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

****

MOTION OF BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW AND THE SOUTHERN COALITION FOR SOCIAL JUSTICE FOR LEAVE TO FILE AMICUS CURAIE BRIEF

****

The Brennan Center for Justice at New York University School of Law (the "Brennan Center") and the Southern Coalition for Social Justice ("SCSJ") respectfully moves this Court, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, for leave to file an *amicus curiae* brief. The Brennan Center is filing its *amicus curiae* brief conditionally along with this motion, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

INTERESTS OF AMICI

The Brennan Center for Justice at New York University School of Law is a nonprofit, non-partisan public policy and law institute seeking to improve our systems of democracy and justice. Through its Democracy Program, the Brennan Center works to eliminate participation barriers, and ensure public institutions reflect the diverse voices and interests that make for a rich and energetic democracy.[1] The Brennan Center has long focused on rooting out discrimination in voting and representation, producing extensive scholarship and empirical research on relevant subjects and appearing as counsel and amici in voting rights litigation in state and federal court. This brief addresses the text, purpose, and legislative history of Section 2 of the Voting Rights Act to demonstrate its consistency with minority coalition claims.

Southern Coalition for Social Justice is a 501(c)(3) nonprofit public interest law organization founded in 2007 in Durham, North Carolina. SCSJ partners with communities of color and economically disadvantaged communities in the south to defend and advance their political, social, and economic rights through the combination of legal advocacy, research, organizing and communications. One of *amicus'* primary practice areas is voting rights. *Amicus* has represented

[1] No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund its preparation or submission. This brief does not purport to convey the position of NYU School of Law.

individual and organizational clients in redistricting cases across the South and in the Fourth Circuit, including North Carolina, South Carolina, and Virginia. *Amicus* SCSJ frequently represents clients in cases brought under the Voting Rights Act (VRA) and Fourteenth Amendment challenging redistricting plans and voting laws and practices that abridge voting, registration, or fair representation for all eligible voters in an increasingly diverse South.

REASONS WHY THE AMICUS BRIEF IS DESIRABLE

The issue of minority coalition claims raised by this case, and the Voting Rights Act ("VRA") more generally, have been researched by the Brennan Center and SCSJ, and are part of their work to hold the political institutions and laws of the United States accountable to the American ideals of democracy and equal justice. The matters asserted within the *amicus curiae* brief shed light on the correct interpretation of the VRA as it applies to minority coalition claims.

CONCLUSION

For the foregoing reasons, the Brennan Center and SCSJ respectfully requests that the Court grant leave to file an *amicus curiae* brief addressing the issue of minority coalition claims posed by the District Court case.

Respectfully submitted this the 14th day of February, 2022.

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The undersigned attorneys hereby certify that they served a copy of the foregoing Motion upon the parties via e-mail and by the filing system to the attorney for Defendants and Amici named below:

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BRIEF OF *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND SOUTHERN COALITION FOR SOCIAL JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLEES

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THE AMICI

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organizing and communications. One of *amicus'* primary practice areas is voting rights. *Amicus* has represented individual and organizational clients in redistricting cases across the South and in the Fourth Circuit, including North Carolina, South Carolina, and Virginia. *Amicus* SCSJ frequently represents clients in cases brought under the Voting Rights Act of 1965 (VRA) and Fourteenth Amendment challenging redistricting plans and voting laws and practices that abridge voting, registration, or fair representation for all eligible voters in an increasingly diverse South.

INTRODUCTION

This case involves claims brought by minority voters under Section 2 of the VRA arguing that the use of at-large elections for the Virginia Beach City Council dilutes their votes. The VRA is a landmark piece of legislation since its enactment in 1965, and Section 2 in particular has a long and storied role in ensuring that no American citizen is denied the right to vote "on account of race or color or in contravention of the guarantees set forth in section 10303(f)(2)." 52 U.S.C. § 10301(a).

The statute's text and history shed light on the intentions and aims of Congress in its drafting. As discussed *infra*, Congress sought to make Section 2 available to individuals who suffered discrimination at the voting booth, whether as one racial group or as part of a minority coalition. Several factors point toward

this conclusion, including the plain language of Section 2, as well as the proper reading of the phrase "members of a class of citizens" and the definition of "class." In addition, the legislative history of the VRA, and its enforcement history, demonstrate that minority coalitions are in harmony with Congress' intent in passing the VRA and drafting Section 2. Finally, Congress and the courts have established a robust and fact-intensive framework for evaluating Section 2, which can resolve claims of vote dilution brought by minority coalitions. Taken as a whole, these arguments give weight to coalition claims as a suitable mechanism to fight vote dilution for multiple minority groups.

