No. 23-___

IN THE

Supreme Court of the United States

RICHARD ROSE, BRIONTÉ MCCORKLE, WANDA MOSLEY, AND JAMES "MAJOR" WOODALL,

Petitioners,

v.

BRAD RAFFENSPERGER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For nearly 40 years, this Court has analyzed claims of vote dilution under Section 2 of the Voting Rights Act of 1965 using the framework established in *Thornburg v. Gingles*, 478 U.S. 30 (1986). This Court reaffirmed that familiar framework in *Allen v. Milligan*, 599 U.S. 1 (2023).

The questions presented are:

1. In a vote-dilution challenge to at-large elections imposed by state law, does Section 2 also require a plaintiff to propose a remedy that does not alter the State's chosen electoral model?

2. Are a State's asserted policy interests for its choice of at-large elections entitled to insurmountable weight under Section 2?

PARTIES TO THE PROCEEDING

The petitioners in this Court are Richard Rose, Brionté McCorkle, Wanda Mosley, and James "Major" Woodall—four Black voters who were the plaintiffs in the district court and the appellees in the Eleventh Circuit.

The respondent in this Court is Brad Raffensperger, in his official capacity as Secretary of State of the State of Georgia.

RELATED PROCEEDINGS

United States District Court for the Northern District of Georgia:

- *Rose v. Raffensperger*, No. 1:20-cv-02921-SDG (Jan. 24, 2022) (opinion and order on motions for summary judgment)
- *Rose v. Raffensperger*, No. 1:20-cv-02921-SDG (Aug. 5, 2022) (opinion and order granting judgment and permanent injunction for the plaintiffs after trial)

United States Court of Appeals for the Eleventh Circuit:

- *Rose v. Secretary, State of Georgia*, No. 22-12593 (Aug. 12, 2022) (per curiam) (granting the Secretary's motion for a stay pending appeal in a 2-1 decision, with a dissent from Rosenbaum, J.)
- *Rose v. Secretary, State of Georgia*, No. 22-12593 (Nov. 24, 2023) (reversing the district court's judgment for the plaintiffs)

United States Supreme Court:

- *Rose v. Raffensperger*, No. 22A136 (Aug. 19, 2022) (mem.) (vacating the Eleventh Circuit's stay pending appeal)
- *Rose v. Raffensperger*, No. 23A764 (Feb. 21, 2024) (mem.) (extending the time to petition for a writ of certiorari)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The district court's opinion after trial was entered on August 5, 2022. It is reproduced at Pet. App. 31a and is reported at 619 F. Supp. 3d 1241. The Eleventh Circuit's opinion was entered on November 24, 2023. It is reproduced at Pet. App. 1a and is reported at 87 F.4th 469.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on November 24, 2023. On February 21, 2024, Justice Thomas granted the petitioners' application (23A764) to extend the time to petition for a writ of certiorari until Saturday, March 23, 2024. The next business day is March 25. Sup. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The pertinent statute is Section 2 of the Voting Rights Act of 1965:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have

> less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301.

INTRODUCTION

The Georgia Public Service Commission ("PSC") determines how much millions of Georgians must pay for their gas and electricity. Yet in the PSC's 145-year-history, only one Black person has ever been elected to it. The reason why is a combination of the State's at-large method of electing commissioners—a relic of Jim Crow—and its extraordinarily high levels of racially polarized voting. The result, as the plaintiffs proved at trial, is vote dilution "on account of race." 52 U.S.C. § 10301(a).

Following a week-long trial, the district court faithfully applied this Court's framework from *Thornburg v. Gingles*, 478 U.S. 30 (1986), to find that Georgia's at-large method of electing its five-member PSC unlawfully dilutes the voting strength of Black citizens across the State. Having found a violation of Section 2, the district court permanently enjoined the State's use of that method. But rather than impose on the State any particular remedy, the district court gave the Georgia General Assembly the opportunity "to choose a new manner of selecting PSC Commissioners" that complies

with Section 2 of the Voting Rights Act. *Rose v. Secretary, State of Georgia*, No. 22-12593, 2022 WL 3572823, at *11 (11th Cir. Aug. 12, 2022) (Rosenbaum, J., dissenting). Because the Georgia legislature did not take that opportunity, PSC elections remained on hold for more than eighteen months while the Eleventh Circuit considered the Secretary's appeal.

In the meantime, this Court gave a full-throated affirmation of *Gingles*. "For the past forty years," this Court explained, "we have evaluated claims brought under § 2" using the *Gingles* framework. *Allen v. Milligan*, 599 U.S. 1, 17 (2023). Under that framework, a Section 2 plaintiff must first satisfy three "preconditions" before showing, under "the totality of circumstances," "that the political process is not 'equally open' to minority voters." *Id.* at 18. This Court has "applied *Gingles* in one § 2 case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country." *Id.* at 19.

But just a few months later, the Eleventh Circuit took a radically different approach. The panel, relying only on circuit case law and vague "principles of federalism," invented a new threshold requirement that it claimed is "implicit" in the first *Gingles* precondition. Pet. App. 20a-22a (cleaned up). This requirement—that "plaintiffs must propose a remedy within the confines of the state's chosen model of government when bringing [a Section 2 vote-dilution] claim" (Pet. App. 26a)—has no basis in the statute's text and bears no resemblance to the familiar *Gingles* framework this Court has applied for decades and reaffirmed in *Milligan*. The panel, citing inapposite circuit decisions that it claimed place "insurmountable weight" on the State's choice of election method, held that the plaintiffs could not succeed as a matter of law

because "Georgia chose the statewide electoral model for the PSC, and plaintiffs' proposed remedy would alter that choice." Pet. App. 20a, 28a.

This Court has never countenanced such a requirement, and no other circuit has ever adopted it. For good reason. The *Gingles* framework already accounts for a State's asserted interest in maintaining the challenged electoral system as one of "several factors relevant to the totality of circumstances inquiry." *Milligan*, 599 U.S. at 18. Only the Eleventh Circuit considers the State's asserted interest as part of the first *Gingles* precondition and then gives that interest "insurmountable weight." Pet. App. 20a (cleaned up). If the panel's threshold requirement were the law, *Gingles* would have come out the other way. So would have countless other Section 2 cases. This Court should "decline to adopt an interpretation of § 2 that would 'revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence' for nearly forty years." *Milligan*, 599 U.S. at 26.

Failing to do so would upend decades of settled law and have a cascading effect far beyond the reach of this case. After carefully weighing the trial evidence, including all evidence of a state interest the Secretary could muster, the district court found that Georgia's at-large system of PSC elections resulted in racial vote dilution in violation of Section 2. That finding was not clearly erroneous, and the panel did not conclude otherwise. It simply decided that whatever rationales Georgia might tender for the at-large scheme—even ones that, on "close observation," the district court found not credible because they "lacked foundation entirely" and "were developed in preparation" for trial (Pet. App. 73a)—automatically trump any amount of racial vote dilution, no matter how severe. If a State's

interest can prevail in *this case*, there is no case in which it won't.

While the panel described this case's challenge to elections for a statewide body as "unprecedented" (Pet. App. 12a n.8), it ignored that Section 2 applies to voting practices imposed "by any State," 52 U.S.C. § 10301(a). The statute is a constitutional exercise of Congress's authority under the Fifteenth Amendment, *see, e.g.*, *Milligan*, 599 U.S. at 41, and it contains no exception for "statewide elections."

Nor is the panel's reasoning so limited. According to the panel's logic, any State (or political subdivision thereof) could assert that its decision to hold at-large elections furthers "important" government interests of "fairness" and avoiding so-called "home cooking." Pet. App. 23a-24a, 27a. Whether those elections are for a statewide body, a county commission, or a municipal board, those same interests would, under the panel's view, preclude *any* remedy (e.g., single-member districts) that alters the State's chosen electoral model and would necessarily defeat a Section 2 challenge without considering either the traditional *Gingles* preconditions or the established factors for analyzing the totality of circumstances. That is not "the law as it exists," *Milligan*, 599 U.S. at 23, unless you are a minority voter in the Eleventh Circuit. This Court should reject the circuit's "attempt to remake our § 2 jurisprudence anew." *Id.*

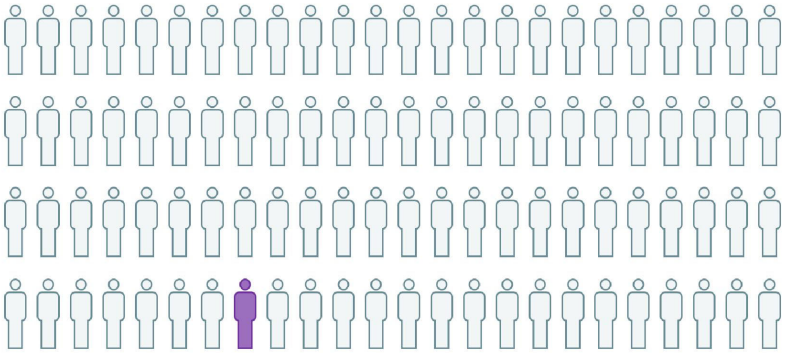
Certiorari is warranted because the panel's opinion conflicts with *Gingles*, *Milligan*, and the decisions of at least five other circuits on issues of exceptional importance to millions of voters. In fact, the Eleventh Circuit's ruling is so at odds with settled law that this case is appropriate for summary reversal, which would allow PSC elections to be held as soon as possible using

a method that complies with Section 2. *See Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 401 (2022) (summary reversal is appropriate where the lower court "committed legal error in its application of decisions of this Court" and doing so "gives the court sufficient time to adopt maps" before the next election). This Court has intervened in this case once before to stop unlawful PSC elections from going forward. It should do so again now.

STATEMENT OF THE CASE

In July 2020, four Black voters from Georgia filed this suit challenging the at-large method of electing members of the PSC under Section 2 of the Voting Rights Act. The PSC is a quasi-legislative, quasi-judicial "administrative body" that regulates utilities in Georgia. *Tamiami Trail Tours, Inc. v. Ga. Pub. Serv. Comm'n*, 99 S.E.2d 225, 232 (Ga. 1957). The PSC consists of five members who make decisions that affect energy policy for all people in Georgia, including Black residents who comprise more than one-third of the State's population. Ga. Const. art. IV, § 1, ¶ I (a). Although a state statute requires that each commissioner reside in one of five districts, they are "elected state wide." O.C.G.A. § 46-2-1 (a), (d). In the Commission's 145-year history, only one Black person has ever been elected to it. *See* Figure 1 (used at trial as a demonstrative).

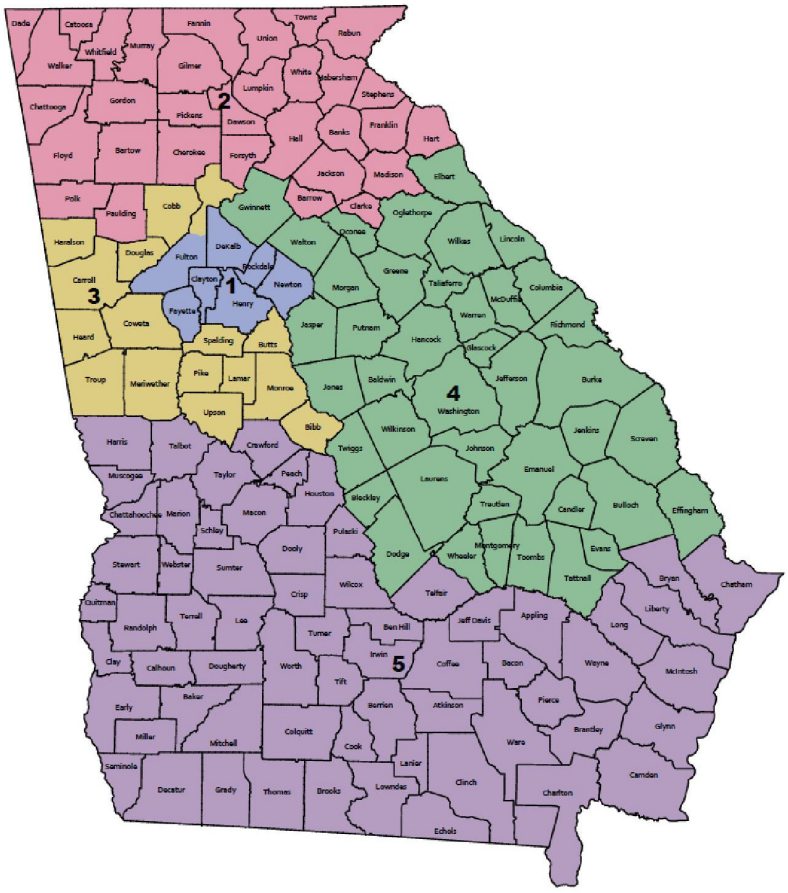
Figure 1: Trial Demonstrative of PSC Electoral History.



A. Trial Court Proceedings

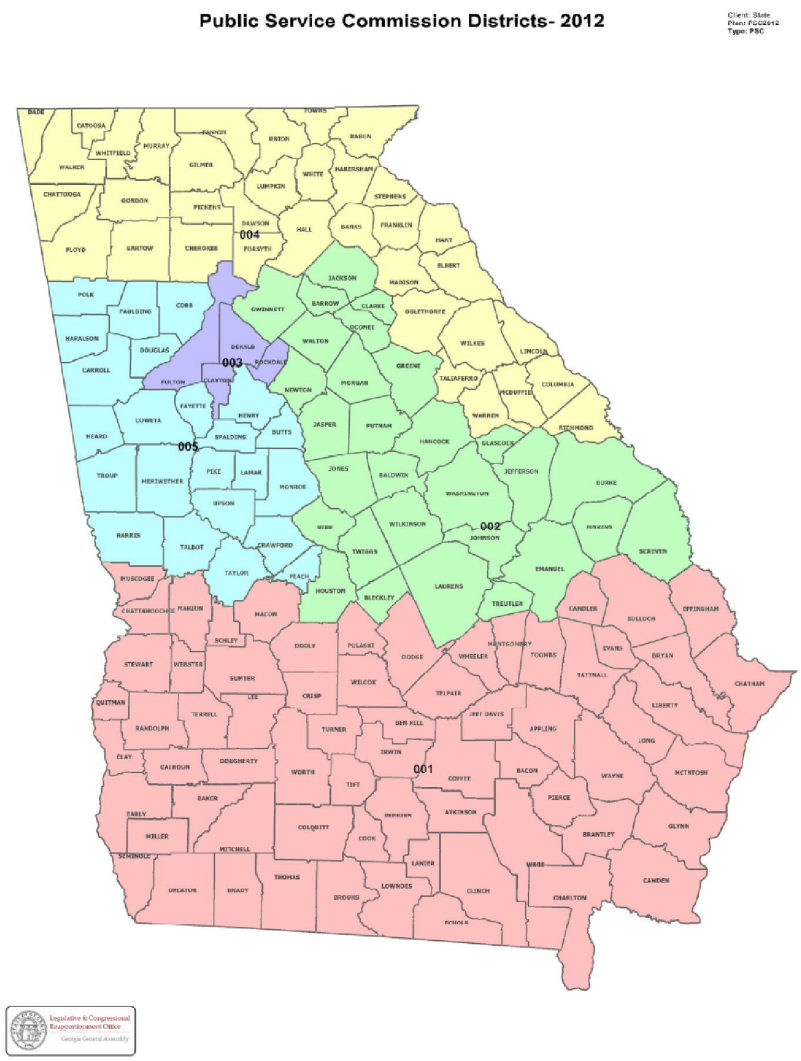
The parties litigated this case for two years in the district court, which had jurisdiction under 28 U.S.C. § 1331 and 52 U.S.C. § 10308(f). During that period, the plaintiffs produced illustrative maps for electing a five-member PSC using single-member districts. The plaintiffs attached one such map, Illustrative Plan 1, to their complaint and had their expert statistician, Dr. Stephen J. Popick, analyze it. Compl. Ex. 3, *Rose v. Raffensperger*, No. 20-cv-2921-SDG (N.D. Ga. July 13, 2020), ECF No. 1-3. Dr. Popick concluded that the district shaded blue below was a majority-Black district that would give Black voters the opportunity to elect candidates of their choice. Pls.' Trial Ex. PX-8 at 19-20, *Rose v. Raffensperger*, No. 20-cv-2921-SDG, (N.D. Ga. July 11, 2022), ECF No. 146-8.

Illustrative Plan 1
Public Service Commission Districts
Rose v. Raffensperger



Dr. Popick also analyzed the map of the PSC residency districts that had been in place between 2012 and 2022, before the Georgia legislature altered them while this case was pending. *Id.* at 15-18. He concluded that District 3, shaded purple below, was also a majority-Black district that would give Black

voters the opportunity to elect candidates of their choice. *Id*.



The Secretary did not dispute any of this evidence. Nor did he dispute the recent PSC election results that, according to Dr. Popick, showed high levels of political cohesion among Black voters and racially

polarized voting and that the Black-preferred candidate lost each time. (Dr. Popick's analysis is reproduced below.)

Table 1: Summary of Election Analyses (Black-Preferred Candidate)

Election	Black-Preferred Candidate	Race of Candidate	Outcome	Black Support	White Support
2021 - District 4 Runoff	Blackman	Black	LOST	96.08%	17.62%
2020 - District 4	Blackman	Black	RUNOFF	94.33%	14.83%
2020 - District 1	Bryant	Black	LOST	94.46%	14.47%
2018 - District 5	Randolph	White	LOST	96.03%	14.40%
2018 - District 3 Runoff	Miller	White	LOST	97.84%	20.13%
2018 - District 3	Miller	White	RUNOFF	96.55%	14.83%
2016 - District 2	Hoskins	White	LOST	79.18%	14.64%
2014 - District 4	Blackman	Black	LOST	81.29%	24.28%
2014 - District 1	Monds	Black	LOST	82.44%	12.49%
2012 - District 5	Staples	White	LOST	80.57%	15.36%
2012 - District 3	Oppenheimer	White	LOST	89.43%	21.47%

Id. at 11.

Table 2: Summary of Election Analyses (White-Preferred Candidate)

Election	White-Preferred Candidate	Race of Candidate	Outcome	Black Support	White Support
2021 - District 4 Runoff	McDonald	White	WON	3.25%	80.64%
2020 - District 4	McDonald	White	RUNOFF	3.57%	77.47%
2020 - District 1	Shaw	White	WON	5.19%	78.19%
2018 - District 5	Pridemore	White	WON	2.82%	79.69%
2018 - District 3 Runoff	Eaton	White	WON	1.87%	78.97%
2018 - District 3	Eaton	White	RUNOFF	3.67%	78.01%
2016 - District 2	Echols	White	WON	20.82%	85.36%
2014 - District 4	McDonald	White	WON	18.71%	75.72%
2014 - District 1	Everett	White	WON	17.56%	87.51%
2012 - District 5	Wise	White	WON	19.43%	84.64%
2012 - District 3	Eaton	White	WON	10.57%	78.53%

Id. at 12.

So the plaintiffs moved for summary judgment on the three *Gingles* preconditions, which the district court largely granted. Pet. App. 109a. As relevant here, the court found that the plaintiffs were "entitled to summary judgment in their favor on the first *Gingles* prerequisite of geography and compactness because they have shown that African Americans are sufficiently large and geographically compact to constitute a majority in a single-member district." Pet. App. 105a.

With the *Gingles* preconditions largely uncontested, the district court presided over a five-day bench trial beginning in June 2022 that focused primarily on the totality of circumstances. Pet. App. 32a. The court heard testimony from more than a dozen witnesses, including Dr. Popick, and admitted more than 100 exhibits into evidence. Pet. App. 38a-53a; *Rose v. Raffensperger*, No. 20-cv-2921-SDG (N.D. Ga.), ECF Nos. 134-148. The evidence showed that all four of the plaintiffs lived in PSC District 3, a majority-Black residency district encompassing several counties near Atlanta. Pet. App. 35a, 38a. In each of the last six general and runoff elections for the PSC, the citizens of District 3 have voted overwhelmingly for the Black-preferred candidate. Pet. App. 42a. But due to the at-large method of voting for each commissioner, combined with exceptional levels of racially polarized voting that Dr. Popick observed, the Black-preferred candidate was defeated every time. Pet. App. 61a. Indeed, former District 3 Commissioner Chuck Eaton, who is White, was elected to three terms on the PSC without ever winning a single county in District 3. Pet. App. 48a-49a.

The district court credited Dr. Popick's testimony that of the "thousands" of elections he had analyzed for racial bloc voting in his career, the PSC general elections since 2012 were among "the clearest examples of racially polarized voting" he had ever seen. Pet. App. 61a. Based on Dr. Popick's analysis, the court found that the "Plaintiffs here easily proved both racial polarization and political cohesion," and that the level of racial polarization in recent PSC elections was even worse than in *Gingles*. Pet. App. 60a.

There was scant evidence at trial of the State's asserted interest in maintaining at-large PSC elections.

The Secretary offered no expert testimony on the subject, nor did he elicit testimony on the matter from Michael Barnes, the long-time director of the Secretary's Center for Election Systems. The only evidence the court heard live was lay opinion testimony from Commission Chair Tricia Pridemore. Pet. App. 47a-48a. Commissioner Pridemore expressed her belief that the at-large structure "allows commissioners to 'work in the best interest of the whole state.'" Pet. App. 48a. In her view, a switch to single-member districts "would introduce favoritism and politics into utility regulation." *Id.* But on cross-examination, she was unable to identify a single rule governing the Commission's activities that could not be implemented if elections were held by district. Trial Tr. at 401:9-12, *Rose v. Raffensperger*, No. 20-cv-2921-SDG (N.D. Ga. June 28, 2022), ECF No. 140.

The plaintiffs, for their part, elicited testimony from Mr. Barnes that single-member districts for the PSC would be feasible and easy for the State to implement. Trial Tr. at 447:23-448:6, *Rose v. Raffensperger*, No. 20-cv-2921-SDG (N.D. Ga. June 29, 2022), ECF No. 141. He also admitted that he had "[n]ever seen an official statement from the Secretary of State's Office or any other part of state government articulating a special interest in maintaining the at-large statewide method of electing members of the Public Service Commission." *Id.* at 448:11-15. The plaintiffs also highlighted deposition testimony from commissioners other than Commissioner Pridemore, including the PSC's longest-serving member, that their day-to-day duties would not change if commissioners were elected via single-member districts instead of statewide. Pet. App. 50a-51a.

Following the trial, the parties submitted more than 250 pages of proposed findings of fact and conclusions

of law. On August 5, 2022, the district court issued a 64-page decision ruling that Georgia's at-large method of electing Public Service Commissioners violates Section 2. Pet. App. 81a-82a.

As to the first *Gingles* precondition, the court reiterated that it "was undisputed that Black voters are a sufficiently large and geographically compact group in current-day Georgia to constitute at least one single-member district in which they would have the potential to elect their representative of choice in district-based PSC elections." Pet. App. 58a. After finding that the plaintiffs had also satisfied the remaining two *Gingles* preconditions based largely on undisputed evidence, the court examined each of the nine so-called Senate Factors as part of its totality-of-circumstances analysis. It found that six of the nine, including the factor considering the State's asserted interest in at-large elections and the two factors *Gingles* instructs are "most important," weighed in the plaintiffs' favor. Pet. App. 59a-75a.

Because the Secretary, relying on circuit precedent concerning judicial elections, had argued that the first *Gingles* precondition also required the plaintiffs to prove a "viable remedy," the district court addressed whether they had done so. Pet. App. 76a-79a. To the extent circuit precedent required such a showing, the court found that the plaintiffs' illustrative maps were a viable remedy and that the Secretary had "conceded that there [was] nothing 'facially problematic' with the proposed map." Pet. App. 77a. Citing *Gingles*, the court explained that single-member districting is "a standard remedy for a Section 2 violation caused by at-large elections," and that the Secretary had not shown why the statute should treat States any differently than

their political subdivisions when the text expressly applies to both. Pet. App. 77a-78a.

The district court also considered and rejected the Secretary's argument that the State had a strong interest in maintaining its at-large system of elections. In so doing, the district court stated that it had "expected the Secretary at trial to offer robust evidence explaining why Georgia's method of selecting PSC members was thoughtfully contemplated by the General Assembly, or that it otherwise furthered some concrete interest that was documented and provable" but, instead, received only "lay opinions" from Commissioner Pridemore. Pet. App. 73a. The district court found that Commissioner Pridemore's proffered justifications for the at-large method "were not tethered to any objective data," "lacked foundation entirely," and, upon "close observation," were "developed in preparation for her testimony and were not preconceived." *Id.*

In closing arguments, the Secretary raised a new defense concerning an alleged "linkage" interest between the Commission's statewide jurisdiction and its electoral base. Pet. App. 74a. Recognizing that "Counsel's argument is not evidence," the district court addressed the Secretary's belated argument anyway. The court explained that the decisions on which the Secretary relied for his linkage argument all concerned judicial elections whose application the Eleventh Circuit had never extended "beyond that unique context." *Id.* "Although the PSC's functions are considered both 'quasi-legislative' and 'quasi-judicial,'" the court reasoned, "it is by and large an administrative body with policy-making responsibilities that make it qualitatively different than courts." *Id.*

The district court permanently enjoined the Secretary from administering future Commission elections using

the at-large method and gave the Georgia General Assembly an opportunity to devise a remedy at its next regular session beginning in January 2023. Pet. App. 81a-82a. The district court's injunction did not require the General Assembly to adopt single-member districts or any other remedy.

