Nos. 21-1533, 21-2431

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, et al.,

Plaintiffs-Appellees,

v.

City of Virginia Beach, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 2:18-cv-00069
The Honorable Raymond A. Jackson

Appellants' Reply Brief

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STATEMENT

Plaintiffs cannot have it both ways. Coalition claims cannot, on the one hand, be recognized as a robust application of Section 2 that is "administrab[le]," Appellees' Brief (Br.) 28, and grounded in different groups' "same experience of being politically excluded," Br. 22, and, on the other hand, be devoid of any legal standards, involving only "a question of fact" concerning "the minority group as a whole," Br. 36 (quotation marks omitted). If coalition claims are to have any integrity, this particular claim must be rejected. Otherwise, the theory should be discarded.

ARGUMENT

I. Defendants' Appeal Is Not Moot

There is no merit in Plaintiffs' assertion that "the City's obligation to obtain preclearance under the [Virginia Voting Rights Act] will likely moot this appeal." Br. 15. To begin, there is no "dilatory non-compliance with…state-law mandate." Br. 18. The City obtained preclearance in mid-January 2022. But Plaintiffs do not explain how that pertains to mootness. Their sole authority found only that a challenge to a redistricting plan was mooted by the county's "adopt[ion] by resolution [of] a new voting plan." *Fayetteville, Cumberland Cty. Black Democratic Caucus v. Cumberland Cty.*, 927 F.2d 595, 1991 WL 23590, at *1, 5 (4th Cir. 1991) (unreported).

But Defendants did not legislate a new plan by ordinance. The district court "**ORDER[ED]** the City of Virginia Beach to implement the plan

immediately…." SPA363.[1] The "typical appellate relief" vacating that order will deprive the plan of legal force and afford "effectual relief." *Chafin v. Chafin*, 568 U.S. 165, 172-73 (2013). Preclearance does not change that. It *permits* the City to use the plan ordered by the court rather than *mandates* it. Va. Code § 24.2-129(B) and (D).

Preclearance, in fact, was a formality. The federal-court order left state authorities no room to object. "A state statute that thwarts a federal court order enforcing federal rights 'cannot survive the command of the Supremacy Clause.'" *Brinn v. Tidewater Transp. Dist. Comm'n*, 242 F.3d 227, 233-34 (4th Cir. 2001) (quoting *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979)). Besides, if Plaintiffs were right, the remedy would be for this Court "to vacate…the lower court's judgment," as the City requests. *Norfolk S. Ry Co. v. City of Alexandria*, 608 F.3d 150, 161 (4th Cir. 2010); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990).

II. The District Court Erred in Reaching the Merits

A. Plaintiffs' Challenge Is Moot

Defendants' opening brief explained (at 16-19) that Plaintiffs' challenge against an "election method[] in which all councilmembers are elected at-large in citywide elections," JA0048, is moot because HB2198 forbids the City from using that system. Plaintiffs talk past Defendants' arguments.

[1] Plaintiffs cite, but do not discuss, Va. Code § 24.2-304.1. It applies to an "ordinance" and is irrelevant. *Id.* § 24.2-304.1(A).

Plaintiffs first contend that HB2198 "left in place three dilutive at-large seats." Br. 17. But a case becomes moot when the challenged law "has been superseded by a significantly amended statutory scheme." *Esposito v. S.C. Coastal Council*, 939 F.2d 165, 171 (4th Cir. 1991); Appellants Brief (Opening Br.) 16-17. That rule governs where "the plaintiff may have some residual claim under the new framework" and requires that challengers "amend their pleadings" to address the new system. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (quoting *Cont'l Bank*, 494 U.S. at 482). Plaintiffs do not acknowledge this governing standard or identify evidence germane to it. Nor do they explain why the three at-large seats, in a new system with seven single-member seats, remain dilutive. They have never contended that *all* eleven council seats must be equal-opportunity districts.

Second, Plaintiffs argue that HB2198 "did not address *how* the seven districts should be configured or require them to be drawn to provide minority voters an equal opportunity to elect their preferred candidates." Br. 16-17. But Virginia law *does* forbid the City from using a future plan "that impairs the ability of members of a protected class…to elect candidates of its choice or its ability to influence the outcome of an election." Va. Code § 24.2-130(A). Plaintiffs admit this "is similar to, but broader than, Section 2 of the federal VRA." Br. 12.

And Plaintiffs have the framework backwards. Because a court cannot enjoin a law before it is enacted, review must follow enactment, not the other way around. In *New York State Rifle & Pistol Ass'n, Inc.*, the Supreme Court did not deem itself entitled to command the New York legislature to enact gun laws

in compliance with the Second Amendment. 140 S. Ct. at 1526-27. Likewise, a ruling on the merits here—opining either on how Defendants should construct a future plan or on the legality of a repealed system—is "advisory." *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1249 (4th Cir. 1991).

