Northern Arapaho); *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1570–71 (N.D. Fla. 1992) (recognizing coalition claim of Dominican, Puerto Rican, and Cuban voters in Dade County), *rev'd on other grounds*, *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990) (holding "[t]wo minority groups (in this case blacks and hispanics) may be a single section 2 minority if they can establish that they behave in a politically cohesive manner"); *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1368 (N.D. Ga. 2001) (finding minority groups "may be combined to form a single-majority district"), *aff'd*, 296 F.3d 1065 (11th Cir. 2002); *Broward Citizens for Fair Districts v. Broward Cnty.*, No. 12-60317-CIV, 2012 WL 1110053, at *6 (S.D. Fla. Apr. 3, 2012) (citing *Hardee County* for the proposition "[t]he Eleventh Circuit has held that two minority groups may be considered a single minority for the purposes of a Section 2 claim"). In *Frank v. Forest County*, 336 F.3d 570 (7th Cir. 2003), *See* Defs.' Br. at 32, the court did not rule that coalitions of minority voters could not bring a Section 2 claim. Rather, the court merely held that plaintiffs had failed to meet their burden on political cohesion to support a cognizable coalition, not that the VRA prohibits coalition claims altogether. *Frank*, 336 F.3d. at 576 (indicating plaintiffs offered no evidence of political cohesion between Black and Native American voters in endogenous elections or common interests regarding county government).

"crossover" claims).[3] *Bartlett*, 556 U.S. at 13–14. The Court rejected crossover claims as cognizable under Section 2 of the VRA, because by definition, such a coalition would preclude plaintiffs' meeting the third *Gingles* precondition that requires a showing of white bloc voting precluding the minority population from electing candidates of their choice. *Id.* at 16. Claims brought by coalitions of minority voters create no such tension with the third *Gingles* precondition. The *Bartlett* Court emphasized that its Opinion was not prohibiting coalitions of minority voting groups:

> This Court has referred sometimes to crossover districts as "coalitional" districts, in recognition of the necessary coalition between minority and crossover majority voters. But that term risks confusion with coalition-district claims in which two minority groups form a coalition to elect the candidate of the coalition's choice. We do not address that type of coalition district here.

Id. at 13–14 (citations omitted). *Bartlett* clearly leaves open the window for such claims, and in no way suggests that this Court's long-standing acceptance of minority coalition claims under Section 2 of the VRA should be abandoned.

C. The Statutory Language of Section 2 and Its Legislative History Are Not Contrary to Fifth Circuit Precedent.

[3] *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), relied on by Defendants, similarly dealt with such "crossover" claims, not with a coalition of minority voters, and quoted this Court's decision in *Campos* with approval.

The plain language of the VRA does not even hint at a limitation against claims brought by coalitions of voters of color. Section 2 prohibits states and other political subdivisions from using voting qualifications or prerequisites to voting or standards, practices, or procedures "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote *on account of race or color* . . . . ." 52 U.S.C. § 10301(a) (emphasis added). Subsection (b) establishes a violation of subsection (a) if, based on a totality of the circumstances, the political processes "are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* at 10301(b). By its very terms, Section 2 thus encompasses a claim brought on behalf of any "class of citizens" to protect them from infringements on their right to vote "on account of race or color." *Id.* at § 10301(a)–(b). The class is defined by membership in the group, however composed, which is discriminated against "on account of race or color." *Id.* Nothing in the plain language of the statute precludes the "members of a class of citizens" from being comprised of multi-racial minority voters.

Furthermore, the legislative history of the VRA explicitly negates Defendants' claim that Congress envisioned Section 2 protections only for Black voters, and not voters of any other group. Defs.' Br. at 25. The legislative history from both the

1975 and 1982 Reauthorizations of the VRA supports Congress's recognition that different minority groups could experience discrimination in similar ways. The 1975 Reauthorization of the VRA—which at the time was expanded to include language minority voters—specifically highlights Black and Hispanic voters as one "substantial minority population" in Texas experiencing discrimination in similar ways. S. REP. NO. 94-295 at 25 (1975). The 1975 Senate Report notes "[e]vidence before the Subcommittee documented that Texas also has a long history of discriminating against members of both minority groups in ways similar to the myriad forms of discrimination practiced, against [B]lacks in the South." *Id.*

