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,

Plaintiffs—Appellees,

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-57, 3:22-CV-93, and 3:22-CV-117

AMICUS CURIAE BRIEF OF JUDICIAL WATCH, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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January 22, 2024

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit 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. Judicial Watch further certifies that, in addition to the persons and entities identified in the briefs of Defendants-Appellants, App. Dkt. 193-1 at 3-6, the following persons may have an interest in the outcome of this case:

Judicial Watch, Inc. (*amicus curiae*)
T. Russell Nobile (*counsel for amicus curiae*)
Robert Popper (*counsel for amicus curiae*)
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January 22, 2024

Respectfully submitted,

/s/ Russ Nobile
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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, DC. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. In furtherance of these goals, Judicial Watch committed substantial resources to standing up a voting litigation team, which has extensive experience litigating voting cases on behalf of private and government clients. This experience includes investigating and litigating cases under Section 2 of the Voting Rights Act – the statute at issue in this appeal. 52 U.S.C. § 10301.

Judicial Watch regularly files amicus briefs concerning the proper interpretation of Section 2. *See, e.g., Thomas v. Bryant*, Case No. 19-60133, 938 F.3d 134 (5th Cir. 2019) (Section 2 lawsuit concerning Mississippi's legislative districts); *Ohio Democratic Party v. Husted*, Case No. 16-3561 (6th Cir. July 1, 2016) (Section 2 lawsuit concerning early voting period); *State of North Carolina, et al. v. League of Women Voters of North Carolina, et al.*, Case No. 14-780 (U.S. Feb. 3, 2015) (Section 2 challenge to voter ID and other election laws); and *League of Women Voters of North Carolina et al. v. State of North Carolina, et al.*, Case No. 14-1845 (4th Cir. Sept. 17, 2014).[1]

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), Judicial Watch and its counsel certify that this brief was not authored in whole in or part by any party's counsel; that no party or party's counsel contributed money to fund preparing or submitting this brief; and that no person other than Judicial

SUMMARY OF ARGUMENT

Section 2 of the Voting Rights Act guarantees that "members of a class of citizens" will not be denied, on account of race, color, or language minority status, an equal opportunity to participate in the political process and elect representatives of their choice. 52 U.S.C. § 10301; *see also Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). Section 2 is not designed to ensure that a candidate supported by minority voters can be elected. Where a minority class only constitutes an electoral minority or plurality, rather than a majority, its members have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength. *Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009). Thus, there is no Section 2 violation where an electoral minority or plurality cannot elect its preferred candidate.

Coalition districts, like other failed sub-majority districting theories (*i.e.*, crossover and influence districts), go well beyond Section 2's text of ensuring equal opportunity in the political process. They are an effort to require districts that guarantee the election of the coalition-preferred candidate by the sheer numbers of a multi-racial coalition wherever such a coalition exists.

Watch and its members contributed money to fund preparing or submitting this brief. Judicial Watch further certifies that it obtained prior consent from all parties to the filing of this brief.

Section 2's plain language, precedent, and legislative history conclusively establish that a required district can only be a majority-minority district. That is because, in the democratic process, there 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." *Bartlett*, 556 U.S. at 19. That "special wrong," which Section 2 addresses, does not exist where the minority group only constitutes an electoral minority or plurality. In that situation, minority voters cannot plausibly claim they would have been able to elect representatives of their choice in the absence of the challenged voting practice.

This is why all the other sub-majority districting theories failed and why coalition theory should likewise be rejected: race-based vote dilution claims under Section 2 require a showing that the minority group is "a numerical, working majority of the voting-age population." *Bartlett*, 556 U.S. at 13. After the Supreme Court resolved that the majority-minority district requirement means a real numerical electoral majority, any pre-*Bartlett* ruling from this Circuit and elsewhere allowing sub-majority districts, including coalition districts, should be overturned. This especially true after the *per curiam* ruling in *Perry v. Perez*, 565 U.S. 388, 399 (2012).

Of all the race-conscious theories promoted under the Voting Rights Act, coalition districting theory is the most pernicious. It is "inherently standardless," s*ee* *Holder v. Hall*, 512 U.S. 874, 889 (1994) (O'Connor, J., concurring), and stretches Section 2 well beyond its "equal opportunity" mandate. 52 U.S.C. § 10301. Such race-conscious theories are either a cynical effort to create partisan or ideological districts otherwise prohibited under *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) or, worse, an effort to redefine minority groups into a singular "class" based on these group's collective non-Whiteness.