Third, Plaintiffs cite precedents applying the voluntary-cessation doctrine. Br. 17. But they ignore authority Defendants cited holding this doctrine inapplicable where the cessation "was not voluntary." *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011). Plaintiffs' cited authorities involve "a governmental entity's change of policy," where "it could return to the contested policy in the future." *Porter v. Clarke*, 852 F.3d 358, 364-65 (4th Cir. 2017). But state law prohibits Defendants from returning to the challenged at-large system. Opening Br. 17. Nor do Defendants retain discretion to utilize "the preexisting 'residency districts,'" Br. 17, which are malapportioned.

B. Plaintiffs Lack Third-Party Standing To Claim Discrimination Against Asian and Hispanic Residents

As Defendants' opening brief detailed (at 19-21), two Black plaintiffs lack standing to assert that Asians and Hispanics are suffering vote dilution and obtain a remedy sorting Asians and Hispanics into districts on the basis of race.[2] Plaintiffs do not deny that these voters are the best proponents of their own rights.

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[2] Plaintiffs call "prudential standing" doctrines into doubt, Br. 19, but the case they cite stated the bar on third-party standing may be compelled under Article III. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014).

Instead, Plaintiffs charge Defendants with conflating standing and the merits. Br. 20. This is inaccurate. Without a coalition of plaintiffs, there is no "logical nexus between the status asserted and the claim," even assuming its merit. *Flast v. Cohen*, 392 U.S. 83, 102 (1968). The claim remains a *coalition* claim, where members of different groups, e.g., "Blacks and Mexican-Americans[,]…join hands…to prevent their votes being diluted." *LULAC, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1495 (5th Cir.), *vacated*, 829 F.2d 546 (5th Cir. 1987). A *coalition* claim requires a *coalition of plaintiffs*. The court-appointed special master took it as a given that a coalition "brought this lawsuit." SJA235.

It is not enough for Plaintiffs to belong to a "single protected coalition," Br. 20, because a coalition claim "combine[s] *distinct* ethnic and language minority groups." *Growe v. Emison*, 507 U.S. 25, 41 (1993) (emphasis added); *see also Bartlett v. Strickland*, 556 U.S. 1, 13-14 (2009) (plurality opinion) (similar definition). Plaintiffs themselves argue that "[t]he 'class of citizens'" in a coalition claim "is not a singular minority group." Br. 22. Thus, the claim on its own terms does not treat Blacks, Asians, and Hispanics as sharing one race. Members of each group must therefore assert their own rights. *See Nordgren v. Hafter*, 789 F.2d 334, 338 (5th Cir. 1986).

III. Plaintiffs' Claim Fails on the Merits

A. Section 2 Does Not Recognize Coalition Claims

Section 2 "does not mention minority coalitions, either expressly or conceptually." *Nixon v. Kent Cty.*, 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc).

Plaintiffs' contrary arguments fail to distinguish *coalition* claims, brought by multiple groups that otherwise lack a Section 2 injury, from *parallel* claims, where each group experiences independent injury and may bring the claim separately or jointly. Plaintiffs' attempts to justify the latter do not justify the former.

1. Section 2 does not empower just any "class" to sue. A class must share "a denial or abridgement of the right…to vote on account of race or color." 52 U.S.C. § 10301(a). Plaintiffs implicitly acknowledge this limitation, Br. 22, and presumably agree that, e.g., Republicans and Democrats are not protected classes. *See* 52 U.S.C. § 10301(a) and (b); *but see* JA1194 (district court implying that "any group seeking to elect a particular candidate" qualifies). But persons without a shared race or color, whose sole commonality is candidate preferences, are the functional equivalent of a political party. *Nixon*, 76 F.3d at 1392.

Plaintiffs purport to locate coalitional protection in racial minorities' "same experience of being politically excluded 'on account of race,' whatever their race is." Br. 22. But racial minorities in a coalition case do *not* have that "same experience" because Section 2 deems *none* of them "politically excluded." Under Section 2, "[t]alk of 'debasement' or 'dilution' is circular talk," *Hall v. Virginia*, 385 F.3d 421, 428 (4th Cir. 2004), unless a group "has 50 percent or more of the voting population and could constitute a compact voting majority," *Bartlett*, 556 U.S. at 19. In a coalition claim, no constituency qualifies. Here, the Black community does not independently qualify, the Asian community does

not independently qualify, and the Hispanic community does not independently qualify.[3]

Plaintiffs do not explain how members of distinct groups share an injury on account of race or color where they share neither an injury (since none is independently injured) nor a race or color. The "impetus" for multiple groups "seeking to proceed as a coalition" is "their inability, as separate groups, to overcome the first *Gingles* threshold factor." *LULAC, Council No. 4434 v. Clements*, 986 F.2d 728, 786 n.43 (5th Cir. 1993) ("*LULAC*"). But the statute does not view them as a conglomerate; it defines them distinctly. Opening Br. 25-26. Plaintiffs, too, recognize them as "plural" not "singular." Br. 22-23. To assume shared experience merely from individuals not being "white voters," Br. 23, reads "impermissible racial stereotypes" into Section 2. *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