In the 1982 Senate Report, Congress reaffirmed Section 2's general protections of the "right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy." S. REP. NO. 97-417 at 28 (1982). Many of the references to Black and Hispanic voters in the 1982 Senate Report thus describe similar circumstances in which each group experiences discrimination in voting and lack an equal opportunity to elect their candidates of choice. *See, e.g.*, *id.* at 5–7 (referencing Black people in an explanation of the history of the VRA), 11 (referencing Black and Latino voters in Section 5 preclearance decisions), 22 (discussing Black and Latino voters in *White v. Regester*, 412 U.S. 755 (1973)), 64–65 (discussing the need for bilingual elections for Latinos and other language

minority groups). The discussion throughout the legislative history of the 1982 Reauthorization indicates that voters of color from different racial/ethnic and language communities share a common experience with discrimination in voting such that Congress needed to extend the protections of the VRA. *See id.*

In sum, Defendants have provided this Court with no reason to veer from its settled precedent. Claims brought by coalitions of minority voters are cognizable under Section 2 of the VRA.

II. THE BLACK AND HISPANIC POPULATION IN PRECINCT 3 IS GEOGRAPHICALLY COMPACT TO SATISFY *GINGLES I*.

After hearing more than a week of testimony from experts on both sides, the County's map drawers, and fact witnesses in the community, the district court concluded Black and Hispanic voters in Galveston County were "sufficiently numerous" and "geographically compact" to satisfy *Gingles I*. *See Thornburg v. Gingles*, 478 U.S. 30, 50 (explaining that the first *Gingles* precondition, the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"). The district court made extensive findings in support of its conclusion as to *Gingles I*, a conclusion that rested on extensive findings of fact and that should be affirmed under FED. R. CIV. P. 52.

Despite these findings, Defendants appear to argue that there is a hitherto unknown districting principle that renders illustrative plans unsuitable as a matter of

"clear error," if they include "two [minority] populations [that] are not in the same area of the County" and one minority population that is "evenly dispersed throughout" the County. Defs.' Br. at 55. The irony of Defendants' position should not be lost, as here the illustrative plan adopted by the district court was a "least change" map from the County's own plan from the previous decade which had a majority-minority coalition district for three decades. District Court Order ¶¶ 83–88 (explaining Cooper used "least-change" approach deemed acceptable based on characteristics of its population changes over past decade); *Id.* ¶¶ 89–90 (explaining Fairfax developed illustrative plan "using least-change approach to equalize population") *Id.* ¶¶ 89–95 (explaining Rush developed illustrative plans that "keep together communities of interest" in Precinct 3).

Beyond that, Defendants' heavy reliance on *LULAC v. Perry*, 548 U.S. 399 (2006), is equally puzzling, as the redistricting decisions here were even more egregious than those that led the *LULAC* Court to admonish the Texas legislature for dismantling a congressional district that had an "increasingly powerful Latino population that threatened to oust the incumbent." *LULAC v. Perry*, 548 U.S. 399, 423 (2006). In *LULAC*, the State had "divided the cohesive Latino community in Webb County, moving about 100,000 Latinos to District 28, which was already a Latino opportunity district, and leaving the rest in a district where they now have little hope of electing their candidate of choice." *Id.* at 438–39. Perhaps realizing its

changes to one district might run afoul of Section 2 and Section 5, the State created a new Latino opportunity district in a completely different part of the state as a remedy. *Id.* at 435. That district, "a long, narrow strip that winds its way from McAllen and the Mexican-border towns in the south to Austin, in the center of the State and 300 miles away," the Supreme Court explained, failed to satisfy Section 2 because it was geographically noncompact. *Id.* at 424, 435.

LULAC v. Perry is instructive for several reasons. First, the *LULAC* Court did not look favorably upon the State's dismantling of a cohesive community of interest, even where that community was less than 50 percent. *Id.* at 427 (noting "the redrawing of lines in District 23 caused the Latino share of the citizen voting-age population to drop from 57.5% [CVAP] to 46% [CVAP]"). Here, the Black and Hispanic coalition that had existed for more than three decades in Precinct 3 was close to 60 percent CVAP under the benchmark plan in 2020. District Court Order ¶ 72. Therefore, the district court rightly treated as suspect the County's obliteration of a compact, majority-minority precinct. Second, the Court in *LULAC* recognized the State's desire to remedy its dramatic changes to one Latino opportunity district by creating another in a different part of State, but reasoned that this was not permissible, because the rights of "some minority voters under § 2" may not be "traded off" for the rights of "other members of the same minority class." *LULAC*, 548 U.S. at 436. In *LULAC* where the State had at least made a failed attempt to

