ELECTION LAW — VOTING RIGHTS ACT — FIFTH CIRCUIT HOLDS SECTION 2 OF THE VOTING RIGHTS ACT DOES NOT ALLOW MINORITY COALITION CLAIMS. — *Petteway v. Galveston County*, 111 F.4th 596 (5th Cir. 2024) (en banc).

The Voting Rights Act of 1965[1] (VRA), "the [legislative] crown jewel of the civil rights movement,"[2] was enacted to serve as a bulwark against racial voter suppression. Section 2 of the VRA, which implemented a nationwide ban on racial discrimination in voting,[3] provides remedies — including, but not limited to, redistricting[4] — that ensure that minority voters can effectively aggregate their political power and elect representatives of their choice. But in *Petteway v. Galveston County*,[5] the Fifth Circuit, sitting en banc, overturned decades of circuit precedent by holding that Section 2 does not allow plaintiffs to bring coalition-based districting claims.[6] Beyond resting on an erroneously narrow reading of the VRA, the Fifth Circuit's holding in *Petteway* weakened the federal judiciary's ability to ensure minority voting power in an increasingly heterogeneous society.[7]

To bring a Section 2 claim, plaintiffs must meet the three-pronged threshold inquiry established in *Thornburg v. Gingles*.[8] The first *Gingles* prong requires that "minority group[s]" be "sufficiently large and geographically compact to constitute a majority in a single-member district."[9] In a coalition district, two or more minority groups combine to constitute a majority of the population in a single-member district in order to collectively meet the first *Gingles* prong.[10] Coalition districts are distinct because of their multiracial composition; other majority-minority districts[11] aggregate members of a singular racial minority group. For decades, courts have adjudicated Section 2 vote dilution

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1 Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

2 Eric H. Holder, Jr., *MLK50 Symposium: Where Do We Go from Here? Keynote Address*, 49 U. MEM. L. REV. 33, 38 (2018).

3 *See* 52 U.S.C. § 10301(a).

4 *See* Allen v. Milligan, 143 S. Ct. 1487, 1516–17 (2023).

5 111 F.4th 596 (5th Cir. 2024) (en banc).

6 *See id.* at 614.

7 *See* Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After* Shelby County, 115 COLUM. L. REV. 2143, 2207 n.283 (2015) (citing Bartlett v. Strickland, 556 U.S. 1 (2009)) (discussing how "the United States [has] become[] more racially diverse").

8 478 U.S. 30, 50–51 (1986).

9 *Id.* at 50.

10 *See* Dale E. Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographic and Electoral Patterns*, 50 HARV. C.R.-C.L. L. REV. 403, 428 (2015) (discussing what a coalition district is).

11 The term "majority-minority district" refers to a political district wherein racial minority voters have an opportunity to elect a candidate of their choice. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1667 n.3 (2001).

claims by adopting coalition districts.[12] The Supreme Court has never directly addressed the permissibility of coalition claims,[13] but federal circuits unanimously accepted the practice until 1996.[14] In *Nixon v. Kent County*,[15] the Sixth Circuit was the first to bar coalition districts, creating a circuit split.[16] In August 2024, the Fifth Circuit became the second.

In 2021, for the first time in three decades, the Galveston County Commissioners Court adopted a redistricting plan without any majority-minority districts.[17] Precinct 3 was the county's sole majority-minority precinct under prior maps.[18] Under the new map, there were none.[19] A group of Black and Hispanic voters sued.[20] They alleged that the new map diluted their votes in violation of Section 2 of the VRA because minorities were deprived of voting power when Galveston County broke up their coalition district.[21] The county responded by disputing the plaintiffs' factual allegations, arguing that Section 2 does not permit coalition claims, and positing that Section 2 itself has outlived its constitutionality.[22]

Following trial,[23] the district court ruled for the plaintiffs.[24] Judge Brown held that "well-established Fifth Circuit precedent"[25] sanctioned coalition claims and noted the absence of any Fifth Circuit precedent holding otherwise.[26] He also rejected the county's "speculat[ion] that

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[12] *See, e.g.*, League of United Latin Am. Citizens v. Midland Indep. Sch. Dist., 812 F.2d 1494, 1495 (5th Cir. 1987), *vacated on state law grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc) (per curiam); Badillo v. City of Stockton, 956 F.2d 884, 890–91 (9th Cir. 1992).