B. Stay Proceedings

On August 12, 2022, a divided motions panel of the Eleventh Circuit granted the Secretary a stay of the district court's injunction based solely on the principle established in *Purcell v. Gonzalez*, 549 U.S. 1 (2006), that federal courts ordinarily should not enjoin state election laws close to elections. In a lengthy dissent, Judge Rosenbaum—the only panelist who addressed the Secretary's merits arguments—concluded that the plaintiffs, not the Secretary, were "likely to win on appeal." *Rose*, 2022 WL 3572823, at *16 (Rosenbaum, J., dissenting). Judge Rosenbaum addressed the Secretary's argument "that the Voting Rights Act doesn't provide federal district courts the power to 'alter the form of government'" but explained "that's not the remedy the district court imposed." *Id.* at *11. "Instead," she continued, "the district court enjoined a state statute and instructed the state legislature to choose a new manner of selecting PSC Commissioners." *Id.*

Two days later, the plaintiffs filed an emergency application in this Court to vacate the Eleventh Circuit's stay, which would have allowed the 2022 PSC elections to proceed using the at-large method that the district court had found unlawful. In their application, the plaintiffs noted the reasonable prospect that this Court would review this case on the merits. Appl. at 20, *Rose v. Raffensperger*, No. 22A136 (U.S. Aug. 14, 2022). In opposing the plaintiffs' application, the Secretary indicated that he was likely to seek review

in this Court if unsuccessful in the Eleventh Circuit. Resp. at 17, *Rose v. Raffensperger*, No. 22A136 (U.S. Aug. 17, 2022). He also acknowledged that the Court's decision in *Milligan* would likely "put to rest any underlying dispute about the scope of Section 2." *Id.* at 17 n.3. On August 19, 2022, this Court granted emergency relief and vacated the Eleventh Circuit's stay. *Rose v. Raffensperger*, 143 S. Ct. 58 (2022) (Mem.).

C. Eleventh Circuit Appeal

While the stay issue was being litigated in this Court, the Eleventh Circuit nominally granted expedited review of the Secretary's appeal on the merits. In his opening brief, the Secretary's primary argument was that the evidence at trial was insufficient to establish that the bloc voting the plaintiffs had proved was "on account of race," not partisan politics. Appellant's Br. at 26, *Rose v. Secretary, State of Georgia*, No. 22-12593 (11th Cir. Sept. 19, 2022), ECF No. 26. As a fallback, he argued, again relying on circuit precedent, that the plaintiffs' proposed remedy of single-member districts would impermissibly alter Georgia's chosen form of government. *Id.*

The Eleventh Circuit heard argument on December 15, 2022.[1] More than eleven months later, on November 24, 2023, the panel issued an opinion reversing the district court's judgment on the sole ground that the plaintiffs had failed to propose a viable remedy in light of the State's asserted interest in maintaining at-large elections for the PSC. Pet. App. 30a. The panel addressed *Milligan* in a single

[1] The United States submitted an amicus brief supporting the plaintiffs and participated in oral argument in the court of appeals. *Rose v. Secretary, State of Georgia*, No. 22-12593 (11th Cir.), ECF Nos. 44 and 52.

paragraph, asserting that it "counsels against a 'single-minded view of § 2.'" Pet. App. 28a. Although the panel recited *Milligan*'s command not to "reduce *Gingles*' totality of circumstances analysis to a single Senate Factor," it did not analyze the totality of circumstances or any of the three *Gingles* preconditions as this Court has described them. *Id.* (cleaned up).

Instead, the panel, relying only on circuit opinions concerning judicial elections and "general principles of federalism," held that implicit in the first *Gingles* precondition is a requirement that Section 2 plaintiffs "propose a remedy within the confines of the state's chosen model of government when bringing [a vote-dilution] claim." Pet. App. 19a-20a, 25a-27a (citing *Nipper v. Smith*, 39 F.3d 1494, 1497 (11th Cir. 1994) (en banc); *SCLC v. Sessions*, 56 F.3d 1281, 1296-97 (11th Cir. 1995) (en banc); and *Davis v. Chiles*, 139 F.3d 1414, 1416 (11th Cir. 1998)). The panel concluded that the plaintiffs' illustrative maps failed this test because "Georgia chose the statewide electoral model for the PSC, and the plaintiffs' proposed remedy would alter that choice in contravention of the principles of federalism." Pet. App. 28a. Put another way, "the State's deliberate choice" of at-large elections—a choice the panel gave "insurmountable weight" based on circuit precedent—"would be undermined" if the Commission were instead elected by single-member districts. Pet. App. 22a.

The only trial evidence the panel cited to support its finding of an insurmountable state interest was lay testimony from Commissioner Pridemore, and one sentence of deposition testimony from Commissioner Tim Echols in which he stated that "he 'thinks it's important that commissioners understand the issues of constituents all across Georgia regardless of where they live.'" Pet. App. 5a, 23a. The panel also noted that

the plaintiffs had provided "no evidence that race motivated Georgia's choice of electoral format" in 1906. Pet. App. 22a.

Notwithstanding the "clear error" standard applicable to the district court's findings of fact and the court's adverse credibility finding about Commissioner Pridemore's testimony, the panel "disagree[d]" with the district court's weighing of her testimony and determined that it could nonetheless "properly consider[]" the "rationales" she gave for the State's asserted interest in maintaining at-large PSC elections. Pet. App. 29a n.18. The panel also discounted the trial evidence "from other commissioners that their duties would not change and testimony from the 'long-time director of the Secretary's Center for Election Systems' that transitioning to single-member districts would be feasible." Pet. App. 29a.

D. Appellate Mandate

After the panel issued its decision, the plaintiffs moved to stay the mandate pending the disposition of a petition for a writ of certiorari in this Court. The Eleventh Circuit denied the motion without explanation, but—on the same day—entered an order stating that "[a] judge of this Court withholds issuance of the mandate in this appeal." Order at 2, *Rose v. Secretary, State of Georgia*, No. 22-12593 (11th Cir. Dec. 18, 2023), ECF No. 65. The court of appeals has not explained why the unnamed judge is withholding the mandate, but one possibility is that the judge has requested a poll on rehearing en banc. *See* 11th Cir. L.R. 35, Internal Operating Procedure No. 5.

As of the date of this petition, the mandate remains withheld, and the district court's permanent injunction is still in effect. The Secretary has called off the regular

PSC elections scheduled for 2024, and two commissioners whose terms expired in 2022 remain in office. *See* Mark Niesse, *Georgia Utility Elections Called Off, Leaving Republicans In Office*, Atlanta Journal-Constitution, Mar. 6, 2024, at A1.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the Eleventh Circuit decided "important federal question[s]" in a way that conflicts with this Court's decisions in *Gingles* and *Milligan* and with the decisions of at least five other circuits. Sup. Ct. R. 10(a), (c); *see, e.g.*, *Wis. Legislature*, 595 U.S. at 401 (granting certiorari to correct "legal error in [the lower court's] application of decisions of this Court" regarding the Voting Rights Act).

The decision below invents a new threshold requirement for vote-dilution plaintiffs that would have produced the opposite result in *Gingles* and countless other Section 2 cases challenging at-large elections or multimember districts over the last four decades. And, by giving "insurmountable weight" to Georgia's asserted policy interests for its use of at-large elections (Pet. App. 20a (cleaned up)), the decision ignores this Court's clear command in *Milligan* that "[a] State's liability under § 2 . . . ***must*** be determined 'based on the totality of circumstances.'" 599 U.S. at 26 (emphasis added) (quoting 52 U.S.C. § 10301(b)). Review is therefore necessary to secure consistency in the application of the Voting Rights Act for millions of Americans and to preserve the *Gingles* framework "'that has been the baseline of our § 2 jurisprudence' for nearly forty years." *Milligan*, 599 U.S. at 26.

I. The decision below conflicts with *Gingles* by requiring Section 2 plaintiffs to propose a remedy that does not alter a State's chosen electoral model.

The Eleventh Circuit's ruling conflicts with this Court's decision in *Gingles*. The first *Gingles* precondition does not require a plaintiff challenging a State's use of at-large elections to propose a remedy that does not "alter" the State's "choice" of "electoral model." Pet. App. 27a-28a. Had that been the rule in *Gingles*, the decision would have come out the other way. *See, e.g.*, *Gingles*, 478 U.S. at 50 (holding that a Section 2 plaintiff challenging the use of multimember districts "must be able to demonstrate that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"). This Court should grant certiorari and reverse on that basis alone.

Gingles was a challenge to North Carolina's chosen electoral model for its General Assembly. *Id.* at 34-35. In 1982, the General Assembly made the "legislative decision to employ multimember, rather than single-member, districts" in certain parts of the State. *Id.* at 46. North Carolina justified its decision with a policy of using whole counties as the building blocks for districts, and the district court found that, unlike here, "the state adduced fairly persuasive evidence that the 'whole-county' policy was well-established historically, had legitimate functional purposes, and was in its origins completely without racial implications." *Gingles v. Edmisten*, 590 F. Supp. 345, 373-74 (E.D.N.C. 1984).

Even so, this Court never required the plaintiffs to show that a multimember remedy did not alter North Carolina's chosen electoral model, and the plaintiffs made no such showing. Instead, the Court held that

the first threshold condition for a claim of vote dilution through the use of multimember districts is to show that the minority group is large enough to constitute a majority "in a single-member district." *Gingles*, 478 U.S. at 50; *accord Milligan*, 599 U.S. at 18 (explaining that the first *Gingles* precondition "is needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district" (cleaned up)). The reason for that requirement is proximate causation: "If it is not [large and compact enough], as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates." *Gingles*, 478 U.S. at 50. And the Court chose single-member districts as the measure of comparison "because it is the smallest political unit from which representatives are elected." *Id.* at 50 n.17.[2]

In the decades since *Gingles*, this Court has never required a plaintiff, as a threshold matter, to propose

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[2] The panel's suggestion that there is no "principled reason" for choosing single-member districts as the benchmark against which to measure an at-large election system defies settled law. Pet. App. 26a. Even before *Gingles*, this Court made clear that, "absent special circumstances," courts should generally "employ single-member districts when they impose remedial plans" after a finding of vote dilution caused by at-large elections. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *accord E. Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636, 639 (1976) (per curiam); *Chapman v. Meier*, 420 U.S. 1, 21 (1975); *Connor v. Johnson*, 402 U.S. 690, 692 (1971) (per curiam). This Court explained the rationale for single-member districts as the benchmark in *Gingles*. 478 U.S. at 50 n.17. And Justice O'Connor later described that benchmark as "self-evident." *Holder v. Hall*, 512 U.S. 874, 888 (1994) (O'Connor, J., concurring). "In a challenge to a multimember at-large system," such as this one, "a court may compare it to a system of multiple single-member districts." *Id.*

a remedy that does not alter a State's chosen electoral model. *See Milligan*, 599 U.S. at 18; *Wis. Legislature*, 595 U.S. at 402; *Abbott v. Perez*, 585 U.S. 579, 614 (2018); *Cooper v. Harris*, 581 U.S. 285, 301 (2017); *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425 (2006); *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *Holder*, 512 U.S. at 880 n.1; *Johnson v. De Grandy*, 512 U.S. 997, 1006-07 (1994); *Voinovich v. Quilter*, 507 U.S. 146, 157-58 (1993); *Growe v. Emison*, 507 U.S. 25, 40 (1993).

No other circuits have interpreted *Gingles* as the Eleventh Circuit did here, either. The Eighth Circuit, for example, affirmed a vote-dilution challenge to South Dakota's legislative redistricting plan that used dual-member districts and at-large elections for its house of representatives. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1016 (8th Cir. 2006). To satisfy the first *Gingles* precondition, the plaintiffs "created a new majority-Indian House district (District 26A) by reconfiguring the boundaries of Districts 26 and 27 into a new District 26 and dividing it into Districts 26A and 26B, giving each a state representative." *Id.* at 1018. The Eighth Circuit did not require the plaintiffs—as the Eleventh Circuit did here—to stick with the State's chosen electoral model. Nor has any other circuit. *See, e.g.*, *Large v. Fremont Cnty.*, 670 F.3d 1133, 1145 (10th Cir. 2012) ("In remedial situations under Section 2 where state laws are *necessarily* abrogated, the Supremacy Clause appropriately works to suspend those laws because they are an *unavoidable obstacle* to the vindication of the federal right.").

There is a good reason why neither this Court nor any other circuit has adopted the Eleventh Circuit's formulation of the first *Gingles* precondition: it is an

exception that swallows the rule because it admits of no limiting principle. The Eleventh Circuit's new rule would seemingly apply, for example, to any county commission or school board that has some basis in state law. *See, e.g.*, *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1287 (11th Cir. 2020) (method of electing school board determined by the Georgia legislature); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1385 (8th Cir. 1995) (en banc) (method of electing school board determined by the Arkansas legislature); *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 247 (11th Cir. 1987) (at-large method of electing county commissions determined by the Alabama legislature); *Jackson v. Edgefield Cnty., S.C. Sch. Dist.*, 650 F. Supp. 1176, 1179 (D.S.C. 1986) (at-large method of electing school board determined by the South Carolina legislature). Nor is there anything in the Eleventh Circuit's formulation that would prevent a State from shielding its legislative districts from challenge simply by converting some or all of them to multimember districts. That result would be contrary to *Gingles* and the text of Section 2, which contains no such exception.

The Eleventh Circuit thus stands alone in its interpretation and application of the first *Gingles* precondition, which is incompatible with *Gingles* itself. Indeed, every other circuit considers a State's interest in maintaining its electoral system as part of the required totality-of-circumstances analysis. *See, e.g.*, *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 243 (2d Cir. 2021); *Veasey v. Abbott*, 830 F.3d 216, 262-63 (5th Cir. 2016) (en banc); *Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000); *Goosby v. Town Bd. of Hempstead, N.Y.*, 180 F.3d 476, 495 (2d Cir. 1999); *Sanchez v. Colorado*, 97 F.3d 1303, 1325-26 (10th Cir.

1996); *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1123 (5th Cir. 1991).[3]

Rather than follow this Court's longstanding formulation of the first *Gingles* precondition, which the Secretary concedes the plaintiffs have satisfied,[4] the panel grafted a new requirement onto it. This requirement—that "plaintiffs must propose a remedy within the confines of the state's chosen model of government when bringing [a Section 2 vote-dilution] claim" (Pet. App. 26a)—appears nowhere in this Court's jurisprudence. This Court should once again "decline to adopt an interpretation of § 2 that would 'revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence' for nearly forty years." *Milligan*, 599 U.S. at 26. And to bring the Eleventh Circuit back in line with this Court's precedents on an important question of federal law, this Court should summarily reverse or set the matter for full merits consideration.

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[3] The panel's assertion that "[o]ur interpretation of the first *Gingles* precondition has attracted support in other circuits" is an overstatement. Pet. App. 8a (citing *Sanchez*, 97 F.3d at 1311, and *Bone Shirt*, 461 F.3d at 1025 (Gruender, J., concurring)). *Sanchez* involved a challenge to the configuration of single-member legislative districts, and the Tenth Circuit correctly applied the first *Gingles* precondition as this Court has always construed it. *Bone Shirt*, as discussed above, would have come out the other way if the Eighth Circuit had applied the Eleventh Circuit's rule. Neither case supports the panel's ruling here.

[4] As the district court explained and no one contests, the evidence "was undisputed that Black voters are a sufficiently large and geographically compact group in current-day Georgia to constitute at least one single-member district in which they would have the potential to elect their representative of choice in district-based PSC elections." Pet. App. 58a.

II. The decision below is contrary to *Milligan* by giving the State's asserted policy interests "insurmountable weight."

This Court in *Milligan* could not have been clearer: "A State's liability under § 2, moreover, ***must*** be determined 'based on the totality of circumstances.'" 599 U.S. at 26 (emphasis added) (quoting 52 U.S.C. § 10301(b)). This command—drawn from the text of Section 2—is no mere suggestion. The panel erred in treating it as such.

Relying on "precedents" concerning judicial elections that are unique to the Eleventh Circuit, the panel held that the plaintiffs could not prevail on their Section 2 claim because "Georgia chose the statewide electoral model for the PSC, and plaintiffs' proposed remedy would alter that choice." Pet. App. 28a. In other words, the plaintiffs had "not proposed a viable remedy" in light of Georgia's asserted "policy interests" in maintaining at-large PSC elections. Pet. App. 16a-17a. The panel did not analyze the three well-established *Gingles* preconditions as this Court described them in *Milligan*. *See* 599 U.S. at 18. Nor did it "analyze the 'Senate factors' at *Gingles*'s totality of the circumstances stage." Pet. App. 16a n.11. Instead, the panel focused solely on whether "the State's deliberate choice" of at-large elections "would be undermined by a forced change in the Commission's structure—from a statewide body to a single-member districted body." Pet. App. 22a.

"That single-minded view of § 2 cannot be squared with the VRA's demand that courts employ a more refined approach." *Milligan*, 599 U.S. at 26; *accord Wis. Legislature*, 595 U.S. at 405 (faulting lower court for "improperly reduc[ing] *Gingles*' totality-of-circumstances analysis to a single factor"). In *Milligan*, this Court rejected Alabama's argument that "there is only one

'circumstance[ ]' that matters" under Section 2. 599 U.S. at 26. The panel committed the same error here; only it fixated on a different circumstance.

The plaintiffs had warned the panel against doing so in a Rule 28(j) letter the day after this Court decided *Milligan*. The plaintiffs emphasized that this Court had "rejected Alabama's 'single-minded view of § 2' that echoes the Secretary's state-interest argument." Letter at 1, *Rose v. Secretary, State of Georgia*, No. 22-12593 (11th Cir. June 9, 2023), ECF No. 57 (quoting *Milligan,* 599 U.S. at 26). The plaintiffs cautioned against following circuit precedent that would place "'insurmountable weight' [] on Georgia's asserted interest in preserving its at-large electoral system." *Id*. (citing *Davis*, 139 F.3d at 1423). Doing so, the plaintiffs explained, "would be inconsistent with the Supreme Court's repeated warning against 'improperly reducing *Gingles*' totality-of-circumstances analysis to a single factor.'" *Id*. (quoting *Milligan*, 599 U.S. at 26).

Undeterred, the panel treated *Milligan*'s command as advisory. "*Milligan*," according to the panel, merely "***counsels*** against a 'single-minded view of § 2.'" Pet. App. 28a (emphasis added). The panel then relied on circuit "precedent" to conclude, contrary to *Milligan*, that "we analyze plaintiffs' proposed remedy and look to a state's policy interests and rationales." *Id.* While the panel professed to analyze the state's asserted interest "as one part of [a] larger undertaking," it did no such thing. Had the panel done so, it would have followed *Milligan* and considered any such interest as one of "several factors relevant to the totality of circumstances inquiry." *Milligan*, 599 U.S. at 18; *see also Houston Lawyers' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 426 (1991) (explaining that "the State's interest in maintaining an electoral system . . . is a

legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred"). Instead, the panel, relying on "binding Eleventh Circuit precedent" only, deemed the State's asserted interest in maintaining at-large elections insurmountable and thus did "not reach Section 2's totality of the circumstances test." Pet. App. 28a.

The panel did so even though the circuit precedent on which it relied concerns elections for trial judges, as opposed to elections for multimember "collegial bodies" such as the PSC. *Nipper*, 39 F.3d at 1498 (Tjoflat, J.). In one of the cases relied on by the panel, the court there correctly observed that, "***in this circuit***, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections." *Davis*, 139 F.3d at 1424 (emphasis added). These precedents, which place "insurmountable weight on a state's interest in preserving" at-large judicial elections, "appear[] to conflict with the Supreme Court's initial pronouncements on this subject." *Id.* at 1423-24. The panel's decision has cemented that conflict and enlarged its scope by extending the reach of these outlier precedents for the first time to a multimember quasi-legislative, quasi-judicial administrative body. Pet. App. 26a-27a.[5]

The panel's defiance of this Court's precedent is especially problematic given the record here. In assessing Senate Factor 9, which "considers whether the policy underlying Georgia's use of the voting standard,

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[5] In dicta, the panel also cited *Holder*, 512 U.S. at 880-81. Pet. App. 26a. But *Holder* held only that "a plaintiff cannot maintain a § 2 challenge to the size of a government body." 512 U.S. at 885. That holding is beside the point here because the plaintiffs have never challenged the PSC's size and have produced illustrative maps for a five-member Commission with statewide jurisdiction.

practice, or procedure at issue is 'tenuous,'" the district court examined the Secretary's "policy justifications" for at-large PSC elections. Pet. App. 72a. After reviewing those justifications, and the strength of the evidence supporting them, the district court found that "Senate Factor 9 weighs in Plaintiffs' favor." Pet. App. 74a. That factual finding is reviewable only for "clear error." *Milligan*, 599 U.S. at 23.

The district court "expected the Secretary at trial to offer robust evidence explaining why Georgia's method of selecting PSC members was thoughtfully contemplated by the General Assembly, or that it otherwise furthered some concrete interest that was documented and provable." Pet. App. 73a. The Secretary offered nothing of the sort. He sponsored no expert testimony on the subject and could not identify a single "policy statement" or shred of "legislative history" that "might have articulated an explanation for why this particular electoral mechanism makes sense for Georgia." *Id.* Rather, the only evidence of a state interest the Secretary offered at trial was the lay opinion of Commissioner Pridemore, who opined that statewide elections could limit in-fighting among commissioners and reduce perceptions of favoritism or "home cooking." *Id*.[6] The district court, however, found Commissioner

[6] The panel also cited deposition testimony of Commissioner Tim Echols, who opined that "it's important that commissioners ***understand*** the issues of constituents all across [Georgia] regardless of where they live." Pet. App. 5a n.5 (emphasis added). The Secretary has never relied on this testimony to advance his state-interest argument. He did not cite it in his proposed findings or in any of his briefs to the Eleventh Circuit. Regardless, the panel offers only speculation that commissioners elected by single-member districts—or some other method that complies with Section 2—could not continue to understand energy-related issues that affect all Georgians.

Pridemore's testimony "unpersuasive" because it was "not tethered to any objective data" and "lacked foundation entirely." Pet. App. 73a. Based on the district court's "close observation" of Commissioner Pridemore's trial testimony, it found "that the justifications she gave for the PSC's electoral structure were developed in preparation for her testimony and were not preconceived." *Id.*

Yet those were the same justifications the panel relied on to hold—without any consideration of the traditional *Gingles* preconditions, the Senate Factors, or any other evidence of racial vote dilution presented at trial—that the plaintiffs' Section 2 "claim cannot proceed." Pet. App. 29a. The panel reached its holding only by ignoring the district court's adverse credibility finding and "disagree[ing]" with the district court's careful weighing of the evidence. Neither can justify reversal under the deferential clear-error standard the panel should have applied. *See Cooper*, 581 U.S. at 316 (explaining that, under the "clear error" standard, "[w]e cannot disrespect such credibility judgments" or "take it upon ourselves to weigh the trial evidence as if we were the first to hear it").

If a State's asserted interest in maintaining at-large elections can be dispositive in this case, it will be so in every case. Such a "single-minded view of § 2" is contrary to *Milligan* and warrants summary reversal or, in the alternative, full merits review. 599 U.S. at 26.[7]

[7] Also contrary to *Milligan* is the panel's decision to fault the plaintiffs for offering "no evidence that race motivated Georgia's choice of electoral format." Pet. App. 22a. The panel assumed that Georgia adopted its at-large method in 1906 for "race-neutral reasons." *Id.* The panel cited no evidence to support that assumption, and Georgia's selecting that method during the

III. This case is an excellent vehicle for deciding federal questions of exceptional importance.

This Court has recognized the paramount importance of the right to vote on many occasions. *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."). And it has not hesitated to grant review when the lower courts have misapplied this Court's decisions interpreting federal statutes designed to protect that right. *See, e.g.*, *Wis. Legislature*, 595 U.S. at 401 (granting certiorari to correct "legal error in [the lower court's] application of decisions of this Court" regarding the Voting Rights Act).

Here, the stakes could not be higher. Georgia is a large state with millions of voters directly affected by the Eleventh Circuit's reformulation of the *Gingles* framework. But Georgia is not the only State implicated. Nine other States—including Alabama—have statewide boards or commissions like the PSC that are elected at large. Pet. App. 25a. And there are at least 18 States that elect supreme court judges or appellate judges through some form of statewide elections. The panel's

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height of Jim Crow suggests otherwise. *See* Pet. App. 33a-34a. Regardless, the plaintiffs had no obligation to show that "race was a motivating factor" in Georgia's decision. Pet. App. 30a. In *Milligan*, this Court "reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent." 599 U.S. at 25. Recognizing as much, the Secretary conceded at trial that "[i]ntent is not relevant" insofar as it concerns Georgia's "adoption of the [at-large] system." Trial Tr. at 863:3-4, *Rose v. Raffensperger*, No. 20-cv-02921-SDG (N.D. Ga. July 1, 2022), ECF No. 143. The panel's contrary belief is yet another reason this Court should grant certiorari and reverse.

reasoning would effectively insulate them and "other multi-member statewide entities" from challenge under the Voting Rights Act. Pet. App. 25a.

And it doesn't stop there. The panel's rationale could foreclose challenges to any state or local body that can assert what it claims are important policy interests supporting its method of election—even in cases, like this one, where the limited evidence supporting those interests was found not credible by the district court that heard it live. Challenges to at-large elections set by state law are especially vulnerable, and those include elections for many county commissions and boards of education, not just statewide bodies. At stake here is nothing less than the viability of any remedy under the Voting Rights Act for racial vote dilution through the use of at-large elections or multimember districts.

These legal issues are perfectly preserved and squarely presented by the panel's decision, making this case an excellent vehicle for resolving them.

CONCLUSION

The Court should grant certiorari and summarily reverse the judgment of the Eleventh Circuit or set the case for full merits briefing and argument.