ARGUMENT

I. The Text and Purpose of the VRA Supports Minority Coalitions

Section 2(a) of the VRA prohibits state and local policies "imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2)." 52 U.S.C. § 10301(a). Section 10303(f)(2),[2] in turn, prohibits policies that "deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group." Subsection (b) from 1982 describes how a violation of subsection (a), which incorporates section 10303(f)(2), can be proven:

[2] 52 U.S.C. § 10303(f)(2) corresponds to Section 4(f)(2) of the VRA.

> A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that . . . members of a class of citizens protected by subsection (a) . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

52 U.S.C. § 10301(b) (emphasis added).

At issue is the effect of the phrase "members of a class of citizens protected by subsection (a)." Appellants (collectively, "the City") urge that "class" be read to mean citizens with "a common racial heritage and shared American experience." City's Am. Br. 24. On this reading, a plaintiff alleging discrimination "on account of race or color," such as her status as a person of color, can only assert a claim if the injury is limited to her specific racial group—even if all citizens of color are similarly affected. The same is true of a plaintiff alleging discrimination because she "is a member of a language minority group."

Under the VRA, "class" refers to the group of citizens *similarly injured* under subsection (a). If a plaintiff's right to vote is abridged solely on account of her being Black, then the relevant "class of citizens" is based solely on her personal race: similarly affected Black citizens. But if a Black plaintiff's right to vote is abridged because she is a person of color and not white, then the relevant class is similarly-injured citizens of color, irrespective of the individual voter's race. The boundaries of the relevant "class" depend on the allegations and facts in a particular case.

This reading reflects Congress's recognition—and the country's experience—that discrimination based on race, color, and language can have many victims. The prejudice behind discriminatory policies often did not target those victims with precision, but instead reflected "the doctrine of White Supremacy," which divides citizens simply into *white* and *non-white*. *See Loving v. Virginia*, 388 U.S. 1, 7 (1967).

This reading of "class," which is the heart of all coalitional claims, is supported by the text and purpose of Section 2, as detailed below:

- Statutes should be read to give effect to all their terms. The City's reading rewrites Section 2 to limit its reach to policies that injure discrete groups delineated by "a common racial heritage and shared American experience," City's Am. Br. 24, regardless of the facts in a particular case. This would effectively delete Section 2's references to language minority status and "color." By contrast, reading "class" in subsection (b) as fact-specific would preserve subsection (a) and reflect the intended function of subsection (b) as clarifying how a subsection (a) violation can be proven.
- Section 4(f) of the VRA shows that Congress knows how to require this kind of evidence when intended to limit it to a single language

minority. The fact that Congress wrote Section 2 differently suggests a difference in meaning.

- When Congress uses terms with settled common-law meanings, those meanings should be applied. The common-law meaning of "class," especially in the context of civil-rights actions, refers to persons similarly injured. This is how "class" was used in the Supreme Court opinions that informed Congress's drafting of subsection (b) in 1982.
- The purpose of the VRA is to remedy the race-, color-, and language-based dilution of voting strength. The City's reading would disserve this purpose and lead to absurd consequences that Congress did not intend: allowing equally discriminatory policies with identical effects on citizens of color to receive different treatment based on the number of racial groups that those citizens of color comprise.

A. The VRA's text protects minority coalitions.

If possible, statutes should be read such that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Subsection (a) prohibits abridgements "on account of race or color" or membership in a language minority group. 52 U.S.C. § 10301(a). Under the City's interpretation, a plaintiff may only prove a claim by showing its effect on her particular racial or ethnic group—the group with which she shares "a common

racial heritage and shared American experience." City's Am. Br. 24. This effectively erases subsection (a)'s reference to language minority groups through its incorporation of Section 4(f)(2), as well as its separate reference to "color." Under the City's reading, these references would become surplusage.

While race, color, and language minority status surely can overlap, Congress did not use the three references to mean the same thing. Nor did it use "color" or "language minority group" to indicate merely a subset of a specific racial group. The word "or," which separates the three references, does not mean "including"—it is "almost always disjunctive, that is, the words it connects are to be given separate meanings." *Loughrin v. United* States, 573 U.S. 351, 357 (2014). A single language can be spoken by members of different racial groups and one racial group can have multiple dominant languages. The City's interpretation does not acknowledge this reality. Plus, as this Court has recognized, race-based and color-based discrimination are two different things. *Bryant v. Bell Atlantic Md., Inc.*, 288 F.3d 124, 132 n.5 (4th Cir. 2002). Considering the history of discrimination that categorized citizens as "white" and "non-white", discrimination based on color can affect all citizens of color, including citizens of different races.