[13] The Supreme Court has considered cases involving coalition claims without addressing the legitimacy of these claims on at least two occasions. *See* Growe v. Emison, 507 U.S. 25, 41 (1993); Bartlett v. Strickland, 556 U.S. 1, 13–14 (2009) (plurality opinion).

[14] *See* Kevin Sette, Note, *Are Two Minorities Equal to One?: Minority Coalition Groups and Section 2 of the Voting Rights Act*, 88 FORDHAM L. REV. 2693, 2696 (2020). *Compare, e.g.*, Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524, 527 (11th Cir. 1990) (permitting coalition districts), *with* Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc) (barring coalition districts).

[15] 76 F.3d 1381 (6th Cir. 1996) (en banc).

[16] *Id.* at 1393 (Keith, J., dissenting).

[17] *See* Petteway v. Galveston County, 698 F. Supp. 3d 952, 962, 970 (S.D. Tex. 2023).

[18] *Id.*

[19] *Id.* at 962.

[20] *See id.* at 964. The Department of Justice, along with local branches of the NAACP and the League of United Latin American Citizens, also sued to enjoin the map. *See id.* at 962–65. The cases were consolidated. *Id.* at 963.

[21] *See id.* at 961–62. The Petteway and NAACP plaintiffs also brought claims under the Fourteenth and Fifteenth Amendments. *See id.* at 962.

[22] *See id.* at 1006, 1015.

[23] *Id.* at 963.

[24] *Id.* at 962.

[25] *Id.* at 1007.

[26] *Id.* (citing Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988), *overruled by* Petteway v. Galveston County, 111 F.4th 596 (5th Cir. 2024) (en banc)).

the [VRA] has outlived its usefulness."[27] Judge Brown then applied the *Gingles* framework for a vote dilution inquiry, finding that the preconditions had been met and that the totality of the circumstances evinced a Section 2 violation.[28] He ordered the county to submit a revised map that complied with Section 2 and contained "at least one" majority-minority district.[29]

The Fifth Circuit affirmed but requested a poll to determine whether the case should be reheard en banc.[30] In a per curiam opinion, Judges Jones, Barksdale, and Elrod held that the district court had "appropriately applied precedent" from *Campos v. City of Baytown*,[31] which permitted coalition-based Section 2 vote dilution claims.[32] Furthermore, the panel held that the county had not met its burden of proving that the district court had committed a clear error in its *Gingles* analysis, and had "failed to show that Section 2 is unconstitutional under existing precedent."[33] But although the panel agreed with the district court's application of binding precedent, it also opined that the Fifth Circuit precedent established in *Campos* was "wrong as a matter of law."[34] The panel called for the case to be reheard to consider overruling *Campos*.[35] The Fifth Circuit vacated the panel opinion and reheard the case en banc.[36]

In a split decision, the en banc Fifth Circuit accepted the panel's invitation by overruling *Campos*, reversing the district court's judgment, and remanding the case for further proceedings.[37] The court's opinion, written by Judge Jones,[38] held that coalition claims are incompatible with the VRA's prohibition on vote dilution.[39] The court read the text of Section 2 — which refers to "a class" of voters — to allow only dilution claims brought by members of individual racial groups, not multiracial coalitions.[40] The court reasoned that individuals of different racial groups would be considered members of "two distinct classes" rather than one shared "class," compelling separate inquiries into whether

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[27] *Id.* at 1016; *see also id.* at 1015 (citing Allen v. Milligan, 143 S. Ct. 1487, 1519 (2023) (Kavanaugh, J., concurring)).

