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.

(See inside cover for continuation of caption)

On Appeal from the United States District Court for the Southern District of Texas

EN BANC BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Anna K. Jessurun
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

(Continuation of caption)

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

GALVESTON COUNTY, TEXAS; GALVESTON COUNTY COMMISSIONERS COURT; MARK HENRY, in his official capacity as Galveston County Judge,
Defendants – Appellants.

DICKINSON BAY AREA BRANCH NAACP; GALVESTON BRANCH NAACP; MAINLAND BRANCH NAACP; GALVESTON LULAC COUNCIL 151; EDNA COURVILLE; JOE A. COMPIAN; LEON PHILLIPS,
Plaintiffs – Appellees,

v.

GALVESTON COUNTY, TEXAS; MARK HENRY, in his official capacity as Galveston County Judge; DWIGHT D. SULLIVAN, in his official capacity as Galveston County Clerk,
Defendants – Appellants.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: February 21, 2024

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that our nation's charter guarantees. CAC accordingly has a strong interest in this case and the questions it raises about the scope of the Fifteenth Amendment's protections, Congress's power to enforce those protections, and the Voting Rights Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

To recount the history of Galveston County, Texas (the "County") is to illustrate the revolutionary impact of the Fifteenth Amendment, the persistent efforts of local officials to flout the Amendment's aspiration of a multiracial democracy, and the promise and power of the Voting Rights Act. Once "a center for buying and selling enslaved Black people during the Antebellum era," ROA.15940, the County today is a diverse community of predominantly Black, Latino, and white residents, *id.* at 15910. In the century after the Fifteenth

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Plaintiffs-Appellees and Defendants-Appellants have consented to the filing of this brief.

Amendment was ratified, guaranteeing that "[t]he right . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude," U.S. Const. amend. XV, communities of color in Texas encountered several obstacles in their effort to exercise their right to vote, from white primaries to poll taxes. ROA.15941. Years later, with the help of the Voting Rights Act, Black and Latino communities in Galveston County advocated for "a majority-minority precinct in which they could elect a candidate of choice." *Id.* at 15911. This precinct—Precinct 3—was "an important political homebase for Black and Latino residents" for thirty years. *Id.* Then, in 2021, the County dismantled that precinct, cracking the Black and Latino population across the Commissioners Court's four precincts. *Id.* at 15885.

Applying the Supreme Court's and this Court's longstanding precedents, the district court held that the County's actions were "fundamentally inconsistent with [Section] 2 of the Voting Rights Act." *Id.* at 15886. The district court described the County's 2021 redistricting as "stark and jarring," *id.* at 16029, and observed that it was "stunning how completely the county extinguished the Black and Latino communities' voice on its commissioners court," *id.* at 16028. "The result of 2021's redistricting," the district court explained, "amounted to Black and Latino voters, as a coalition of like-minded citizens with shared concerns, 'being shut out of the process altogether.'" *Id.* (quoting *Johnson v. Waller County*, 593 F. Supp.

3d 540, 608 (S.D. Tex. 2022)). A panel of this Court affirmed the district court's factual findings as to vote dilution. *See Petteway v. Galveston County*, 86 F.4th 214, 218 (5th Cir.), *vacated by* 86 F.4th 1146 (5th Cir. 2023).

In this en banc proceeding, the County focuses on a single issue. Seeking to overturn this Court's decades-old precedent, the County asserts that vote dilution claims brought by geographically compact and politically cohesive voters of color are not cognizable under Section 2 for the sole reason that the voters are not all the same race. The County is wrong. As the text and history of the Fifteenth Amendment and the Voting Rights Act make clear, cohesive coalitions of voters of color may bring vote dilution claims under Section 2.