Nor does proof of political cohesion bridge this gap. *See* Br. 25. For one thing, Plaintiffs deny that each group must be proven cohesive, independently or with others, so their version of coalition claims does not even purport to show anything shared by majorities of each group. Br. 36. For another, such proof would show only that "candidates [who] do not obtain a majority of votes lose." *Nixon*, 76 F.3d at 1392. "That is not an unfortunate by-product of democracy,

[3] Plaintiffs' tepid defense of the district court's baffling conclusion that the Black community does qualify is equally baffling. They cite JA1212 as showing that "Defendants' own expert stated [a majority-Black district] was possible," Br. 32 n.6, but the page says nothing like that.

but is rather the *purpose* of democracy." *Id.* A group sharing neither race nor color nor shared discrimination cannot be deemed excluded "on account of race or color" merely because of shared candidate preferences.

2. Plaintiffs' rejoinders cannot overcome these basic problems.

First, it is not true that Defendants' argument "isolates 'class' in subsection (b)." Br. 22. The statute references "a class of citizens protected by subsection (a)," linking back to subsection (a)'s operative phrase "on account of race or color." A group sharing only alleged candidate preferences does not fall within that text, read in context.

Second, it is incorrect that Defendants' argument creates the "absurd" result that, "if a system dilutes Black *and* Hispanic voting power, then it dilutes neither…." Br. 23. To the contrary, if both Black and Hispanic voting power is diluted, members of either group—or both—can sue to obtain majority-Black and majority-Hispanic districts. A coalition claim addresses the opposite scenario and proposes, oddly, that, if a system dilutes *neither* Black *nor* Hispanic voting power, *both* groups' votes can yet be deemed diluted.

Third, Plaintiffs are correct that Section 2 "does not limit its protections to a single minority group bringing claims seriatim." Br. 21. Nothing in Section 2 prevents joinder of claims that might otherwise be brought separately. The question here, however, is whether Section 2 *authorizes* joint claims that could *not* be brought separately. *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 895 (5th Cir. 1993) (Jones, J., concurring) ("The proper question is whether Congress *intended to protect* coalitions.").

Fourth, Plaintiffs play word games, contending that the phrase "a class of citizens" "is not…singular." Br. 22. But it is: "class" is singular. The phrase "of citizens" is an adjectival phrase that limits "class" but cannot expand it or transform its meaning. *See Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018). Plaintiffs acknowledge as much by accurately creating subject-verb agreement in that sentence, using the singular "is" to match the singular noun "class," not the plural "are" to match "citizens." *See* Br. 22. In this way, "the last antecedent grammatical rule," Br. 23, supports Defendants, not Plaintiffs, by treating the plural "citizens" as limiting, not expanding on "class." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (applying the canon to a "limiting clause" (citation omitted)). And the singular-plural canon does not apply here for the same reason it did not apply in *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1482 (2021). That canon permits multiple classes to bring Section 2 suits together or separately, but "it does not mean a [class] can consist of multiple" groups otherwise lacking claims. *Id.*

Fifth, Plaintiffs suggest that "the Supreme Court…recognizes coalition claims." Br. 24. It does not. *See Growe*, 507 U.S. at 41 (declining to decide the issue). The precedents Plaintiffs cite were joint or parallel claims, not coalition claims. For example, the claim in *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021), was that precinct-voting and self-delivery absentee ballot requirements burdened "Arizona's American Indian, Hispanic, and African American citizens," *id.* at 2334, but each group could independently tender that allegation, and no aggregation was required to manufacture an otherwise non-

existent claim. Likewise, the assertion in *Wright v. Rockefeller*, 376 U.S. 52 (1964), was intentional discrimination, which does not require a 50% threshold showing. *Id.* at 56-57. In *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991), it was unclear whether the plaintiffs sought majority-Black and majority-Hispanic districts or coalition districts, and the distinction was unnecessary to the decision. *See id.* at 422-25. Any "antecedent propositions" assumed but not decided in these decisions do not control. *United States v. Norman*, 935 F.3d 232, 241 (4th Cir. 2019).

3. Plaintiffs resort to legislative history, but when *Nixon* was decided, no one had located "any direct evidence that Congress even contemplated coalition suits, far less intended them." *Nixon*, 76 F.3d at 1387. Twenty-six years later, Plaintiffs identify no oversight in this effort.