remedy what it perceived might be a violation, the County in this case did not even try to remedy its violation, even after the commissioner in Precinct 3 suggested multiple times that the new plan was "discriminatory and ran afoul" of Section 2. District Court Order ¶ 230. Third, the *LULAC* Court described the Latino community that had been dismantled in much the same way that the district court here characterized the Black and Hispanic coalition, as one that was "subject[ed] to significant voting-related discrimination" and as "becoming [more] politically active and cohesive." *LULAC*, 548 U.S. at 438. For all these reasons, the district court's finding of fact—that the Black and Hispanic population in Precinct 3 was geographically compact under the old commissioners' court plan as well as in the least-change illustrative plans—was not in clear error.

III. UNDER *GINGLES III*, PLAINTIFFS DO NOT BEAR THE BURDEN OF DISPROVING THAT POLITICS RATHER THAN RACE EXPLAINS VOTING BEHAVIORS.

Contrary to Defendants' argument, Defs.' Br. 54, plaintiffs in a Section 2 action decidedly do not bear the burden of eliminating "politics" as "a causative factor" in "voting patterns." This Court has made it clear who has the burden of proof on the issue of the interplay of race and politics in a Section 2 action: the defendant.

In this Circuit, the extent to which factors other than race affect voting patterns is initially a *Gingles III* issue. *LULAC v. Clements*, 999 F.2d at 891-92. However, even at that stage, it is a defendant's burden to come forward with

those proofs. *See Teague v. Attala Cnty.*, 92 F. 3d 283, 290 (5th Cir. 1996) (finding error "by placing the burden on plaintiff to disprove that factors other than race affect voting patterns"). Once a plaintiff demonstrates racial polarization, it is up to a defendant to present proofs to "rebut the plaintiffs' evidence by showing that no such bias exists in the relevant voting community." *Id*. at 290, 292 (citing *Nipper v. Smith*, 39 F.3d 1494, 1513, 1524 (11th Cir. 1994). This Court has expressly described this dynamic as "burden-shifting." *Id.* Here, the district court did consider evidence introduced by Defendants at trial to determine whether partisanship motivates voting behavior in Galveston County, ultimately concluding "the data unerringly points to racially polarized voting." District Court Order ¶¶ 143–152. The Court should accord the required deference to the district court's findings of fact.

IV. SECTION 2 IS CONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Defendants ask this Court to stay the judgment below on the basis that Section 2 is unconstitutional. It is difficult to discern whether Defendants are arguing facial unconstitutionality (based on a lack of a "temporal limitation" in the statute) or unconstitutionality as applied. *See* Defs.' Br. 54 (arguing that "Section 2 requires governments to consider race in making redistricting decisions," and citing to *Allen v. Milligan*, 599 U.S. 1, 30(2023)). Neither challenge is legitimate.

A. Section 2 Is Facially Constitutional.

Defendants' primary argument appears to be that Section 2's supposed "use of race" must survive a strict scrutiny analysis. Defs.' Br. 68. However, there is nothing in the plain language of Section 2 of the VRA that requires the "sort[ing] of voters" or the use of "racial classifications in governmental decisions," Defs.' 68–69, that might subject its facial constitutionality to the rigors of a strict scrutiny examination. *See, e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*), 600 U.S. 181 (2023). To the contrary, Section 2 is a law intended to do just the opposite of such prohibited behavior. It is rationally designed to stop the treatment of people differently on the basis of race, by enforcing the permanent guarantees of the Civil Rights Amendments.

In this context, the lack of a "temporal limitation" in the statute cannot possibly lead to constitutional infirmity. The Fourteenth and Fifteenth Amendments do not contain a termination date, and it follows necessarily that the lack of such a limitation in statutes implementing these fundamental rights cannot be constitutionally fatal.