Ratified in 1870, the Fifteenth Amendment gave Congress the "power of conferring upon the colored man the full enjoyment of his right" and "enabl[ed] Congress to take every step that might be necessary to secure the colored man in the enjoyment of these rights." Cong. Globe, 41st Cong., 2d Sess. 3670 (1870). Congress used this sweeping authority to enact the Voting Rights Act of 1965, heralded as "the most successful civil rights statute in the history of the Nation." *Allen v. Milligan*, 599 U.S. 1, 10 (2023) (quoting S. Rep. No. 97-417, at 111 (1982)). Recognizing that the right to vote includes "the right to have the vote counted at full value without dilution or discount," S. Rep. No. 97-417, at 19, Congress amended Section 2 in 1982 to declare that "the political processes in [a]

State must be 'equally open,' such that minority voters do not 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice,'" *Allen*, 599 U.S. at 25 (quoting 52 U.S.C. § 10301(b)).

While unrelenting discrimination against Black voters was the immediate impetus first for the Fifteenth Amendment and, a century later, the Voting Rights Act, *see id.* at 10, both the Fifteenth Amendment and the Voting Rights Act intentionally include sweeping language that broadly protects all communities of color from discrimination in voting. The Framers of the Fifteenth Amendment understood that future voters of color were at risk of state-sanctioned obstacles to the franchise and chose expansive language to prohibit all voting discrimination "on account of race or color" to ensure that the Amendment was "as complete as possible." Cong. Globe, 40th Cong., 3d Sess. 1008 (1869). Nearly a century later, Congress mirrored the Fifteenth Amendment's broad prohibition of race discrimination in voting in the Voting Rights Act of 1965. When Congress amended Section 2 in 1982, Congress expressly based Section 2's text on Supreme Court cases that embraced the Constitution's fundamental principle of voting equality for all voters of color, including Black and Latino voters. *See Allen*, 599 U.S. at 13 (explaining that Section 2 "borrowed language from a Fourteenth Amendment" Supreme Court case that recognized that the Constitution's

prohibition of vote dilution protects a diverse set of communities of colors from the dilution of their votes); *see also White v. Regester*, 412 U.S. 755, 765 (1973) (holding that two multi-member districts in Texas diluted the votes of Black and Mexican-American citizens).

In amending Section 2, Congress prohibited redistricting schemes that are "not equally open to participation by members of a class of citizens protected" against abridgment of their right to vote "on account of race or color." 52 U.S.C. § 10301. At the time Section 2 was amended, a "class" was "a number of people or things grouped together because of certain likenesses." *See, e.g.*, *Webster's New World Dictionary* 138 (2d ed. 1982). This language plainly authorizes claims brought by cohesive coalitions of Black and Latino voters like Plaintiffs here, so long as those voters share the experience of having their collective voting strength minimized due to their race. Where, as here, the proof shows that Black and Latino citizens vote as a cohesive bloc, they are a single class of voters protected by Section 2 from vote dilution. The County's claims that this language should be interpreted more narrowly, or that a coalition of Black and Latino voters can never be sufficiently cohesive to bring a coalition claim of vote dilution, are without merit and are at odds with this Court's precedents, which have long permitted these claims and rightfully treated cohesion among diverse plaintiffs as a "question of fact." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999

F.2d 831, 864 (5th Cir. 1993) (en banc); *see also Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) ("If, together, [Black and Latino voters] are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the *Gingles* threshold as potentially disadvantaged voters."); *id.* ("[P]laintiffs must prove that the minorities so identified actually vote together.").

Together, the Fifteenth Amendment and the Voting Rights Act sweep broadly to protect all communities of color from voting discrimination and thereby strengthen our multiracial democracy. The County's arguments in this case are at odds with the text and history of Section 2 of the Voting Rights Act and would undermine its ability to help realize the Constitution's promise of voting equality. This Court should reject them and affirm the judgment of the district court.

ARGUMENT

I. The Fifteenth Amendment Created an Expansive Prohibition on All Racial Discrimination in Voting and Empowered Congress to Pass the Voting Rights Act to Protect Communities of Color from Vote Dilution.