When possible, statutory provisions should be read "harmoniously," especially when addressing the same subject. *Anderson v. FDIC*, 918 F.2d 1139, 1143 (4th Cir. 1990). The City's reading of "class" in subsection (b) conflicts with

subsection (a)'s references to minority-language status, as well as its reference to "color." The correct reading harmonizes the two sections, recognizing that "class" in subsection (b) refers to the group of persons similarly injured, whether by race-, color-, or language-based discrimination.

In harmony, subsection (b) establishes the results-based orientation of the inquiry and elaborates the proof required to show a violation of subsection (a)—it does not limit subsection (a)'s scope. As Congress clarified in the 1982 amendments, subsection (a) requires a plaintiff to prove: (1) a denial or abridgement of the right of any citizen to vote; and (2) that the harm is the combination of the effects of the challenged policy and the plaintiff's "race or color" or (by reference) membership in "a language minority group." 52 U.S.C. § 10301(a), 10303(f)(2). Subsection (b) then clarifies that the first element required by subsection (a), an abridgement of the right to vote, can be established by showing differences in electoral outcomes. It also provides that the second causal element can be proven by looking to citizens similarly situated to the plaintiff—to whether voters in the same "class" as the plaintiff are less able to elect their chosen candidates. Subsection (b) does not limit subsection (a); rather, it describes how the causal impact of race or color can be proven—by looking to voters who share that characteristic to see if they are similarly disadvantaged. In *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986), the Supreme Court elaborated the threshold

proof required when applying this statutory structure to multimember districts. The Court's analysis did not require that all class members belong to a single racial minority. *See* Appellee's Resp. Br. 21-23; *infra* at 19-22.

Nevertheless, the City effectively asks this Court to amend Section 2(b) in the following way:

> A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that . . . members of a ~~class of citizens~~ **single racial minority** protected by subsection (a) . . . have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . . .

If Congress wanted to single out specific groups in this way, it would have done so expressly—as it did in Section 4(f)(3) of the VRA, which prohibits states and localities from providing voting materials

> only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.

52 U.S.C. § 10303(f)(3) (emphasis added).

"[W]hen Congress includes particular language in one section of a statute but omits it in another," then Congress presumptively "intended a difference in meaning." *Loughrin*, 573 U.S. at 358; *see also Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 357 (2013) (same for differences in rights provisions among civil-rights statutes). In Section 4(f)(3), Congress provided that a violation is

established by looking to the size of a "single" group. But it did not do so in Section 2, which cites Section 4(f)(2), and looks not at a single group, but instead to the injury suffered by a "class of citizens protected by subsection (a)."

Congress was not ignorant of this difference. The 1982 amendments that added Section 2(b) also amended Section 4(f)—indeed, Congress amended 4(f)(4) to clarify the rights of "Alaskan Natives and American Indians" to certain assistance, specifying those groups by name. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(c), 96 Stat. 133-34. The fact that Congress chose not to refer to racial, ethnic, or other groupings in its amendment to Section 2 is "particularly telling." *See Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 129 (2015). Congress used different language in Sections 2(b) and 4(f), and the interpretation of those sections should respect that choice.

Applying the last-antecedent rule also indicates that the VRA defines the scope of protection as *citizens* because the term "citizens" and not "class" is the last antecedent before the relevant limiting phrase in subsection (b). *See Lockhart v. United States*, 577 U.S. 347, 351 (2016) (describing the last-antecedent presumption); Kevin Sette, *Are Two Minorities Equal to One?*, 88 Fordham L. Rev. 2693, 2727 (2020) (applying it to Section 2(b)). Thus, the last-antecedent rule further establishes that the relevant class for purposes of subsection (b) consists of citizens covered by the common injury defined in subsection (a): those suffering

voting discrimination on the basis of race, color, or language minority status. Nothing in the text of Section 2 otherwise limits "class." As the Supreme Court observed with respect to Title VII, there is no such thing as "a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1747 (2020). The same applies to Section 2.