Plaintiffs cite a single reference to "Mexican Americans and blacks" in the same sentence, but this accompanied the 1975 amendments. *See* Br. 26-27. It was not until 1982 that Congress added the language Plaintiffs rely on here, establishing Section 2 effects liability "even [in] the absence of proof of discriminatory intent…." *Chisom v. Roemer*, 501 U.S. 380, 383-84 (1991).[4] Nor does the reference of two racial groups in one sentence move the needle for Plaintiffs' argument, since it is equally consistent with the parallel claims

[4] Plaintiffs' argument based on verbiage in *Chisom*, *see* Br. 21, stands rejected in *Nixon*, 76 F.3d at 1388-89. And *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), supports Defendants, holding that "the ordinary public meaning of the statute's language at the time of the law's adoption" controls. *Id.* at 1741.

involving independent injuries to both groups. The same can be said of the words "a fair chance to participate" in the 1982 amendments. Br. 27. "Legislative history…is meant to clear up ambiguity, not create it." *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011). But Plaintiffs are simply "looking over a crowd and picking out [their] friends." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citation omitted).

4. Defendants' opening brief (at 30) explained that the handful of decisions recognizing coalition claims lack reasoned support. Plaintiffs' brief confirms this. It references the decisions, but does not make use of their reasoning, because there is precious little. Br. 24-25 & n.3. Undeterred, Plaintiffs ask the Court to follow the "vast majority of courts" anyway. Br. 23 (boldface omitted). But the Court's task is not "'merely to count noses.'" *Laskar v. Hurd*, 972 F.3d 1278, 1293-94 (11th Cir. 2020) (quoting *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 785 (7th Cir. 2019)). It is quality, not quantity, that counts. If *Nixon* is an "outlier," as Plaintiffs say, Br. 25, it is so only in being thoroughly reasoned.

Plaintiffs also resist the relevance of the holding in *Bartlett* and *Hall* that Section 2 does not "grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance.'" *Bartlett*, 556 U.S. at 14-15 (quoting *Hall*, 385 F.3d at 431). Defendants are correct that *Bartlett* "did not address coalition districts," but they cannot avoid its "reasoning." Br. 30. *Bartlett*'s logic that "[n]othing in § 2 grants special protection to a minority group's right to form political coalitions[,]" applies equally here. *Bartlett* rejected

any Section 2 right "to join other voters—*including other racial minorities*, or whites, or both—to reach a majority…." 556 U.S. at 14 (emphasis added). Plaintiffs ignore this reasoning. Nor do Plaintiffs address Defendants' observation that their own evidentiary showing depends on *white* crossover voting to establish performing districts. Opening Br. 29.

5. Plaintiffs do address *Bartlett*'s observation that construing Section 2 to compel multi-race districts "would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating…,'" 556 U.S. at 21-22 (citation omitted), but their argument makes little sense, Br. 28-29. They cannot deny that adding this class of claims would increase the number of race-based districts—including, potentially, in Virginia Beach. And, whether or not "[c]oalition claims encourage cross-racial partnerships," this certainly does not "relieve any administrability and divisiveness concerns." Br. 29. The problem is *identifying* whether those "cross-racial partnerships" actually exist, and that problem is even more pronounced where many races may have such partnerships than where two may. *See Bartlett*, 556 U.S. at 21. Plaintiffs' assertion that "[a]ddition is not too steep an administrative hurdle," Br. 28, carries no credibility when their brief insists that even algebra is insufficient, *see* Br. 39-40, and that experts need "homogenous precinct analysis, ecological regression ('ER'), and ecological inference ('EI')," Br. 33, which are subject to manipulation, Br. 35-36, and fail to address small groups, Br. 35. And any "objective, administrable rule," *Bartlett*, 556 U.S. at 22, would weed out the weak cases, such as this one.

Recognizing coalition claims would place redistricting authorities in the impossible position of "[r]acial gerrymandering" by creating coalition districts, *id.*, or incurring Section 2 liability otherwise. *See Abbott v. Perez*, 138 S. Ct. 2305, 2315 (2018) (discussing these "competing hazards of liability" (citation omitted)). Plaintiffs retort that "Defendants' misplaced constitutional and administrability arguments would apply to single-race claims as much as to coalition claims." Br. 28. Not so. Coalition claims compound the problem of racial predominance in the way *Bartlett* warned crossover claims would. 556 U.S. at 21-22. Regardless, the Supreme Court just issued a stay of a Section 2 injunction and took the exceptional step of granting certiorari before a district court's judgment to determine whether this equal-protection argument *does* apply to single-race claims. *See Merrill v. Milligan*, 2022 WL 354467 (U.S. Feb. 7, 2022).

B. Plaintiffs' Claim Fails the Second Precondition

Plaintiffs ask this Court to recognize coalitional classes that "share…the same experience of being politically excluded 'on account of race,'" Br. 22, but to excuse them from proving any such shared experience. It is untenable for them to defend coalition claims on a theory of shared injury without any evidence regarding the voting patterns of two of the three groups in the putative coalition. If coalitional claims are cognizable, a "'higher-than-usual' burden to prove…political cohesion" applies. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 422 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004) (citation omitted).