[28] *Id.* at 1015.

[29] *Id.* at 1017.

[30] Petteway v. Galveston County, 86 F.4th 214, 218 (5th Cir. 2023) (per curiam).

[31] 840 F.2d 1240 (5th Cir. 1988).

[32] *Petteway*, 86 F.4th at 218.

[33] *Id.*

[34] *Id.* at 217.

[35] *Id.* at 218.

[36] *Petteway*, 111 F.4th at 599.

[37] *Id.* at 614.

[38] Judge Jones was joined by Chief Judge Richman (in all but Section II.D) and Judges Smith, Barksdale, Elrod, Southwick, Willett, Ho (in only Sections I, II.C, and III), Duncan, Engelhardt, Oldham, and Wilson. *Id.* at 598–99, 599 n.* & n.†.

[39] *Id.* at 606–07.

[40] *Id.* at 604.

each group had experienced a distinct dilution injury.[41] The Fifth Circuit rejected plaintiffs' reliance on the Supreme Court's instruction in *Chisom v. Roemer*[42] that courts should interpret the VRA "in a manner that provides 'the broadest possible scope' in combating racial discrimination"[43] to accord with the "broad remedial purpose" of the Act.[44] The Fifth Circuit pointed to more recent Supreme Court decisions outside of the VRA context instructing that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration."[45] The court posited that "Congress's failure to *expressly authorize* coalition claims" compelled its holding.[46]

The majority also rejected the plaintiffs' argument that, when Congress enacted the pivotal 1982 VRA amendments,[47] "Congress was aware of cases involving coalition claims" and thus tacitly consented to them through its intentionally broad statutory language.[48] Because "[n]one of the pre-1982 cases . . . decided, as a matter of law, whether coalition claims are permissible," the majority found it improper to conclude that Congress's awareness of these cases implied such legislative authorization.[49] The Fifth Circuit also extended Supreme Court precedent, arguing that the logic of *Bartlett v. Strickland*[50] — which had held that Section 2 did not compel the drawing of "crossover" districts wherein minority voters can influence electoral outcomes with sufficient support from white voters[51] — "applies with equal force to coalition claims."[52] Finally, the majority concluded that stare decisis did not require adherence to the Fifth Circuit's prior holdings in *League of United Latin American Citizens v. Clements*[53] and *Campos*.[54]

Judge Ho concurred in part and in the judgment.[55] He reasoned that the Supreme Court's rejection of "crossover" districts necessarily

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41 *Id.* at 604–05.

42 501 U.S. 380 (1991).

43 *Id.* at 403 (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).

44 *Id.* at 403–04 (citing South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966)).

45 *Petteway*, 111 F.4th at 606 (alteration in original) (quoting Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 150 (2016)).

46 *Id.* at 607 (citing Campos v. City of Baytown, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc); Bond v. United States, 572 U.S. 844, 858 (2014)).

47 *See* Veasey v. Abbott, 830 F.3d 216, 242 n.31 (5th Cir. 2016) (en banc) (explaining that in the 1982 amendments, "Congress acted . . . to make it *easier* for minority plaintiffs to combat discriminatory laws").

48 *Petteway*, 111 F.4th at 607.

49 *Id.* at 608.

50 556 U.S. 1 (2009).

51 *Id.* at 25–26 (plurality opinion).

52 *Petteway*, 111 F.4th at 609–10.

53 999 F.2d 831 (5th Cir. 1993).

54 *Petteway*, 111 F.4th at 613.