Such interpretation of "class" is also consistent with the term's common-law origins and use in civil rights litigation. Unless Congress directs otherwise, the courts presume that "a statutory term has its common-law meaning." *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003). The history of the term "class" in the civil-rights context is closely tied to the federal class action. Indeed, by the time Section 2(b) was enacted in 1982, class actions were a common mechanism for civil-rights plaintiffs. *See* Fed. R. Civ. P. 23(b)(2) advisory committee's note to the 1966 amendment ("Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration."). The Federal Rules of Civil Procedure enshrined the common-law meaning of "class" when it defined a "class" of injured persons according to "common questions of law or fact." 5 *Moore's Federal Practice - Civil* § 23App.100 (2021) (discussing

Fed. R. Civ. P. 23). In other words, "class," as a term of art, referenced persons similarly injured in a particular case by a particular law or policy.

Congress was responding in 1982 to other Fourteenth- and Fifteenth-Amendment cases involving race- or color-based discrimination in which the "class" was defined by the facts on the ground—an inquiry that was "intensely local." *See White v. Regester*, 412 U.S. 755, 769 (1973) (recognizing classes defined by facts unique to the particular geographic areas). The Supreme Court affirmed in *Hernandez v. Texas*, 347 U.S. 475, 478-79 (1954), that the existence of a "separate class" was a community-specific "question of fact". The attitudes of the community—whether the putative class was considered separate and distinct—was sufficient proof. *Id*. at 479. The Court in *White v. Regester* cited *Hernandez*, noting that, "[c]onsistently with *Hernandez v. Texas*, the District Court considered Mexican-Americans in Bexar County to be an identifiable class for Fourteenth Amendment purposes." 412 U.S. at 767. Notably, depending on the facts, the courts would frequently circumscribe a "class" at varying levels of generality. In *Hernandez*, the class was limited to Mexican Americans, while in other cases, it could be Hispanos or Hispanics, a term that defines a group as broad as "person[s] of Spanish, Mexican, or Cuban heritage." *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 195 n.6 (1973). In *Keyes*, a Fourteenth-Amendment suit challenging segregation in Denver's school system, the Court held that Black and Hispanic

students were part of the same class, despite being "of different origins." 413 U.S. at 198. The important factor was their common injury—they had "suffer[ed] identical discrimination in treatment when compare[d] with the treatment afforded Anglo students." *Id*. *See also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 150 n.5 (1977) (classifying Puerto Rican and Black citizens as a minority group and using the term "nonwhite" to refer to them collectively).

Congress considered both *White* and *Keyes* when crafting the 1982 amendments. *See* S. Rep. No. 97-417, at 2, 132-33, 178 (1982). Indeed, it was *White* on which Congress based the results-based test codified in Section 2. *See id*. at 2 (1982). Congress used the word "class" in subsection (b) in the same way that the *White* Court had—in its common-law sense, to indicate a group of citizens commonly injured by the same race-, color-, or language-based discrimination, however that discrimination happens to manifest in a particular geographic location. As the Court noted in 1954, "community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection." *Hernandez*, 347 U.S. at 478. It was against this fulsome backdrop that Congress wrote Section 2(b).

B. Such an interpretation is consistent with the VRA's purpose.

As the Supreme Court observed in *Gingles*, Section 2 primarily concerns the interaction between electoral laws, practices, and structures with social and historical conditions that operate to create inequality in opportunities to elect preferred representatives on the basis of race, color, or language minority status. 478 U.S. at 47. The Court specifically noted the propensity of multimember districts and at-large systems to "minimize or cancel out the voting strength of racial [minorities in] the voting population" in the presence of certain case-specific factors. *Id.* (citation and internal quotation marks omitted). This minimizing or cancelling is no less present when the submergence impacts a Black minority, like in *Gingles*, or, as here, where minority voters encompass multiple identities. In other words, the purpose of Section 2 (and its text) would be frustrated by limiting "class" to a single racial group as a matter of law rather than leaving its definition as a case-specific factual inquiry. *Cf. Chisom v. Roemer*, 501 U.S. 380, 403-04 (1991) (reaffirming that the VRA "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination").

The propriety of this approach is further supported by the absurd result that could flow from the application of the textually untethered view advanced by the City. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be

avoided if alternative interpretations consistent with the legislative purpose are available."); *United States v. Young*, 989 F.3d 253, 260 (4th Cir. 2021). Consider a hypothetical pair of counties where minority voters experience dilution:

County A	**County B**
• At-large system dilutes the votes of citizens of color • Citizens of color are geographically compact, politically cohesive and there is persistent racially polarized voting • Voting-age citizens of color could compose 60% of a hypothetical single-member district • *Voting-age citizens of color are 90% Black and 10% Latino*	• At-large system dilutes the votes of citizens of color • Citizens of color are geographically compact, politically cohesive and there is persistent racially polarized voting • Voting-age citizens of color could compose 60% of a hypothetical single-member district • *Voting age citizens of color are 50% Black and 50% Latino*
Result: **Actionable**	Result: **Exempt**

In County A, citizens of color are as politically cohesive and geographically compact as citizens of color in County B. The continued use of an at-large election system affects citizens of color in each county equally. Citizens of color represent the same share of the voting-eligible population. The only difference is that County B's population includes a greater share of Latino citizens. Under the City's reading, this difference would immunize County B's policy from suit under Section 2, leading to results plainly inconsistent with the purpose and text of Section 2.