1. Plaintiffs Invoke the Wrong Legal Standard

To establish that one racial group—here, the Black group—shares an experience of political exclusion with others—here, the Asian and Hispanic groups—a plaintiff must prove that "black-supported candidates receive a majority of the Hispanic and Asian vote." *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989). In turn, to show shared experience running in the other directions, the plaintiff must prove that "Hispanic-supported candidates receive a majority of the black and Asian vote" and that "Asian-supported candidates receive a majority of the black and Hispanic vote." *Id.* No other legal test is conceptually available. Opening Br. 31-32.

Plaintiffs beg to differ, announcing that the "'key' Section 2 inquiry for coalition claims is whether 'the minority group as a whole' is politically cohesive." Br. 36 (citation omitted). But that does not even ask whether different groups "share…the same experience of being politically excluded," Br. 22, and attributes preferences of large groups to smaller groups. Under Plaintiffs' test, a putative coalition comprising 90% Black voters and 10% Hispanic voters would be a coalition on the strength of Black cohesion alone, even if every Hispanic voted against Black-preferred candidates. That is not a shared experience, which is why courts have demanded proof that "blacks and Latinos…have the same preferred candidate." *Rodriguez*, 308 F. Supp. at 443.

The district court's special master, Dr. Grofman, recognized this, stating after *Brewer* was decided: "[B]y failing to disaggregate, we might wrongly infer that neither [alleged coalitional minority] group is supporting the white

candidate(s) when in fact one group may be giving most of its support to the white candidate(s)." Bernard Grofman, Voting Rights in A Multi-Ethnic World, 13 Chicano-Latino L. Rev. 15, 24 (1993). Accordingly, Dr. Grofman opined that he "would require that (1) each group usually supports viable candidates of its own race or ethnicity, and (2) each group usually supports viable candidates of the other group…." *Id.* at 23 (footnotes admitted). Plaintiffs' relaxed standard attributes preferences of larger groups to smaller groups in the undifferentiated "Minority" category.

Plaintiffs have no conceptual or statutory response. They instead insist that "cohesion is 'a question of fact.'" Br. 36. But the *standard* of cohesion is not: "whether the court applied the correct burden of proof is a question of law subject to plenary review." *Abbott*, 138 S. Ct. at 2326. A finding "based on a misunderstanding of what is meant by 'political cohesiveness'" is a "legal" error. *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988). And Plaintiffs protest too much in criticizing the "single cramped statistical framework Defendants propose." Br. 37. *Brewer*'s framework is not "statistical," and it is not "cramped" to demand an examination of Asians' and Hispanics' *own* candidate preferences where plaintiffs (who are not Asian or Hispanic) cry discrimination against Asians and Hispanics. Plaintiffs' permissive approach would enable members of one group to use others for the instrumental purpose of filling out a 50% racial quota regardless of those groups' real interests. *See LULAC,* 986 F.2d at 786 n.43 (warning of this "risk"). For this reason, the Supreme Court warned that "there [is] quite obviously a higher-than-usual need

for the second of the *Gingles* showings," if coalition cases are even viable. *Growe*, 507 U.S. at 41. Plaintiffs ignore that command.[5]

Instead, Plaintiffs charge Defendants with "misrepresentation" of *Brewer*, Br. 38, which is difficult to understand when Defendants simply quoted *Brewer*, Opening Br. 31-32. It is Plaintiffs who misrepresent *Brewer* by cutting its statement "that minority groups may be aggregated" off from the remainder of the sentence: "for purposes of asserting a Section 2 violation." *Brewer*, 876 F.2d at 453; Br. 38. This referred to the Fifth Circuit's recognition of coalition claims, but the portion Defendants quoted refers to the standard of cohesion. Other courts have read *Brewer* as Defendants do. *See, e.g.*, *Kumar v. Frisco Indep. Sch. Dist.*, 476 F. Supp. 3d 439, 504 (E.D. Tex. 2020); *Rollins v. Fort Bend Indep. Sch. Dist.*, 1996 WL 560295, at *13 (S.D. Tex. June 30, 1994), *aff'd*, 89 F.3d 1205 (5th Cir. 1996).