A. Section 2 Does Not Classify According to Race.

The statutory language of Section 2 is race neutral; it prohibits voting standards practices, and procedures "*on account of* race or color" without any

specification as to *which* racial groups may bring a Section 2 challenge. 52 U.S.C. § 10301(a). Thus, courts interpreting the statutory language have found Section 2 was intended to protect the rights of *all* voters, regardless of race, consistent with the purpose of the Fifteenth Amendment which, by its own terms, "grants protection to all persons, not just members of a particular race." *U.S. v. Brown*, 494 F. Supp. 2d 440, 445 (S.D. Miss. 2007) (emphasis in the original) (citing *Rice v. Cayetano*, 528 U.S. 495, 512 (2000); *Chisom v. Roemer*, 501 U.S. 380, 404 (1991); *see also Hayden v. Pataki*, 449 F.3d 305, 353 (2d Cir. 2006) (Parker, J., dissenting) (stating "from its inception and particularly through its amendment in 1982, Congress intended that § 2. . . be given the broadest possible reach").

Consistent with the plain language of the statute and the clear congressional intent, courts have entertained claims by all racial groups, including by white voters. This Court in 2020 found white voters had standing to bring a Section 2 claim although it found for the defendant on the grounds that the voters had not met the *Gingles* preconditions. *Anne Harding Cnty. v. County of Dallas*, 948 F.3d 302, 307 (5th Cir. 2020). The Second Circuit similarly held white voters had standing to bring a claim under Section 2, because "[t]here is no reason, as we see it, that a white voter may not have standing, just as a nonwhite voter, to allege a denial of equal protection as well as an abridgement of his right to vote on account of race or color." *United Jewish Organizations of Williamsburgh, Inc. v. Wilson*, 510 F.2d 512, 521 (1975).

And a district court in the Fifth Circuit, in *United States v. Brown*, 494 F. Supp. 2d 440, 486 (S.D. Miss. 2007), concluded not only that white voters had standing to bring Section 2 claims but also that Section 2 "applies with ease" where "the proof establishes a specific racial intent by black election officials to disenfranchise white voters." *Id.* (finding election official's decision to count the votes of black voters while rejecting those of white voters was racially motivated).

B. Section 2 Is Rationally Based.

Because Section 2 does not trigger strict scrutiny, its facial constitutionality is subject to a test of rationality. *Shelby County v. Holder*, 570 U.S. 529, 55–52 (2013) (applying rational basis test to Section 4 of VRA); *South Carolina v. Katzenbach*, 383 U.S. 301, 329–330 (1966). The statute need only "rationally further[] a legitimate state purpose or interest." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973). The Supreme Court has recently reaffirmed Section 2 easily passes the rational basis test. *Allen v. Milligan*, 599 U.S. 1, 41 (2023) (quoting *City of Rome v. United States*, 446 U.S. 156, 177 (1980)) (reaffirming Section 2 is "an appropriate method of promoting the purposes of the Fifteenth Amendment."). Defendants have set forth no reason for this Court to consider doing otherwise.

B. The Absence of a "Temporal Limitation" Is Constitutionally Irrelevant.

Nor is there a "trend," as Defendants would have it, to support some sort of constitutional requirement of "temporal limits" on laws designed to combat racial discrimination. Defs.' Br. 70–71. Defendants have not identified—and amicus has not found—a single instance where the Supreme Court has ruled that a statute is facially unconstitutional because it lacked some sort of termination date. To create such a requirement for a statute that is implementing constitutional amendments which themselves have no "temporal limitation" would make no sense.

Contrary to Defendants' argument, *Shelby County v. Holder*, 570 U.S. 529 (2013), does not stand for the proposition they press. There, the Court was in a position to assess the constitutionality of the coverage formula in Section 4 of the VRA that subjected certain states and political subdivisions to the preclearance requirements of Section 5 of the VRA, because of the uniqueness of that statute. *Id.* at 556–57.

First, unlike Section 2 which is permanent, Section 5 was not. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). It was originally enacted in 1965, with a five-year sunset provision, and then reenacted for another five years, then another seven years, then another twenty-five years, and finally, in 2006, for another twenty-five years. *Id.* at 538–39. After the last reenactment, the Court was in the position of

doing what courts may do with any statute—judging whether it is a constitutional exercise of congressional power *at the time of its enactment or reenactment*. And that is what it did in *Shelby County*, assessing the legislative record to ascertain whether it was sufficient to support a rational basis finding in 2006 for the continued use of the coverage formula that had been first enacted in 1965. *See*, *e.g.*, *id.* at 547 ("Congress said the same [that tests and devices that blocked access to the ballot have been forbidden nationwide] when it reauthorized the Act in 2006"); *Id.* at 547–48 (" [T]hese are the [voter registration] numbers that were before Congress when it reauthorized the Act in 2006."). The "fundamental problem" with the extension of Section 5 for another twenty-five years, the Court explained, was that "Congress did not use the record it compiled to shape a coverage formula grounded in current conditions. *Id.* at 554. "If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula." *Id*. at 556.[4]

[4] That was also the posture of the case in *City of Rome*, when the Court considered (and rejected) the argument of whether Section 5 of the VRA had "outlived its usefulness by 1975, when Congress extended the Act for another seven years." *City of Rome v. United States,* 446 U.S. 156, 180 (1980) (viewing the issue as whether "to overrule Congress' judgment that the 1975 extension was warranted").