In language "as simple in command as it [is] comprehensive in reach," *Rice v. Cayetano*, 528 U.S. 495, 512 (2000), the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. "Fundamental in purpose

and effect . . . , the Amendment prohibits all provisions denying or abridging the voting franchise of any citizen or class of citizens on the basis of race," *Rice*, 528 U.S. at 512, and "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

Recognizing that "[i]t is difficult by any language to provide against every imaginary wrong or evil which may arise in the administration of the law of suffrage in the several States," Cong. Globe, 40th Cong., 3d Sess. 725 (1869), the Framers of the Fifteenth Amendment chose sweeping language requiring "the equality of races at the most basic level of the democratic process, the exercise of the voting franchise," *Rice*, 528 U.S. at 512. The Fifteenth Amendment equally forbids laws that deny the right to vote outright on account of race, as well as those that abridge the right by diluting the voting strength of citizens of color and nullifying the effectiveness of their votes. *See Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 333-34 (2000).

To make the Fifteenth Amendment's guarantee a reality, the Framers explicitly invested Congress with a central role in protecting the right to vote against all forms of racial discrimination. They did so by providing that "Congress shall have power to enforce this article by appropriate legislation." U.S. Const. amend. XV, § 2. By adding this language, "the Framers indicated that Congress was to be chiefly responsible for implementing the rights created" by the

Amendment and that Congress would have "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966); *see also Allen*, 599 U.S. at 41 ("The VRA's 'ban on electoral changes that are discriminatory in effect . . . is an appropriate method of promoting the purposes of the Fifteenth Amendment.'" (quoting *City of Rome v. United States*, 466 U.S. 156, 177 (1980)).

In giving Congress the power to protect the right to vote, the Fifteenth Amendment specifically limited state sovereignty. The only means to safeguard equal political opportunities and ensure the multiracial democracy the Fifteenth Amendment promised, the Framers insisted, "are to be found in national legislation. This security cannot be obtained through State legislation, . . . where the laws are made by an oppressing race." Cong. Globe, 41st Cong., 2d Sess. app. 392 (1870). Stringent national safeguards were needed to "neutralize the deep-rooted prejudice of the white race there against the negro" and "secure his dearest privileges" at the ballot box. *Id.*

Tragically, the Fifteenth Amendment "proved little more than a parchment promise." *Allen*, 599 U.S. at 10. The passage of the Voting Rights Act—after nearly a century of efforts to flout the Fifteenth Amendment's mandate—was necessary precisely because the Fifteenth Amendment alone was insufficient to ensure that citizens of color in fact enjoyed equal opportunity "to participate in the

political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). With the Voting Rights Act, Congress evinced its "firm intention to rid the country of racial discrimination in voting." *Katzenbach*, 383 U.S. at 315.

Section 2 of the Voting Rights Act "make[s] clear that certain practices and procedures that *result* in the denial or abridgement of the right to vote are forbidden even though the absence of proof of discriminatory intent protects them from constitutional challenge." *Chisolm v. Roemer*, 501 U.S. 380, 383-84 (1991). Congress recognized that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot" and acted to eliminate all "discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups." S. Rep. No. 97-417, at 6, 28.

Section 2 has long protected communities of color from vote dilution. As the Supreme Court explained just last year in *Allen v. Milligan*, vote dilution occurs when voters of color "lack an equal opportunity to participate in the political process when a State's electoral structure operates in a manner that 'minimize[s] or cancel[s] out the[ir] voting strength.'" 599 U.S. at 25 (alterations in original) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). "A district is not equally open, in other words, when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial

racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Id.* Communities of color are most at risk of vote dilution when they are "submerged in a majority voting population that 'regularly defeat[s]' their choices." *Id.* at 18 (alteration in original) (quoting *Gingles*, 478 U.S. at 48).