II. Section 2 claims by minority coalitions are consistent with Congress' intent in passing the VRA.

Congress enacted the VRA "in part as a prophylactic safeguard against racial discrimination" and expected it to be "forward-looking and constructive in nature." Voting Rights Act: Hearing on S.53, S.1761, S.1975, S.1992, and H.R. 3112, Before the Subcommittee on the Constitution, 97th Cong. 68-69 (1982). In its repeated reauthorizations of the VRA and expansions of Section 2, Congress was aware of minority coalition claims in the courts and as enforced by the Department of Justice ("DOJ"), and spoke of different racial and language minorities in tandem. It recognized that their experiences of discrimination often ran in parallel. An interpretation of Section 2 that denies minority coalitions access to the VRA's broad remedial protection would be "wholly inconsistent with the plain language of the Act and the express purpose which Congress sought to attain in amending Section 2; that is, to expand the protection of the Act." *Chisom*, 501 U.S. at 404 n.8 (quoting *Chisom v. Edwards*, 839 F.2d 1059, 1061 (1988)).

A. Congress intended for Section 2 to broadly apply to minority coalitions.

Congress was aware of precedent and practice authorizing minority coalition claims when it codified and reauthorized the expansive standards in Section 2. Congress declined to foreclose such claims and instead implicitly ratified what it understood was existing law and practice at the time—similarly aggrieved

minorities bringing claims as a single class. *See Bostock*, 140 S. Ct. at 1747 ("failure to speak directly to a specific case that falls within a more general statutory rule does not create a tacit exception").

In fact, in drafting the 1982 amendment, Congress directly referenced at least one Supreme Court case in which a minority coalition challenged the validity of an election law on grounds of racial discrimination. *See* S. Rep. No. 417, 97th Cong., 2nd Sess. (1982) (citing *Wright v. Rockefeller*, 376 U.S. 52 (1964)). In *Wright*, Black and Hispanic voters claimed that a New York apportionment statute violated the Fourteenth and Fifteenth Amendments and argued that the districting scheme was "contrived to create one district…which excludes non-white citizens and citizens of Puerto Rican origin," while concentrating members of the same in three other districts.[3] 376 U.S. at 52-54 (1964) (in considering a minority coalition's challenge, the Court found plaintiffs failed to prove New York districting law was motivated by racial considerations or drawn along racial lines).

Even prior to the 1975 expansion of the VRA, the Supreme Court and various other federal courts ruled on cases in which minorities aggregated their claims. In *White v. Regester*, for example, the Supreme Court evaluated in 1973

[3] Although *Wright* was originally decided in 1964, a year before passage of the VRA, and was brought under 14th and 15th Amendments, Congress's reliance on *Wright* in its expansions of the VRA is evidence of Congressional awareness of minority coalition claims in the area of voting discrimination.

whether a multi-member election scheme for the election of state legislators impermissibly and unconstitutionally denied the Mexican-American and Black right to vote in each of their geographic locations respectively. Although *White v. Regester* is a consolidation of actions filed in four District Courts, the Supreme Court evaluated all of the voters' rights collectively. Similarly, the Second Circuit in *Coalition for Educational in District One v. Board of Education*, a challenge by a minority coalition of Black, Hispanic, and Chinese Lower East Side residents, upheld a District Court's finding that certain school board procedures were invalid under the VRA because they had a disparate impact on these voters. 495 F.2d 1090, 1093 (2d Cir. 1974).