Respectfully submitted,

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March 25, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-12593

RICHARD ROSE,

an individual,

BRIONTE MCCORKLE,

an individual,

WANDA MOSLEY,

an individual,

JAMES MAJOR WOODALL,

Plaintiffs-Appellees,

versus

SECRETARY, STATE OF GEORGIA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-02921-SDG

Before BRANCH and GRANT, Circuit Judges, and SCHLESINGER,* District Judge.

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* The Honorable Harvey Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

BRANCH, Circuit Judge:

The Georgia Public Service Commission ("PSC") consists of five commissioners elected through statewide, at-large elections.[1] Plaintiffs—four black residents of Fulton County, Georgia—sued the Georgia Secretary of State ("Secretary") alleging that this election system constitutes unlawful vote dilution under Section 2 of the Voting Rights Act ("VRA"). In short, plaintiffs allege that black Georgians have been unable to elect their preferred PSC candidates because the statewide electoral system forces them to go head-to-head with the preferences of white Georgians across the State. Plaintiffs contend that single-member districts would be less dilutive and, therefore, are required. The Secretary argues that partisanship—not race—has driven the PSC's electoral outcomes. He also argues that plaintiffs' requested remedy (single-member districts) would impermissibly alter Georgia's chosen form of government—a statewide body designed to avoid provincialism in the tough business of regulating energy. The district court agreed with plaintiffs and enjoined the Secretary from administering statewide PSC elections and from certifying any commissioner elected via such method.[2] For the reasons below, and with the benefit of oral argument, we reverse.

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[1] As the district court recognized in its order, Georgia's PSC elections are "statewide" because they are open to every registered Georgia voter and "at-large" because all voters are eligible to vote directly for all five commissioners (instead of electing a single commissioner that then represents their district on the PSC). For ease of reference, we refer to this as a "statewide" system.

[2] This order also cancelled elections for two PSC seats that were scheduled for November 2022.

I. Background

A. The PSC's Functions and Method of Election

The Georgia Constitution requires a five-member PSC for utility regulation. Ga. Const. Art. IV, § 1, ¶ I(a) ("There shall be a [PSC] for the regulation of utilities which shall consist of five members who shall be elected by the people."). The PSC's significant responsibilities are wide-ranging. At a basic level, the PSC determines, or at least monitors, the prices consumers pay for utilities—including electricity, natural gas, and some telephone services. The PSC also controls permitting for power plant construction and it has some jurisdiction over internet connectivity and rural broadband, among other functions. Simply put, the PSC is important to the State and its citizens.

The PSC carries out its responsibilities as an "administrative body" that performs "quasi-judicial" and "quasi-legislative" functions. *Tamiami Trail Tours, Inc. v. Ga. Pub. Serv. Comm'n*, 99 S.E.2d 225, 233 (Ga. 1957). That is, it conducts some of its proceedings as an adjudicatory body that "hears rate cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders"—similar to the judicial role. But it also sets utility rates, controls permitting for power plant construction, and regulates pole attachments and landlines for communications—similar to the legislative role.

The PSC dates back to 1879 when the Georgia General Assembly adopted an act establishing its predecessor, the Railroad Commission. In 1922, the General Assembly changed the name of the Railroad Commission to the PSC and expanded its powers and duties. Since 1906, Georgia's PSC commissioners—railroad commissioners prior to 1922—have been elected

statewide to staggered six-year terms. When the PSC achieved constitutional status in 1945, the General Assembly retained the same election system.[3] In fact, in over 100 years, there has only been one change to PSC elections. Specifically, in 1998, under Governor Roy Barnes, the Georgia General Assembly created a five-district system with a residency requirement that remains in place today. Under this system, PSC commissioners must live in the district they represent, but they are still elected through statewide elections.[4] For example, to represent the PSC's third district (Clayton, DeKalb, and Fulton Counties), a PSC commissioner must live in one of those three counties; however, Georgians in all 159 counties will vote on that commissioner's candidacy. The residency requirement did not alter the electoral system (*i.e.*, statewide elections are still used), but it did change the candidate pool (*i.e.*, a PSC candidate must live in the district that he would represent if he were to win the statewide election).

The PSC's statewide electoral structure was deliberately chosen to advance policy interests that the Georgia General Assembly deemed important. For example,

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[3] Before 1945, the PSC was only a creature of statute.

[4] The Georgia Constitution requires that the PSC be "elected by the people," Ga. Const. Art. IV, § 1, ¶ I(a), leaving room for the Georgia General Assembly to spell out the specifics of the electoral system by statute. Since 1998, the governing law has provided:

> The [PSC] shall consist of five members to be elected as provided in this Code Section. . . . [M]embers elected to the commission shall be required to be residents of one of five [PSC] Districts as hereafter provided, but each member of the commission shall be elected state wide by the qualified voters of this state who are entitled to vote for members of the General Assembly.

O.C.G.A. § 46-2-1(a).

the PSC's statewide elections allow each commissioner to prioritize the "best interest[s] of the whole state" without logjams from regionalized disputes. As PSC Chair Tricia Pridemore testified below:

> [T]he one thing about the five commissioners is that we don't fight over where things go. We don't fight over which district gets a new gas plant or . . . a solar farm. . . . The way [PSC elections are] structured enables us to . . . maximize the needs for the state.

If each commissioner represented only a district, then important questions of utility regulation—such as the location of energy and infrastructure—could turn into a zero-sum game between commissioners beholden to their districts instead of a collaborative effort to reach the best result for the entire State. Similarly, Pridemore testified that the statewide electoral system discourages fights over rate setting, one of the PSC's most important functions: "We don't fight and argue amongst the five of us . . . over [whether] District 5 customers pay less than District 3 or District 3 electric customers pay more." Other PSC commissioners provided similar views.[5] At the end of the day, the Georgia General Assembly selected a statewide election system that allows PSC commissioners to focus on the needs of Georgia as a whole.

B. Section 2 of the VRA

An upfront understanding of the framework of Section 2 of the VRA helps contextualize plaintiffs'

[5] Commissioner Tim Echols, for example, provided that he "think[s] it's important that commissioners understand the issues of constituents all across [Georgia] regardless of where they live."

allegations, the Secretary's counter arguments, and the district court's various rulings.

The text of Section 2 is straightforward:[6] It forbids "any State or political subdivision" from imposing any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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." 52 U.S.C. § 10301(a). The right protected by Section 2 is "equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11

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[6] The pertinent text of Section 2 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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) of this title, as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, [t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

52 U.S.C. § 10301(a)–(b).

(1994). Notably, Section 2 explicitly disclaims a right to proportionality. 52 U.S.C. § 10301(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

In *Thornburg v. Gingles*, 478 U.S. 30, (1986), the Supreme Court laid the foundation for assessing at-large voting systems for vote dilution under Section 2. *Id.* at 43–51. "[A]t-large elections" are not "*per se* violative of § 2," but the Supreme Court has "long recognized that . . . at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population." *Id.* at 46–47 (quotation omitted) (alteration adopted). In such a case, at-large districts are prohibited. *Id.* at 48.

To establish vote dilution under Section 2, plaintiffs must first satisfy the three *Gingles* preconditions:

> First, the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district. Second, the minority group must be able to show that it is politically cohesive. And third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate."

Allen v. Milligan, 599 U.S. 1, 18 (2023) (brackets in original) (ellipses in original) (quotations omitted) (internal citations omitted) (citing *Gingles*, 478 U.S. at 51).

Importantly, we have interpreted the first *Gingles* precondition—a minority group being sufficiently large and geographically compact to constitute a majority in a reasonably configured district—to require plaintiffs

to "offer[] a satisfactory remedial plan." *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302 (11th Cir. 2020). Without a satisfactory remedial plan, plaintiffs "cannot succeed." *Id.*; *see also Nipper v. Smith*, 39 F.3d 1494, 1530 (11th Cir. 1994) (en banc) ("[T]he issue of remedy is part of the plaintiff's prima facie case in section 2 vote dilution cases."); *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999) ("We have repeatedly construed the first *Gingles* factor as requiring a plaintiff to demonstrate the existence of a proper remedy."). Further, plaintiffs' remedial plan cannot be fundamentally at odds with the state's chosen model of government because "[n]othing in the Voting Rights Act suggests an intent on the part of Congress to permit the federal judiciary to force on the states a new model of government." *Nipper*, 39 F.3d at 1531.

Our interpretation of the first *Gingles* precondition has attracted support in other circuits. *See Sanchez v. Colorado*, 97 F.3d 1303, 1311 (10th Cir. 1996) ("The inquiries into remedy and liability, therefore, cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system."(quoting *Nipper*, 39 F.3d at 1530–31)); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1025 (8th Cir. 2006) (Gruender, J. concurring) (same). Even circuits that do not assess the viability of the proposed remedy as part of the first precondition inquiry recognize that proper remedies are critical in Section 2 vote dilution cases. *See generally Cousin v. Sundquist*, 145 F.3d 818, 831 (6th Cir. 1998) ("Therefore, even if we found that plaintiffs' showing met the *Gingles* pre-conditions or satisfied the totality of the circumstances test, we would not approve the imposition of such a remedy."). Thus, especially in a case like this one, where plaintiffs

offer only a single, dramatic remedy—transforming a statewide voting system into a single-member districted plan—it makes no difference whether a claim fails for the lack of a permissible remedy at the precondition stage or after the totality of the circumstances analysis.

If plaintiffs can satisfy each *Gingles* precondition, the analysis then proceeds to a totality of the circumstances test[7] to determine whether the voting system

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[7] As part of the totality of the circumstances analysis, we traditionally consider the "Senate factors," which include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
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> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; and
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> . . .

"result[s] in unequal access to the electoral process." *Gingles*, 478 U.S. at 46; *see also Wright*, 979 F.3d at 1288 ("Once all three *Gingles* requirements are established, the statutory text directs us to consider the totality of the circumstances to determine whether members of a racial group have less opportunity than do other members of the electorate." (quotation omitted)). "[I]t is the plaintiff's burden to establish each of the *Gingles* preconditions and to show, under the totality of the circumstances, that members of a protected class suffer unequal access to the political process." *Wright*, 979 F.3d at 1307 (emphasis in original).

Putting these pieces together, the traditional Section 2 vote dilution case challenges the operative boundaries of an electoral system and seeks to redraw those boundaries so that the minority population's voting strength is no longer diluted across the aggregated voting population. *Gingles*, 478 U.S. at 46–47. Often, these cases challenge multi-member, at-large districts used by governmental subunits within a state—such as city councils, county commissions, or school boards—and allege vote dilution because white voters get to vote for every board member which, in turn, drowns out the preferences of minority voters. *See generally United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1552 (11th Cir. 1984) (county commission and school board); *Sanchez v. Bond*, 875 F.2d 1488, 1489–90 (10th Cir. 1989) (county commission); *Badillo v. City of Stockton*, 956

> 8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
>
> 9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Wright, 979 F.3d at 1289.

F.2d 884, 885–86 (9th Cir. 1992) (city council); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1385 (8th Cir. 1995) (school board); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 938 (7th Cir. 1988) (school board and park district); *Clarke v. City of Cincinnati*, 40 F.3d 807, 808 (6th Cir. 1994) (city council); *Washington v. Tensas Par. Sch. Bd.*, 819 F.2d 609, 610–12 (5th Cir. 1987) (school board and policy jury which was the "parish governing authority"); *Holloway v. City of Va. Beach*, 42 F.4th 266, 270–71 (4th Cir. 2022) (city council); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1111–12 (3d Cir. 1993) (school board); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 481 (2d Cir. 1999) (town board); *Uno v. City of Holyoke*, 72 F.3d 973, 977–78 (1st Cir. 1995) (city council). In these cases, plaintiffs essentially allege that there are no "safe" districts in which minority voters have an enhanced opportunity to elect their preferred candidates. If vote dilution is found in these multi-member, at-large electoral systems, then the traditional remedy entails imposing a single-member districted system with some allocation of "majority-minority" districts in which "a minority group composes a numerical, working majority of the voting-age population." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009); *see Connor v. Johnson*, 402 U.S. 690, 692 (1971) ("[S]ingle-member districts are preferable to large multi-member districts as a general matter.").

Section 2 vote dilution challenges have also been brought against electoral systems that employ single-member districts. *Voinovich v. Quilter*, 507 U.S. 146, 157–58 (1993) ("In [*Growe v. Emison*, 507 U.S. 25, 40–42 (1993)], however, we held that the *Gingles* preconditions apply in challenges to single-member as well as multimember districts."); *see, e.g.*, *De Grandy*, 512 U.S. at 1000. Plaintiffs in these cases generally allege that their votes are diluted because the operative electoral

map has an insufficient number of majority-minority districts. In the context of these single-member districts, if vote dilution is found, the traditional remedy is to redraw the boundaries of the already-existing single-member districts to remove the plan's dilutive effect. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 495 (2006) (Roberts, J., concurring) ("[I]n the context of single-member districting schemes, we have invariably understood [Section 2 of the VRA] to require the possibility of *additional* single-member districts that minority voters might control." (emphasis in original)).

In these two types of traditional Section 2 cases, plaintiffs have experienced mixed levels of success depending—of course—on the facts of the case. Importantly, however, despite the extensive and litigious history of Section 2, it had *never* been used to invalidate a statewide election system on vote dilution grounds until the district court reached such a holding in this case.[8]

C. Procedural History

Plaintiffs filed this lawsuit in the Northern District of Georgia in July 2020. They alleged that Georgia's statewide PSC elections dilute their votes in violation of Section 2 of the VRA because black voters have been consistently unable to elect their preferred candidates

[8] We are unaware of—and plaintiffs failed to provide—any case that has invalidated a statewide election system under the Section 2 framework. When asked at oral argument if plaintiffs' counsel was "aware of any case where § 2 renders a statewide election illegal," counsel admitted that "[he thought] the answer [was] no." The district court recognized the unprecedented nature of this case as well, noting that "[t]his case presents the novel question of whether there can be vote dilution in violation of Section 2 of the [VRA] when the challenged election is held on a statewide basis."

over the voting strength of white voters across Georgia.[9] Plaintiffs maintained that this electoral ineffectiveness was despite the fact that "African Americans in Georgia [were] sufficiently numerous and geographically compact to constitute a majority of the voting-age population in at least one single-member district." Accordingly, plaintiffs sought a remedy that would change Georgia's statewide system to single-member districts—including one Atlanta-based district with a black majority.

The Secretary moved to dismiss. The district court denied the Secretary's motion in full.

Then, the parties cross-moved for summary judgment. In particular, plaintiffs argued that they were entitled to partial summary judgment because they satisfied the three preconditions for a Section 2 vote dilution claim as set forth in *Gingles*. 478 U.S. at 50–51. The Secretary again argued that plaintiffs lacked standing or that, at least, plaintiffs "failed to demonstrate they have a sufficient remedy" because "the undisputed evidence demonstrates the State has a strong interest

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[9] Plaintiffs do not cabin their argument to the PSC's unique statewide system that is coupled with a residency requirement—rather, they take aim at the statewide system in general. That is, even without the live-in-the-district requirement, plaintiffs would put forth the same vote dilution argument, as they made clear during proceedings at the district court:

> District Court: So you're saying that even if there was no residency requirement your challenge would still be viable? Your challenge is to the statewide at-large nature of election?
>
> [Plaintiffs' Counsel]: Absolutely, Your Honor. In a nutshell, our claim is that African-American voters votes are diluted by the at-large nature of elections for the [PSC] because of the presence of racially-polarized voting.

in maintaining its form of government for the PSC as a statewide elected body."

While the Secretary's motion was denied in its entirety, plaintiffs' motions were granted in part. The district court agreed that plaintiffs satisfied the *Gingles* preconditions and were entitled to summary judgment on those points. However, it determined that plaintiffs were not entitled to summary judgment on their proposed remedy, and the case was set for trial. After a five-day bench trial, the district court found that Georgia's statewide PSC elections diluted the voting strength of black voters in violation of Section 2 and permanently enjoined the Secretary from administering or certifying future PSC elections under this method. The district court also found that plaintiffs' proposed remedy (single-member districts) was viable.

The Secretary appealed, and "move[d] for a stay pending appeal of the district court's . . . order permanently enjoining him from conducting statewide elections on November 8, 2022, for Districts 2 and 3 of the Georgia [PSC]." A panel of this Court granted a stay, finding that the district court should not have altered the rules of an election that was about to occur under the "*Purcell* principle." *See Purcell v. Gonzalez*, 549 U.S. 1 (2006). The Supreme Court, however, vacated the stay, concluding that we erred in failing to analyze the request under the traditional stay factors.[10] *Rose v. Reffensperger*, 143 S. Ct. 58, 59 (2022).

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[10] The Supreme Court stated:

> The August 12, 2022 order of the United States Court Appeals for the Eleventh Circuit staying the district court's of injunction is vacated. Respondent's emergency motion for a stay pending appeal relied on the traditional stay factors and a likelihood of success on the

Accordingly, we ordered the Secretary to "file a supplemental brief addressing whether a stay pending appeal is appropriate under the traditional stay factors." Instead, the Secretary filed an "Unopposed Motion to Withdraw Emergency Stay Injunction Pending Appeal," which was granted, and the PSC elections at issue did not occur in November 2022. We then heard oral arguments on the merits of the Section 2 vote dilution claim.

II. Standard of Review

We review a district court's "finding of vote dilution under § 2" of the VRA for "clear error." *Wright*, 979 F.3d at 1288. Similarly, a "district court's determination regarding one of the *Gingles* prongs is entitled to considerable deference." *Johnson v. Hamrick*, 296 F.3d 1065, 1074 (11th Cir. 2002). We have emphasized, however, that clear error review is not a "rubber stamp," *Wright*, 979 F.3d at 1301, and we always retain the power to "correct a district court's errors of law and its findings of fact based upon misconceptions of law," *United States v. Jones*, 57 F.3d 1020, 1022 (11th Cir. 1995).

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merits, see *Nken v. Holder*, 556 U.S. 418 (2009), yet the Eleventh Circuit failed to analyze the motion under that framework. Instead, it applied a version of the *Purcell* principle, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*), that respondent could not fairly have advanced himself in light of his previous representations to the district court that the schedule on which the district court proceeded was sufficient to enable effectual relief as to the November election should applicants win at trial. The Eleventh Circuit may reconsider whether a stay pending appeal is appropriate, subject to sound equitable discretion.

Rose v. Raffensperger, 143 S. Ct. 58 (Mem), 213 L. Ed. 2d 1143 (2022)

III. Discussion

This vote dilution challenge is not a traditional one. Rather, plaintiffs ask us to find—*for the first time ever*—that statewide elections constitute vote dilution under Section 2. And, as a remedy, plaintiffs ask that we replace Georgia's chosen form of government (five statewide commissioners) with a completely different system (one commission with five single-member districts) that does not protect the statewide interests the Georgia General Assembly deemed important. Simply put, plaintiffs' request strains both federalism and Section 2 to the breaking point.

Nonetheless, in a novel decision, the district court ruled that Georgia's statewide PSC elections constitute vote dilution in violation of Section 2. But, because it is clear to us that plaintiffs' proposed remedy is a unique application of Section 2 that would upset Georgia's policy interests that are afforded protection by federalism and our precedents, we hold that plaintiffs have not proposed a viable remedy and have failed to satisfy *Gingles*'s first precondition. *See, e.g.*, *Nipper*, 39 F.3d at 1529. Thus, we conclude that the district court made a mistake of law, and we reverse.[11]

A. Plaintiffs' proposed remedy

Plaintiffs propose converting PSC elections from statewide to single-member districted elections. Specifically, under plaintiffs' proposal, the State of Georgia would be divided into five districts and PSC commissioners would be elected by voters in their

[11] Because we decide this appeal on the remedy requirement at the first *Gingles* precondition, we do not consider the Secretary's argument that the district court's finding of racial vote dilution was clearly erroneous, and we do not proceed to analyze the "Senate factors" at *Gingles*'s totality of the circumstances stage.

district rather than by every voter in the State. Plaintiffs' proposed map includes one majority-minority district. That district (proposed District 1) would span the Atlanta area and include all of Clayton, DeKalb, Fayette, Henry, Newton, and Rockdale Counties as well as the southern half of Fulton County. This district would have a 54% black voting-age population. The other four districts would be largely rural and majority white.

B. Plaintiffs' proposed remedy is not viable

As an initial matter, we agree with plaintiffs that Section 2 applies because it explicitly protects against voting "standard[s], practice[s], or procedure[s]" imposed by "any State or political subdivision" that "result[] in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a); *see Milligan*, 599 U.S. at 24–25. Nonetheless, plaintiffs cannot satisfy the first *Gingles* precondition because their novel application of Section 2 relies on a remedy that is not viable. *Wright*, 979 F.3d at 1302 ("A section 2 plaintiff cannot succeed without offering a satisfactory remedial plan.").

To reiterate a critical point, plaintiffs' proposed remedy asks us to wade into uncharted territory. Plaintiffs do not bring a routine challenge to an at-large voting structure at the municipal or county level and seek a single-member districted plan as the remedy. Nor do they seek to redraw an already-existing single-member districted system into a less dilutive single-member system. We have considered those challenges. *See generally Wright*, 979 F.3d at 1287; *De Grandy*, 512 U.S. at 1000. Instead, plaintiffs' novel proposal is that we dismantle Georgia's statewide PSC system and replace it with an entirely new districted system. But we have never gone this far.

We start by laying out the applicable legal framework established by three of our precedents and then we apply our precedent to the instant case. *See Nipper*, 39 F.3d at 1497; *S. Christian Leadership Conf. v. Sessions*, 56 F.3d 1281, 1296–97 (11th Cir. 1995) [hereinafter *SCLC*] (en banc); *Davis v. Chiles*, 139 F.3d 1414, 1416 (11th Cir. 1998).

Nipper is the first case of the trifecta. 39 F.3d at 1496. In *Nipper*, this Court—sitting *en banc*—expressly limited our reach in certain Section 2 vote dilution cases. *Id.* In that case, plaintiffs "challenge[d] the [at-large election] system used to elect the judges of Florida's Fourth Judicial Circuit Court [comprised of three counties] . . . and the judges of the Duval County Court." *Id.* They sought "a remedy, such as the creation of subdistricts, that [would] ensure their ability to elect black judges of their choice." *Id.* at 1497. A majority of the Court[12] interpreted the first *Gingles*

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[12] Due to recusals, eight judges sat *en banc* for *Nipper*. 39 F.3d at 1496 n.*. Judge Tjoflat's plurality opinion was joined by one judge. *Id.* at 1496–1547. Judge Edmondson concurred and was joined by three judges. *Id.* at 1547 (Edmondson, J., concurring). As such, the portions of the plurality opinion that were concurred to (specifically Parts III(A) and III(B)(1)) are binding because they were joined by a six-judge majority. *Id.* For Judge Edmondson (and the three judges that joined his concurrence), the case was open and shut:

> For me, the point that determines the outcome of the case is this one: The State of Florida's legitimate interest in maintaining linkage between jurisdiction and the electoral bases of its trial judges is, as a matter of law, great and outweighs (either at the vote-dilution-finding stage or at the remedy stage) whatever minority vote dilution that may possibly have been shown here.

Id.

precondition to require "a remedy *within the confines of the state's judicial model*." *Id.* at 1531 (emphasis added). Without such a remedy, plaintiffs could not succeed because "[n]othing in the [VRA] . . . permit[s] the federal judiciary to force on the states a new model of government; moreover, from a pragmatic standpoint, federal courts simply lack legal standards for choosing among alternatives." *Id.* Then, after examining the alternative models proposed by the plaintiffs, we held that plaintiffs' claim failed because each alternative would threaten important state interests and "undermine the administration of justice." *Id.* at 1543, 1546–47 ("Florida's current model of trial court elections embodies a state judgment that the voters in a judge's jurisdiction should have the right to hold that judge accountable for his or her performance in office.").

The logic of *Nipper* was quickly reaffirmed, this time in a challenge to Alabama's at-large elections for trial judges. *SCLC*, 56 F.3d at 1281. Sitting *en Banc* again, we had the power to revisit the legal standards employed in *Nipper*—but did not. *Id.* at 1294. Instead, after affirming the district court's finding that there was no vote dilution, we went on to hold that "no remedy [was] available." *Id.* We reiterated that "[w]hen determining whether the remedy a plaintiff seeks is a feasible alternative to the challenged electoral system, a state's interest in maintaining the challenged system is a legitimate factor to be considered." *Id.* Then, we considered Alabama's interests in "maintaining the link between a trial judge's electoral base and jurisdiction," protecting against "favoritism concerns" that arise when smaller districts are created, and "ensuring a reasonable pool of qualified potential candidates." *Id.* at 1297. In sum, we held that "the many state policy interests . . . preclude[d] the remedies appellants[]

propose[d]." *Id.* Thus, *SCLC* cemented the analysis of *Nipper*.

Finally, in *Davis*, in affirming the district court's rejection of a proposed remedy in a Section 2 vote dilution suit challenging an at-large judicial election system in Florida, a panel of this Court reiterated our prior holdings regarding impermissible remedies:

> In *Nipper* and *SCLC*, we ruled that a state's interest in maintaining its judicial model and in preserving such linkage outweighed the plaintiffs' interest in ameliorating the effects of racial polarization in at-large judicial elections. . . . Based on these precedents, we hold that Davis's [proposed remedy] would not be a proper remedy . . . .