Minority districting "that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Coalition districts takes these concerns from *Shaw* one step further by treating members of minority groups as a fungible, homogenized group of individuals and ignores the very distinctions that make ethnic and racial minorities distinct in the first place. *See id*. ("reinforces the perception that members of the same racial group regardless of their age, education, economic status, or the community in which they live-think alike, share the same political interests, and will prefer the same candidates at the polls.").

ARGUMENT

I. Sub-Majority Districting Theories Arose as the Supply of Jurisdictions That Satisfied *Gingles*' First Precondition Were Exhausted.

In 1982, Congress amended Section 2 of Voting Rights Act to add new subsection (b). *See* 52 U.S.C. § 10301. Four years later, the Supreme Court interpreted amended Section 2 and confirmed that race-based vote dilution claims were actionable under amended Section 2(b). *Thornburg v. Gingles*, 478 U.S. 30, 47-51 (1986) (setting forth preconditions for race-based dilution claims under Section 2); *see Bartlett*, 556 U.S. at 11. Until then, Section 2 had been a "little-used" statute with most dilution claims arising under the Fourteenth Amendment's Equal Protection Clause. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2331 (2021). Following the announcement of the Section 2 dilution framework in *Gingles*, civil rights organizations scoured the country searching for jurisdictions with electoral practices that met its preconditions.

The first *Gingles* precondition requires plaintiffs to show "that the minority group 'is sufficiently large and geographically compact to constitute a majority in a single-member district[.]'" *Bartlett*, 556 U.S. at 9 (quoting *Gingles*, 478 U.S. at 50-51). A majority-minority district is one "in which a majority of the population is a member of a *specific* minority group." *Voinovich*, 507 U.S. at 149 (emphasis added). In *Bartlett*, the Supreme Court explained that plaintiffs must show the relevant

minority group is "a numerical, working majority of the voting-age population" to satisfy the first precondition for creating a majority-minority district. *Id.* at 13.

This numerical majority requirement is not arbitrary. *Id.* at 19. The ultimate question in a Section 2 case is whether the members of a minority group have an *equal* opportunity to elect their candidate of choice. 52 U.S.C. § 10301 (emphasis added). As the Court explained:

> the majority-minority rule has its foundation in principles of democratic governance. The special significance, in the democratic process, of a majority means 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.

Bartlett, 556 U.S. at 19. If a minority group has a real, working electoral majority but is unable to elect its candidate of choice, that is good evidence that Section 2 relief may be appropriate. *See* 52 U.S.C. § 10301.

Conversely, where "a minority group constitutes substantially less than a majority in a proposed district, 'minority voters cannot maintain that they would have been able to elect representatives of their choice in the absence of the [challenged voting practice].'" *See* Brief for Amicus United States at *18, *Bartlett v. Strickland*, (No. 07-689), 2008 U.S. S. Ct. Briefs LEXIS 708 (quoting *Gingles*, 478 U.S. at 50 n.17). A minority class constituting an electoral minority or plurality "standing alone have no better or worse opportunity to elect a candidate than does

any other group of voters with the same relative voting strength."[2] *Bartlett,* 556 U.S. at 14. "Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Id.* at 15. "[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground." *Id.* (citing *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)). Even when they do find common political ground with other electoral minorities or pluralities, Section 2's special protections do not shield them any more than any other political or ideological coalition.

The pool of jurisdictions that satisfy *Gingles'* first precondition is finite and largely depleted. See *Allen v. Milligan*, 143 S. Ct. 1487, 1509 (2023) (explaining that geography and demographics have frustrated Section 2 claims) (citations omitted). After the initial rush of lawsuits, and despite substantial population changes in the 37 years since *Gingles*, there are few remaining jurisdictions that satisfy the first *Gingles* precondition.[3] This is best illustrated by reviewing statistics of the cases brought by the U.S. Attorney General, who has primary responsibility for enforcing Section 2. 52 U.S.C. § 10308(d). The United States has only filed 13

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[2] As used in this brief, "electoral minority" and "electoral plurality" refer to the citizen voting-age populations of the groups in question.

[3] From 1982 through 2005, an estimated 331 lawsuits were filed against jurisdictions addressing vote dilution claims under Section 2. *See* E. Katz, M. Aisenbrey, A. Baldwin, E. Cheuse, & A. Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J. L. Reform 643, 654 (2006).

vote dilution lawsuits under Section 2 since 2005.[4] Such a comparatively low rate is not the result of a lack of resources or desire. Simply, 37 years after *Gingles*, most of the eligible jurisdictions either have been sued or unilaterally changed their method of elections.