Congress, in reauthorizing the VRA in 2006, stated the purpose of the VRA "…is to ensure the right of all citizens to vote" and noted in its findings that "racial and language minorities continue to remain politically vulnerable." Pub. L. 109–246, §2, July 27, 2006, 120 Stat. 577. Congress also cited filings of Section 2 cases as well as enforcement actions by the DOJ. At the time of that reauthorization, two Circuit Courts had previously explicitly determined that the term class could apply to minority voters of different racial or ethnic identity. In *LULAC I*, the Fifth Circuit ruled that Black and Hispanic voters could aggregate to bring a Section 2 claim. *LULAC v. Midland Independent School Dist.*, 812 F.2d 1494, 1499-502 (5th Cir. 1987). The Fifth Circuit upheld this finding several times prior to the

reauthorization of the VRA: once in 1988, twice in 1989, and again in 1993. *See generally LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993); *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988). Similarly, the Eleventh Circuit in *Concerned Citizens of Hardee County v. Hardee County Board of Commissioners* held that two minority groups could aggregate so long as they were politically cohesive. 906 F.2d 524, 526 (11th Cir. 1990). Before the Sixth Circuit ruled in 1996 that minority coalition claims could not be brought under Section 2, all courts addressing minority coalition claims under Section 2 properly deemed them to be permissible. *Nixon v. Kent County*, 76 F.3d 1381, 1393 (1996) (Keith J., dissenting). In fact, *Nixon* notwithstanding, many courts continue to rule that minority coalition claims brought under Section 2 are proper. *See, e.g., Pope v. County of Albany,* 687 F.3d 565 (2d Cir. 2012).

Despite Congress' explicit awareness of minority coalition claims in the courts, Congress never took any steps to redefine "class." *See, e.g., Nixon*, 76 F.3d at 1398. Indeed, even critics of the proposed amendments raised no concerns about such claims. Voting Rights Act: Hearing on S.53, S.1761, S.1975, S.1992, and H.R. 3112. Before the Subcommittee on the Constitution, 97th Cong. 524 (1982); *see also* S. Rep. No. 417 at 108-239 (Report of the Subcommittee on the Constitution). Based on this evidence, Congress chose to expand rather than

restrict the scope and reach of the VRA and recognized both implicitly and explicitly that experiences of discrimination can cut across multiple identities.

When Congress expanded the VRA to cover discrimination not only on the basis of "race or color" but also on account of membership in a "language minority group,"[4] Pub. L. 94–73, 89 Stat. 400, this intent and understanding shone through clearly. In its 1975 report, the Senate Judiciary Committee did not focus solely on racial or language identity, but instead detailed the experiences that created the "class" that the VRA was trying to protect— a wide range of experiences of discrimination shared by racial and language minorities, including "invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others," S. Rep. No. 94-295 at 30, and the "economic dependence of these minorities upon the Anglo power structure." *Id.* at 28. Recognizing that experiences of discrimination are often shared by members of different minority groups, the Committee noted that Texas, which "has a substantial minority population…comprised primarily of Mexican Americans and blacks," also has "a long history of discriminating against members of both minority groups." *Id.* at 25; *see also LULAC*, 812 F.2d at 1496, *vacated and aff'd*

[4] Language minorities protected by the VRA are those "racial minorities whose primary language is other than English," such as Hispanic-Americans, Asian-Americans, American Indians, and Alaska natives. S. Rep. No. 295, 94th Cong., 1st Sess. 8 (1975).

on other grounds, 829 F.2d 546 (5th Cir. 1987) (finding that Black and Hispanic voters in Midland, Texas were both victim to "oppressive discrimination that has had lingering effects on the election system," in turn impacting "the rights of Hispanics and Blacks to register, to vote, and to otherwise participate in the election process"). That shared experience of multiple minority groups is critical to understanding the "class" that Congress passed the VRA to protect.

The Senate Judiciary Committee also emphasized that the purpose of the Section 2 framework is to require a "searching practical evaluation of the 'past and present reality." S. Rep. No. 417, 97th Cong., 2d Sess. 4, 30 (1982). The ultimate question, according to Congress, is "whether, *in the particular situation*, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice." *Id.* Such an inquiry, designed to respond to the evolving context of voter discrimination, compels an interpretation of Section 2 that preserves rather than curtails the intended breadth and flexibility encouraged by the "totality of the circumstances" inquiry. Accordingly, if the reality of voter discrimination involves mechanisms targeting or impacting multiple minority groups, then denying that class of voters access to Section 2 relief simply because they are too powerless as a singular minority would be incompatible with the express purpose of the Act and the standards mandated by Congress.

B. Congress was aware of and accepted the VRA's application to multiracial classes when it reauthorized and amended the Act in 1975 and 1982.