Courts have applied Section 2 to districting maps "in an unbroken line of decisions stretching four decades," *id.* at 38, using the well-established *Gingles* framework, *see id.* at 17; *see also id.* at 19 (collecting cases). Under *Gingles*, plaintiffs must, as an initial matter, satisfy three preconditions. First, they must demonstrate that the "minority group [is] sufficiently large and [geographically] compact," *id.* at 18 (alteration in original) (quoting *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 402 (2022) (per curiam)), thereby establishing that that group can "elect a representative of [their] choice in some single-member district," *id.* (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)). Second, they must establish that the minority group is "politically cohesive." *Id.* (quoting *Gingles*, 478 U.S. at 51). Cohesion, in turn, shows that the plaintiffs vote together such that "a representative of [their] choice would in fact be elected" in that district. *Id.* at 19 (quoting *Growe*, 507 U.S. at 40). Third, the plaintiffs must establish that "the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate," *id.* at 18 (alteration in original) (quoting

Gingles, 478 U.S. at 51). This precondition "'establish[es] that the challenged districting thwarts a distinctive minority vote' at least plausibly on account of race." *Id.* at 19 (alteration in original) (quoting *Growe*, 507 U.S. at 40). Once the three preconditions are established, plaintiffs must also show "under the 'totality of the circumstances,' that the political process is not 'equally open' to minority voters." *Id.* at 18 (quoting *Gingles*, 478 U.S. at 45-46).

Section 2 demands "'an intensely local appraisal' of the electoral mechanism at issue," *id.* at 19 (quoting *Gingles*, 478 U.S. at 79), and it requires that close attention be paid to whether the "effect of the[] [State's] choices" is to "deny[] equal opportunity" to voters of color, *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 441-42 (2006) (*LULAC*); *see Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994) (explaining that "[t]he need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power"). In this respect, the results test "permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 576 U.S. 519, 540 (2015).

Thus, Section 2's protection against vote dilution is a crucial component of the Voting Rights Act's and the Fifteenth Amendment's commitment to eliminating voting discrimination against communities of color.

II. The Text and History of the Fifteenth Amendment and the Voting Rights Act Sweep Broadly to Protect All Communities of Color.

The Fifteenth Amendment was enacted against the backdrop of rampant discrimination against newly freed Black people in the wake of the Civil War. The Framers were deeply concerned about white citizens exercising their political power to "restore slavery in fact." Cong. Globe, 39th Cong., 1st Sess. 3210 (1866); *see also* Cong. Globe, 40th Cong., 2d Sess. 883 (1868) ("We seek to give suffrage to [Black citizens] because there is no other way given under heaven or among men whereby the life of that race can be made tolerable or endurable."); Cong. Globe, 40th Cong., 3d Sess. 983 (1869) ("[Slavery] will never die until the negro is placed in a position of political equality from which he can successfully bid defiance to all future machinations for his enslavement."). In other words, empowering Black citizens with the franchise was "the only opposition to white hegemony." Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915, 941 (1998); Travis Crum, *Reconstructing Racially Polarized Voting*, 70 Duke L.J. 261, 310-11 (2020) ("The Fifteenth Amendment attempted to address the root cause of the problem: widespread private discrimination that was transformed into state power by an all-White and largely racist electorate.").

While the Framers were motivated by the harms suffered by Black citizens during Reconstruction, they wrote the Fifteenth Amendment's sweeping

prohibition of racial discrimination in voting to safeguard voters of all races, including foreign-born citizens. In debates about which classes of people would be covered by the Amendment, the Framers "repeatedly referred to the 'Chinese,' the 'Irish,' and the 'Germans' as races, signaling that the original understanding of race encompasses what today would be considered nationality or ethnicity." Travis Crum, *The Unabridged Fifteenth Amendment*, 133 Yale L.J. ___ (forthcoming 2024) (manuscript at 77-78) [hereinafter "Crum, *Unabridged*"]. The Framers were also keenly aware of the intersection between national immigration laws and enfranchisement: while naturalization was limited to white people at the time, the Framers knew that if those laws were to change, the Fifteenth Amendment would lead to the enfranchisement of naturalized citizens of color. *See id.* at 31.