Rather than seeing this development for what it is—monumental progress in ensuring minorities have an equal opportunity to elect candidates they prefer—civil rights advocates have sought new theories that enable them to expand Section 2 far beyond its text and the holding in *Gingles*. *See, e.g.,* J. Gerald Hebert, Redistricting in the Post-2000 Era, 8 Geo. Mason L. Rev. 431, 455 (2000) ("[T]he Democratic Party will seek to work closely with minority officeholders and civil rights advocates to create districts that" are "less than 50% minority."). A common approach in these theories involves recasting minority populations to overcome the inability to create a majority-minority district as required by *Gingles*' first precondition.[5] Judicial Watch refers to these as "sub-majority districting" theories, of which the three most common involve coalition, crossover, and influence districts. *See generally Bartlett*, 556 U.S. at 13 (describing coalition, crossover, and

[4] *See* U.S. Department of Justice, Civil Rights Division, Voting Section Litigation, *Cases Raising Claims Under Section 2 Of The Voting Rights Act*, available at https://perma.cc/6834-25CX.

[5] Proponents of sub-majority theories offered different theories in *Bartlett*, such as "effective minority districts" and "functional majority districts." *See Bartlett*, 556 U.S. at 14; and Brief of Amici Lawyers' Committee for Civil Rights Under the Law, et al., at *6, *Bartlett v. Strickland*, 2008 U.S. S. Ct. Briefs LEXIS 533. The Court rejected all such theories in favor of requiring a real numerical, working majority of citizen voting-age population. *Bartlett*, 556 U.S. at 13-14.

influence districts). Typically, sub-majority theories involve claims against localities where the relevant minority group comprises an electoral minority or plurality rather than a real "numerical, working majority of voting-age population." *See Bartlett,* 556 U.S. at 13-14. That is, localities are sued under Section 2 even where the minority group is *not* sufficiently large or geographically compact to constitute a majority-minority district under *Gingles* and *Bartlett*.

The three common sub-majority districting theories each combine an ethnic or racial group that constitutes an electoral minority or plurality with other ethnic or racial groups or, in the case of crossover districts, a tranche of White voters who often support the minority group's preferred candidate. Relying on such combinations, proponents of sub-majority districting theories claim that, like majority-minority districts with "functional" majorities, the minority groups in these purported districts are entitled to the extraordinary right under Section 2 to a court-ordered district with a particular racial makeup. *See supra* note 5.

"Coalition district" theory is the remaining sub-majority districting theory now that the Supreme Court has rejected the other two. This theory contends that two or more ethnic or racial groups (either electoral minorities or pluralities) should be combined even though none of the groups could independently satisfy *Bartlett*'s requirement of a numerical electoral majority. *See De Grandy*, 512 U.S. at 1020 (describing coalition districts). As discussed below, the other two forms that the

Court previously rejected were "crossover districts," where an ethnic and racial group is combined with White voters to form an electoral majority, and "influence districts," where a minority group constitutes an influential minority or plurality.

II. Sub-Majority Districts Are Not Supported by Section 2's Text or Precedent.

The text of Section 2 provides that a violation is established if it is shown that "the political processes … are not equally open to participation by members of *a class* of citizens [on account of race, color, or language minority status] in that its members have less opportunity than other[s] to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301 (emphasis added). In a typical Section 2 case, the "class" of citizens is the specific ethnic or racial group on whose behalf the case is brought. *See, e.g.*, *United States v. City of Euclid*, 580 F. Supp. 2d 584, 586 (N.D. Ohio 2008) (holding at-large electoral scheme denied Blacks equal opportunity under Section 2). It is the members of this *class* who must constitute a numerical electoral majority of the citizen voting-age population. *Bartlett*, 556 U.S. at 13-14; *Gingles*, 478 U.S. at 50. By contrast, sub-majority minority districts involve claims on behalf of members of *classes*, plural. Nothing in Section 2's text or *Gingles* allows members of an ethnic or racial class to be combined or treated as one with members of other ethnic or racial classes to satisfy the first *Gingles* precondition. *See Nixon v. Kent Cty.*, 76 F.3d 1381, 1387 (6th Cir. 1996) ("A textual analysis of § 2 reveals no word or phrase which

reasonably supports combining separately protected minorities."). Proponents of sub-majority districts have never resolved the fundamental textual problems with this theory.