The record of DOJ enforcement of Section 5 on behalf of multiracial coalitions and judicial approval of such DOJ action informed Congress when it amended and re-enacted the VRA in 1982 and maintained parallel language between Section 5 and Section 2 to define the protected population. *Compare* 52 U.S.C. 10301 § 2(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed … in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2)") *with* 52 U.S.C. § 10304 ("Any voting qualification or prerequisite to voting, or standard, practice, or procedure… that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2)"). As drafted, both provisions concern citizens who suffer violations on account of race, color, or membership in a language minority. Whether Congress intended Section 5 to be invoked by multiracial coalitions thus implicates whether it intended Section 2 to be as well. *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) (establishing that "[i]n all

but the most unusual situations, a single use of a statutory phrase must have a fixed meaning.").

The history of Section 5 enforcement provides further evidence that Congress intended to create a VRA capable of reaching discrimination suffered by multiple minority groups. It is axiomatic that "'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts [that] statute without change.'" *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 581 (1978)). That is precisely what happened with the VRA: Congress adopted a consistent administrative and judicial application of the VRA to multiracial coalitions when it amended Section 2.

Prior to 1982, the DOJ regularly enforced Section 5 on behalf of multiple racial groups. For instance, in a 1974 letter objecting to a district plan submitted by Kings County, New York, the DOJ premised its denial of preclearance on the grounds that the districts "unnecessarily dilut[ed] the voting strength of black and Puerto Rican residents." *See* Letter from J. Stanley Pottinger, Assistant Attorney General, to George D. Zuckerman, April 1, 1974. In 1975, the DOJ warned of possible "submergence" of the voting strength "of significant concentrations of Black, Puerto Rican and Chinese people." Letter from J. Stanley Pottinger, Assistant Attorney General, to Stanley E. Michels, Sept. 3, 1975. Finally, in 1976,

DOJ objected because the "dilutive" system imposed a possible "discriminatory effect on blacks and Mexican-Americans" concentrated in a single geographic area. Letter from J. Stanley Pottinger, Assistant Attorney General, to L. Holt Magee, March 11, 1976. Other examples similarly apply Section 5 on behalf of multiple, explicitly named racial minorities. *See* Brennan Center for Justice, https://www.brennancenter.org/sites/default/files/2022-02/Holloway_Appendix_DOJ_Enforcement_Letters.pdf (last visited Feb. 14, 2022) (compiling twenty DOJ letters between 1974 and 1982 enforcing Section 5 on behalf of a multi-racial class).

Furthermore, the Supreme Court took no issue with such application of Section 5. In the case arising out of the 1974 enforcement action against Kings County, the DOJ's practice of aggregating Black and Puerto Rican voters into a single minority group was uncontroversial and the Supreme Court recognized their rights in aggregate as a cognizable "nonwhite" population. *Carey*, 430 U.S. at 150 n.5 ("The NAACP, the Attorney General, and the court below classified Puerto Ricans in New York together with blacks as a minority group entitled to the protections of the Voting Rights Act . . . Hereinafter we use the term 'nonwhite' to refer to blacks and Puerto Ricans . . ."). This acknowledgement to the multiracial reach of Section 5 is particularly salient because the *Carey* decision was cited at length in hearings leading to the 1982 amendment and reauthorization of the VRA.

See Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 97th Cong., 1st Sess., Part 3 at 2119-20 (1981); Hearings Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary, 97th Cong., 2nd Sess., Parts 1-2 (citing *Carey* 51 times); S. Rep. No. 97-417, p. 121 (1982).

Had Congress "disagreed" with the multiracial reach of the VRA, it would have altered the language to sever the parallelism with Section 5. *Dougherty Cty. v. White*, 439 U.S. 32, 38 (1978) (continuing to interpret Section 5 broadly because Congress did not "clarif[y] its intent" during reenactment). When Congress instead retained these "parallel definitions," it "intended to ratify" the interpretation reached by the DOJ. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (discussing Congress's active endorsement of existing interpretations of "disability" under the Rehabilitation Act in its enactment of the Americans with Disabilities Act).

III. The Fact-Intensive Nature of the Section 2 Framework Makes It More than Capable of Resolving Claims Raised by Minority Coalitions.

Congress and the courts have established a robust and fact-intensive framework for evaluating Section 2 claims, which can resolve claims of vote dilution brought by minority coalitions. In particular, both (i) the "totality of circumstances" framework required under Section 2 and (ii) the three-part test for establishing racially polarized voting under *Gingles* easily identify meritorious

Section 2 claims brought by minority coalitions but can reject claims that fail to meet the requirements.