139 F.3d at 1423 (citations omitted). In fact, this holding was the only possible outcome because our case law "has placed . . . an insurmountable weight on a state's interest in preserving its constitution's judicial selection system and in maintaining linkage between its judges' jurisdictions and electoral bases." *Id.*

The primary takeaway from this line of precedent is that general principles of federalism undergird our decisions—as they must. *Id.* ("[W]e must consider Florida's interest in maintaining the challenged electoral system. . . . Of primary importance in this case, our adoption of Davis's plan would require us to contravene Florida's Constitution and to substantially break the link between the affected judges' jurisdictions and electoral bases."); *see also SCLC*, 56 F.3d at 1298 (Edmondson, J., concurring) ("The basic structure of Alabama's judicial branch of government, including the shape of its judicial jurisdictions and the manner of selecting trial judges, is in the hands of Alabama's

people."). This significant respect for a state's decisions on matters involving its governmental structure stems from our federalist system of government which necessitates respect for states that are "residuary sovereigns and joint participants in the governance of the Nation." *Alden v. Maine*, 527 U.S. 706, 748 (1999); *Printz v. United States*, 521 U.S. 898, 918–19 (1997) ("Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" (quoting The Federalist No. 39, at 245 (James Madison)). Thus, while the Fourteenth Amendment and VRA overcome state sovereignty in certain factual situations in the voting rights arena, we must remain mindful of state authority, which is a hallmark of American government. *See, e.g.*, *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 871 (5th Cir. 1993) ("The substantiality of the state's interest has long been the centerpiece of the inquiry into the interpretation of the Civil War Amendments and their interplay with the civil rights statutes.").

Building on federalism, the second critical takeaway is that we must assess a plaintiff's proposed remedy early and strongly consider the state's interest in maintaining its form of government when making that assessment. Specifically, "there must be a remedy *within the confines of the state's [PSC] model*[.]" *Nipper*, 39 F.3d at 1531. And we must consider "a state's interest in maintaining the challenged system" when "determining whether the remedy a plaintiff seeks is a feasible alternative to the challenged electoral system." *SCLC*, 56 F.3d at 1294; *see also Davis*, 139 F.3d at 1423; *Houston Lawyer's Ass'n v. Att'y Gen.*, 501 U.S. 419, 426–27 (1991) (recognizing the importance of considering the state's interest in assessing a plaintiff's proposed remedy). We must be mindful that "[i]mplicit in this

first *Gingles* requirement is a limitation on the ability of a federal court to abolish a particular form of government and to use its imagination to fashion a new system." *Nipper*, 39 F.3d at 1531; *Wright*, 979 F.3d at 1302 ("A section 2 plaintiff cannot succeed without offering a satisfactory remedial plan," because "the issue of remedy [at the first *Gingles* precondition] is part of the plaintiff's prima facie case.").

The Georgia General Assembly determined that the PSC—a state commission with statewide authority and statewide responsibilities—should be elected on a statewide basis. O.C.G.A. § 46-2-1(a). It did so for race-neutral reasons, and plaintiffs do not suggest otherwise. Indeed, there is no evidence that race motivated Georgia's choice of electoral format at all. To the contrary, the State's deliberate choice was informed by significant policy considerations that would be undermined by a forced change in the Commission's structure—from a statewide body to a single-member districted body. Thus, an adequate remedy has not been proposed. *See SCLC*, 56 F.3d at 1297 ("[T]he many state policy interests we have discussed . . . preclude the remedies appellants[] propose; moreover[,] these interests outweigh whatever possible vote dilution may have been shown in this case.").

We reach this conclusion because plaintiffs' proposed remedy would fundamentally change the PSC's structure and operations.[13] A change from statewide to single-

[13] To combat this point, plaintiffs point to the dissent to our grant of a stay in this case in August 2022. In pertinent part, the dissent argued that the district court did not permit a remedy that altered Georgia's chosen form of government because "[t]he district court didn't, for instance, add a branch of government, or move a power from one branch to another" or "change how any of the three branches must conduct themselves." *Rose v. Sec'y*, No.

member districted elections would clearly affect the inner-workings of the PSC because commissioners would be serving a new constituency—their respective districts rather than the State as a whole.[14] As PSC Chair Pridemore testified, the current system allows commissioners to focus on the needs of the entire State, whereas a districted plan has the potential to disconnect commissioners from that critical statewide mission. *See Id.* at 1296 (recognizing, in the judicial context, an important state interest in "linkage," which preserves accountability by "[l]inking a trial court judge's territorial jurisdiction and electoral base"); *Cousin*, 145 F.3d at 827 (same).

Plaintiffs' proposed remedy would also undo a fundamental component of Georgia's current PSC electoral system—its insulation from localized special interests. Our precedents make clear that this concern is not only relevant, but also can be the defining feature of an elected body. *See, e.g.*, *Nipper*, 39 F.3d at 1544. As we have stated, "[t]he implementation of subdistricts would increase the potential for 'home cooking' by creating a smaller electorate and thereby placing added pressure on elected [officials] to favor constituents—especially as

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22 12593, 2022 WL 3572823, at *11 (11th Cir. 2022) (Rosenbaum, J., dissenting). This test sets an arbitrarily high threshold such that nearly every conceivable proposal would pass muster (*i.e.*, no proposed remedy will be as significant as offering a fourth branch of government). Such a test does not comport with our precedents that expressly protect a state's chosen form of government. And moving from a statewide electoral system to a districted one is, in any event, a change of significant magnitude.

[14] Because the PSC's electoral map is already drawn into residency districts, plaintiffs argue that single-member districted elections would be consistent with the State's chosen model of government. This argument ignores that each commissioner is still elected statewide.

election time approaches." *Id.*; *see also SCLC*, 56 F.3d at 1297 ("Subdistricting would also increase the specter of 'home cooking': Creating a smaller electorate would increase the pressure to favor constituents."). And the concern over provincialism is merited because "[e]veryone agrees that in some politically volatile and controversial cases it is beneficial to have the electorate come from the entire circuit rather than some smaller portion." *SCLC*, 56 F.3d at 1297.

The provincialism concerns discussed in our precedents are magnified when dealing with a statewide body like the PSC. Compared to county commission districts, for example, there is much greater potential for divisive problems to arise across an entire state—especially one as large as Georgia—and the pertinent issues are more likely to be large-scale with huge significance.[15] Thus, while changing an at-large electoral system to a single-member districted system may be a permissible remedy at the county level where there is little risk of provincialism due to the county's size, such a remedy can be impermissible at the State level where pro-

[15] Just one example of a hugely divisive and significant issue with which the PSC is involved is the construction of Plant Vogtle near Augusta, Georgia. The total project "nears $35 billion" in cost. Jeff Amy, *Utilities Begin Loading Radioactive Fuel into a Second New Reactor at Georgia Nuclear Plant*, Assoc. Press (Aug. 17, 2023), [https://perma.cc/2PZY-7YTG]. And soon there will be "a hearing . . . by the PSC to determine how much customers will pay versus Georgia Power." Erica Van Buren, *Georgia Power to Start Loading Fuel into Plant Vogtle Unit 4, Test the Reactor*, Augusta Chron. (Aug. 18, 2023), [https://perma.cc/AYD3-D4G9]. It is easy to see how such a project—which carries large costs and directly affects one specific area of the state (in order to, in theory, reduce energy costs across the entire state)—would implicate "home cooking" concerns in a way that would negatively affect the PSC's mission to protect the interests of the entire State.

vincialism concerns merit considerable weight. And the State's interest is all the stronger where, as here, the PSC's statewide body furthers important race-neutral goals. Accordingly, the need to prioritize the State's interests over local concerns supports the State's policy-based decision to have its PSC elected statewide. And finally, while it does not play a determinative role in our analysis, we note that Georgia is not the only state to undertake this calculus and conclude that statewide elections are best for state boards like the PSC. Rather, nine other states—of varying regions and political majorities—employ statewide elections for their state commissions. Plaintiffs' counsel admitted as much at oral argument: "there are . . . seven states . . . including Georgia, that use [statewide] at-large elections for some or all of their utility regulators," as well as "two states . . . that use [statewide] at-large elections for some or all of their boards of education[]," and "Hawaii . . . uses [statewide] at-large elections for a native Hawaiian board." And there is no reason that if the statewide PSC—justified by a legitimate desire to avoid provincialism in the regulation of utilities and untainted by even a suggestion of racial bias in its creation—could be converted by this Court into a multidistrict body, that the State Supreme Courts and other multi-member statewide entities could not be converted as well.

Here, plaintiffs have failed to put forward an alternative less-dilutive voting practice that can be implemented to elect commissioners to the statewide PSC. Plaintiffs instead propose adopting an election scheme that would effectively change the structure of the PSC itself from a statewide body to a body that comprises single-member districts. This extraordinary

remedy is not viable given Georgia's strong interests in maintaining the PSC as a statewide body.

We do not mean to suggest that Section 2 plaintiffs could never prevail when asserting a Section 2 vote dilution claim against a statewide body. Instead, we merely reaffirm the principle that plaintiffs must propose a remedy within the confines of the state's chosen model of government when bringing such a claim.

Further supporting our decision is the difficulty in selecting a reasonable benchmark to evaluate the challenged voting practice. As the Supreme Court has explained, sometimes selecting a reasonable benchmark is easy, sometimes it is hard. *Holder v. Hall*, 512 U.S. 874, 880–81 (1994). Here, plaintiffs simply state, without citing any case, that their proposed remedy is the benchmark. But that cannot be right. If we accepted plaintiffs' argument that a proposed remedy is the benchmark, we would never struggle to find one. And, in fact, in *Holder*, the Supreme Court wrestled with the issue of how to choose an appropriate benchmark. *Id.* at 881. In that case, the plaintiffs challenged the size of a county commission and argued that a five-member commission should serve as the benchmark over the single member commission that was in place. *Id.* The Supreme Court held that "there [was] no principled reason why one size should be picked over another as the benchmark for comparison." *Id.* Similarly, here, plaintiffs have not provided a principled reason why a PSC comprising single-member districts should be picked as the benchmark.

We turn now to plaintiffs' counterarguments—and reject them.

To start, despite plaintiffs' argument to the contrary, the *Nipper* line of precedent is binding on the instant

case. Of course, we are fully aware that *Nipper*, *SCLC*, and *Davis* involve judicial elections. But the application of these decisions is not limited to judicial elections only. Even if that were the case, these decisions would still have equal force here because the PSC is a "quasi-judicial" administrative body. *Tamiami Trail*, 99 S.E.2d at 233 ("It has been recognized by this court and by the courts of other jurisdictions that an administrative body such as the Public Service Commission may, in matters which come before it for determination, perform quasi-judicial functions as well as quasi-legislative functions."). This categorization is not hollow. Rather, the PSC operates in a distinctly judicial fashion. It "hears rate cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders to come to a decision." Further, the reasons that we respect a state's decision regarding its judicial election system (*i.e.*, linking the electoral and jurisdictional districts for accountability, protecting against "home cooking," and promoting fairness) apply just the same in the "quasi-judicial" context (as analyzed above). *See generally Nipper*, 39 F.3d at 1544.

We also recognize that *Davis* references a state's "constitutional" model at multiple points. 139 F.3d at 1423. We do not read *Davis* to mean, however, that only constitutionally enshrined models of government are entitled to judicial respect. To the contrary, as explicated in *Davis*, "[u]nder *Nipper* . . . this court must carefully consider the impact that any remedial proposal would have on the judicial model enshrined in a state's constitution *or statutes*." 139 F.3d at 1421 (emphasis added). As such, we do not analyze whether the Georgia General Assembly chose its form of government by constitutional or statutory means because it makes no

difference.[16] *Compare* Ga. Const. Art. IV, § I, ¶ I(a), *with* O.C.G.A. § 46-2-1(a). Either way, Georgia chose the statewide electoral model for the PSC, and plaintiffs' proposed remedy would alter that choice in contravention of the principles of federalism.

Next, plaintiffs argue in a Federal Rule of Appellate Procedure 28(j) letter that the Supreme Court's decision in *Allen v. Milligan* supports their argument because the Supreme Court rejected Alabama's arguments which "echoe[d] the Secretary's state-interest argument." 599 U.S. at 24–26. *Milligan* counsels against a "single-minded view of § 2" and quotes *Wisconsin Legislature v. Wisconsin Elections Commission*, 595 U.S. 398, 405 (2022), to provide that a court cannot "improperly reduc[e] *Gingles*' totality-of-circumstances analysis to a single [Senate] factor." *Milligan*, 599 U.S. at 24–26. Critically, however, our analysis is not "single-minded"; rather, in conformance with precedent, we analyze plaintiffs' proposed remedy and look to a state's policy interests and rationales as one part of that larger undertaking.[17] Similarly, *Wisconsin Legislature* does not change our analysis—we are not weighing the Senate factors because we do not reach Section 2's totality of the circumstances test (*i.e.*, step two of the

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[16] We recognize that the district court interpreted the Georgia Constitution's requirement that the PSC be "elected by the people" to require only that the PSC be elected—instead of appointed by the governor, for example. *See* Ga. Const. Art. IV, § I, ¶ I(a). In other words, the district court found that the specific form of those elections (statewide) is not constitutionally prescribed and is rooted only in statute. *See* O.C.G.A. § 46-2-1(a). As such, the district court concluded that plaintiffs' proposed remedy would not require the alteration of Georgia's chosen form of government.

[17] A state's interest, however, is not infallible. *See*, *e.g.*, *SCLC*, 56 F.3d at 1297 ("[T]hese interests outweigh whatever possible vote dilution may have been shown in this case.").

Section 2 analysis once the *Gingles* preconditions are satisfied). Rather, we go no further than the first *Gingles* precondition as interpreted by binding Eleventh Circuit precedent. *See League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 943 (11th Cir. 2023) (describing our binding commitment to our Circuit's precedent). At this first step, we conclude that plaintiffs' lack of an adequate remedial proposal means that their claim cannot proceed. *See Milligan*, 599 U.S. at 18 ("To succeed in proving a § 2 violation under *Gingles*, plaintiff *must* satisfy three preconditions." (italics added) (quotations omitted)).

Finally, plaintiffs argue that other evidence—such as testimony from other commissioners that their duties would not change and testimony from the "longtime director of the Secretary's Center for Election Systems" that transitioning to single-member districts would be feasible—proves that "switching to single-member districts would not even affect the commissioners' day-to-day work."[18] As to whether the PSC will

[18] Despite their own reliance on lay opinion testimony, plaintiffs also argue that PSC Chair Pridemore's "lay opinion" regarding the State's policy interest in maintaining its statewide election system is insufficient. The district court agreed, finding that Pridemore's testimony was "not tethered to any objective data" and "lacked foundation." It is unclear to us what "data" could be offered to better support Georgia's policy interests. To the extent that the district court preferred "arguments buried in legislative history" over Pridemore's testimony, we disagree that such forms of evidence would be more compelling or instructive. All in all, we understand the principal reasons that Georgia adopted a statewide elected PSC were a concern for avoiding conflicts amongst the PSC's commissioners in order to achieve cohesive utility policy that favors Georgians in each region of the State equally and the desire to dodge the "home cooking" problem (issues that we have highlighted as important in our precedents). We find these rationales are properly considered.

be affected by the potential change in electoral format, the district court dismissed the State's interests, such as its "linkage" concern (*i.e.*, its interest in promoting accountability by having an official's territorial jurisdiction mirror his electoral base). But the district court's reasoning was premised on discounting our *Nipper* line of precedent because those cases concerned judicial elections. We have already explained how this conclusion rests on a mistake of law. *See Jones*, 57 F.3d at 1022 ("We may correct a district court's errors of law and its findings of fact based upon misconceptions of law."). And because the district court also mistook other critical parts of our law—including our Circuit's emphasis on *Gingles*'s first precondition and the effect that federalism and our precedent have in a novel Section 2 case—we must reverse. *Id.*

IV. Conclusion

The Georgia General Assembly determined that the State's PSC—a constitutionally created state commission with statewide authority and statewide responsibilities—should be elected statewide. Georgia chose this electoral format to protect critical policy interests and there is no evidence, or allegation, that race was a motivating factor in this decision. On the facts of this case, we conclude that plaintiffs' novel remedial request fails because Georgia's chosen form of government for the PSC is afforded protection by federalism and our precedents. In simple terms, plaintiffs have failed to propose a viable remedy and cannot satisfy the first *Gingles* precondition as we understand it. Because the district court made mistakes of law, we reverse.

REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:20-cv-02921-SDG

RICHARD ROSE, BRIONTÉ MCCORKLE,
WANDA MOSLEY, and JAMES WOODALL,

Plaintiffs,

v.

BRAD RAFFENSPERGER, *in his official capacity as Secretary of State of the State of Georgia*,

Defendant.

OPINION AND ORDER

Since 1906, commissioners on the Public Service Commission for the State of Georgia have been elected on a statewide, at-large basis. Today, the Court finds that this method of election unlawfully dilutes the votes of Black citizens under Section 2 of the Voting Rights Act of 1965 and must change.

The Secretary of State is hereby ENJOINED from preparing ballots for the November 8, 2022 election that include contests for Districts 2 and 3 of the Public Service Commission (PSC); from administering any future elections for vacancies on the PSC using the statewide, at-large method; and from certifying the election of any PSC commissioner who is elected using such method.

I. Procedural Posture

Plaintiffs filed this lawsuit against the Georgia Secretary of State in July 2020, alleging a violation of Section 2 under the Voting Rights Act (VRA), 52 U.S.C. § 10301. In January 2022, the Court ruled on the parties' competing motions for summary judgment. In its order, the Court concluded that the totality-of-the-circumstances analysis necessary to resolve Plaintiffs' Section 2 claim, including the feasibility of their proposed remedy, required factual findings to be made after a trial.[1]

The Court therefore conducted a five-day bench trial, from June 27 to July 1, 2022. Following the trial, and at the Court's direction, each side filed Proposed Findings of Fact and Conclusions of Law.[2] In a bench trial, this court "must find the facts specially and state its conclusions of law separately." Fed. R. Civ. P. 52(a)(1). In vote dilution cases, the Eleventh Circuit has further required that district courts "explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning." *Johnson v. Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999) (quoting *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979)). Having presided over the bench trial, evaluated the credibility of the witnesses, and carefully considered the evidence and the record in its entirety, the Court makes the following factual findings and legal conclusions.

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[1] *See generally* ECF 97 (Summary Judgment Motions (SJM) Order).

[2] ECF 144 (Def.'s proposed findings); ECF 145 (Pls.' proposed findings).

II. Factual Findings

A. The Structure and Function of the PSC

The Court finds it necessary, as a preliminary matter, to explain how the PSC developed over the last 140 years. That history not only underscores the importance of Plaintiffs' claim, but it also provides context for the Court's conclusion that their proposed remedy is feasible.

The 1877 Georgia Constitution conferred "[t]he power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs" on the Georgia General Assembly. GA. CONST. art. IV, § 2, ¶ I (1877). In 1879, the General Assembly adopted an act concerning the regulation of railroad freight and passenger tariffs, which created the Railroad Commission and provided that three commissioners—appointed by the governor and confirmed by the state senate—would carry out the act's provisions. 1878 Ga. Laws 125 (Law No. 269, *Reg. of Freight & Passenger Tariffs*). Commissioners served a six-year term, and appointments were staggered to ensure that a new commissioner would be appointed every two years. *Id.* § I.

In 1906, the General Assembly changed the method of selecting commissioners to require that they be "elected by the electors of the whole State, who are entitled to vote for members of the General Assembly." 1906 Ga. Laws 100, § 1 (Law No. 453, *Election of R.R. Commis*) (the 1906 Act). The following year, the General Assembly added two commissioners, bringing the total to five. 1907 Ga. Laws 72, § 1 (Law No. 223, R.R. *Comm'n, Membership, Powers, etc.*) (the 1907 Act).

The commissioners were to be "elected by the qualified voters of Georgia as prescribed" in the 1906 Act. *Id.*

The General Assembly changed the name of the Railroad Commission to the Public Service Commission in 1922 and expanded its powers and duties. 1922 Ga. Laws 143 (Law No. 539, *R.R. Comm'n Changed to Pub. Serv. Comm'n*). In 1945, the Georgia Constitution was amended to confer on the General Assembly, among other things, the "power and authority of regulating . . . public utilities." GA. CONST. art. IV, § I, ¶ I (1945). The amendment enshrined members of the PSC as constitutional officers who "shall be elected by the people." GA. CONST. art. IV, § IV, ¶ III (1945). The terms of the commissioners remained six years and staggered, as they always had been. *Id.* It was left to the General Assembly to determine the "manner and time of election" of commissioners. *Id.*

Prior to 1998, the Georgia Code provided that any voter in Georgia entitled to vote for members of the General Assembly could vote for members of the PSC, and that election procedures were to be held "under the same rules and regulations as apply to the election of the Governor." 1998 Ga. Laws 1530 (Law No. 978, *Pub. Util. & Pub. Transp.—Pub. Serv. Comm'n; Election of Members; Dist.*) (amending O.C.G.A. § 46-2-1). This formulation of who was entitled to vote for members of the PSC was consistent with the structure employed in the 1906 and 1907 Acts: "elected by the electors of the whole State" and "elected by the qualified voters of Georgia."

In 1998, the General Assembly amended the Georgia Code to require members of the PSC to reside in one of five districts, but the members would continue to be elected by statewide vote. *Id.* at 1531 (adding O.C.G.A. § 46-2-1(a)). Commissioners' terms remained six years

and were staggered as prescribed by the State Constitution, although the code amendment altered the method applied to create the stagger. *Id.* (adding O.C.G.A. § 46-2-1(d)). There is no indication from the revision to the statute that the General Assembly intended any change to who would be permitted to vote for PSC members.

Thus, while the Georgia Constitution guarantees that PSC commissioners must be elected by popular vote, what constitutes an election "by the people" is left to the discretion of the General Assembly. By statute, the General Assembly has decided that PSC elections are to be held using the same rules and regulations applied to gubernatorial elections; that general elections must take place every two years; and that one commissioner must live in each of the five residency districts for which they are seeking office for at least 12 months prior to the election and throughout the six-year term. O.C.G.A. § 46-2-1.

The seats from PSC Districts 2 and 3 are on the ballot for the November 8, 2022 general election and are at the heart of this dispute.[3] Between 2012 and 2022, District 3 included Clayton, DeKalb, Fulton, and Rockdale Counties.[4] According to 2010 Census data of which the Court took judicial notice, the population of District 3 was 52.02% Black (including those who identified as another race in addition to Black).[5] The residency districts were redrawn in 2022, after the 2020 Decennial Census, pursuant to Georgia Senate Bill 472. 156th Gen. Assemb., Reg. Sess. (Ga. 2022).

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[3] Trial Tr. 438:3–11 (Barnes); PX-66 (Barnes Decl.), at 10.

[4] PX-2, at 1 (2012 PSC map).

[5] *Id.* at 2 (population data for 2012 PSC map); PX-8 (Popick Rpt.), at 16 (tbl.3).

District 3 is now comprised of Clayton, DeKalb, and Fulton Counties.[6] The population was 48.79% Black and 9.88% Hispanic (including Black Hispanics).[7]

PSC Chairperson Tricia Pridemore testified that the PSC has three primary roles—ensuring the "safety, reliability and affordability of utilities."[8] PSC decisions affect the lives of every Georgian because they determine how much consumers pay for utilities and whether utility providers may pass certain costs on to their consumers.[9] For example, the PSC sets residential, commercial, and industrial utility rates.[10] It regulates aspects of Georgia Power, including what the company charges customers, and electric energy generation and transmission.[11] On the telecommunications side, the PSC regulates pole attachments and landlines. It also has some jurisdiction over connectivity and rural broadband internet connectivity.[12]

The PSC hears rate cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders to come to a decision. It decides utility rates that affect all ratepayers throughout Georgia. The PSC can also assess fines and administer federal funds for pipeline safety across Georgia.[13] The PSC is therefore "an administrative

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[6] PX-3, at 1 (2022 PSC map).

[7] *Id.* at 2 (population data for 2022 PSC map).

[8] Trial Tr. 388:19–21 (Pridemore).

[9] PX-36 (PSC website printout), at 2; PX-98, at 13 (Eaton Tr. 83:11–18); PX-103, at 8 (Shaw Tr. 37:20–21).

[10] Trial Tr. 390:2–6 (Pridemore).

[11] *Id.* 388:24–389:2 (Pridemore).

[12] *Id.* 389:18–21 (Pridemore).

[13] ECF 121-3 (Joint Stip.), ¶¶ 1, 14–17, 19.

body" that performs both "quasi-legislative" and "quasi-judicial" functions "by virtue of the express powers conferred upon it by the General Assembly." *Tamiami Trail Tours, Inc. v. Ga. Pub. Serv. Comm'n*, 213 Ga. 418, 428 (1957) (citations omitted).[14]

B. Census Data and Georgia's Demographics

Based on the 2020 Census, there are 10,711,908 Georgians. Of those, 50.1% identify as non-Hispanic White; 33.0% identify as "any part" Black (meaning Black alone or in combination with another race); and 16.9% identify as members of other racial groups.[15] According to data from the Secretary of State, Georgia had 7,004,034 active voters as of December 2021. Of those, 53.1% identified as White; 29.4% identified as Black; 12.1% identified as members of another racial group; and, for 8.8%, their race was unknown.[16]

Further, American Community Survey (ACS) and 2020 Census data show significant continuing disparities between the socioeconomic circumstances of Black and White Georgians. Per capita income for Black Georgians is $24,215, while per capita income for White Georgians is almost double that, at $40,348.[17] The poverty rate for Black Georgians is more than twice that of White Georgians— 18.8% compared to 9%.[18]

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[14] Trial Tr. 412:3–4 (Pridemore); ECF 121-3 (Joint Stip.), ¶¶ 14–15; PX-98, at 14–15 (Eaton Tr. 85:18–25).

[15] ECF 121-3 (Joint Stip.), ¶ 4.

[16] *Id.* ¶ 6.

[17] ECF 57 (Mot. for Judicial Notice), ¶ 8. The Court granted Plaintiffs' motion for judicial notice of various census data. ECF 97 (SJM Order), at 1.

[18] ECF 57 (Mot. for Judicial Notice), ¶ 6.