Contrary to arguments by some Plaintiffs here, challenges to coalition districts are not "foreclose[d]" in this circuit or any other circuit. Dkt. 239 at 177. Sub-majority theories have come before the Supreme Court on at least four occasions since 2003 and in three the Court ultimately rejected the sub-majority theory. The Court first considered sub-majority districts in the context of Section 5 of the Voting Rights Act. In *Georgia v. Ashcroft*, 539 U.S. 461 (2003), the Court held that the state's creation of influence districts was relevant to whether a redistricting plan had the purpose or effect of denying or abridging the right to vote under Section 5. *Id.* at 478; 52 U.S.C. § 10304. There, the Court faulted the lower court for not considering the implications of sub-majority districts in evaluating whether the 2000 redistricting plan was retrogressive under Section 5. *Id. Georgia* is the lone instance in which the Court did not outright reject arguments favoring sub-majority districts. As discussed, *infra*, Congress took on the task of rejecting sub-majority districting considerations in the Section 5 context when it abrogated the *Georgia* decision during the Section 5 reauthorization process in 2006.

The Court next addressed sub-majority theories three years later when the Court reviewed Texas' 2003 redistricting plan. *See League of United Latin Am.*

Citizens v. Perry, 548 U.S. 399 (2006) ("*LULAC*"). There, a majority of the Court agreed that Section 2 vote-dilution claims involving influence districts are not cognizable. *See id.* at 444-46 (opinion of Kennedy, J.); *id.* at 512 (Scalia, J., concurring in the judgment in part and dissenting in part).

Bartlett was the third instance in which the Court addressed sub-majority districting theories. As previously discussed, *supra*, the *Bartlett* Court held that Section 2 requires the creation of a majority-minority district in which a minority group composes a numerical, working majority of the citizen voting-age population and does not require the creation of crossover districts. 556 U.S. at 12-20. "Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." *Id.* at 15.

Notably, three years later, in a *per curium* opinion, the Court admonished the Western District of Texas simply because it *may* have ordered the creation of a coalition district as part of an interim districting plan for the 2012 federal elections. "If the District Court did set out to create a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so." *Perry*, 565 U.S. at 399 (citing *Bartlett*, 556 U.S. at 13-15).

Accordingly, the Supreme Court has rejected crossover (*Bartlett*) and influence (*LULAC*) districting theories in Section 2 cases, and coalition districts

should not fare any better given the Court's analysis in those cases and as well as in *Perry*. Indeed, most of the authority Plaintiffs rely on below in support of coalition districts preceded *Bartlett*, which raises serious questions about these authorities' persuasive value. *See* Dkt. 239 at 177 (collecting cases). Even the more recent cases Plaintiffs cite rely on the same pre-*Bartlett* authorities. *See id*. (citing *Perez v. Abbott*, 250 F. Supp. 3d 123, 138-39 (W.D. Tex. 2017) and *LULAC v. Abbott*, 3:21-cv-259, ECF No. 144, at 3 (W.D. Tex. Jan. 8, 2022)).

While it is true the Supreme Court acknowledged in *Bartlett* that it was not then addressing coalition districts, there is no practical or principled argument why that theory should fare any better than the other sub-majority theories rejected by the Court. Plaintiffs make no effort to explain how the pre-*Bartlett* authority upon which they rely can be reconciled with *Bartlett*'s clear requirement that the members of the injured class of voters must constitute a numerical, working majority. Plaintiffs must offer some plausible explanation to resolve the obvious conflict between the viability of sub-majority theories and the reasoning in *Bartlett*. Today, pre-*Bartlett* authority is neither compelling nor controlling and any ruling from this Circuit and elsewhere allowing sub-majority districts, including coalition districts, should be overturned.

The legislative history of the Voting Rights Act contains no evidence that Congress even contemplated that sub-majority districts were protected or required.