2. Plaintiffs' Showing Falls Short of the Legal Standard

Plaintiffs did not even arguably prove that the Asian, Hispanic, and Black groups share experience of exclusion from the political process, even defined to include support for the same candidates.

a. As in other cases finding no coalitional cohesion, "[n]o regression analysis was presented to isolate the voting patterns of Hispanic voters as

[5] Plaintiffs also have no response to Defendants' point that their standard is more lenient than that which governs a single-race claim. Opening Br. 36. Whereas a plaintiff alleging a single-race Asian claim must show that the Asian group is cohesive, Plaintiffs disclaim any need to make this showing.

compared to African-American voters" or to Asian voters. *Rollins*, 1996 WL 560295, at *13. Thus, the "quantitative expert testimony at trial," Br. 33, did not establish that "black-supported candidates receive a majority of the Hispanic and Asian vote," *Brewer*, 876 F.2d at 453. That evidence, Plaintiffs concede, "did not yield specific percentage estimates for Hispanic and Asian votes for particular election contests." Br. 37. Like the district court, Plaintiffs contend only "that the *Minority* Community is politically cohesive," taken as a whole. Br. 33 (emphasis added); *see also, e.g.*, *id.* at 34 ("the minority community votes cohesively"); *id.* at 37 (citing evidence "that illustrated the Minority Community's cohesion"). But what does that prove? Plaintiffs have no evidence that the Asian community is cohesive, that the Hispanic community is cohesive, or that the three groups together are cohesive. Opening Br. 33-36.

Thus, Plaintiffs' assertions carry no legal—or even logical—significance. It does not matter that Dr. Spencer used "three standard statistical methods," Br. 33, that "Dr. Spencer did not rely on any single statistical method," Br. 35, or even that the district court "concluded that the evidence proved minority cohesion," Br. 34. None of that addresses the right legal question. As Defendants explained, there is no difference between Plaintiffs' assertions and the unbelievable assertion that Republican and Democratic voters in Cleveland, Detroit, or Oakland are cohesive around Democratic candidates because, taken together, estimates show high support for Democratic candidates in those cities. Opening Br. 44. Aggregation hides, rather than reveals, the truth.

b. Plaintiffs' sole attempt to overcome this problem relies on Dr. Spencer's rejection of the "linear" bounds of his own ecological-regression method. Br. 35-36. The district court's reliance on Dr. Spencer's testimony—disclosed for the first time at trial on newly scribbled charts—was legal and clear error. Opening Br. 39-44.

First, even if Dr. Spencer made a reliable showing "that Black voters exhibited similar voting preferences as the combined Minority Community," Br. 35, the legal error of aggregation would not be overcome. Dr. Spencer's departure from linearity still does not purport to examine Asian and Hispanic voting preferences separately. This approach includes no point estimates for these groups and fails to analyze whether their voting patterns merge or diverge.

Second, it was clearly erroneous for the district court to stand by this testimony because the court-appointed special master rejected it as "mathematically impossible." SJA285; Opening Br. 42-44. Plaintiffs accuse Defendants of citing "a single out-of-context sentence," Br. 37, but Dr. Grofman addressed this issue fulsomely in (1) a full paragraph in his report, (2) a robust footnote, (3) an entire appendix, and (4) another robust footnote. *See* SJA235 (footnote 15); SJA241 (paragraph D1); SJA284-85 (Appendix B); SJA284-85 (footnote 41). Dr. Grofman explained that it is not "statistically possible to determine the voting behavior in Virginia Beach of African-American, Asian-American, and Hispanic populations individually," and he "placed no reliance on conclusions by experts for Defendants *or experts for Plaintiffs* about differences in voting behavior between the three groups or between any single group and

the combined group." SJA235 (emphasis added). The reference to "experts for Plaintiffs" was to Dr. Spencer's rejection of linearity. Opening Br. 41.[6]

Further, Plaintiffs take Dr. Grofman out of context. They quote his conclusion that there is "clear and compelling evidence for racially polarized voting in Virginia Beach," Br. 38 (quoting SJA285), but omit the key qualification: "between White (non-Hispanic) and non-White voters," SJA285 (boldface omitted). That is, he found cohesion "**of the composite minority group as a whole**." SJA285; *see also* SJA240 (finding cohesion "**when we look at the combined minority community**"). Dr. Grofman treated this as sufficient only because this amalgamation was the "group whose voting behavior Judge Jackson asked me to examine," SJA235, and because he felt obliged to "take as given by the Court's opinion that the relevant voting rights pertain to the combined minority community…." SJA224. But Dr. Grofman disclaimed taking a side in the "[l]egal issues" that "can only be addressed by the Court." SJA342. As shown, his prior writing rejected Plaintiffs' legal position.