55 *Id.* at 614 (Ho, J., concurring in part and in the judgment).

foreclosed coalition claims.[56] Moreover, he noted that Justices Scalia, Thomas, and Gorsuch "have suggested that courts should not decide vote dilution claims under Section 2 of the Voting Rights Act at all."[57]

Judge Haynes dissented.[58] She argued that *Campos* was correctly decided.[59] Since she could not "identify any reversible error of fact or law in the district court's reasoning," she would have affirmed the district court's ruling.[60]

Judge Douglas dissented,[61] sharply criticizing the majority's "atextual and ahistorical" decision as having "dismantled the effectiveness of the Voting Rights Act in this circuit."[62] First, she recounted the origins of the VRA and described the history of racial voting discrimination nationwide and in Galveston County.[63] Second, Judge Douglas argued that the majority did not correctly contend with stare decisis, and thus was not on solid footing to overturn its en banc precedent.[64] Judge Douglas also critiqued the majority's interpretation of the VRA and argued that the majority had strayed from the *Chisom* Court's suggestion that the Act be read broadly.[65] Her dissent rebuked the majority's reading of the Act's legislative history,[66] and cautioned that the majority's holding would have negative consequences for a diverse and multiracial society.[67]

The Fifth Circuit's erroneously narrow reading of Section 2 contravenes the statute's broad language and expansive remedial intent. This error will diminish the protection that the Act was intended to provide in the context of our heterogeneous and diversifying electorate.

Since the 1960s, Congress consistently drafted the VRA and its subsequent amendments in a manner that affirms the statute's expansive scope. The text of Section 2 includes intentionally broad-sweeping language, proscribing any "voting qualification or prerequisite to voting or standard, practice, or procedure" that burdens "the right . . . to vote on account of race."[68] This language came from lawmakers' efforts, alongside those of the Department of Justice, to design the VRA to effectuate the promises of the Fifteenth Amendment[69] by addressing the ever-

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[56] *Id.* (citing *Bartlett*, 556 U.S. at 26 (Thomas, J., concurring in the judgment)).

[57] *Id.* (quoting Harding v. County of Dallas, 948 F.3d 302, 316 (5th Cir. 2020) (Ho, J., concurring in part and dissenting in part)).

[58] *Id.* at 615 (Haynes, J., dissenting).

[59] *Id.*

[60] *Id.*

[61] *Id.* (Douglas, J., dissenting). Judge Douglas was joined by Judges Stewart, Graves, Higginson, and Ramirez.

[62] *Id.*

[63] *See id.* at 615–26.

[64] *See id.* at 628–31.

[65] *See id.* at 631–35 (citing Chisom v. Roemer, 501 U.S. 380, 403 (1991)).

[66] *See id.* at 634–35.

[67] *See id.* at 636.

[68] 52 U.S.C. § 10301(a).

[69] U.S. CONST. amend. XV.

evolving array of state voter suppression tactics.[70] Congress has repeatedly rebuffed judicial attempts to limit the VRA's scope: In response to the Supreme Court's narrowing construction in *City of Mobile v. Bolden*,[71] Congress amended Section 2[72] to restore and enlarge its coverage. "The 1982 amendment further expanded the protection afforded by § 2"[73] and affirmed Congress's intent to give the VRA a broad remedial scope.[74] The Supreme Court accordingly embraced Congress's directive to interpret the VRA broadly and instructed other courts to do the same.[75]

The Fifth Circuit's rejection of this directive is both unpersuasive and troubling. Its best response to *Chisom*'s instruction is that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration."[76] There are two problems with this response. First, the VRA's "basic purpose" of broadly remediating discrimination in voting is far from "vague." Here, the Fifth Circuit conflates vagueness with breadth. The statute's purpose of precluding all racially discriminatory voter suppression practices has been clearly expressed since 1965.[77] A law is not vague simply because its purpose is capacious or maximalist.[78] Second, the Fifth Circuit's reliance on the "words of [the VRA's] text regarding the *specific* issue" is misplaced.[79] The Supreme Court has considered and rejected the structure of the majority's argument — that is, if coalition claims were permissible, Congress would have expressly written them into the law — as an illegitimate interpretative strategy for analyzing the VRA.[80] By demanding express authorization of coalition

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70 During Senate consideration of the VRA, the Attorney General endorsed efforts to broaden the language of Section 2 because that section "was intended to be all-inclusive of any kind of [racially discriminatory] practice." *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566 (1969) (quoting *Voting Rights: Hearings on S. 1564 to Enforce the 15th Amendment to the Constitution of the United States Before the S. Comm. on the Judiciary,* 89th Cong. 192 (1965) [hereinafter *Hearings*] (statement of Nicholas Katzenbach, Att'y Gen. of the United States)).