The Voting Rights Act was enacted in 1965 and amended several times, including the 1982 amendment which added Section 2(b). The legislative history from the 1982 amendments shows that Congress was focused on voting practices that reduced the minority population in electoral districts below 50% and emphasized the importance of this threshold. *See*, *e.g.*, S. Rep. No. 417, 97th Cong., 2d Sess. at 120-121 (1982). During the 2006 reauthorization of Section 5, Congress made clear that the reauthorized Section 5 did not protect sub-majority districts. It expressly abrogated *Georgia v. Ashcroft,* rejecting any argument that the creation of influence districts was relevant to evaluating retrogression under Section 5. The Senate Judiciary Committee Report stated its belief that the reauthorization prohibited coalition districts:

> The bill's proposed language codifies this understanding. It eliminates any risk that the scenarios feared by *Georgia v. Ashcroft*'s critics will unfold. By focusing solely on the protection of naturally occurring legislative districts with a majority of minority voters, the reauthorization bill ensures that minority voters will not be forced to trade away solidly majority-minority districts for ambiguous concepts like 'influence' or 'coalitional.' Rather, as the House Committee Report makes clear, the bill 'rejects' the Supreme Court's interpretation of section 5 in *Georgia v. Ashcroft*, and establishes that the purpose of section 5's protection of minority voters is, in the words of the bill, to 'protect the ability of such citizens to elect their preferred candidates of choice.'

S. Rep. No. 295, 109th Cong., 2d Sess. at 18-21 (2006) (emphasis added); *see also* H. Rep. No. 478, 109th Cong., 2d Sess. at 70-71 (2006) (seeking to preclude consideration of influence districts).

III. There Is No Limiting Principle to Coalition Districts.

Proponents of coalition districts provide no limiting principle when it comes to the creation of these districts. "The wide range of possibilities makes the choice inherently standardless." *Holder*, 512 U.S. at 889 (O'Connor, J., concurring) (declining to allow Section 2 vote dilution challenges based on the number of governing board's seats). Here, the Court is asked to evaluate a bipartite coalition of Black and Hispanic electoral minorities. But there is no obvious limit to the number of groups that can be combined to form coalition districts. This is not a speculative concern.

For example, during the 2010 redistricting cycle, the Attorney General alleged that certain legislative and congressional districts in Texas were sub-majority districts, including House District 149, which he claimed was a *tripartite* coalition district comprised of Asian-American, Black, and Hispanic voters. *Texas v. United States*, 887 F. Supp. 2d 133, 112-21 (D.D.C. 2012), *vacated*, 133 S. Ct. 2885 (2013). The evidence at trial showed little cohesion amongst the tripartite group during Democratic primaries. *Id.* But because the tripartite coalition voted cohesively for a Democratic incumbent at the general election, the Attorney General alleged it was

protected under Section 5. *Id.* The legitimacy of the House District 149 coalition went unresolved after the Supreme Court struck down Section 5's coverage formula in *Shelby County v. Holder*, 570 U.S. 529 (2013).

There is no reason to believe that three ethnic or racial groups is the limit to forming coalition districts. In theory, the only limiting factor is that the coalition-preferred candidate lose the general election. If that candidate loses, and if a district could be drawn where any combination of ethnic and racial groups who voted for that candidate forms a majority, then, under Plaintiffs' theory, federal law *requires* that the district *must* be drawn. This stretches Section 2 well beyond its textual mandate of "equal opportunity." "In using [the term "opportunity"], Congress made clear that the Voting Rights Act does not demand equal outcomes." *Brnovich*, 141 S. Ct. at 2358 (Kagan, J., dissenting). Coalition districts would take the Voting Rights Act one step further to now demand "*un*equal outcomes." Without a majority-minority threshold, any districting scheme could be challenged whenever disparate minority communities could be pooled together in sufficient numbers to create some potential to elect a candidate.

Moreover, even if coalition district voters were considered to be a single "class of citizens," that class is not protected under federal law. A coalition district is defined by the shared, *partisan* leanings of the members of different racial and ethnic groups. Coalition districts are, thus, partisan or ideological districts. Section

2 only covers race-based vote dilution, tracking the text of the Fifteenth Amendment. *Bartlett*, 556 U.S. at 10. Partisan districts, unlike racial districts, are not protected. *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

The ethnic and racial groups in House District 149's tripartite coalition, or here in Precinct 3 of Galveston's County Commissioners Court, do not share race, color, previous condition of servitude, or language minority status. U.S. CONST. amend. XV; 52 U.S.C. § 10301(a); 52 U.S.C. § 10303(f)(2). These groups' ancestors did not share a similar "condition of servitude." Likewise, they are not all language minorities. The only shared ethnic or racial trait amongst Asian-Americans, Blacks, and Hispanics is that they are not White. Non-Whiteness, of course, is neither a race nor a color, and there is no constitutional basis for distributing electoral advantages on that basis. *See LULAC*, 548 U.S. at 446 (warning that the recognizing influence district under Section 2 "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions."). Members of distinct ethnic and racial classes are no more fungible in the Section 2 context than they are in daily life, and to lump them all together for purposes of political gerrymandering is to ignore the very distinctions that make them minorities. Neither Section 2 nor *Gingles* requires racial homogenization.