Third, the district court hardly needed Dr. Grofman to debunk Dr. Spencer's inferences about Asian and Hispanic voting behavior when Dr. Spencer also "concluded…it is mathematically impossible to derive voting

[6] Plaintiffs leverage Dr. Grofman's analysis rejecting the algebraic method of Defendants' expert, Dr. Kidd, Br. 39-40, but Defendants no longer rely on that method to show actual "voting behavior," SJA235, but rather to show *possible* voting behavior that Plaintiffs cannot rule out, *see* Opening Br. 34. Plaintiffs forget the parties are not similarly situated: the burden is theirs. *Growe*, 507 U.S. at 42.

patterns for each minority group separately." Br. 37 (quotation marks omitted); *see also* Br. 35. It was improper for Dr. Spencer to develop a novel method on the witness stand through scribbled curves on charts to illustrate what he admitted cannot be proven. Plaintiffs acknowledge that "ER assumes a linear relationship," Br. 35, so Dr. Spencer was not entitled to reject that assumption for some purposes (all-minority cohesion) and not others (Black cohesion). Opening Br. 40-41. Plaintiffs retort that his result "converged with the homogenous precinct analysis," Br. 40 n.9, but Dr. Grofman concluded "we cannot directly make use of the method of *homogeneous precincts* in the City of Virginia Beach to assess the voting behavior of the separate minority communities" because "[t]here are no such sufficiently racially/ethnically homogenous precinct in Virginia Beach" even for "the three groups combined." SJA237. Dr. Spencer, too, admitted that homogenous precincts do not exist in Virginia Beach, rendering that method useless. JA0438-JA0440.

Plaintiffs ignore that the methodological limitations Dr. Spencer purported to correct *ad hoc* at trial were addressed by the leading expert Dr. Gary King, who invented ecological inference to overcome "the assumption of linearity underpinning the ecological regression method." *Rodriguez v. Harris Cty.*, 964 F. Supp. 2d 686, 759 (S.D. Tex. 2013), *aff'd*, 601 F. App'x 255 (5th Cir. 2015). King's method is "regarded as an improvement upon ecological regression" for this reason. *United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 597 (E.D. Mich. 2019) (collecting cases). Dr. Spencer performed this method, it

is the method curing the linearity problem, but the results do not help Plaintiffs. Opening Br. 35, 41.

c. Plaintiffs' reliance on "qualitative evidence" fares no better. Br. 42. Plaintiffs argue only that the putative coalition "advocated together in at least seven categories." Br. 43. But the cohesion question looks to "whether members of the minority usually *vote* for the same candidates." *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987) (emphasis added). The district court "should have looked only to *actual voting patterns*," not to "socioeconomic" factors or "political opinion." *Gomez*, 863 F.2d at 1416 (reversing a trial court for this error); *see also United States v. Blaine Cty.*, 363 F.3d 897, 910 (9th Cir. 2004) ("[I]t is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis."). Evidence of purported shared issue advocacy is meaningless in the absence of any connection to "the 'voting preferences expressed in actual elections.'" *Sanchez v. State of Colo.*, 97 F.3d 1303, 1312 (10th Cir. 1996); *see also Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) ("[A] minority group is politically cohesive if it votes together."). Plaintiffs respond that both "quantitative" and "qualitative" evidence is relevant, Br. 44, but that is not the issue. The problem is that their qualitative evidence does not prove different groups "often support different [or the same] candidates," *Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989), which is the inquiry their authorities require, Br. 42-45.

Defendants do not "ask[] this Court to draw different conclusions from the record" than the district court's, as Plaintiffs allege. Br. 45. Defendants'

evidence speaks to the legally salient question of candidate support; Plaintiffs' does not. The unrebutted testimony showed that the Filipino community—the City's largest Asian community—does not regularly support Black-preferred candidates. JA0858-60; JA0334; JA0359; JA0717; JA0722-23; JA1003; JA2269-70; JA2293-94. It also showed that, even where the disparate groups come together on a "specific issue," they then "disperse and go about [their] business." JA0190-91. Plaintiffs' witness—their *sole* witness of Asian or Hispanic descent—Democratic Del. Kelly Convirs-Fowler, testified that Filipino voters provide, for her, "crossover" support, an acknowledgment that these voters ordinarily prefer Republicans. JA0322. The deficiency in Plaintiffs' reliance on "seven categories" of issue advocacy is that "it is the plaintiff's burden to show that voters in the minority group have a *candidate*…that the group would prefer to elect." *Mallory v. Ohio*, 173 F.3d 377, 383 (6th Cir. 1999) (emphasis added) (*citing Thornburg v. Gingles*, 478 U.S. 30, 67-70 (1986)).

And Plaintiffs cannot credibly call unrebutted evidence that Filipino voters regularly vote for Republican candidates "irrelevant because the City Council elections are nonpartisan," Br. 45, when Plaintiffs call it highly relevant that "'voters from the Minority Community strongly prefer Barack Obama over John McCain,'" Br. 34 (quoting JA1225). It is unlikely that a group polarized against the Black community in partisan races suddenly becomes cohesive in non-partisan races. And, because Plaintiffs' partisan *aggregate* "Minority" estimates hide the unrebutted fact that Filipinos vote Republican, there is every reason to suspect the same concealment is occurring in their *aggregate* estimates

of patterns in nonpartisan council races. This method buries Filipino preferences and silences their voices.