71 446 U.S. 55 (1980).

72 Congress added the Section 2(b) "class" language at issue in *Petteway* in 1982; its placement within these broadening amendments belies the proposition that this language was designed to narrow the statute's scope.

73 Chisom v. Roemer, 501 U.S. 380, 392 (1991).

74 *Id.* at 403.

75 *See id.* at 403–04.

76 *Petteway*, 111 F.4th at 606 (alteration in original) (quoting Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 150 (2016)).

77 *See Hearings*, *supra* note 70, at 191–92.

78 *Cf.* Richard M. Re, *Stuntz's Presence in* Yates, PRAWFSBLAWG (Mar. 2, 2015, 5:25 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/03/stuntzs-presence-in-yates.html [https://perma.cc/M396-SNKL] (positing that in Yates v. United States, 574 U.S. 528 (2015), the government was criticized for reading a statute in a manner that was overly broad rather than impermissibly vague).

79 *Petteway*, 111 F.4th at 606 (quoting *Montanile*, 577 U.S. at 150).

80 *See Chisom*, 501 U.S. at 389, 403–04 (noting the lower court's reasoning that "Congress would not have authorized vote dilution claims in judicial elections without making an express,

districts, the Fifth Circuit disregarded the capacious legislative purpose undergirding the VRA[81] and ignored the "super-strong presumption" of statutory stare decisis,[82] which would have compelled an alternative result.

The Fifth Circuit's disregard for the VRA's primary purpose limits minority access to the political process. In the 1980s and 1990s, Black and Hispanic residents of Galveston County organized to create Precinct 3.[83] Though neither group alone was sufficiently numerous and compact to comprise a majority within one precinct, these communities recognized that their interests would be better represented by forming a coalition district.[84] They transformed what was once "an epicenter of the nation's slave trade"[85] into "an important political homebase for Black and Latino residents."[86] Without a coalition district, they have been dispersed into other precincts, and lacking a district containing sufficient numerosity and compactness to satisfy the *Gingles* preconditions, may become "locked out of the political process."[87] The new Galveston County map dilutes Black and Hispanic votes, but the Fifth Circuit denies them a remedy. They suffer in solidarity but must seek relief separately.

The Fifth Circuit's rejection of coalition claims risks undermining cross-racial solidarity and rewarding residential segregation. The United States is becoming more diverse and less residentially segregated for certain minority groups — two positive developments.[88] But the Fifth Circuit's ruling risks making residential heterogeneity an impediment to Section 2 relief.[89] As a community diversifies, it becomes less likely that households of any single race will be sufficiently concentrated to meet the *Gingles* compactness threshold that plaintiffs must satisfy to bring a Section 2 claim,[90] despite high levels of racially polarized voting

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unambiguous statement to that effect," *id.* at 389, but holding that Congress's "express effort to broaden the protection afforded by the Voting Rights Act," *id.* at 404, demanded just that result). Justice Scalia, dissenting in *Chisom*, opined that the Court had, albeit "tacitly," previously declined to apply a clear statement rule to Section 2 and agreed with the majority's refusal to apply it in *Chisom* itself. *Id.* at 412 (Scalia, J., dissenting) (citing City of Rome v. United States, 446 U.S. 156, 178–80 (1980)).

81 *See id.* at 403–04 (majority opinion).

82 William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1364 (1988).

83 *See* Petteway v. Galveston County, 698 F. Supp. 3d 952, 970 (S.D. Tex. 2023).