Not all Congressmen wanted the Fifteenth Amendment to sweep so broadly, and some sought to narrow its scope. Some, for example, endorsed a version of the Amendment that only enfranchised citizens of "African descent." Cong. Globe, 40th Cong., 3d Sess. 985 (1869). That proposal's supporters believed that such an amendment would "remed[y] the one existing evil with regard to which there is yet an omission in the Constitution," *id.* at 1008, and that Congress "should not project beyond that into theoretical amendments," *id.*; *see id*. at 985 ("Give us, then, the colored man, for that and that only is the object that is now before us.").

They also noted that only enfranchising those of African descent would "leave out of the question the subject of the Chinese immigration." *Id.* at 1008.

Others—led by Congressmen representing Western states—sought to add a provision expressly excluding Chinese immigrants from the Amendment's protection. *Id.* at 939; Crum, *Unabridged*, *supra*, at 31. Supporters of that version knew that a Fifteenth Amendment that abolished "all political distinctions as to race and color" would lead to Chinese immigrants having "no constitutional obstacle to" the ballot box. Cong. Globe, 40th Cong., 3d Sess. 901 (1869); *see id.* at 939 ("[T]he giving of the right of suffrage to the colored people in the southern States, who are a different race entirely from the Asiatics who are now flocking to the shores of the Pacific, was right. . . . But now the question arises how far we shall extend the suffrage and to what classes of people.").

Neither proposal succeeded. Supporters of the enacted Amendment's broad prohibition against racial discrimination in voting wanted the Amendment to be "as complete as possible, so that it shall provide against any possible necessity of an amendment hereafter." *Id.* at 1008. The Framers understood that such a sweeping prohibition was necessary precisely because they could not predict how future majorities would seek to disenfranchise future minorities. *See, e.g.*, *id.* at 900 ("But is it perfectly certain that at no future time any other class of persons will be subjected to political burdens and disabilities in the United States?"); *id.* at 901

("[I]s it perfectly certain that the time may never come when bitter controversies will arise between native-born and foreign-born citizens of the United States? . . . I do not speak of these things as probabilities but as possibilities; and I say there ought to be a power in Congress to control this spirit if it should ever arise."); *id.* at 1009 ("I think to single out one race is unworthy of the country and unworthy of the great opportunity now presented to us."). Thus, the Fifteenth Amendment was designed not only to remedy the ongoing rampant discrimination against Black citizens, but also to act as a bulwark against future efforts to disenfranchise other voters of color.

The Voting Rights Act's text and history parallel that of the Fifteenth Amendment. The statute was enacted against states' persistent use of tests "designed to deprive Negroes of the right to vote." *Katzenbach*, 383 U.S. at 311; *see Allen*, 599 U.S. at 9 ("Jim Crow laws like literacy tests, poll taxes, and 'good-morals' requirements abounded, 'render[ing] the right to vote illusory for blacks.'" (quoting *Katzenbach*, 383 U.S. at 312-13, and *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 220-21 (2009) (Thomas, J., concurring in judgment in part and dissenting in part) (alteration in original)). Nonetheless, the VRA broadly prohibited racial discrimination "on account of race or color," "closely track[ing] the language of the Amendment it was adopted to enforce." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2331 (2021).

The Supreme Court's early decisions on vote dilution—which laid the foundation for the amendment of Section 2 in 1982—exemplifies the breadth of Section 2's prohibition. In *White v. Regester*, 412 U.S. 755 (1973), Black and Mexican-American citizens in Texas challenged two multi-member districts, arguing that one "operated to dilute" Black citizens' voting power and that the other diluted Mexican-American citizens' voting power. *Id.* at 759. The *White* Court held that plaintiffs bringing vote dilution claims must show that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity . . . to participate in the political processes and to elect legislators of their choice." *Id.* at 766.

The Supreme Court understood that questions of vote dilution required "an intensely local appraisal of the design and impact of the . . . multimember district in the light of past and present reality, political and otherwise." *Id.* at 769-70. Affirming the district court's factual findings, the *White* Court explained how "historic and present condition[s]" of discrimination against Black and Mexican-American voters interacted with the multi-member districts at issue to prevent voters of color from "enter[ing] into the political process in a reliable and meaningful manner." *Id.* at 767. While the determination of vote dilution under *White* required a fact-intensive and localized inquiry, *White* made clear that so long

as voters of color could satisfy its demands, the Constitution's prohibition of vote dilution protects a diverse set of communities of colors from the dilution of their votes.