Georgia has an unemployment rate of 4.8% for those in the labor force who are at least 16 years old. The rate is 3.8% for non-Hispanic Whites and 6.9% for Blacks.[19] The median household income in Georgia is $61,980. For households headed by non-Hispanic Whites, the median income is $71,790. It is just $47,096 for Black-headed households.[20] Sixty-four percent of all households in Georgia own their own homes. Among households headed by non-Hispanic Whites, 75.1% are homeowners and 24.9% are renters. For Black-headed households, only 47.5% own their own homes and 52.5% rent.[21] For all households in Georgia, 11.2% receive Supplemental Nutrition Assistance Program (SNAP) benefits (also known as food stamps). Of non-Hispanic White-headed households, 6.5% receive SNAP benefits. That percentage is over three times higher—20.3%—for Black-headed households.[22] Black Georgians are also less likely than White Georgians to have graduated high school or obtained a college degree.[23]

C. The Plaintiffs

The Plaintiffs are Black voters who reside in PSC District 3 and who voted in recent PSC elections.[24] Although each testified that, in their experience, race plays a role in Georgia elections,[25] none have been

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[19] *Id.* ¶ 5.

[20] *Id.* ¶ 7.

[21] *Id.* ¶ 9.

[22] *Id.* ¶ 10.

[23] *Id.* ¶¶ 3-4.

[24] *Id.* ¶ 2.

[25] Trial Tr. 60:2–61:10 (Woodall), 321:12–21 (McCorkle), 479:10–480:4 (Rose), 545:16–25 (Mosley).

prevented from casting a vote in Georgia because of their race.[26]

Plaintiff Richard Rose is the president of the NAACP's Atlanta chapter.[27] In that role, he regularly attends community meetings with Black Georgians. Rose also fields calls from Black Georgians and maintains contact with political leaders in the Black community.[28] He is aware of issues particular to the Black community that he believes fall within the PSC's purview.[29]

Plaintiff Wanda Mosley is the national field director at Black Voters Matter Fund, which is based in Atlanta. Prior to that, she served as the organization's senior state coordinator in Georgia.[30] In that role, Mosley was responsible for organizing and registering Black voters and conducting outreach in Black communities, which has provided her an understanding of issues that are important to Black Georgians.[31]

Plaintiff James Woodall is a minister and former president of the Georgia NAACP.[32] Woodall testified that, during his tenure with the NAACP, his top priority was understanding the concerns of Black Georgians, so he regularly attended meetings where Black Georgians voiced their issues.[33] Woodall's

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[26] ECF 121-3 (Joint Stip.), ¶ 3. *See also* Trial Tr. 97:2–4 (Woodall), 502:12–4 (Rose).

[27] Trial Tr. 469:12–13, 470:1–3.

[28] *Id.* 471:24–472:20.

[29] *Id.* 472:21–23.

[30] *Id.* 517:1–2, 520:13–14, 520:24–521:3.

[31] *Id.* 522:10–13.

[32] *Id.* 45:11–18.

[33] *Id.* 47:9–48:11.

engagement with Black Georgians makes him aware of issues that fall within the PSC's purview and that have a disproportionate effect on Black Georgians.[34]

Plaintiff Brionté McCorkle is executive director of Georgia Conservation Voters, a nonprofit organization that advocates for environmental justice and organizes and mobilizes communities around environmental justice issues.[35] She has had significant involvement with the PSC and has attended PSC hearings.[36] Her work has provided her with an understanding of the particularized needs of Black Georgians when it comes to issues that fall within the PSC's purview.[37]

The Court found each Plaintiff to be credible when it comes to identifying and understanding how matters within the PSC's jurisdiction affect the Black community.[38]

D. The Defendant

Defendant Brad Raffensperger (the Secretary) was sued in his official capacity as the Secretary of State for the State of Georgia.[39] He is Georgia's chief election official and is a nonvoting member of the State Election Board. O.C.G.A. §§ 21-2-50(b), 21-2-30(d). The Election Board must "formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of

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[34] *Id.* 48:12–14, 54:12–22.

[35] *Id.* 261:3–262:2, 262:11–18.

[36] *Id.* 274:25–276:21, 279:15–20, 277:11–15.

[37] *Id.* 279:25–281:9.

[38] At a bench trial, "it is the exclusive province of the judge . . . to assess the credibility of witnesses and to assign weight to their testimony." *Childrey v. Bennett*, 997 F.2d 830, 834 (11th Cir. 1993).

[39] ECF 1 (Compl.), ¶ 10.

primaries and elections." *Id.* § 21-2-31(2). Among his other duties, the Secretary is responsible for certifying the results of PSC elections.[40]

E. The Experts

The parties presented three experts—two testifying for Plaintiffs and one for the Secretary—who evaluated mass voting behavior in Georgia and opined on voting disparities and the reasons for those disparities.

1. Stephen J. Popick, Ph.D.

Plaintiffs offered Dr. Stephen Popick to discuss the statistical analysis of election data.[41] From 2006 to 2012, Dr. Popick worked in the Voting Rights Section of the Civil Rights Division at the U.S. Department of Justice.[42] Here, Dr. Popick conducted a racial-bloc voting analysis of PSC election contests from 2012 to 2020 to ascertain whether voting in Georgia was racially polarized.[43] He has conducted hundreds of such analyses on thousands of individual elections.[44] Dr. Popick referred to this as the "separate electorates test," which predicts whether Black voters would have elected a different candidate if the election were held only amongst Black voters as opposed to Black and White voters together.[45]

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[40] Trial Tr. 446:3–5, 446:21–24 (Barnes).

[41] *Id.* 165:3–6, 166:9–12.

[42] *Id.* 160:8–12.

[43] *Id.* 166:17–20.

In *Gingles*, the Supreme Court used the terms "racial bloc" and "racial polarization" interchangeably. *Thornburg v. Gingles*, 478 U.S. 30, 53 n.21 (1986).

[44] Trial Tr. 183:17–23.

[45] *Id.* 182:17–21.

Dr. Popick found strong evidence of racial polarization in PSC elections and concluded that "Black voters were cohesive in their support of the same candidate in each election," and "White voters were cohesive around a different candidate in each election, and that the candidate preferred by White voters won 11 out of 11 times."[46] Since 2012, Black voters have voted as a bloc at rates ranging from 79.18 to 97.84%.[47] During that same time frame, White voters also voted as a bloc at rates ranging from 75.72 to 87.51%.[48] In each of the six most recent general and runoff elections for PSC commissioners, Black voters supported the same candidate at a rate greater than 94%.[49] Despite this strong cohesion, the Black-preferred candidate lost in all elections despite the Black-preferred candidate going to a runoff in two of those elections.[50] Dr. Popick testified that, in all of his years of experience, his analysis of the PSC elections in Georgia since 2012 "is one of the clearest examples of racially polarized voting" he has ever seen.[51]

The Court finds Dr. Popick's opinions and conclusions to be highly persuasive and compelling evidence of racial polarization in PSC elections.

2. Bernard Fraga, Ph.D.

Plaintiffs also offered the testimony of Dr. Bernard Fraga, an expert in political data analysis.[52] Dr. Fraga

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[46] *Id.* 168:16–22, 197:12–19.

[47] PX-8 (Popick Rpt.), at 11.

[48] *Id.* at 12.

[49] Trial Tr. 198:1–11; PX-8 (Popick Rpt.), at 11.

[50] Trial Tr. 197:18–20.

[51] *Id.* 183:20–23, 198:12–17.

[52] *Id.* 571:23–572:3.

testified that Georgia's method of conducting PSC elections involves several practices that enhance the opportunity for the dilution of Black votes, including a statewide method of election despite the existence of residency districts, a majority-vote and runoff requirement, and staggered terms and numbered seats, which Dr. Fraga believes are an "anti-single shot" mechanism.[53]

Dr. Fraga testified that Georgia's combination of a statewide election with numbered seats and residency districts is quite unusual.[54] He opined that this practice institutionalizes a form of vote dilution by allowing the State's majority-White population to dilute the votes of any majority-Black residency district in voting for the commissioner from that district.[55] And, because elections are staggered, a minority group has less of an opportunity to concentrate its voting strength behind a candidate of choice.[56]

Dr. Fraga also testified as to whether members of the minority group have been denied access to a candidate slating process. He views the system of gubernatorial appointments employed in Georgia for PSC vacancies as an informal slating process, which confers an incumbency advantage on the person appointed for the open position, although the incumbency advantage has decreased over time.[57] Dr. Fraga looked at guber-

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[53] *Id.* 574:3–9; ECF 121-3 (Joint Stip.), ¶ 13.

"Single-shot voting" occurs when a minority is able to win some at-large seats, but only "if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." *Gingles,* 478 U.S. at 38 n.5.

[54] Trial Tr. 574:18–575:1, 575:16–25.

[55] *Id.* 576:1–11.

[56] *Id.* 577:15–24.

[57] *Id.* 589:22–590:8, 590:16–20, 611:20–612:7.

natorial appointments to the PSC from 1996 through 2020.[58] Of those, only one (David Burgess) was Black.[59] Black appointees therefore comprised only 20% of the total appointments during that time. This is an underrepresentation in comparison to Black Georgians' 32.1% share of the citizen voting age population (CVAP).[60] Based on this analysis, Dr. Fraga concluded that Black Georgians are excluded from the informal slating process and, therefore, are less likely to enjoy the benefits of incumbency.[61]

Dr. Fraga also testified on "the[ ] lingering effects of discrimination manifesting in lower rates of participation in the electoral process."[62] For example, there was an approximately 5% to 11% voter turnout gap between White voters and Black voters in each general and runoff election from 2016 through 2021.[63] Dr. Fraga attributes that gap, and the lower rate of political participation by Black voters, to the lingering effects of discrimination.[64] He also found that Black Georgians donate to candidates at a lower rate than White Georgians.[65] Eighty percent of individual donors were White, but less than 10% were Black.[66]

Dr. Fraga found that Black candidates are substantially less likely to win office in non-judicial

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[58] *Id.* 590:9–15; PX-5 (Fraga Rpt.), at 14.

[59] Trial Tr. 591:16–20; PX-5 (Fraga Rpt.), at 14.

[60] Trial Tr. 591:24–592:2; PX-5 (Fraga Rpt.), at 5, 15.

[61] Trial Tr. 592:3–10; PX-5 (Fraga Rpt.), at 15.

[62] Trial Tr. 585:14–18.

[63] *Id.* 579:22–583:23; PX-5 (Fraga Rpt.), at 6.

[64] Trial Tr. 583:24–584:4.

[65] *Id.* 584:5–12.

[66] *Id.* 585:3–9; PX-5 (Fraga Rpt.), at 10.

statewide elections for the PSC and other offices than White candidates.[67] He examined the 164 statewide Georgia elections that occurred between 1972 and 2021, and only four Black candidates won during that time.[68] The four successful Black candidates won a total of eight separate elections—4.9% of the total. Raphael Warnock was elected U.S. Senator in 2020; Mike Thurmond was elected Commissioner of Labor in 1998, 2002, and 2006; Thurbert Baker was elected Georgia Attorney General in 1998, 2002, and 2006; and David Burgess was elected to the PSC in 2000.[69] Thus, despite comprising 32.1% of the CVAP in Georgia, Black candidates were only successful 4.9% of the time. Of the twelve major-party Black candidates to enter the primary process for U.S. Senate and Governor since 2006, only two made it to the general election ballot.[70] Dr. Fraga concluded that Black Georgians are underrepresented in statewide offices and statewide elections.[71]

The Court found Dr. Fraga's analysis, opinions, and conclusions to be highly persuasive and entitled to great weight.

3. Michael Barber, Ph.D.

The Secretary presented Dr. Michael Barber as an expert in political science, the interplay between racial and political polarization, and statistical analysis.[72] Dr. Barber testified that Black voters consistently

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[67] Trial Tr. 585:19–586:3; PX-5 (Fraga Rpt.), at 4, 11–13.

[68] Trial Tr. 586:4–13; PX-5 (Fraga Rpt.), at 11–12.

[69] Trial Tr. 587:8–19; PX-5 (Fraga Rpt.), at 11–12.

[70] Trial Tr. 588:10–589:2; PX-5 (Fraga Rpt.), at 12.

[71] Trial Tr. 588:6–9; PX-5 (Fraga Rpt.), at 11–12.

[72] Trial Tr. 625:7–13, 627:22–628:1.

prefer Democratic candidates regardless of the race of the candidate.[73] He generally found that Black voters supported Democratic candidates between 86% and 93% of the time, compared with less than 40% for White voters.[74] Dr. Barber did not examine PSC elections at all and could not speak to the effect of race or partisanship in those contests.[75]

The Court generally credits Dr. Barber's analysis but finds it of limited utility in this case. Dr. Barber did not consider the impact of race on party affiliation, which was a crucial omission. Indeed, Dr. Barber conceded that his model did not account for factors that may determine partisanship, including race or racial identity.[76] This omission is surprising in light of his own prior scholarship, which concluded that "race is the strongest predictor" of a person's actual partisan affiliation.[77]

Plaintiffs called Dr. Fraga back to the stand to rebut Dr. Barber's testimony. Dr. Fraga opined that it is impossible to separate racial identity from partisan affiliation because "everything related to party, in part, is due to race, not the other way around."[78] Dr. Fraga criticized Dr. Barber's failure to account for the large volume of political science research showing that race or racial identity is a key determinant of an

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[73] *Id.* 639:2–14; DX-28 (Barber Rpt.), at 6–10.

[74] DX-28 (Barber Rpt.), at 9.

[75] Trial Tr. 705:8–10, 17–19.

[76] *Id.* 697:23–698:7.

[77] PX-111 (Michael Barber & Jeremy Pope, *Groups, Behaviors, and Issues as Cues of Partisan Attachments in the Public*, Am. Pol. Res. (2022), at 4–5). *See also* Trial Tr. 701:6–702:8, 702:23–704:17.

[78] Trial Tr. 760:20–761:16.

individual's party affiliation.[79] By failing to consider what causes party identification, Dr. Fraga opined, Dr. Barber's attempt to disentangle race and party is inherently flawed.[80]

The Court finds that the interplay between race and partisanship is difficult if not impossible to disentangle. But, as discussed further in its Conclusions of Law, the Court is unconvinced that such disentangling is necessary or even relevant to the vote dilution analysis.

F. The Commissioners

Each of the current PSC commissioners testified live or by deposition during the trial. The Court highlights only the portions of their testimony that are relevant to the Court's analysis.

Tricia Pridemore, commissioner for District 5, is the PSC chairperson.[81] She testified that it takes a majority vote of the commissioners to raise utility rates and decide Integrated Resource Plan cases.[82] She also testified that the PSC has a consumer affairs group that works for all five commissioners to field issues raised by consumers, which prevents preferential treatment of certain commissioners and districts.[83] Pridemore does not believe that Black ratepayers have different needs than White ratepayers.[84]

In her opinion, statewide, at-large elections "provide centralization of thought for energy and utility policy,"

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[79] *Id.* 759:5–761:3.

[80] *Id.* 761:17–763:7.

[81] *Id.* 352:13–20.

[82] *Id.* 400:21–23, 412:5–10.

[83] *Id.* 391:5–6, 11–12, 393:18–24.

[84] *Id.* 418:21–419:1, 422:20–21.

as commissioners avoid fighting over decisions such as more or less favorable rates, where to locate new plants and energy facilities, or which districts receive broadband or lower pole attachment rates.[85] She believes the current structure allows commissioners to "work in the best interest of the whole state" and to use the existing transmission, pipeline, and telecommunication systems to "maximize the needs for the state."[86] Pridemore believes that the statewide nature of its elections allows the PSC to keep utility rates below the national average and helps drive the State's economic development, although she provided no evidence of any correlation.[87]

Pridemore opposes single-member districts, which she believes would introduce favoritism and politics into utility regulation.[88] She believes it would be "detrimental to how the state operates and oversees utility regulation" for commissioners to be elected by district instead of statewide.[89]

The Court finds Pridemore's testimony credible concerning the inner workings and functions of the PSC—matters that relate to her core responsibilities as chairperson. However, her lay opinions regarding the effect of changing from statewide to district-based elections were speculative and are not afforded much weight.

Charles Eaton is a former commissioner of District 3, where Plaintiffs reside.[90] In 2006, he defeated the

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[85] *Id.* 386:23–387:12.

[86] *Id.* 387:13–17.

[87] *Id.* 387:17–22.

[88] *Id.* 397:19–21.

[89] *Id.* 396:13–14.

[90] ECF 121-3 (Joint Stip.), ¶ 3; PX-98, at 2 (Eaton Tr. 18:4–7).

only Black commissioner up to that point in the District 3 PSC runoff election. Although the Black incumbent—David Burgess— received more votes in the general election, he lost to Eaton in the runoff.[91] Even in the runoff, though, Burgess won a majority of the votes in each of the counties that comprised District 3.[92] In other words, Eaton would not have won the District 3 election if it had been a single-member district.[93] Nor would he have won reelection in 2012 or 2018 if the elections had been by single-member district.[94] Indeed, in every PSC election, Eaton was not the candidate of choice for the voters of District 3.[95]

Timothy Echols is the commissioner from District 2.[96] He believes the purpose of the residency districts for PSC commissioners is "[t]o make sure that the

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Eaton testified by deposition. PX-104 (Eaton video deposition clips).

[91] PX-98, at 11 (Eaton Tr. 71:3–72:1).

The Court overrules the Secretary's Fed. R. Evid. 602 and 701 objections. Eaton is competent to testify and has personal knowledge of election results related to his own candidacy.

[92] PX-98, at 11, 12 (Eaton Tr. 73:15–17, 77:5–8).

[93] *Id.* at 11 (Eaton Tr. 72:2–73:20).

[94] *Id.* at 4–5, 10–11 (Eaton Tr. 34:23–36:1, 38:3–16, 69:18–70:24).

Although it is unclear whether the Secretary's objections are limited to specific portions of this testimony, the Court similarly overrules the Secretary's Rule 602 and 701 objections. Indeed, counsel for the Secretary conceded during trial that there was no dispute that the counties in District 3 voted for Eaton's opponent in the 2018 election. Trial Tr. 152:10–20.

[95] PX-98, at 13 (Eaton Tr. 79:18–25).

[96] PX-99, at 2 , 13 (Echols Tr. 20:18–21:1, 52:22–24).

Echols testified by deposition. PX-105 (Echols video deposition clips).

state is fully represented geographically."[97] Echols believes that the General Assembly "wanted to make sure that rural parts of the state had representation and that metro Atlanta didn't dominate politics in Georgia."[98] In his view, energy regulation is "the least partisan of all politics, probably, in any state."[99]

Jason Shaw, the commissioner from District 1, testified that he was appointed to the PSC in 2018.[100] There was no application process for the position; he was simply contacted by the governor about the possible appointment.[101] Likewise, Lauren McDonald, the commissioner from District 4, was first appointed to the PSC in 1998.[102] As with Shaw, McDonald did not apply for the position but was contacted by the governor and asked to accept the appointment.[103] He believes the residency districts were created to ensure that the PSC represents all parts of Georgia.[104] Nothing about his day-to-day work would change if he were elected only by the voters of District 4, except

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[97] PX-99, at 14, 16 (Echols Tr. 54:19–22, 56:9–15).

[98] *Id.* at 16 (Echols Tr. 56:25–57:7).

[99] *Id.* at 56 (Echols Tr. 160:5-8). *See also generally id.* (Echols Tr. 159:8–160:8).

[100] PX-103, at 6 (Shaw Tr. 32:20–33:2).

[101] *Id.* at 9 (Shaw Tr. 40:13–22).

[102] PX-101, at 3–4, 6 (McDonald Tr. 25:13–21, 27:17–28:2, 28:17–18, 44:11-14); PX107 (McDonald video deposition clips).

[103] PX-101, at 3–4 (McDonald Tr. 25:13–28:2).

[104] *Id.* at 18 (McDonald Tr. 92:5–13).

Plaintiffs' foundation objection is overruled. McDonald may testify as to his personal opinion.

that his workload would be reduced due to fewer phone calls from constituents in other districts.[105]

The Secretary's Rule 403 and 701 objections are overruled. Echols may express his lay opinion on these issues.

Terrell Johnson is the current commissioner from District 3, where Plaintiffs reside.[106] Governor Kemp appointed Johnson to fill the vacancy in 2021 when Eaton was appointed to the bench.[107] Johnson is only the second Black person to serve on the PSC.[108] Like Shaw and McDonald, he did not apply for appointment but was contacted by a member of the governor's staff.[109] He had never considered running for the PSC, though he does not believe that the job requires any specialized knowledge in power or energy.[110] None of his duties would change if he were elected only by the residents of District 3.[111]

Like the testimony of Pridemore, the Court finds the testimony of each of the remaining commissioners to be credible on matters within their personal knowledge.

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[105] *Id.* at 13 (McDonald Tr. 62:1–7).

[106] PX-100, at 7 (Johnson Tr. 32:20–33:10).

Johnson testified by deposition. PX-106 (Johnson video deposition clips).

[107] PX-100, at 7 (Johnson Tr. 32:20–33:10); PX-35 (July 21, 2021 Press Release by the Office of the Governor); Aug. 26, 2021 Executive Order 1 *available at* https://gov.georgia.gov/executive-action/executive-orders/2021-executive-orders.

[108] ECF 121-3 (Joint Stip.), ¶ 1; PX-100, at 10 (Johnson Tr. 40:11–17).

[109] PX-100, at 9 (Johnson Tr. 37:24–39:10).

[110] *Id.* at 14 (Johnson Tr. 61:1–4).

[111] *Id.* at 11 (Johnson Tr. 49:20-50:5).

G. The District 3 Candidates

Plaintiffs presented the testimony of two former candidates for PSC District 3, both of whom were unsuccessful. Lindy Miller challenged Eaton in 2018.[112] She won every county in District 3 but lost the election statewide.[113] Miller testified that, based on the economic data, there are "many more low-income Black rate payers than high-income Black rate payers and [a] disproportionate number of low-income Black rate payers [relative to] low-income White rate payers in Georgia."[114] She does not believe the PSC has been responsive to the needs of low-income Black voters.[115] She does not believe that the commissioners had "openly advocat[ed] or highlight[ed] issues that were important to Black communities, like energy burden, for example," or reducing the fees customers were being charged in connection with Georgia Power's construction of nuclear power facilities.[116]

Miller testified to her experience in running a statewide election campaign and the difficulties that entails.[117] In her view, the statewide election of commissioners creates an "accountability" question.[118] Although a candidate must live in a particular district

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[112] ECF 130-3, at 5, 31 (Miller Tr. 5:9–12, 31:2–10). Miller testified by video deposition. PX-110.

[113] ECF 130-3, at 33 (Miller Tr. 33:21–25).

[114] *Id.* at 52 (Miller Tr. 52:13–17). *See generally id.* at 51–53 (Miller Tr. 51:21–53:6).

[115] *Id.* at 24, 28–30 (Miller Tr. 24:8–16, 28:14–30:19).

[116] *Id.* at 27 (Miller Tr. 27:4–19). Ms. Miller described an "energy burden" as "what percent of your gross household income [ ] you spend on energy costs." *Id.* at 18 (Miller Tr. 18:6–8).

[117] *Id.* at 34–36 (Miller Tr. 34:13–36:19).

[118] *Id.* at 12, 24–25 (Miller Tr. 12:6–8, 24:8–25:19).

to run for the PSC and presumably has relationships and networks in that district, that person must win votes from those outside the district who may not relate to or experience the issues facing lower-income or Black populations.[119]

Chandra Farley lives in Atlanta and lost in the 2022 Democratic primary for PSC District 3.[120] Farley also discussed the disproportionate effect that "energy burden" has on Black households because they are more likely to be low-income.[121] According to Farley, the PSC is regularly provided with information relating to energy equity and has the ability to lessen the energy burden on Black Georgians, but it has failed to do so.[122] For example, she and others unsuccessfully lobbied the PSC to extend the Covid-related moratorium on utility disconnections.[123]

Although the Court generally found Miller's and Farley's testimony credible, it affords little weight to their lay opinions on matters relevant to the Court's determination.

III. Conclusions of Law

This Court must conduct an "intensely local appraisal" of the facts to determine what result is compelled by the VRA under the totality of the circumstances. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (cleaned up). This involves a "searching practical evaluation of the 'past and present reality.'" *Id.* (quoting Senate Rpt.

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[119] *Id.* at 36–38 (Miller Tr. 36:20–38:3).

[120] Trial Tr. 99:14–19, 124:5–7, 131:16–132:3.

[121] *Id.* 109:4–16.

[122] *Id.* 110:17–111:18, 113:24–116:4.

[123] *Id.* 117:7–121:20.

at 30, 1982 USCCAN 177, 208). The Court is confident that it has done exactly that.

A. Vote Dilution Claims Under the Voting Rights Act

Section 2 of the VRA prohibits any "standard, practice, or procedure . . . 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. . . ." 52 U.S.C. § 10301(a). Vote dilution occurs if, based on the totality of circumstances, members of that protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). Members of the class are not entitled to proportional representation, only equal access to participate in the political process. *Id.*

The Supreme Court has outlined three preconditions that Plaintiffs must show to establish a vote-dilution claim: (1) the minority group must be large and geographically compact enough to form a majority in a single-member district; (2) the minority group must be politically cohesive; and (3) the minority group must show that the majority votes sufficiently as a bloc to generally defeat the minority group's preferred candidate. *Gingles*, 478 U.S. at 50–51.