In *Gingles*, the Court set forth a framework for evaluating vote dilution claims under Section 2, including a non-exhaustive list of factors established by the 1982 Senate Report to be considered in the "totality of circumstances" for Section 2 claims (the "Senate Factors"). *See Gingles*, 478 U.S. at 44-45, 48-51. The Court also identified three preconditions (the "*Gingles* preconditions") for demonstrating racially polarized voting—one of the hallmark Senate Factors for vote dilution claims. Under *Gingles*, plaintiffs making vote dilution claims must demonstrate that (i) the minority population in question "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (ii) the minority population is "politically cohesive"; and (iii) the non-minority population "votes sufficiently as a bloc . . . to defeat the minority's preferred candidate." *Id*. at 50-51. Plaintiffs must first demonstrate that their claim satisfies these *Gingles* preconditions, and "[i]f those preconditions are met, the court must then determine under the 'totality of circumstances' whether there has been a violation of Section 2." *Levy v. Lexington Cty.*, 589 F.3d 708, 713 (4th Cir. 2009).

Importantly, not all coalition claims will meet the *Gingles* preconditions sufficient for a Section 2 claim. For example, if the aggregate[5] of voters of three different races does not comprise a majority of the voting-age population in any single hypothetical single-member district, then its coalition claim would likely fail the first *Gingles* precondition. Yet even coalition claims that do satisfy that numerosity precondition must still demonstrate that its members are politically cohesive and face persistent racial-bloc voting by white voters. For example, the Second Circuit affirmed a district court finding that Black and Latino coalition claimants satisfied the second *Gingles* precondition; claimants presented expert evidence relying on ecological inference models demonstrating minority voting cohesion for losing candidates and anecdotal evidence in support thereof. *Natl. Assn. for Advancement of Colored People, Spring Valley Branch v. E. Ramapo C. Sch. Dist*., 462 F. Supp. 3d 368, 387 (S.D.N.Y. 2020), *aff'd sub nom*. *Clerveaux v. E. Ramapo C. Sch. Dist.*, 984 F.3d 213, 225-26, 232-33 (2d Cir. 2021). In contrast, the Fifth Circuit upheld a district court ruling that coalitional Black and Mexican-American claimants did not demonstrate political cohesion, because (i) anecdotal

[5] The Court's rejection of "crossover" claims in *Bartlett v. Strickland*, 556 U.S. 1 (2009), has no bearing on coalition claims. The minority group in *Bartlett* depended on white voters—who are not protected under the VRA—in its failed attempt to meet the first *Gingles* precondition concerning numerosity. *Bartlett*, 556 U.S. at 14-15. Not so with minority coalitions, where each claimant is a member of a protected group aggregated with others to meet the first *Gingles* precondition.

evidence of cohesiveness was not supported "by survey or other demonstrative evidence"; (ii) "Anglos voted with [each] minority group more frequently than the two groups voted together"; and (iii) prior electoral results demonstrated that each group preferred different candidates. *Overton*, 871 F.2d at 536.

In any case, the *Gingles* preconditions provide a fact-intensive framework allowing courts to make a probing inquiry into the political context unique to each case. That framework is sufficiently narrow to allow courts to reject[6] inappropriate claims, yet broad enough to recognize valid coalition claims. The same is true of the "totality of circumstances" assessment. This inquiry embeds a fact-intensive, yet flexible, standard for courts to assess Section 2 claims. *See Gingles*, 478 U.S. at 46. The Fourth Circuit has also credited the flexibility of the standard, finding "it is this inclusive examination of the totality of the circumstances that is tailor-made for considering why voting patterns differ along racial lines." *United States v. Charleston Cty.*, 365 F.3d 341, 348 (4th Cir. 2004). There is no logical reason for the judiciary to impose a categorical restriction of coalition claims when Congress has provided for a more thoughtful approach.

[6] The claimants in *Bartlett* also failed the third *Gingles* precondition that the majority votes as a bloc to defeat minority-preferred candidates, as the existence of crossover white voters dispelled any notion of majority cohesiveness. *See Bartlett*, 556 U.S. at 16. Unlike the *Bartlett* claimants, minority coalition claimants can demonstrate that a cohesive white voting bloc is able to thwart a population, comprised of multiple minority groups from protected classes, from electing its candidate of choice.

CONCLUSION

The VRA, including Section 2, seeks to provide full, fair, and equal access to the ballot. Ultimately, while Section 2 does not explicitly identify minority coalition claims, numerous factors make clear that minority coalition claims are an essential part of Section 2. To disallow such claims would be to contravene the intention of Congress in both recognizing persistent voter dilution as it affects multiple minority groups and drafting Section 2 broadly enough to encompass enforcement against such dilution in fulfillment of the VRA's worthy objectives.

Respectfully submitted this the 14th day of February, 2022.

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Dated: February 14, 2022

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