When amending Section 2, Congress understood that the Voting Rights Act's prohibition against abridgments of the right to vote "on account of race or color" broadly protected communities of color from local efforts to minimize their voting strength, just as the Court ruled in *White*. In fact, Congress took language directly from *White* to craft Section 2's prohibition on discriminatory results. *See* S. Rep. No. 97-417, at 28 ("In adopting the 'result standard' as articulated in *White v. Regester*, the Committee has codified the basic principle in that case . . . ."). By elevating *White*'s holding on vote dilution to a statutory standard, Congress endorsed *White*'s sweeping protection of all communities of color from vote dilution and embraced *White*'s demanding, localized, and fact-intensive inquiry. *See id.* at 30 ("As the Court said in *White*, the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'"); *see also id.* at 34 ("The results test *makes no assumptions one way or the other* about the role of racial political considerations in a particular community." (emphasis in original)). Since 1982, various communities of color have used Section 2 to protect against vote dilution. *See, e.g.*, *LULAC*, 548 U.S. at 435 (holding that a Texas congressional map diluted the

voting strength of Latino citizens); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1016 (8th Cir. 2006) (holding that a South Dakota legislative map diluted the voting strength of Native American voters).

In sum, while the Fifteenth Amendment and the VRA were both motivated by rampant discrimination against Black voters, both reach far beyond that immediate motivation—and intentionally so. Both Congresses understood that to achieve a real multiracial democracy, racial discrimination in voting against all communities of color had to be eradicated.

III. When Black and Latino Citizens Vote as a Cohesive Bloc, They Are a Single Class of Voters Protected by the Voting Rights Act from Vote Dilution.

As this Court has recognized for decades, Section 2's sweeping text protecting against vote dilution includes claims brought by cohesive coalitions of citizens of color so long as those voters satisfy *Gingles*' requirements. *See Clements*, 999 F.2d at 863-64; *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1499 (5th Cir.), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987); *Campos*, 840 F.2d at 1244. The County's arguments that this Court should, in effect, ignore the plain text of Section 2 are all without merit.

A. It is a "'fundamental canon of statutory construction' that words generally should be 'interpreted as taking their ordinary, contemporary, common

meaning . . . at the time Congress enacted the statute.'" *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) ("Words must be given the meaning they had when the text was adopted.").

Section 2 prohibits redistricting schemes that "abridge[] . . . the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). A violation of Section 2

> is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision 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. § 10301(b) (emphasis added). Putting the two subsections together, the subject of a vote dilution claim is the "class of citizens" whose right to vote is "abridge[d]" "on account of race or color."

As the County recognizes, *see* County En Banc Br. 32, the "class" is the unit of analysis for a vote dilution claim. Contemporary dictionaries define "class" to mean "a number of people or things grouped together because of certain likenesses." *Webster's New World Dictionary* 138 (2d ed. 1982); *see The Oxford Senior Dictionary* 107 (1982) ("[p]eople or animals or things with some

characteristics in common"); *The American Heritage Dictionary* 278 (2d ed. 1982) ("[a] set, collection, group, or configuration containing members having or thought to have at least one attribute in common"); *The New Collins Concise Dictionary of the English Language* 204 (1982) ("a collection or division of people or things sharing a common characteristic"); *New York Times Everyday Dictionary* 123 (1982) ("a distinctive group with a common characteristic and name"). Put simply, a group of people is a "class" when the members of that group have at least one common characteristic. Section 2 makes explicit the characteristic that the "members of a class" of vote dilution plaintiffs must share: having their right to vote "abridge[d]" by a redistricting scheme "on account of race or color." 52 U.S.C. § 10301.