C. Plaintiffs' Claim Fails the Third Precondition

Because the district court concluded that "50% of the minority-preferred candidates have lost," JA1232, Plaintiffs failed to prove that a cohesive white voting bloc is "*usually*…able to defeat" the minority group's preferred candidates, *Gingles*, 478 U.S. at 49. Plaintiffs ignore this finding and erroneously try to explain away the many minority-preferred-candidate wins. Br. 46-47. Like the district court, they argue that white minority-preferred candidates do not count, *id.*, and ignore this Court's contrary holding in *Lewis v. Alamance Cty.*, 99 F.3d 600, 607 (4th Cir. 1996). Opening Br. 47-48.

Plaintiffs' attempts to explain away the fact that two Black (and Black-preferred) members serve on the Council today are perplexing. Their contention that these candidates received "unusually high and unprecedented support from white voters," Br. 49 n.11, wrongly discounts highly probative evidence of "substantial crossover voting," which cuts against them on "third *Gingles* precondition." *Bartlett*, 556 U.S. at 24. White support is a reason to count, not discount, these races.[7] And Plaintiffs still have not explained how a lawsuit lacking any public attention prior to the November 2019 council election

[7] Plaintiffs' argument that one candidate may have received support from "a prominent Republican organization," Br. 49 n.11, contradicts their argument that partisan information is "irrelevant." Br. 45.

somehow creates a special circumstance, offering only reasons it "could" be without cognizable evidence of what *is*. Br. 48.

D. Plaintiffs' Claim Fails the Totality of the Circumstances

Plaintiffs' arguments under the totality-of-the-circumstances further read any integrity out of coalition claims. To establish groups' "same experience of being politically excluded," Br. 22, there is no substitute for evidence that *each* group had the same experience, Opening Br. 50-51. Plaintiffs, however, can only cite vague references to "the entire coalition" in the opinion below, Br. 52, which purported to find "each factor…met," JA1238. Plaintiffs do not deny that "Asian students perform at the same, or higher, rate compared to white students," JA1249, that more Asian than white students graduate college, JA1250, that Asian household income exceeds white household income, JA1251, that white and Asian home-ownership rates are almost identical. JA1252, that not a single Asian-American has lost any Virginia Beach race, JA1262, or that "the City…overutilized Asian-American owned business." JA1268.

Plaintiffs try to divert the Court's attention to "Black, Latino, and Asian-American" statistics combined, Br. 53, which again attributes the experiences of some groups to others. But to pretend the Asian, Hispanic, and Black experiences are "the same," Br. 22, is a disservice to all groups. And it is Plaintiffs' standard that would replace a searching local inquiry with a "stilted" approach, Br. 51-52, "viewing race exclusively in white/nonwhite terms" and ignoring "divergent communities knitted together by various traditions and

carried forth, above all, by individuals." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723-24 (2007) (citation omitted).

IV. The Injunction Is Indefinite

The injunction commanding the City to "comply with Section 2" as to "any practice, policy, procedure or other action," JA1277, is an "'obey the law' injunction[]" that is "unenforceable." *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1222 (11th Cir. 2000). It is not true "that this Court has repeatedly approved…materially indistinguishable" injunctions. Br. 54-55. Plaintiffs' cited authorities merely enjoined "any further use of the at-large system." *United States v. Charleston Cty.*, 316 F. Supp. 2d 268, 307 (D.S.C. 2003), *aff'd*, S.C., 365 F.3d 341 (4th Cir. 2004); *Collins v. City of Norfolk,* 883 F.2d 1232, 1244 (4th Cir. 1989) (ordering lower court to "enjoin at-large elections").

Plaintiffs' rhetoric that the injunction is not "burdensome" if the City "really intends to comply," Br. 55 (citation omitted), means nothing in this context. The City can violate Section 2 without "intent," *Chisom*, 501 U.S. at 383, and even without volition if it is administering a state election law, Opening Br. 52. And Section 2 precedent has "engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Merrill*, 2022 WL 354467, at *4 (Roberts, C.J., dissenting). This leaves the City—acting in good faith—no meaningful way to avoid potentially crushing contempt sanctions. Plaintiffs' authority, *see* Br. 54-55, addresses different statutory schemes lacking this acute indefiniteness problem and is not on point. *See SEC*

v. Goble, 682 F.3d 934, 950 (11th Cir. 2012) (differentiating scenarios where injunctions tracking legal provisions are and are not sufficiently definite).

CONCLUSION

The injunction, liability finding, and judgment below should be vacated, and the case remanded with instructions that this case be dismissed or, alternatively, that judgment be entered for Defendants in this case.

Dated: February 14, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P ("Rule") 32(a)(7)(B) because it contains 6,497 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto MT typeface.

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CERTIFICATE OF SERVICE

I certify that on February 14, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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