Coalition districts require courts to weigh and, ultimately, to compel the use of districts that prioritize what are purely political alliances among racial groups who may have little in common. The only thing the different groups within a coalition may share is the intention to vote for the same party—to be candid, the intention to vote for a Democrat in the general election. There are no judicially manageable standards for determining when a court should order such relief. As the Court reasoned in *Bartlett*, courts "'are inherently ill-equipped' to 'make decisions based on highly political judgments' of the sort that crossover-district claims would require." 556 U.S. at 17 (citations omitted). Section 2 is not a vehicle for court-ordered partisan districts.

Race-conscious redistricting theories by proponents of coalition districts ensure that we will never have a color-blind society. Classifications based on race carry a danger of stigmatic harm and promote notions of racial inferiority and lead to a politics of racial hostility. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989). "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). It is not the "[judiciary's] role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral district . . . . It is a sordid business, this divvying us up by race." *LULAC*, 548 U.S.

at 511 (Roberts, C.J., dissenting). Plaintiffs' theory of coalition districts would force courts to do exactly that and will only further the sordid business of divvying us up by race.

IV. The District Court Clearly Erred by Not Giving Greater Weight to Primary Elections.

The record below indicated that Black and Latino voters often do not vote for the same candidate in the primary, but later coalesce behind the party nominee in the general election. *See* Tr. Dkt. 245 ¶66-70. Practically speaking, this means that during Democratic primaries Black voters support a Black-preferred candidate while Latinos support a different preferred candidate, before both groups later support the nominee in the general election. The trial court's finding that endogenous primaries had "limited probative value in determining inter-group cohesion" is fundamentally flawed because it disregards this meaningful evidence that illustrates these are ideological and partisan coalitions, not racial coalitions. *See* ROA 15928 ¶122.

Gingles' second precondition require proof of minority voting cohesion. *Gingles*, 478 U. S. at 51 (emphasis added). But rather than satisfying *Gingles* second precondition, the split support at the primary level followed by general election cohesion proves that these groups do *not* have the same candidate of choice, until they are forced to choose between political parties. At that point, these groups have the same candidate of choice (*i.e.*, the Democratic nominee) and vote cohesively—but because of shared ideological leanings, and clearly not because of their shared

race, color, previous condition of servitude, or language minority status. Stated differently, this evidence shows that it is not that a "white majority votes sufficiently as a bloc" to defeat the coalition's preferred candidate in the primary. *Gingles*, 478 U. S. at 51. Rather, the coalition does not have a single preferred candidate in the primary.

CONCLUSION

For the foregoing reasons, *amicus curiae* Judicial Watch respectfully requests that the Court reverse the final judgment of the district court and render judgment dismissing the complaint.

January 22, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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January 22, 2024

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No. 23-40582 Petteway v. Galveston County
USDC No. 3:22-CV-57
USDC No. 3:22-CV-93
USDC No. 3:22-CV-117

Dear Mr. Nobile,

You must submit the 7 paper copies of your brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

If your brief was insufficient and required corrections, the paper copies of your brief must **not** contain a header noting "RESTRICTED". Therefore, please be sure that you print your paper copies **from this notice of docket activity** and not the proposed sufficient brief filed event so that it will contain the proper filing header. Alternatively, you may print the sufficient brief directly from your original file without any header.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By: _____
Christina C. Rachal, Deputy Clerk
504-310-7651

cc:
Mr. Neil G. Baron
Ms. Pooja Chaudhuri
Ms. Sarah Xiyi Chen
Ms. Alexandra Copper
Mr. Matthew Nicholas Drecun
Mr. Chad Wilson Dunn
Mr. Jordan Raschke Elton

Mr. Mark P. Gaber
Mr. Bruce I. Gear
Mr. Kyle Douglas Hawkins
Mr. Daniel David Hu
Ms. Hilary Harris Klein
Ms. Simone Tyler Leeper
Mr. Richard Mancino
Ms. Mimi Murray Digby Marziani
Mr. Hani Mirza
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Mr. Joseph M. Nixon
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Mr. Paul A. Ready
Ms. Bernadette Reyes
Ms. Valencia Richardson
Mr. Nicolas Riley
Mr. Joseph R. Russo Jr.
Mr. Nickolas A. Spencer
Ms. Adrianne Spoto