Once a court is satisfied that these preconditions are met, it must evaluate several factors that were identified in the Senate Report accompanying the 1982 VRA amendment (the Senate Report). *Id.* at 44–45. The so-called "Senate Factors" are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register,

to vote or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

> 9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Solomon v. Liberty Cnty., 899 F.2d 1012, 1015–16 (11th Cir. 1990) (Kravitch, J., specially concurring) (citing Senate Rpt. at 28–29, 1982 USCCAN 206–07); *see also Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1289 (11th Cir. 2020) (same). Vote dilution is highly likely where these factors are present. *Solomon*, 899 F.2d at 1015; *see also Gingles,* 478 U.S. at 45 (concluding that these nine factors "will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims") (footnote omitted).

The Supreme Court has instructed lower courts to weigh Senate Factors 2 and 7 more heavily: "If present, the other factors . . . are supportive of, but *not essential to,* a minority voter's claim." *Gingles*, 478 U.S. at 48 n.15 (emphasis in original); *see also City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1555 (11th Cir. 1987) (*Carrollton NAACP*) (reversing the district court's judgment for the defendants because it failed to sufficiently consider racial bloc voting and racial polarization).

The Secretary argues that Plaintiffs' votes are not being diluted "on account of race or color" because, as Dr. Barber testified, the polarization that exists in Georgia elections is the result of partisanship rather than race.[124] The Court's rejection of this argument is more fully developed in its analysis of Senate Factor 2 below, but it warrants a preface here.

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[124] *See, e.g.*, Trial Tr. 833:3–834:6 (Def.'s closing); ECF 121-2 (Def.'s Stmt. of the Case), at 3.

Plaintiffs do not need to show that their votes have been diluted because of purposeful discrimination. It is the *result* of the challenged practice—not the intent behind it—that matters. *Gingles,* 478 U.S. at 35–36; *see also Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (emphasizing that "Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone"). Thus, even if race and partisanship are highly correlated and hard to disentangle, the fact remains that there is a disproportionate—and dilutive—effect on Black voters.

But more importantly, nothing in the VRA requires a plaintiff to control for every possible covariant to ensure that the discriminatory effect is caused solely or even predominantly by race as opposed to some other factor. Race and partisanship are correlated because Black voters may perceive that the issues that matter to them are more likely to be addressed by a particular party or candidate. In other words, they are not selecting Democratic candidates because they are Democrats; they are selecting Democratic candidates because they perceive, rightly or wrongly, that those candidates will be more responsive to issues that concern Black voters. This is supported by Dr. Fraga's expert testimony that race is a key factor in determining party affiliation.[125]

The Secretary's argument is flawed because it asks the Court to introduce a factor into the vote dilution analysis that is simply not supported by the law. A high correlation between race and partisanship does not *undermine* a Section 2 claim, it is *necessary* to it. The minority voting group must be politically cohesive, which is a *Gingles* prerequisite, and the best (albeit

[125] Trial Tr. 759:5–761:3.

imperfect) proxy for political cohesion is partisan alignment. We expect politically cohesive groups to vote in corresponding patterns.

To determine whether a practice dilutes the right to vote "on account of race," then, this Court chooses to stay within the confines of the *Gingles* preconditions and the Senate Factors. *See Gingles*, 478 U.S. at 48–51; *Solomon*, 899 F.2d at 1013–16 (Kravitch, J., concurring). The Secretary cannot point to a single case establishing that, even if those factors are satisfied, a plaintiff must still prove that race independent of partisanship explains the discriminatory effect.[126] That is not the law, and this Court will not impose such a requirement.

B. The *Gingles* Preconditions Are Met.

The Court finds that Plaintiffs carried their burden of showing that the *Gingles* preconditions are satisfied. This Court found at summary judgment that Plaintiffs largely satisfied the three *Gingles* preconditions.[127] The evidence at trial only reinforced that finding, so the Court need only summarize its original *Gingles* analysis here.

As to geography and compactness, it was undisputed that Black voters are a sufficiently large and geographically compact group in current-day Georgia to constitute at least one single-member district in which they would have the potential to elect their representative of choice in district-based PSC elections.

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[126] *See, e.g.*, Trial Tr. 841:11–17, 860:22–862:15 (Def.'s closing) (citing the opinion by Judge Tjoflat, joined by one other judge, in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994), and *Alabama State Conf. of the NAACP v. Alabama*, No. 2:16-CV-731-WKW, 2020 WL 583803 (N.D. Ala. Feb. 5, 2020), involving elections of judges).

[127] *See generally* ECF 97 (SJM Order).

Gingles, 478 U.S. at 50; *Wright*, 979 F.3d at 1303.[128] Plaintiffs further showed that Black voters are politically cohesive.[129] *Gingles*, 478 U.S. at 51. The Secretary agreed that Black voters have been politically cohesive in general elections for PSC commissioners since 2012.[130] Plaintiffs also established racial-bloc voting by the White majority that enables that majority to defeat Black-preferred candidates, further supported by the trial testimony of Dr. Stephen Popick.[131] *Id*.

C. The Senate Factors Compel a Finding of Vote Dilution.

Of the nine Senate Factors, courts are to weigh Senate Factors 2 and 7 more heavily in the vote dilution analysis. *Gingles*, 478 U.S. at 48 n.15; *see also Carrollton NAACP*, 829 F.2d at 1555. The Court will therefore address those two factors first.

1. Racial Polarization in Elections (Senate Factor 2)

Senate Factor 2 concerns the extent to which voting in the jurisdiction is racially polarized, which is "[t]he surest indication of race-conscious politics," and the "the keystone of a dilution case." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1566, 1567 (11th Cir. 1984); *accord Wright*, 979 F.3d at 1305. The

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[128] *Id.* at 24–27.

[129] *Id.* at 27–29.

[130] ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 6; ECF 121-3 (Joint Stip.), ¶¶ 9–10.

[131] ECF 97 (SJM Order), at 29–32; ECF 121-3 (Joint Stip.), ¶ 12.

Court has already found—and the parties do not dispute—that voting in Georgia is polarized.[132]

As previewed above, the Secretary argues that partisanship better explains this polarization, and therefore any dilution occurs on account of party rather than race. But the Court is heavily persuaded by Dr. Fraga's testimony that it is impossible to separate race from politics in current-day Georgia, even if that were required under the VRA. As Dr. Fraga made clear, race likely drives political party affiliation, not the other way around.[133] Even the Secretary's expert, Dr. Barber, conceded that race is a significant factor in determining vote choice.[134] His own scholarship tells us that race is the "strongest predictor" of partisan identification—even more so than one's political views.[135]

The Secretary's position is facially inconsistent with *Gingles*, which requires Plaintiffs to show that voting is both racially polarized *and* politically cohesive. This necessarily means that the correlation between race and partisan voting must be high, or else there would be no discernable evidence of cohesive bloc voting. And Plaintiffs here easily proved both racial polarization and political cohesion. Indeed, they showed that the racial polarization found to exist in the *Gingles* case

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[132] ECF 97 (SJM Order), at 29–32; ECF 121-3 (Joint Stip.), ¶ 9; Trial Tr. 841:7–9 (Pls.' closing).

[133] Trial Tr. 760:20–761:16.

[134] *Id.* 705:20–24, 706:6–12.

[135] *Id.* 701:6–702:8. *See also* PX-111 (*Groups, Behaviors, and Issues as Cues of Partisan Attachments in the Public*).

itself is exceeded by the racial polarization in recent PSC general elections.[136]

Dr. Popick, who has analyzed racial bloc voting in thousands of individual elections in his professional career, credibly and compellingly testified that his analysis of the PSC general elections since 2012 shows "one of the clearest examples of racially polarized voting" he has ever seen.[137] And that racial polarization is far more stark than partisan identification alone would predict.[138] Racially polarized voting in Georgia increased after 2016 but partisan identification did not.[139] Racial polarization exists even in elections that do not feature a Republican-Democrat matchup.[140] In fact, political cohesion by White voters was the strongest in the 2014 District 1 election where there was no Democratic candidate and the Black-preferred candidate was a Black Libertarian.[141] This contest showed even higher political cohesion among Black voters (82.44%) than the contest featuring a Black Democratic candidate for District 4 (81.29%).[142]

This does not mean that partisan division is never relevant to a vote dilution analysis. For example, courts must consider whether the White majority votes as a bloc or whether that vote is fractured along

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[136] Trial Tr. 806:16–807:9 (Pls.' closing); ECF 144 (Pls.' proposed findings), ¶ 550 & tbl.

[137] Trial Tr. 183:20–23, 198:12–17.

[138] *Id.* 765:15–767:4 (Fraga).

[139] Trial Tr. 767:25–769:19 (Fraga). *Compare* PX-8 (Popick Rpt.), at 11–12 *with* DX-28 (Barber Rpt.), at 7.

[140] Trial Tr. 695:9–16 (Barber), 769:20–770:16 (Fraga).

[141] *Id.* 767:5–24 (Fraga); PX-6 (Fraga Rebuttal Rpt.), at 7.

[142] PX-8 (Popick Rpt.), at 11.

political lines. *See Gingles*, 478 U.S. at 48 n.15 ("[I]f difficulty in electing and White bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates."). Where the White majority vote is fractured, some White votes would align with Black votes and allow the Black-preferred candidate to prevail. So, while a plaintiff claiming vote dilution could meet the political cohesion requirement, that scenario would not be sufficient to demonstrate racial-bloc voting.

But here, Plaintiffs have proven both political cohesion and racial polarization in PSC elections. The Secretary has not offered any evidence of an alternate explanation for why minority-preferred candidates are less successful, such as "organizational disarray, lack of funds, want of campaign experience, the unattractiveness of particular candidates, or the universal popularity of an opponent." *Uno v. City of Holyoke*, 72 F.3d 973, 983, 983 n.4 (1st Cir. 1995) (citing *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (Tjoflat, J.)). Senate Factor 2 weighs heavily in Plaintiffs' favor.

2. Election of Minorities to Public Office (Senate Factor 7)

Senate Factor 7 looks at the extent to which members of the minority group have been elected to public office in the jurisdiction. While the other Senate Factors focus on the effects on minority voters and their ability to participate in the political process, this one focuses on the race of the candidates for office.[143]

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[143] The Secretary claims, without any supporting authority, that this factor is of limited utility. *See, e.g.*, ECF 144 (Def.'s proposed findings), ¶ 181. The Secretary's position is directly contrary to precedent, which prioritizes Senate Factors 2 and 7 in

There is no dispute that, outside of the unique context of judicial elections, Georgia has elected few Black officials statewide. Nor is there dispute that the lack of diversity among the members of the PSC has been and continues to be substantial. There have been five Black candidates for the PSC in the seven most recent elections, including two Black candidates in 2014. Every time, the Black candidate lost to a White candidate.[144] The Secretary rightly points out that, for the upcoming November 2022 election, both major-party candidates for PSC District 3 are Black.[145] But that race—and even Georgia's U.S. Senate race, which also features two Black candidates[146]—will not significantly alter the overall paucity of Black candidates who have been elected to statewide public office in Georgia. Analyzing 164 statewide elections over a 50-year timeframe, Dr. Fraga found that Black candidates won only eight races—less than 5% of the total.[147] Even assuming a Black candidate wins both the District 3 and U.S. Senate races in November 2022, the total would increase to only 6%. This is substantially lower than the CVAP, the Black voting population, and the total Black population in Georgia.[148]

It is true, as the Secretary highlights, that Black-preferred candidates have won some recent statewide elections in Georgia. For example, in the 2020 general elections, Black-preferred candidates were successful

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the totality-of-the-circumstances analysis. *Gingles*, 478 U.S. at 48 n.15; *Carrollton NAACP*, 829 F.2d at 1555.

[144] Trial Tr. 589:10–17 (Fraga); PX-5 (Fraga Rpt.), at 12–13.

[145] Trial Tr. 132:1–21 (Farley).

[146] *Id.* 754:18–755:10 (Rose).

[147] *Id.* 585:19–586:13 (Fraga); PX-5 (Fraga Rpt.), at 4, 11–13.

[148] ECF 121-3 (Joint Stip.), ¶¶ 4–6.

in the presidential race and two U.S. Senate races.[149] But Senate Factor 7 asks courts to consider the election of minority candidates, not minority-preferred candidates, as a barometer for the racial environment. This factor weighs in Plaintiffs' favor.

3. History of Official Discrimination (Senate Factor 1)

This factor looks at "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote or otherwise to participate in the democratic process." *Solomon,* 899 F.2d at 1015 (Kravitch, J., specially concurring). Past discrimination has lingering effects on voter behavior because it "may cause [B]lacks to register or vote in lower numbers than [W]hites" and "may also lead to present socioeconomic disadvantages, which in turn can reduce participation and influence in political affairs." *Marengo Cnty. Comm'n*, 731 F.2d at 1567.

The Court finds no need to belabor its discussion of Senate Factor 1 because it is undisputed that Georgia has a "well-documented history of discrimination against its Black citizens."[150] Some may argue that Georgia's history should not be held against it forever and that this factor should therefore not carry much weight. But the Supreme Court instructs this Court to consider Georgia's history of discrimination in evaluating the totality of the circumstances for a VRA claim, and the Court finds that Senate Factor 1 is satisfied.

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[149] *Id.* ¶ 11.

[150] Trial Tr. 842:15–17 (Def.'s closing); ECF 121-3 (Joint Stip.), ¶ 8.

4. Voting Practices that May Enhance Opportunities for Discrimination (Senate Factor 3)

This factor examines "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." *Solomon*, 899 F.2d at 1015 (Kravitch, J., specially concurring).

Dr. Fraga persuasively testified that Georgia's unique PSC election procedures enhance the opportunity for discrimination against Black Georgians, including a statewide election with residency districts; the majority-vote/runoff requirement; and "anti-single shot" staggered terms with numbered seats.[151] He testified that PSC elections are "textbook examples" of Senate Factor 3 because they mirror the specific policies called out in the Senate Report.[152]

Large election districts can enhance the opportunity for discrimination by increasing the cost of campaigning. *See, e.g.*, *Marengo Cnty. Comm'n*, 731 F.2d at 1570 (recognizing that large, rural area made countywide campaigns expensive). The financial barriers to entry are particularly problematic in light of the economic disparities proven at trial.[153] Majority-vote/runoff requirements can also create opportunities for vote dilution in contrast to a plurality-win system. Under the latter, members of the minority group may be able to consolidate their votes behind one candidate

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[151] Trial Tr. 574:3–9.

[152] *Id.* 573:21–574:2.

[153] *See supra* Section II.B.

while the majority group splits its votes among several different candidates. If votes are split in this manner under a majority-vote requirement, a runoff takes place, and the majority has a second opportunity to defeat the minority's preferred candidate. *City of Rome v. United States,* 446 U.S. 156, 183–84 (1980), *superseded by statute on other grounds as stated in Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 209–11 (2009); *United States v. Dallas Cnty. Comm'n*, 739 F.2d 1529, 1536–37 (11th Cir. 1984). *See also LULAC v. Clements*, 986 F.2d 728, 749 (5th Cir. 1993) ("Majority vote requirements can obstruct the election of minority candidates by giving [W]hite voting majorities a 'second shot' at minority candidates who have only mustered a plurality of the votes in the first election.") (citations omitted). Finally, Georgia's staggered terms for PSC commissioners also work as an anti-single shot mechanism and thereby enhance the opportunity for discrimination. *City of Rome*, 446 U.S. at 184-85, 185 n.21.

The Court finds Dr. Fraga's testimony on this point compelling and concludes that, by employing this unique aggregation of statewide, at-large elections for PSC commissioners, with requirements for a majority vote, residency districts, and staggered terms with numbered seats, Georgia uses electoral practices that enhance the opportunity for vote dilution. Senate Factor 3 weighs in Plaintiffs' favor.

5. Slating Processes (Senate Factor 4)

The fourth Senate Factor examines whether members of the minority group have been denied access to any candidate slating process. Slating is "a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of

approval for the candidates selected." *Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1116 n.5 (5th Cir. 1991) (citing *Overton v. City of Austin*, 871 F.2d 529, 534 (5th Cir. 1989) (per curiam)).

There is no formal candidate slating process in Georgia. But Dr. Fraga characterized the use of gubernatorial appointments to fill vacancies on the PSC (which is required by statute, O.C.G.A. § 46-2-4) as an "informal slating process" that confers an incumbency advantage on candidates who are appointed.[154] Echols and Shaw both testified that their incumbency made it easier to raise funds and run statewide.[155]

The Court is not persuaded in the PSC election context that gubernatorial appointments act as an informal slating process, even if the appointments confer some incumbency advantage. Of the five appointments Dr. Fraga examined, three of those commissioners were defeated in their post-appointment elections.[156]

Even if the Court were to accept that appointments constitute an informal slating process for PSC members, the Court does not find that Black candidates have necessarily been excluded from it—at least not in recent years. Of the six PSC appointments between 1996 and 2022, two have been Black. While Plaintiffs are skeptical of Johnson's appointment because it occurred during the pendency of this litigation, the

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[154] Trial Tr. 590:4–22. *See generally supra* Section II.E.2.

[155] PX-99, at 24 (Echols Tr. 71:15–22); PX-103, at 11, 13 (Shaw Tr. 44:18–45:21, 54:20- 24).

The Secretary's Rule 701 objection to Shaw's testimony is overruled.

[156] Trial Tr. 611:13–16.

Court declines to discount it. Senate Factor 4 does not weigh in Plaintiffs' favor.

6. Effects of Discrimination (Senate Factor 5)

Senate Factor 5 looks at the extent to which members of the minority group bear the effects of discrimination that hinder their ability to participate effectively. But "the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation." *Marengo Cnty. Comm'n*, 731 F.2d at 1569. Instead, the burden is on "those who deny the causal nexus to show that the cause is something else." *Id.*

The Senate Report explains the rationale and the nature of the inquiry for this factor:

> [D]isproportionate educational, employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of Black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

Senate Rpt. at 29 n.114, 1982 USCCAN 206 (citations omitted); *see also Gingles,* 478 U.S. at 69 ("[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.").

The evidence at trial demonstrated that Black Georgians still suffer from the effects of segregation and discrimination. Dr. Fraga testified that Black

voters turnout at lower rates and donate to campaigns at lower rates because of the lingering economic disparities caused by historical discrimination.[157] Income per capita for Blacks is only 60% of that for Whites; the median household income for Black-headed homes is 66% of that for Whites; the poverty rate is twice as high; the unemployment rate is close to twice that of Whites; the rate of homeownership is lower; and the rate of receiving benefits under the SNAP is more than three times higher.[158]

Even the Secretary's expert, Dr. Barber, reached similar conclusions in his scholarly work, finding "large and persistent gaps in voter turnout by race" and concluding that "[B]lack citizens are much less likely to vote and much more likely to live in local communities where fewer individuals vote than [W]hites."[159] Dr. Barber concluded that Black citizens are more than three times as likely to live in an area where voter turnout is consistently low, which can perpetuate political inequality along racial lines.[160] Senate Factor 5 weighs in Plaintiffs' favor.

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[157] Trial Tr. 583:24–585:9 (Fraga); PX-5 (Fraga Rpt.), at 6, 9–11.

[158] Trial Tr. 736:6–14 (Barber); DX-49 (Barber Rebut. Rpt.), at 8 (indicating an income gap of approximately $23,000 between Black and white Georgia households); ECF 57 (Mot. Jdl. Notice) ¶¶ 3, 5, 6, 7, 8, 10. *See also supra* Section II.B.

[159] Trial Tr. 668:19–25 (Barber).

[160] *Id.* 668:7–669:25 (Barber); PX-37 (Michael Barber & John B. Holbein, *410 Million Voting Records Show That Minority Citizens, Young People, and Democrats Are at a Profound Disadvantage at the Ballot Box*).

7. Racial Appeals in Political Campaigns (Senate Factor 6)

Senate Factor 6 examines whether political campaigns have been characterized by overt or subtle racial appeals. The parties agree that racial appeals in statewide political campaigns are relevant to this factor.[161] The Court interprets this factor to encompass political campaign advertisements in Georgia generally; the type of campaign to which they relate is relevant to the weight this evidence carries.[162]

Witnesses testified to seeing political ads or statements made during a political campaign that they characterized as racial appeals. Some of the political ads shown were overtly racial in nature and disturbing, even if not sponsored by the candidates themselves. But several of the ads were more subtle, and reasonable people could disagree over whether they were racial appeals at all. The Court does not question Plaintiffs' sincere beliefs about what constitutes a racial appeal, but these ads and statements do not carry the weight Plaintiffs seek to place on them. On balance, while there was some evidence of racial appeals made during political campaigns in statewide Georgia races generally, there was no evidence of such appeals in PSC campaigns. Senate Factor 6 does not weigh in Plaintiffs' favor.

8. Responsiveness of Elected Officials (Senate Factor 8)

Senate Factor 8 concerns the responsiveness (or lack thereof) of elected officials to the particularized needs of the members of the minority group. Unresponsiveness

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[161] *Id.* 464:14–465:20 (colloquy).

[162] *Id.* 465:21–24 (colloquy).

is "evidence that minorities have insufficient political influence to ensure that their desires are considered by those in power." *Marengo Cnty. Comm'n*, 731 F.2d at 1572. This factor is "of limited importance" both because of its subjectivity and Section 2's focus on the ability to participate in the political process itself. *Id.* Even if officials are responsive, that does not necessarily equate to equal electoral opportunity. *Id.*

As evidence of the PSC's purported lack of responsiveness to Black voters, Plaintiffs point to testimony from the current commissioners expressing their views that the Black community does not have specialized needs when it comes to matters within the PSC's jurisdiction.[163] McDonald, for instance, believes that income status is the issue.[164]

Plaintiffs testified that some PSC issues disproportionately affect Black Georgians.[165] These issues include high utility rates and energy burden; the location of power plants; the utility disconnection moratorium; and cost overruns related to the construction of Georgia Power's nuclear power plant.[166] Plaintiff McCorkle testified that the City of Atlanta—which is in PSC District 3—is home to communities

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[163] Trial Tr. 418:21–419:1, 421:19–422:1 (Pridemore); PX-99, at 28, 30 (Echols Tr. 85:10–20, 91:3–8); PX-100, at 12 (Johnson Tr. 55:12–18); PX-101, at 18 (McDonald 94:7–18); PX-103, at 18 (Shaw Tr. 70:21–71:3).

[164] PX-101, at 18 (McDonald 94:7–95:23).

[165] Trial Tr. 55:8–23, 62:6–21 (Woodall); *id.* 281:10–13, 314:7–13, 334:13–335:23 (McCorkle); *id.* 475:6–25, 480:5–20 (Rose); *id.* 536:21–537:6, 559:10–560:6 (Mosley).

[166] *Id.* 49:7–50:13, 52:15–53:16 (Woodall); *id.* 284:19–285:13 (McCorkle); *id.* 472:21– 473:9 (Rose); *id.* 522:14–18 (Mosley).

that endure the highest energy burden in Georgia.[167] But Pridemore testified credibly that the decision to lift the moratorium involved a number of competing policy interests.[168] Echols similarly testified that continuing the moratorium would have "put people in a greater [financial] difficulty down the road."[169]

The issues identified by Plaintiffs are important ones and they are inherently tied to income and poverty levels, which disproportionately affect Black Georgians given the continuing effects of discrimination on socio-economic factors.[170] But Senate Factor 8 focuses on a lack of responsiveness, not disproportionate effect, and the Court concludes that it requires something more than an outsized effect correlated with race. Plaintiffs have not presented sufficient evidence here. Senate Factor 8 does not weigh in Plaintiffs' favor.

9. Policy Justifications for the Voting Practice (Senate Factor 9)

This final Senate Factor considers whether the policy underlying Georgia's use of the voting standard, practice, or procedure at issue is "tenuous." Senate Report at 29, 1982 USCCAN 207; *see also Houston Laws.' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 426–27 (1991) ("[W]e believe that the State's interest in maintaining an electoral system . . . is a legitimate

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[167] *Id.* 300:7–15 (McCorkle).

[168] *Id.* 416:17–418:23 (Pridemore).

[169] PX-99, at 42 (Echols Tr. 115:23–116:6). *See also* PX-101, at 19–20 (McDonald Tr. 98:13–99:8); PX-103, at 17 (Shaw Tr. 66:14–67:4).

[170] *See, e.g.*, Trial Tr. 422:17–21 (Pridemore); PX-101, at 18 (McDonald 94:7–95:23); s*ee also supra* Section II.B.

factor to be considered by courts among the 'totality of circumstances.'").

The Court expected the Secretary at trial to offer robust evidence explaining why Georgia's method of selecting PSC members was thoughtfully contemplated by the General Assembly, or that it otherwise furthered some concrete interest that was documented and provable. Perhaps a policy statement, or arguments buried in legislative history, might have articulated an explanation for why this particular electoral mechanism makes sense for Georgia. But the only evidence the Court heard to this point came from the lay opinions of the commissioners, most notably Pridemore.[171]

Although not herself an expert on electoral structure and function, Pridemore nonetheless opined that statewide elections serve to (1) avoid conflict over the location of energy and infrastructure; (2) avoid having different utility rates for different districts; (3) avoid potential favoritism by the consumer affairs staff; and (4) maintain the federal and state pipeline safety programs.[172] But the Court finds Pridemore's testimony on these points unpersuasive, not because the Court questions her sincere beliefs, but because they were not tethered to any objective data and they lacked foundation entirely. In fact, it appeared to the Court based on its close observation of Pridemore's testimony at trial that the justifications she gave for the PSC's electoral structure were developed in preparation for her testimony and were not preconceived.

The Secretary's counsel argued in closing that Georgia had an interest in maintaining its electoral

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[171] Trial Tr. 390:13–19 (ruling making clear Pridemore was providing lay opinion testimony).

[172] Trial *Id.* 386:23–388:14, 390:22–392:16, 402:2–9 (Pridemore).

structure to guarantee a "linkage" between the commissioners' jurisdiction and electoral base.[173] Counsel's argument is not evidence, of course, but the Court will address it nonetheless.