The County asserts that because "class" is singular, Section 2 does not permit "distinct minority groups to aggregate" claims. County En Banc Br. 32. The County's focus on the term's singular form is misplaced. Coalitional plaintiffs are not separate classes coming together to make a Section 2 claim. Instead, those plaintiffs are *one* class—singular—that all share the same trait: their vote has been diluted on account of their race. By insisting that the plural is required to encompass a claim brought by minority voters of different races, the County obfuscates the heart of its argument. The County seeks to rewrite Section 2 to change the characteristic that a class must share from the abridgment of the right to

vote "on account of race or color," 52 U.S.C. § 10301(a), to the abridgment of the right to vote on account of *their shared* race or color. "But this Court may not narrow a provision's reach by inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020).

B. Significantly, claims brought by cohesive coalitions of voters of color are compatible with the *Gingles* inquiry. *Gingles* requires a localized, case-by-case assessment of whether a Section 2 class constitutes a cohesive, compact majority and whether racially polarized voting operates to weaken the class's voting strength. Thus, diverse communities of color can successfully bring a Section 2 claim when they can show, among other things, that they are cohesive under *Gingles*, just like any other class seeking to bring a Section 2 claim.

The County seemingly suggests that diverse communities of color should be categorically barred from bringing Section 2 claims because, in its view, such a class can never satisfy *Gingles*' cohesion requirement. County En Banc Br. 17 (coalitions of voters of color are not actually cohesive, but are instead "political alliances" unprotected by the VRA); *see also id.* at 12, 23, 25. But this argument assumes that diverse communities of color can never be cohesive just because their members are not all the same race. Such race-based assumptions are irreconcilable with the Constitution's promise of voting equality. *See Miller v. Johnson*, 515 U.S. 900, 912 (1995) ("Race-based assignments 'embody stereotypes that treat

individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'" (quoting *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547, 604 (1990))). Just as "a State may not 'assum[e] from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,'" *LULAC*, 548 U.S. at 433 (alteration in original) (quoting *Miller*, 515 U.S. at 920), the County may not assume that voters of different races are so different as to never be cohesive merely due to their race.

Indeed, it is precisely because such assumptions are inappropriate that cohesion is considered a factual question under *Gingles*, as this Court has recognized for decades. *Clements*, 999 F.2d at 864 ("[W]e have treated the issue as a question of fact, allowing aggregation of different minority groups where the evidence suggests that they are politically cohesive . . . ."); *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989) (finding no cohesion as a matter of fact); *see also Growe*, 507 U.S. at 41 (assuming that coalition claims are permissible, but finding no evidence of "minority political cohesion").

Notably, the questions about cohesion that the County asserts are too speculative for courts to answer—including "whether coalition voters have turned out to support the same candidates in the past" and "whether any voting trends can be explained by factors such as incumbency," County En Banc Br. 23; *see also*

County Opening Br. 36—are precisely the questions that courts have addressed under *Gingles* for decades. *See Gingles*, 478 U.S. at 56 ("A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim."); *id.* at 57 ("[T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as . . . incumbency, . . . may explain minority electoral success in a polarized contest."). The County makes no effort to explain why courts can handle these factual questions in vote dilution claims brought by a single-race class of voters but cannot in claims brought by a coalition of voters of color.[2]

C. The County claims that this Court's precedents permitting coalition claims are inconsistent with Supreme Court decisions, particularly *Bartlett v. Strickland*, 556 U.S. 1 (2009). *See* County En Banc Br. 22. This is incorrect. Notably, the *Bartlett* Court expressly disclaimed ruling on coalition claims, *see id.* at 13-14 (plurality opinion)—and understandably so.

[2] The County's argument that *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), has any bearing on this case is meritless. *See* County En Banc Br. 25-27. In *Rucho*, the Supreme Court held nonjusticiable a claim that partisan gerrymandering was unconstitutional. *Rucho*, 139 S. Ct. at 2506-07. That case had nothing to do with claims under the Voting Rights Act. Courts, including this one, have consistently adjudicated vote dilution claims under the well-established, judicially-created standard set out in *Gingles*.

Bartlett dealt with crossover claims, that is, claims that "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* at 13. While crossover claims are incompatible with the *Gingles* framework, coalition claims are not.