City of Boerne v. Flores, 521 U.S. 507 (1997), cited to by Justice Thomas in his dissent in *Milligan*, is to the same effect. *See Allen v. Milligan*, 599 U.S. 1, 80–88 (2023) (Thomas, J., dissenting). There the Court held that the Religious Freedom Restoration Act exceeded Congress' powers to enforce the Fourteenth Amendment, not because it had outlived its usefulness in 1997, but because the "legislative record

The Court's determination that there is a lack of support in the congressional record for the 2006 reenactment of the coverage formula for Section 5 of the VRA is not, of course, the only basis for distinguishing *Shelby County*'s treatment of Section 5 from any consideration of Section 2's viability. Section 5 has "extraordinary and unprecedented features," not found in Section 2 or in any other statute of which Amicus is aware. *Shelby Cnty. v. Holder*, 570 U.S. 529, 549 (2013). These include the requirement that covered states obtain federal permission before enacting any law relating to voting, "a drastic departure from principles of federalism." *Id.* at 535. That the coverage formula meant that Section 5's requirement applied only to some states was "an equally dramatic departure from the principle that all States enjoy equal sovereignty." *Id.* That the preclearance procedure switches the burden of proof to the covered jurisdiction and applies substantive standards different than those governing other states rendered the statute even more extraordinary. *Id*. at 545. These features of the statute, as well as the fact that Section 5 was never intended to be permanent, were crucial to the decision in *Shelby County*. *Id*. at 540. That these factors do not apply to Section 2 is evidenced by the *Shelby County* Court's twice emphasizing that its "decision in no way affects

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lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *City of Boerne*, 521 U.S. at 530.

the *permanent*, nationwide ban on racial discrimination in voting found in § 2." *Id.* at 540–41. (emphasis added).

C. Section 2 Is Not Unconstitutional As Applied to Redistricting

Defendants appear to argue that Section 2, as applied to vote dilution cases and as construed by the Court in *Gingles* and *Milligan*, requires "race-based" redistricting. Defs.' Br. 47,67, 70. To the contrary, the portion of the *Milligan* opinion that did not garner a majority of the votes of the Justices, to which Defendants cite, stressed "[w]hen it comes to considering race in the context of districting, we have made clear that there is a difference between being aware of racial considerations and being motivated by them." *Allen v. Milligan*, 599 U.S. 1, 30 (2023) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)) (internal quotations omitted).

Even were the application of Section 2 to vote dilution claims deemed to result in "race-based" districting, the *Gingles* framework, both the preconditions and the totality of circumstances standards, prevents findings of liability absent case-specific analysis and proof of case-specific discrimination and therefore meet any standard of constitutionality. For example, the first *Gingles* precondition, that a Section 2 plaintiff identify a majority-minority district that complies with traditional districting principles, as Justice Kavanaugh recognized in *Milligan*, guards against the institution of racial proportionality. 599 U.S. at 43–44 (2023) (Kavanaugh J.,

concurring). The second *Gingles* precondition, which tests for cohesiveness in voting of the minority populations, guards against stereotyping people on the basis of their race. *See id.* at 18–19 (majority opinion). Finally, both the second and third *Gingles* preconditions taken together serve as a case-specific temporal limitation, because, as a leading authority wrote, plaintiffs would not need to resort to Section 2 for relief in jurisdictions where they are fully integrated into the political system. Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WILLIAM & MARY L. REV. 725, 741 (1998).

CONCLUSION

For the foregoing reasons, this Court should affirm the Findings of Facts and Conclusions of Law of the district court.

CERTIFICATE OF COMPLIANCE WITH FRAP 32

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6109 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman font in 14 point type.

s/ Pooja Chaudhuri
Pooja Chaudhuri

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2023, I electronically filed the Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Pooja Chaudhuri
Pooja Chaudhuri