It is no doubt important to maintain the linkage between officials' jurisdiction and their electoral base, which preserves accountability and reduces the incentive to favor certain constituents. *See S. Christian Leadership Conf. of Ala. v. Sessions*, 56 F.3d 1281, 1296–97 (11th Cir. 1995) (en banc). But that decision, on which the Secretary relies, was focused on judicial elections, and the Eleventh Circuit has not extended its application beyond that unique context. *Wright*, 979 F.3d at 1297; *Davis v. Chiles*, 139 F.3d 1414, 1423–24 (11th Cir. 1998). It makes sense that the state would not want judges—who are supposed to be impartial neutrals—to favor their own constituents. Although the PSC's functions are considered both "quasi-legislative" and "quasi-judicial," it is by and large an administrative body with policy-making responsibilities that make it qualitatively different than courts.

Even crediting the Secretary's linkage concern, which the Court does find deserves some weight, it does not outweigh the interests of Black Georgians in not having their votes for PSC commissioners diluted. *Houston Laws.' Ass'n*, 501 U.S. at 427 ("Because the State's interest . . . is merely one factor to be considered in evaluating the 'totality of circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution."). Senate Factor 9 weighs in Plaintiffs' favor.

In sum, six of the nine Senate Factors weigh in Plaintiffs' favor, including the most important Factors,

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[173] *Id.* 836:4–837:2, 857:24–858:3 (Def.'s closing).

2 and 7. This Court concludes that Georgia's statewide, at-large system for electing PSC members dilutes the votes of Black Georgians in violation of the VRA.

D. The Secretary's Statutory Interpretation Argument Fails.

The Secretary argues that the statewide, at-large election of PSC members is not a "standard, practice, or procedure" within the meaning of Section 2 because the State itself cannot be viewed as a "district."[174] Statewide election is not a districting plan, the Secretary argues, but rather a choice made by the sovereign state "about how it will regulate utilities" in Georgia.[175]

This Court has already ruled that nothing in the VRA suggests that a party lacks standing when the challenge is to a statewide versus political subdivision election, nor has the Secretary presented a persuasive argument for why the VRA exempts statewide at-large elections from its scope.[176] But more importantly, the Secretary's argument is foreclosed by the plain language of Section 2, which applies any time "it is shown that the political processes leading to nomination or election *in the State or political subdivision* are not equally open to participation by members" of a

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[174] ECF 121-2 (Def.'s Stmt. of the Case), at 2. The Secretary raised this issue for the first time in the parties' proposed pretrial order. *See also* Trial Tr. 27:23–28:11 (Def.'s opening). Plaintiffs asserted that this argument was waived because the Secretary did not raise it in his Answer or motion to dismiss. *Id.* 825:10–14 (Pls.' closing). The Court finds it unnecessary to wade into the issue of waiver because the Secretary's position is substantively foreclosed by the plain language of the statute.

[175] Trial Tr. 832:4–8 (Def.'s closing).

[176] ECF 36 (MTD Order), at 20–21.

protected class. 52 U.S.C. § 10301(b) (emphasis added). The statute clearly addresses elections held at the state-level and the district-level, and the Secretary has provided no authority to suggest that this language means anything other than what it explicitly says. Nor does the Secretary's status as an agent of a "sovereign" shift this analysis. So long as PSC members are elected by popular vote, those elections must comply with the VRA regardless of whether they are conducted at the state or political subdivision level.

E. Plaintiffs' Proposed Remedy

Under Eleventh Circuit precedent, Plaintiffs must offer a viable remedy to establish the first *Gingles* prerequisite. *Nipper*, 39 F.3d at 1530–31; *see also Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999); *Davis,* 139 F.3d at 1419–20 ("In assessing a plaintiff's proposed remedy, a court must look to the totality of the circumstances, weighing both the state's interest in maintaining its election system and the plaintiff's interest in the adoption of his suggested remedial plan.") (citing *Houston Laws.' Ass'n*, 501 U.S. at 426); *Brooks v. Miller*, 158 F.3d 1230, 1239 (11th Cir. 1998) (same).

Plaintiffs seek to convert PSC elections from statewide, at-large residency districts to single-member districts.[177] Under the map presented by Plaintiffs, proposed District 1 (covering Clayton, DeKalb, Fayette, part of Fulton, Henry, Newton, and Rockdale Counties) would be a majority-Black district, with slightly over 54% of the voting-age population being Black.[178] This proposed

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[177] *See, e.g.*, ECF 1 (Compl.), ¶ 18; PX-8 (Popick Rpt.), at 19–20; PX-50, at 1 (Pls.' Illustrative Plan).

[178] PX-50, at 2 (population data for Pls' Illustrative Plan).

District 1 overlaps in large part with existing PSC District 3.[179]

Single-member districting is a standard remedy for a Section 2 violation caused by at-large elections. *See, e.g.*, *Gingles*, 478 U.S. at 50; *see also id.* at 50 n.17 ("The single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected."); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 952 F. Supp. 2d 1360, 1366 (N.D. Ga. 2013) (where "the challenged system is at-large voting, just as in *Gingles*[,] the adequate alternative electoral system is simply single-member districting, which is a workable regime and an available remedy"). Courts must impose single-member districts unless they "can articulate such a singular combination of unique factors" that a different result is justified. *Chapman v. Meier*, 420 U.S. 1, 21 (1975) (cleaned up); *accord Wise v. Lipscomb*, 437 U.S. 535, 540–41 (1978); *Connor v. Johnson*, 402 U.S. 690, 692 (1971) (per curiam).

The Secretary has conceded that there is nothing "facially problematic" with the proposed map submitted by Plaintiffs and that "it's exactly the kind of evidence that you could put forward to show the feasibility of a remedy" if this case did not involve a "sovereign."[180] The Secretary also acknowledged at summary judgment that the Section 2 injury alleged by Plaintiffs is "one that has been accepted by courts since the inception" of the VRA; however, he argued that Plaintiffs failed to *prove* the existence of that injury.[181] At the summary

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[179] PX-2, at 1 (2012 PSC Map); PX-8 (Popick Rpt.), at 15–18.

[180] ECF 35 (MTD H'g Tr.), 40:12–24.

[181] ECF 88 (Def.'s SJM Reply), at 2.

judgment stage, the Court agreed.[182] But Plaintiffs have now proven their case.

The Court previously declined to enter judgment in favor of Plaintiffs on the Secretary's Third and Fourth Affirmative Defenses, which respectively assert that Plaintiffs lack constitutional and statutory standing. The Court declined ruling at that time only because of the open question concerning the viability of Plaintiffs' proposed remedy.[183] Having now concluded that it is, Defendants' Third and Fourth Affirmative Defenses are rejected.

The Secretary's Eighth Affirmative Defense asserts that Plaintiffs' proposed remedy "will result in a violation of the U.S. Constitution because Plaintiffs' proposed remedies require the alteration of the form of government of the State of Georgia."[184] The Court disagrees.

The Georgia Constitution currently provides, "[t]he filling of vacancies and manner and time of election of members of the [PSC] shall be as provided by law." GA. CONST. art. IV, § 1, ¶ I(c). The statewide, at-large method of election is prescribed by statute, not the Georgia Constitution. O.C.G.A. § 46-2-1(a); *Cox v. Barber*, 275 Ga. 415, 415 (2002). Further, and as discussed above, the history of the Georgia constitutional provision concerning the PSC makes clear that the requirement that commissioners be "elected by the people" was intended only to require that they be

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[182] ECF 97 (SJM Order), at 9–12.

[183] *Id.* at 12.

[184] ECF 37 (Ans.), Eighth Aff. Defense.

elected rather than appointed by the governor as originally had been done.[185]

This interpretation is also consistent with adjacent provisions of the Georgia Constitution relating to other constitutional boards and commissions. Members of the State Board of Pardons and Paroles shall be "appointed by the Governor." GA. CONST. art. IV, § II, ¶ I. Members of the State Personnel Board shall also be "appointed by the Governor." GA. CONST. art. IV, § III, ¶ I(a). Members of the State Transportation Board shall be "elected by a majority vote of the members of the House of Representatives and Senate." GA. CONST. art. IV, § IV, ¶ I(a). By contrast, the Georgia Constitution leaves the "manner" of PSC elections to the General Assembly, which opted for statewide, at-large elections.

Nothing in the Court's order requires a change to Georgia's constitution; it does, however, require a change to the manner in which PSC commissioners are elected. The constitutional requirements that the PSC have five members, that they be elected, and that they serve six-year staggered terms will be unaffected by using single-member voting districts as the *manner* for those elections. The Court rejects the Secretary's Eighth Affirmative Defense.

F. Timing

Georgia has significant interests "in conducting an efficient election [and] maintaining order," because "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *New Ga. Project v. Raffensperger*, 976 F.3d

[185] *See supra* Section II.A.

1278, 1284 (11th Cir. 2020) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam)).

It is now August, and the PSC elections for Districts 2 and 3 are on the November 8, 2022 ballot.[186] The Court specifically conducted the trial in this action sufficiently in advance of the November election so that Plaintiffs could be afforded relief in the event they prevailed in the Court's ruling on a complete record.[187] Michael Barnes, who runs the State's Center for Election Systems, testified at trial that there would be little disruption to the State's preparation for or conduct of the November 2022 general election if the Court directed that the PSC races be removed from the ballots for that election before August 12, 2022, while the draft ballots were still being prepared by his office.[188] This Order is entered sufficiently in advance of that deadline to minimize the disruption to the electoral process and the Secretary's operations.

During the preliminary injunction hearing, counsel for the Secretary made clear the State's position on what would happen under Georgia law in the event the Court enjoined the PSC races on the November 2022 ballots: The commissioners currently holding the positions for Districts 2 and 3 (Echols and Johnson) would "holdover" in those positions "until such time as

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[186] O.C.G.A. § 46-2-1(d), § 46-2-4; ECF 110-1, at 9 (2022 State Elections & Voter Registration Calendar).

[187] ECF 112 (PI Order), at 9.

[188] Trial Tr. 441:18–444:9 (Barnes); ECF 108, at 24–25 (PI H'g Tr. 23:11–23, 24:14– 25:25).

there was an election."[189] The Court agrees with the Secretary's analysis under Georgia law.

The concerns raised by *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006),—that courts generally "should not enjoin state election laws in the period close to an election"—are not present here. *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022). In *Purcell*, the preliminary injunction was issued one month before the election and without adequate time to develop a factual record. 549 U.S. at 5–6. The Court's ruling here is not preliminary. It is a permanent injunction, entered after a full trial, on a complete record, with factual findings and conclusions of law. As a result, the Court finds no impediment to enjoining the Secretary from conducting elections for PSC Districts 2 and 3 in November. This Order issues in sufficient time to present little disruption to the State.

While delaying elections for Districts 2 and 3 until a later date will regrettably cause disruption to the candidates currently running for those offices, the Court does not find that such disruption outweighs the important VRA interests that are implicated, for the reasons discussed in this Order. And there is no evidence in the record suggesting that the Court's injunction will cause disruption to voters themselves.

IV. Conclusion

This Order should not be interpreted to find that statewide, at-large elections violate Section 2 of the Voting Rights Act in all circumstances and at any point in time. Rather, the Court has followed its

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[189] ECF 108, at 6 (PI H'g Tr. 5:19–7:5) (relying on *Clark v. Deal*, 298 Ga. 893 (2016); *Kanitra v. City of Greensboro*, 296 Ga. 674 (2015); and *Garcia v. Miller*, 261 Ga. 531 (1991)).

mandate under *Gingles* of conducting an "intensely local appraisal" of the facts to determine what result is compelled under the totality of the circumstances for Georgia today. And that appraisal, in this Court's view, compels only one result.

The Secretary is ENJOINED from preparing ballots for the November 8, 2022 election that include contests for PSC Districts 2 and 3; from administering any future elections for vacancies on the PSC using the statewide, at-large method currently prescribed by O.C.G.A. § 46-2-1, *et seq.*; and from certifying the election of any PSC commissioner elected using this method.

The Court is cognizant of the fact that the General Assembly next meets in regular session in January 2023. Consequently, this Order shall remain in effect until a method for conducting such elections that complies with Section 2 is enacted by the General Assembly and approved by the Court, or is otherwise adopted by the Court should the General Assembly fail to enact such a method.

The Clerk is DIRECTED to enter JUDGMENT in favor of Plaintiffs.

Within 30 days after entry of this Order, Plaintiffs are DIRECTED to file a motion in support of their claim under 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e) for attorneys' fees and expenses.

SO ORDERED this 5th day of August, 2022.

/s/ Steven D. Grimberg
Steven D. Grimberg
United States District Court Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:20-cv-02921-SDG

RICHARD ROSE, *et al.*,

Plaintiffs,

v.

BRAD RAFFENSPERGER, in his capacity as Secretary of State of the State of Georgia,

Defendant.

OPINION AND ORDER

This case presents the novel question of whether there can be vote dilution in violation of Section 2 of the Voting Rights Act (VRA) when the challenged election is held on a statewide basis. On the parties' cross-motions for summary judgment, the Court concludes that certain disputes of material issues of fact require a trial and preclude complete resolution at this stage. After careful consideration of the parties' briefing, and with the benefit of oral argument, the Court DENIES Defendant's motion for summary judgment [ECF 80] and GRANTS in part and DENIES in part Plaintiffs' partial motions for summary judgment [ECF 56; ECF 79]. Plaintiffs' Motion for Judicial Notice of Census Data [ECF 57] is GRANTED.

I. Background

The Georgia Public Service Commission (the Commission) exists by virtue of the State Constitution:

> There shall be a Public Service Commission for the regulation of utilities which shall consist of five members who shall be elected by the people.

GA. CONST. ART. IV, § 1, ¶ I(a) (2021). The commissioners serve terms of six years. *Id.* The Georgia Constitution also dictates that "[t]he filling of vacancies and manner and time of election of members of the [Commission] shall be as provided by law." GA. CONST. ART. IV, § 1, ¶ I(c). The method of election is therefore prescribed by statute. O.C.G.A. § 46-2-1. Commissioners' terms are staggered, and general elections take place every two years. *Id.* § 46-2-1(d). Each commissioner is required to live in one of five residence districts, but "each member of the commission shall be elected state wide by the qualified voters of this state who are entitled to vote for members of the General Assembly." O.C.G.A. § 46-2-1(a). A commissioner must continue to live in that particular district throughout the term. *Id.* § 46-2-1(b).

Plaintiffs are residents of and registered voters in Fulton County, Georgia.[1] They are all African American.[2] The sole Defendant is Brad Raffensperger, sued in his official capacity as the Georgia Secretary of State.[3] On July 14, 2020, Plaintiffs filed suit asserting that the method of electing members of the

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[1] ECF 62-1 (Def.'s Resp. to Pls.' SUMF), No. 1.

[2] *Id.*

[3] ECF 1 (Compl.), ¶ 10.

Commission causes improper dilution of their votes.[4] They seek a declaratory judgment that this violates Section 2 and an order directing the Secretary to administer Commission elections in a manner that complies with the VRA.[5]

On May 27, 2021, Plaintiffs moved for partial summary judgment on certain of the Secretary's affirmative defenses.[6] The Secretary opposed the motion and Plaintiffs replied.[7] After the close of discovery, on July 9, Plaintiffs filed a second motion for partial summary judgment on the Secretary's remaining affirmative defenses and the *Gingles* prerequisites.[8] The Secretary opposed this motion (in most respects), and Plaintiffs replied.[9] Also on July 9, the Secretary filed his own motion for summary judgment.[10] Plaintiffs opposed, and the Secretary filed a reply.[11] On July 28, the United States filed an *amicus* brief.[12] The Court heard

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[4] *See generally* ECF 1 (Compl.).

[5] *Id.* at 10–11 (*ad damnum* clause).

[6] ECF 56 (Pls.' First MSJ) (First, Second, Fourth, Fifth, and Sixth Defenses).

[7] ECF 62 (Def.'s Resp. to Pls.' First MSJ); ECF 68 (Pls.' Reply on First MSJ).

[8] ECF 79 (Pls.' Second MSJ) (Third, Seventh, Eighth, Ninth, and Tenth Defenses).

[9] ECF 85 (Def.'s Resp. to Pls.' Second MSJ); ECF 87 (Pls.' Reply on Second MSJ).

[10] ECF 80 (Def.'s MSJ).

[11] ECF 84 (Pls.' Resp. to Def.'s MSJ); ECF 88 (Def.'s Reply on MSJ).

[12] ECF 86 (U.S. Stmt. of Interest).

argument on November 8.[13] The basis for the Court's rulings follows.

II. Applicable Law

A. Summary Judgment Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" only if it can affect the outcome of the lawsuit under the governing legal principles. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party seeking summary judgment has the burden of informing the district court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If a movant meets its burden, the party opposing summary judgment must present evidence showing either (1) a genuine issue of material fact or (2) that the movant is not entitled to judgment as a matter of law. *Id.* at 324.

B. The Voting Rights Act

Section 2 of the VRA prohibits practices that deny or abridge the right to vote of any United States citizen based on race or color. 52 U.S.C. § 10301(a). Such a violation is established

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have

[13] ECF 95 (minute entry); ECF 96 (Nov. 8, 2021 H'g Tr.).

> less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 10301(b). Section 2 does not, however, create an entitlement to proportional representation for members of a protected class. *Id.*

1. *Gingles*

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court first interpreted Section 2 after Congress amended it in 1982. The amendment emphasized that a court's focus must be on the *results* of the challenged practices rather than the intent behind their adoption. *Id.* at 35–36. Under *Gingles*, plaintiffs must satisfy three prerequisites to establish a vote-dilution claim:

> *First*, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. *Second*, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. *Third*, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Id. at 50–51 (second emphasis in original) (footnotes omitted) (citations omitted). While at-large elections are not *per se* violations of Section 2, they are impermissible if under the totality of the circumstances they "result in unequal access to the electoral process." *Id.* at 46.

2. Senate Factors

In addition to the three *Gingles* prerequisites, courts must generally consider several factors that were identified in the Senate Report accompanying the 1982 VRA amendment. *Id.* at 44–45. These Senate Factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions,[14] or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

[14] "Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates." *Gingles*, 478 U.S. at 38 n.5 (internal quotation marks omitted) (citations omitted).

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Solomon v. Liberty Cnty., Fla., 899 F.2d 1012, 1015–16 (11th Cir. 1990) (Kravitch, J. specially concurring). Two additional factors may also be probative:

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 1016. These "Senate Factors" will "typically establish" a Section 2 violation. *Id.* at 1015. *See also Gingles,* 478 U.S. at 45 (concluding that these nine factors "will often be pertinent to certain types of § 2 violations, particularly to vote dilution claims") (footnote omitted). Ultimately, *Gingles* "calls for a flexible, fact-

intensive inquiry into whether an electoral mechanism results in the dilution of minority votes." *Brooks v. Miller*, 158 F.3d 1230, 1239 (11th Cir. 1998).

III. Discussion

The Court first addresses whether (1) Plaintiffs have suffered a harm that gives them standing to sue and (2) the Secretary is the proper Defendant. The Court next considers the existence of an appropriate remedy, which is at the heart of the parties' dispute. Third, the Court assesses whether Plaintiffs have carried their burden to establish the three *Gingles* prerequisites. Finally, the Court examines the Secretary's affirmative defenses.

A. Injury, Standing, and the Proposed Remedy

Constitutional standing is a necessary element of every case invoking federal jurisdiction. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Its existence is a threshold issue. *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) ("Because standing to sue implicates jurisdiction, a court must satisfy itself that the plaintiff has standing before proceeding to consider the merits of her claim, no matter how weighty or interesting."). Moreover, in order to carry their initial burden under *Gingles*, Plaintiffs must show that the challenged practice is tied to the injury sought to be remedied. *Gingles*, 478 U.S. at 50 n.17. And the proposed remedy must itself be feasible: If there is no feasible remedy, there can be no injury. *Davis v. Chiles*, 139 F.3d 1414, 1419–20. *See also id.* at 1423 ("[A] plaintiff must propose a viable and proper remedy in order to establish a prima facie case under Section Two.") (citations omitted). Here, the Secretary argues that Plaintiffs lack both statutory and constitutional

standing because their injury is a partisan one, and the proposed remedy impermissible.[15]

1. The Nature of Plaintiffs' Injury

The parties agree that Plaintiffs *allege* they are being injured by the at-large method of electing members of the Commission because this system dilutes the strength of their votes.[16] But the Secretary argues that, because members of the Commission are elected on a statewide basis, Plaintiffs' only injury is that they do not like the outcome.[17] Thus, his Third and Fourth Affirmative Defenses respectively assert that Plaintiffs lack constitutional and statutory standing.[18] Plaintiffs counter that they are entitled to summary judgment on these defenses.[19]

Adopting the Secretary's interpretation would amount to a *per se* rule that vote dilution in violation of Section 2 can *never* take place on a statewide-level. Section 2, however, applies to both states and their political subdivisions, 52 U.S.C. § 10301(a). The Court finds no basis to adopt a blanket rule that vote dilution can never occur at a statewide level. Nor has the Secretary pointed to any case law that requires such an interpretation, although the Secretary is quick to note that neither Plaintiffs nor the United States

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[15] *See, e.g.*, ECF 80-1 (Def.'s MSJ), at 4–14. *See also* ECF 37 (Ans.), at 2 (Third and Fourth Defenses).

[16] ECF 1 (Compl.), ¶ 36; ECF 80-1 (Def.'s MSJ), at 6.

[17] ECF 80-1 (Def.'s MSJ), at 7–8.

[18] ECF 37 (Ans.), at 2.

[19] ECF 56 (Pls.' First MSJ), at 1, 7–9 (Fourth Defense); ECF 79 (Pls.' Second MSJ), at 1, 8–10 (Third Defense).

have pointed to any case law supporting their interpretation either.[20]

If the Commission were a countywide commission rather than a statewide elected body, there would be little question that the current at-large method of elections could cause an injury for purposes of Section 2 and constitutional standing. *See, e.g.*, *Houston Lawyers' Ass'n v. Att'y Gen. of Tex.*, 501 U.S. 419, 421 (1991) (concluding Section 2 applied to at-large, district-wide electoral scheme used for the election of trial judges in Texas); *Gingles*, 478 U.S. at 46–47 (recognizing that multimember districts and at-large voting schemes may dilute the votes of racial minorities); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1550 (11th Cir. 1984) (concluding district court was clearly erroneous in holding that the county's at-large system had no discriminatory results). In fact, the Secretary concedes that the Section 2 injury *alleged* by Plaintiffs is "one that has been accepted by courts since the inception" of the VRA, although the Secretary asserts they have failed to *prove* the existence of that injury.[21]

The Court agrees with the United States' assertion that statewide vote dilution of the type alleged here is a cognizable injury under Section 2.[22] There is no legal basis to distinguish between States and their political subdivisions based on the language of Section 2. Plaintiffs must still, however, propose a viable remedy (without which they will lack the necessary injury for standing purposes).

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[20] ECF 88 (Def.'s Reply on MSJ), at 3.

[21] ECF 88 (Def.'s Reply on MSJ), at 2.

[22] ECF 86 (U.S. Stmt. of Interest), at 5–10.

To the extent the Secretary seeks summary judgment because Plaintiffs' vote-dilution injury is not cognizable and they therefore lack standing, his motion is DENIED. However, Plaintiffs' motions are DENIED to the extent they seek summary judgment on the Secretary's Third and Fourth Affirmative Defenses because, if Plaintiffs are unable to establish after trial that their proposed remedy is feasible, they will not have shown the existence of an injury. *Davis*, 139 F.3d at 1419–20. Those defenses therefore remain viable.

2. The Secretary as Defendant

For a plaintiff to have constitutional standing, his alleged injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alterations in original) (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)). Further, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (citing *Simon*, 426 U.S. at 38, 43, 96).

The Secretary argues that he is not the proper Defendant because an order enjoining him from administering elections for members of the Commission and directing him to comply with Section 2 would not redress Plaintiffs' purported injury.[23] The Secretary declares that, under such an injunction, the Governor could simply continuously appoint people to vacant positions on the Commission since the Secretary would be unable to administer elections for those positions.[24] Plaintiffs counter that the Secretary

[23] ECF 80-1 (Def.'s MSJ), at 10–14. *See also* ECF 37 (Ans.), at 1 (Second Defense).

[24] ECF 80-1 (Def.'s MSJ), at 11–12.

conceded the issue of whether he is a proper party by failing to identify any missing but necessary parties in his initial disclosures or the joint preliminary report.[25]

This is the same basic argument the Secretary made at the motion to dismiss stage, which was rejected by the Court.[26] At the time, the Secretary served as the Chair of the State Election Board, which was responsible for adopting rules and regulations governing the conduct and administration of elections. O.C.G.A. §§ 21-2-30(d), -31(2) (2008). But that statute was amended, effective March 25, 2021. Act of Mar. 25, 2021, 2021 Ga. Laws Act 9 (S.B. 202). The Secretary is no longer Chair, and is only an *ex officio*, nonvoting member of the State Election Board. O.C.G.A. § 21-2-30(a), (d) (2021). The question before the Court is whether these changes mean that the Secretary is no longer a necessary or sufficient Defendant.

Although the parties disagree about the scope of the Secretary's current duties,[27] he or his office remain responsible for (among other things) qualifying certain candidates for elections, including political-body and independent candidates for the Commission; building the databases used to create absentee ballots and program voting machines; and certifying election results.[28] The Secretary also co-signs the commission ultimately issued to the winner of an election for the Commission.[29] *See generally* O.C.G.A. § 21-2-50(a) (2019).

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[25] ECF 56 (Pls.' First MSJ), at 6.

[26] ECF 36 (Jan. 5, 2021 Op. & Order), at 29–33.