84 *Id.* at 970–71.

85 *Petteway*, 111 F.4th at 623 (Douglas, J., dissenting).

86 *Petteway*, 698 F. Supp. 3d at 970.

87 Ho, *supra* note 10, at 413 (emphasis omitted).

88 *See* Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1348 (2016) (discussing, in 2016, the increasing difficulty minority groups were having when trying to "meet[] [the] *Gingles*[] compactness requirement").

89 *See id.*

90 *See* Elmendorf & Spencer, *supra* note 7, at 2207 n.283 (citing Bartlett v. Strickland, 556 U.S. 1 (2009)); Ho, *supra* note 10, at 412, 415.

in many jurisdictions.[91] Minorities seeking representation will be disincentivized from building ties with residents of different racial communities.[92] Such a development could perversely incentivize a zero-sum approach to addressing racial voting discrimination and discourage cross-racial coalition-building.[93]

The Fifth Circuit's approach removes a tool from the toolboxes of litigators seeking to protect racial minorities from vote discrimination — but alternative strategies remain on the table if coalition districts are no longer a viable litigation tool. Alternative systems of electoral design can build minority political power by changing the rules under which elections are conducted, rather than the districts from which representatives are elected.[94] Systems that do not rely on geography, such as proportional representation,[95] may be better suited than districting to our contemporary sociopolitical landscape, wherein voters of different races increasingly live side-by-side.[96] These alternative systems could be enacted as litigation remedies[97] or through legislative or administrative change at the state and local levels, as exemplified by state voting rights acts that explicitly contemplate alternative methods of election.[98] Thus, the Fifth Circuit's holding — though damaging — need not be fatal to the goal of ensuring the effective aggregation of cross-racial groups' political power. By seeking to enact structural changes, advocates can still strive to ensure that the political process remains open to all, regardless of race — the foundational purpose of the VRA of which courts today, including the Fifth Circuit, have lost sight.

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91 *See* Shiro Kuriwaki et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 118 AM. POL. SCI. REV. 922, 929–30 (2024); *see also* Ruth Greenwood, *Introducing RPV Near Me*, ELECTION L. BLOG (Jan. 9, 2023, 7:42 AM), https://electionlawblog.org/?p=134248 [https://perma.cc/3FUJ-C7PT].

92 *See* Ho, *supra* note 10, at 434.

93 This was the case in Galveston County, as Black and Hispanic residents did not always "see[] eye to eye." Expert Witness Report of Max Krochmal, Ph.D. on Behalf of the United States of America at 27, Petteway v. Galveston County, 698 F. Supp. 3d 952 (S.D. Tex. 2023) (No. 22-cv-00057). One attorney "blame[d] the city of Galveston for pitting [B]lacks against Hispanics" in the fight for representation. *Id.* at 27–28 (first alteration in original).

94 For example, cross-racial voting blocs may still be able to aggregate political power through tools beyond race-conscious districting. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 16 (1995) ("As a solution that permits voters to self-select their identities, cumulative voting also encourages cross-racial coalition building."); *see also* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1714 (1993) (describing structural rules that affect minority groups' ability to aggregate, including mandatory runoffs, numbered-post rules, and anti-single-shot provisions).

95 *See* GUINIER, *supra* note 94, at 16.

96 *See* Stephanopoulos, *supra* note 88, at 1348.

97 *See* NICHOLAS O. STEPHANOPOULOS, PROTECT DEMOCRACY & NEW AMERICA, PROPORTIONAL REPRESENTATION AND THE VOTING RIGHTS ACT 13 (2024).

98 *See* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 EMORY L.J. 299, 347 (2023). It bears stating that the pursuit of policy change is not a panacea. Legislative processes can be resource intensive; jurisdictions with histories of voting discrimination may be less likely to adopt egalitarian electoral designs; and enacted legislation may be enjoined in court.