First, as the Court explained in *Bartlett*, the defining feature of crossover districts is that the Section 2 class at issue—there, the Black voters bringing the vote dilution claim—are not a majority in their jurisdiction, meaning that they could never satisfy the first *Gingles* precondition. *See id*. at 15. Put differently, *Bartlett* stands for the principle that a Section 2 class must constitute a geographically compact majority to make a *Gingles* claim. *See id.* at 26. While Section 2 plaintiffs in crossover districts are never a majority, coalitions of voters of color can, and must, "cross the *Gingles* threshold" to bring a vote dilution claim. *Campos*, 840 F.2d at 1244.

Second, because crossover claims rely on some, but not all, of the majority voters in a district, these claims are in tension with the third *Gingles* precondition, that is, that the white majority "vote[s] sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate," *Wis. Legislature*, 595 U.S. at 402. After all, if some majority voters in the electorate vote with voters of color, there is likely no majority bloc voting that defeats the Section 2 class's candidate of

choice. *See Bartlett*, 556 U.S. at 16 (plurality opinion). This infirmity does not plague coalition claims. As Plaintiffs have shown here, a cohesive coalition of voters of color does not require white voters to elect their candidate of choice; in fact, voters of color are prevented from electing their chosen candidate *because* of the majority's racial bloc voting against their candidate. Thus, while crossover claims cannot satisfy *Gingles* as a matter of law, coalition claims can.[3]

D. Finally, the County argues that allowing coalition claims would lead to a litany of undesirable consequences, such as proportional representation, County En Banc Br. 33-34, and intrusion into states' authority over redistricting, *id.* at 17. But these arguments run headlong into *Allen*. There, the Supreme Court rejected the argument that Section 2 claims promote proportionality and imperil important federalism principles, explaining that *Gingles*' fact-intensive and localized inquiry guards against both concerns. As the Court put it, the *Gingles* framework, "properly applied, . . . itself imposes meaningful constraints on proportionality." *Allen*, 599 U.S. at 26. Additionally, the Court noted that redistricting is "'primarily the duty and responsibility of the State[s],' not the

[3] For the same reasons, the County's argument that *LULAC* undermines coalition claims is mistaken. *See* County En Banc Br. 20-21. In *LULAC*, the Court held that Section 2 does not require influence districts, that is, districts in which the Section 2 class can "influence the outcome between some candidates," *see LULAC*, 548 U.S. at 445 (plurality opinion), but that says nothing about whether geographically compact and cohesive coalitions of voters of color can bring a claim under Section 2.

federal courts," but underscored that *Gingles*' "exacting requirements" ensure that "judicial intervention" into states' authority over redistricting is limited to instances in which "the 'excessive role [of race] in the electoral process . . . den[ies] minority voters equal opportunity to participate.'" *Id.* at 29-30 (alterations in original) (quoting *Abbott v. Perez*, 585 U.S. 579, 588 (2018), and S. Rep. No. 97-417, at 33-34). The County offers no reason why *Gingles* would adequately prevent unwarranted judicial intervention and proportional representation in cases like the one brought by Black voters in *Allen*, but not cases like the one brought by Black and Latino voters here. There is no such reason.

* * *

As this Court has held for decades and as the text and history of Section 2 make clear, Section 2 permits cohesive coalitions of voters of color to challenge state and local officials' efforts to minimize their voting strength. This Court should reject the County's invitation to rule, as a matter of law, that cohesive coalitions of voters of color cannot satisfy *Gingles* and bring vote dilution claims.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

/s/ Brianne J. Gorod
Elizabeth B. Wydra
Brianne J. Gorod
David H. Gans
Anna K. Jessurun
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 501
Washington, D.C. 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

Dated: February 21, 2024

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on February 21, 2024.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 21st day of February, 2024.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,370 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the 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 14-point Times New Roman font.

Executed this 21st day of February, 2024.

/s/ Brianne J. Gorod
Brianne J. Gorod

Counsel for Amicus Curiae