[27] *See, e.g.*, ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 2.

[28] ECF 79-1 (Def.'s Stipulated Facts), ¶¶ 1–2, 4.

[29] *Id.* ¶ 5.

The Secretary admits that his proffered hypothetical—in which the Governor simply appoints commissioners to fill vacancies, *ad infinitum*—would violate the Georgia constitutional provision that requires members of the Commission to be "elected by the people."[30] GA. CONST. ART. 4, § 1, ¶ I. Georgia law provides that the Governor shall appoint a person to fill any vacancy on the Commission, and that such person shall "hold his office until the next regular general election." O.C.G.A. § 46-2-4. The Court presumes that the Governor will abide by his State and Federal constitutional duties. Therefore, the Court will not credit counsel's hypothetical as providing any reasonable basis to conclude that the Secretary is not the proper Defendant in this action.

If Georgia's current method of electing members of the Commission violates Section 2 and the Secretary is enjoined from conducting elections under that process, the cause of Plaintiffs' alleged vote-dilution injury will be stopped. This is enough under *Lujan* for purposes of traceability and redressability. 504 U.S. at 561. Nothing about such an injunction would prevent the next regular election from taking place as the Secretary pontificates.[31] Rather, under this scenario, the election would take place, with the Secretary certifying the results, using a method that complies with Section 2—whether that method is developed by the Georgia General Assembly or this Court. *See, e.g., Perry v. Perez*, 565 U.S. 388, 391–92 (2012) (per curiam) (noting that, when the Texas legislature failed to enact new redistricting plans after the 2010 census, "[i]t thus fell to the District Court in Texas to devise interim plans for the State's" elections) (citation omitted).

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[30] ECF 80-1 (Def.'s MSJ), at 13–14.

[31] ECF 88 (Def.'s Reply on MSJ), at 6.

The changes in Georgia's election law do not, therefore, alter the conclusion the Court reached at the motion to dismiss stage.[32] The Secretary's motion is DENIED as to (1) redressability to the extent he argues he is the incorrect Defendant and (2) the argument that Plaintiffs' injury is not cognizable. Plaintiffs' first motion for summary judgment is GRANTED to the extent it seeks judgment on the Secretary's Second Affirmative Defense.

3. Plaintiffs' Proposed Remedy

"In assessing a plaintiff's proposed remedy, a court must look to the totality of the circumstances, weighing both the state's interest in maintaining its election system and the plaintiff's interest in the adoption of his suggested remedial plan." *Davis*, 139 F.3d at 1419–20 (citing *Houston Lawyers' Ass'n*, 501 U.S. at 426). *See also Brooks*, 158 F.3d at 1239 (same). The Eleventh Circuit has, however, cautioned that "[i]mplicit in th[e] first *Gingles* requirement is a limitation on the ability of a federal court to abolish a particular form of government . . . ." *Davis*, 139 F.3d at 1421 (quoting *Nipper v. Smith*, 39 F.3d 1494, 1531 (11th Cir. 1994) (plurality opinion)). *Cf. Holder v. Hall*, 512 U.S. 874 (1994) (plurality opinion) (concluding a plaintiff cannot maintain a Section 2 action against the size of a government body).

Plaintiffs' proposed remedy is therefore relevant to both the first *Gingles* prerequisite and the totality-of-the-circumstances analysis. This does not mean, however, that the Court must rule on whether Plaintiffs have satisfied the remedy portion of the first prerequisite for the case to advance to trial. *See, e.g., Brooks*, 158 F.3d at 1240 (finding no error in district court's

[32] ECF 36 (Jan. 5, 2021 Op. & Order), at 28–33.

conclusion—after bench trial—that the harm that would result from plaintiffs' proposed remedy was "too great to justify ordering such a system" and that the plaintiffs had therefore failed to establish the first prerequisite); *Ala. State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Alabama* (*Alabama NAACP*), Case No. 2:16-cv-731-WKW, 2020 WL 583803, at *4, *37 (M.D. Ala. Feb. 5, 2020) (concluding after six-day bench trial that the plaintiffs had failed to meet the first prerequisite because they had not shown "that a feasible remedy can be fashioned"). The Court concludes that summary judgment on matters related to Plaintiffs' proposed remedy is inappropriate.

i. The State's Interests

The Secretary's Eighth Affirmative Defense asserts that the relief Plaintiffs seek would "result in a violation of the U.S. Constitution because Plaintiffs' proposed remedies require the alteration of the form of government of the State of Georgia."[33] His discovery responses further explained that this defense is based on Georgia's sovereignty under the Guaranty Clause of the U.S. Constitution (ART. IV, § 4) and the Tenth Amendment since (he argues) Plaintiffs' proposed remedy would require a change in Georgia's Constitution.[34] Thus, the Secretary contends that a remedy requiring the election of Commission members through districts rather than at-large would force a new form of government on the State and "fundamentally alter[ ] the nature that [the] sovereign state has set up [for] its constitutional commissions to govern utilities."[35] He compares this case to *Holder v. Hall*, 512 U.S. 874, in

[33] ECF 37, at 2 (Eighth Defense).

[34] ECF 85-1 (Def.'s Response to Pls.' SUMF), ¶ 4.

[35] ECF 80-1 (Def.'s MSJ), at 16.

which the Supreme Court held that Section 2 cannot be used to change the size of a government body.[36]

The Secretary further argues that, "given the unique interests of the State in the design of the [Commission]," Plaintiffs cannot demonstrate a permissible remedy to their alleged injury.[37] He asserts that members of the Commission exercise authority over and "take calls from constituents across" the entire State.[38] Accordingly, he concludes that the "unique nature of the structure and purpose" of the Commission—including its quasi-judicial function—"is furthered by statewide elections" of its members.[39]

The Secretary acknowledges, however, that the precise issue in this case is one of first impression.[40] He also accepts that the State's interests are a factor to be considered "in weighing the totality of the circumstances,"[41] so they are not a *per se* bar to Plaintiffs' preferred remedy. "Because the State's interest in maintaining an at-large, district-wide electoral scheme for single-member offices is merely one factor to be considered in evaluating the 'totality of circumstances,' that interest does not automatically, and in every case, outweigh proof of racial vote dilution." *Houston Lawyers'*

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[36] *Id.* at 18. *See generally id.* at 18–20.

[37] *Id.* at 16 (citing *Nipper*, 39 F.3d at 1530–31 (plurality opinion)). *See also* ECF 37 (Ans.), at 2 (Eighth Defense).

[38] ECF 80-1 (Def.'s MSJ), at 16–17.

[39] *Id.* at 18. The order denying the motion to dismiss addresses the Secretary's arguments that the Court should apply judicial-elections cases. *See generally* ECF 36 (Jan. 5, 2021 Op. & Order), at 34–39.

[40] ECF 80-1 (Def.'s MSJ), at 18.

[41] *Id.* at 17–18 (citing *Brnovich*, 594 U.S. __, 141 S. Ct. 2321, 2339–40 (2021)).

Ass'n, 501 U.S. at 427 (concluding that a state's interest in maintaining its electoral system is properly considered under the totality of the circumstances).

Plaintiffs contest the factual and legal predicates on which the Secretary's arguments are based.[42] They assert that summary judgment in favor of the Secretary is inappropriate and that there remain disputed issues of fact.[43] The United States' *amicus* brief also asserts that the Secretary misapplies *Holder* because nothing in Plaintiffs' proposed plan requires a change in the number of commissioners.[44]

The Court concludes that these matters, including the State's interests in maintaining its current form of electing members to the Commission, involve disputed issues of material fact that cannot be resolved on the parties' cross-motions for summary judgment. However, questions of first impression on Georgia law are also involved, so some additional discussion is warranted.

ii. The State's Chosen Form of Government

All Georgia voters currently may vote for each member of the Commission. O.C.G.A. § 46-2-1(a). Plaintiffs' proposed remedy would change that system such that voters would only be eligible to vote for the one member of the Commission for the particular voting district in which the voter resides.[45] The Secretary asserts that implementing such a system would impermissibly force the State to adopt a new

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[42] ECF 79 (Pls.' Second MSJ), at 11–14.

[43] ECF 84 (Pls.' Resp. to Def.'s MSJ), at 11. *See generally id.* at 9–16.

[44] ECF 86 (U.S. Stmt. of Interest), at 10–13.

[45] ECF 80-1 (Def.'s MSJ), at 18; ECF 84 (Pls.' Response to Def.'s MSJ), at 9–11. *See also* ECF 96 (Nov. 8, 2021 H'g Tr.), at 7–8.

form of government.[46] Plaintiffs' briefing does not tackle this issue head on, focusing primarily on the Secretary's arguments about the State's specific interests in maintaining the current system.[47] However, the parties ably addressed this point during oral argument.[48]

In effect, the issue centers on the meaning of the phrase "elected by the people" in the constitutional provision establishing the Commission. GA. CONST. ART. IV, § 1, ¶ I(a). The phrase is not used elsewhere in the Georgia Constitution in a similar context from which the Court might glean meaning. Nor has the Court found, or the parties pointed to, any case law on point. Does "elected by the people" mean that Georgia's Constitution requires all eligible voters in the State to have the opportunity to vote for each member of the Commission, or is that outcome only dictated by the statute (O.C.G.A. § 46-2-1(a)), which requires members of the Commission to be elected statewide? Stated somewhat differently, does implementing Plaintiffs' proposed remedy require abrogating the State Constitution? The parties disagree sharply about the answer.

During oral argument, the Secretary urged this Court to certify the issue to the Georgia Supreme Court.[49] Plaintiffs counter that this is unnecessary because the answer is irrelevant—no matter its interpretation, the State Constitution cannot override

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[46] ECF 80-1 (Def.'s MSJ), at 15–16; ECF 96 (Nov. 8, 2021 H'g Tr.), at 7–8.

[47] ECF 84 (Pls.' Response to Def.'s MSJ), at 10–16.

[48] *See generally* ECF 96 (Nov. 8, 2021 H'g Tr.).

[49] ECF 96 (Nov. 8, 2021 H'g Tr.), at 7–8.

Section 2.[50] While Plaintiffs' point about Section 2 is well taken, it certainly does not make the answer immaterial. Whether the at-large election of members of the Commission is required by the Georgia Constitution or only by statute bears on the totality-of-the-circumstances analysis the Court must undertake. It could affect, for example, the weight the Court should place on the State's interests in maintaining its current form of electing members of the Commission. *Davis*, 139 F.3d at 1421. Clarity on these issues may be necessary for the Court to assess the totality of the circumstances.

Given the issues that remain to be presented at trial, however, the Court cannot conclude that certification is required at this stage. The Georgia Supreme Court does not "give advisory opinions or respond to certified questions that are anticipatory in nature." *GEICO Indem. Co. v. Whiteside*, 311 Ga. 346, 346 n.1 (2021) (citing *CSX Transp. v. City of Garden City,* 279 Ga. 655, 658 n.5 (2005)). It is possible this Court may be able to rule after trial without needing to certify any questions. Ga. Sup. Ct. R. 46 (permitting certification of legal questions to that court when "it shall appear [to the certifying court] . . . that there are involved in any proceeding before it questions or propositions of the laws of this State *which are determinative of said cause* and there are no clear controlling precedents in the appellate court decisions of this State") (emphasis added). Waiting until after trial to assess whether

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[50] ECF 96 (Nov. 8, 2021 H'g Tr.), at 39–41 (citing *City of Rome v. United States*, 446 U.S. 156 (1980), abrogated on other grounds as stated in *Northwest Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193, 209–11 (2009); *Marengo Cnty. Comm'n*, 731 F.2d 1546). *See also* ECF 84 (Pls.' Resp. to Def.'s MSJ), at 13 (citing S. Rep. No. 97-417, at 29 n.117 (1982); *Hous. Laws.' Ass'n*, 501 U.S. at 427; *Marengo Cnty. Comm'n*, 731 F.2d at 1571).

certification is appropriate will obviate the risk of presenting questions that ultimately may not be dispositive. Moreover, it would provide the Georgia Supreme Court with a complete record to consider in ruling on any questions that this Court does certify. *See, e.g.*, Ga. Sup. Ct. R. 47 ("The Court certifying to this Court a question of law shall formulate the question and cause the question to be certified and transmitted to this Court, *together with copies of such parts of the record and briefs in the case as the certifying Court deems relevant*.") (emphasis added).

4. Summary

Georgia's interests in maintaining the at-large method of election of members of the Commission (and thus the appropriateness of the remedy sought by Plaintiffs) cannot be determined on summary judgment. Accordingly, the Court DENIES Plaintiffs' request for judgment in its favor on the Secretary's Eighth Affirmative Defense. It is also therefore improper to conclude as a matter of law that Plaintiffs suffered no injury and thus lack standing. The Court DENIES the Secretary's Motion for Summary Judgment.

B. The *Gingles* Prerequisites

The Supreme Court has made clear that the three part test of *Gingles* is a threshold that a plaintiff must meet in order to maintain a section 2 claim. *Solomon*, 899 F.2d at 1017 (Kravitch, J. specially concurring). These requirements

> present mixed questions of law and fact. Initially, the district court must make findings of fact concerning the polity's demographics and actual voting patterns in particular elections. The subsequent determination of the legal inferences to be drawn from those

> facts, however, involve questions of law and the application of legal standards.

Id. at 1017 n.6. Accordingly, while those factual issues that are not in dispute are appropriately resolved here, the inferences to be drawn from them under the totality of the circumstances are not. They must await trial. As discussed below, unless otherwise noted, the parties do not dispute the following facts, which establish that Plaintiffs have satisfied the three basic *Gingles* prerequisites.

1. Geography and Compactness

Under the first *Gingles* prerequisite, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. *See also Wright v. Sumter Cnty. Bd. of Elecs. & Registration*, 979 F.3d 1282, 1303 (11th Cir. 2020) (citing *Gingles*, 478 U.S. at 106). The minority group must have the potential to elect its representative of choice in a single-member district. *Wright*, 979 F.3d at 1303 (emphasis added) (citing *Growe v. Emison*, 507 U.S. 25, 40 (1993)).

Demographic information maintained by the Secretary's office shows that 29.95% of Georgia's electorate is "Black, not of Hispanic origin."[51] These voters are sufficiently numerous and geographically compact to form a majority in at least one single-member district in a five-district plan for the election of Commission members.[52] The illustrative plan proposed by Plaintiffs also shows—and the Secretary acknowledges—that the creation of such a district is

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[51] ECF 79-1 (Def.'s Stipulated Facts), ¶ 10.

[52] ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 5.

possible.[53] Accordingly, the parties agree to all the necessary facts to establish this part of the first *Gingles* prerequisite.

Plaintiffs further contend that, had their proposed plan been in effect since 2012, it would have allowed Black voters to elect a candidate of their choice in at least one district.[54] The Secretary disputes this assertion.[55]

As the Court reads *Gingles* and its progeny, to satisfy the first prerequisite Plaintiffs need not prove their candidate of choice *would* have been elected. They have put forward enough facts—that the Secretary does not dispute—to establish that their proposed single-member, majority-minority district would give African Americans the *potential* to elect their representative of choice to the Commission. This is sufficient to satisfy the first prerequisite of geography and compactness. *Gingles*, 478 U.S. at 50 n.17 ("Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.") (emphasis in original); *see also Solomon*, 899 F.2d at 1018 n.7 (Kravitch, J. specially concurring) ("So long as the *potential* exists that a minority group could elect its own representative in spite of racially polarized voting, that group has standing to raise a vote dilution challenge under the Voting Rights Act.") (citing *Gingles*, 478 U.S. at 50 n.17) (emphasis added).

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[53] ECF 1-3 (Pls.' Illustrative Districting Plan); ECF 35 (Dec. 8, 2020 H'g Tr.), at 40 (counsel for the Secretary acknowledging Plaintiffs' proposed map draws a majority-minority district).

[54] ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 9.

[55] *Id.*

Plaintiffs are therefore entitled to summary judgment in their favor on the first *Gingles* prerequisite of geography and compactness because they have shown that African Americans are sufficiently large and geographically compact to constitute a majority in a single-member district. The Secretary may present evidence at trial about the inferences the Court should draw from these facts under the totality of the circumstances.

2. Political Cohesiveness

The second *Gingles* prerequisite is that "the minority group . . . show that it is politically cohesive." 478 U.S. at 50. The parties agree that Black voters have been politically cohesive in general elections for members of the Commission since 2012.[56] In fact, Plaintiffs' expert concluded—and the Secretary does not dispute— that such cohesion was present in all general and runoff elections for seats on the Commission from 2012 through the present.[57]

However, the Secretary asserts that there are "no particularized needs of the Black community in the context of utility regulation, because each ratepayer is treated the same and the process of ratemaking is applied statewide."[58] The Secretary further argues that determining the causes of the polarization—racial or partisan—are inappropriate for resolution on summary judgment.[59]

The Court does not view this second prerequisite as requiring an assessment of the *relevancy* of political

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[56] ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 6.

[57] *Id.*, No. 11.

[58] ECF 79-1 (Def.'s Stipulated Facts), ¶ 8.

[59] ECF 85 (Def.'s Resp. to Pls.' Second MSJ), at 12–14.

cohesion as applied to the functions of the Commission, nor the *causes* of polarization. Rather, the weight to be afforded to this *Gingles* prerequisite and the conclusions to be drawn from it should be part of the totality-of-the-circumstances analysis under the Senate Factors. *Gingles*, 478 U.S. at 37 (identifying extent of racial polarization in elections under second Senate Factor); *Solomon*, 899 F.2d at 1015 (Kravitch, J. specially concurring) (same). *See also Nipper v. Smith*, 39 F.3d 1494, 1497 (11th Cir. 1994) (Tjoflat, J. opinion) (noting Supreme Court and Eleventh Circuit have not yet determined under a totality analysis "whether section 2 plaintiffs . . . must demonstrate that their diminished opportunity to participate in the political process and to elect representatives of their choice is being caused by the interaction of racial bias in the voting community and the challenged scheme") (omission in original).

Plaintiffs are therefore entitled to summary judgment on the second *Gingles* prerequisite. In so ruling, the Court draws no conclusions or inferences about why candidates of choice were not elected, the causes of polarization, nor even the relevancy of these facts given the functions of the Commission.[60] The parties remain free to present evidence on these issues at trial.

3. Racial Bloc Voting

The third *Gingles* prerequisite requires that "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the

[60] *Id.* at 14 (arguing the Eleventh Circuit has held it is improper to resolve such issues at summary judgment).

minority's preferred candidate." *Gingles*, 478 U.S. at 51 (citations omitted).

The parties agree that, since 2012, of the 25 candidates for the Commission whose race was known, four were Black.[61] Candidates preferred by Black voters in those elections were (1) not supported by the majority of white voters and (2) defeated,[62] though such candidates are not themselves necessarily Black.[63] General elections for Commission members during that time were polarized along racial lines.[64] White voters thus vote sufficiently as a bloc in Commission elections to have defeated the Black-preferred candidate in every election since 2012.[65]

The parties also agree that their experts appropriately used a statistical estimating method called Ecological Inference (EI) to determine the existence of polarization in voting.[66] The EI method shows "significant polarization" in Georgia elections,[67] but the parties resolutely disagree about the cause(s). The Secretary attributes it to partisanship.[68] Plaintiffs counter that race heavily informs a voter's partisan preferences.[69]

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[61] ECF 79-1 (Def.'s Stipulated Facts), ¶ 11.

[62] ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 7.

[63] *See, e.g.*, ECF 79-4 (Popick Expert Report), at 13 (identifying race of black-preferred candidates).

[64] ECF 85-1 (Def.'s Resp. to Pls.' SUMF), No. 8.

[65] *Id.*, No. 13.

[66] ECF 87-2 (Pls.' Resp. to Def.'s SAMF), No. 1.

[67] *Id.*, No. 2.

[68] *See generally* ECF 80-3 (Barber Expert Report).

[69] *See generally* ECF 80-4 (Fraga Rebuttal Report).

Plaintiffs also argue that the reason for the polarization is not relevant to an analysis of the *Gingles* prerequisites.[70]

In *Gingles*, the Supreme Court treated the terms "racial bloc" and "racial polarization" as interchangeable. 478 U.S. at 53 n.21. While the *extent* of racial polarization is one of the Senate Factors, *id.* at 55, the *existence* of racial-block voting is part of the *Gingles* third prerequisite. In establishing this prerequisite, "the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives." *Id.* at 51.

> [T]he question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2. And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting.

Id. at 56 (citations omitted).

Further, the plurality opinion in *Gingles* concluded that, "[f]or purposes of § 2, the legal concept of racially polarized voting incorporates neither causation nor intent. *It means simply that the race of voters correlates with the selection of a certain candidate or candidates*; that is, it refers to the situation where different races

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[70] ECF 87-2 (Pls.' Resp. to Def.'s SAMF), Nos. 3–7, 9–10.

(or minority language groups) vote in blocs for different candidates." *Id.* at 51 (emphasis added). Thus, four justices concluded that the existence of political polarization does not negate the import of racial-bloc voting. *See also generally Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (emphasizing that "Congress made clear that a violation of § 2 could be established by proof of discriminatory results alone"); *Davis*, 139 F.3d 1414 (not requiring racial bias to be the cause of racial bloc voting to establish the *Gingles* factors). Thus, the Court does not interpret the applicable case law as requiring proof of intentional racial bias on the part of the electorate to satisfy the third prerequisite under *Gingles*.

The Court concludes that Plaintiffs have shown the existence of racial-bloc voting as a matter of law, and entry of summary judgment in favor of Plaintiffs on the third *Gingles* prerequisite is appropriate. However, given the "discrete inquiries" necessary under the Senate Factors to assess "legally significant" racial polarization and the extent of such polarization, those elements and the weight they should receive must be examined at trial.

4. Summary

Plaintiffs' motions for summary judgment are GRANTED with respect to the three basic *Gingles* factors—(1) geography and compactness, (2) political cohesiveness, and (3) racial bloc voting. The causes of polarization, including the effects of partisanship, will be examined as part of the totality-of-the-circumstances analysis at trial, as will Plaintiffs' proposed remedy and injury.

C. The Secretary's Affirmative Defenses

Plaintiffs' motions for summary judgment challenge all of the Secretary's affirmative defenses. Those defenses are:

1. The allegations in Plaintiffs' Complaint fail to state a claim upon which relief may be granted.
2. Plaintiffs' claims are barred for failure to name necessary and indispensable parties.
3. Plaintiffs lack constitutional standing to bring this action.
4. Plaintiffs lack statutory standing to bring this action.
5. Plaintiffs' federal claim against Defendant is barred by the Eleventh Amendment to the United States Constitution.
6. Plaintiffs' claim is barred by sovereign immunity.
7. Plaintiffs' Complaint requests relief that will result in a violation of the U.S. Constitution because Plaintiffs' proposed remedies require the use of race as a predominate factor in the redistricting process, which is prohibited by the Equal Protection Clause of the Fourteenth Amendment.
8. Plaintiffs' Complaint requests relief that will result in a violation of the U.S. Constitution because Plaintiffs' proposed remedies require the alteration of the form of government of the State of Georgia.

> 9. Defendant denies that Plaintiffs have been subjected to the deprivation of any right, privilege, or immunity under the Constitution or laws of the United States.[71]

The Secretary's Tenth Affirmative Defense is actually a reservation of rights: "Defendant reserves the right to amend its defenses and to add additional ones, including lack of subject matter jurisdiction based on the mootness or ripeness doctrines, as further information becomes available in discovery."[72] The Secretary has withdrawn his Seventh, Ninth, and Tenth Affirmative Defenses,[73] and the Court has already addressed the Second, Third, Fourth, and Eighth Affirmative Defenses above. The Court addresses the Secretary's remaining affirmative defenses (First, Fifth, and Sixth) *seriatim*.

1. First Affirmative Defense: Failure to State a Claim

The Court has already ruled that Plaintiffs' Complaint withstood dismissal under Rule 12(b)(6).[74] Discovery is now complete. The Secretary's contention that Plaintiffs' first summary judgment motion was premature is therefore moot. The Secretary's argument about why the Court's Motion to Dismiss Order did not dispose of this defense is that the denial was "on an exceedingly charitable standard of review," and surviving summary judgment is different.[75] That is true but somewhat beside the point. As Plaintiffs point out, whether a party has failed to state a claim is determined based

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[71] ECF 37 (Ans.), at 1–3.

[72] *Id.* at 3.

[73] ECF 85, at 7 n.3.

[74] ECF 36 (Jan. 5, 2021 Op. & Order).

[75] ECF 62 (Def.'s Resp. to Pls.' First MSJ), at 2–3.

on the face of the pleading. To withstand dismissal under Rule 12(b)(6), "a *complaint* must [ ] contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Am. Dental Ass'n v. Cigna Corp.,* 605 F.3d 1283, 1289 (11th Cir. 2010) (emphasis added) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

The Court has already ruled on the sufficiency of the Complaint, so the Secretary's First Affirmative Defense is moot and judgment in favor of Plaintiffs on that defense is appropriate. The Court GRANTS Plaintiffs' motion for summary judgment on the Secretary's First Affirmative Defense. This, of course, has no bearing on the burden Plaintiffs must carry to prevail at trial.

2. Fifth and Sixth Affirmative Defenses: Eleventh Amendment and Sovereign Immunity

The Court understands that the Secretary has maintained these defenses to preserve them for appellate review, since the Court has already rejected them.[76]

To reiterate, Supreme Court and Circuit precedent compel this Court to find that (1) private plaintiffs have standing to sue under Section 2; (2) such causes of action are not barred by the Eleventh Amendment; and (3) Section 2 is a valid exercise of congressional power under the Fourteenth and Fifteenth Amendments, overriding states' sovereign immunity. The Court GRANTS summary judgment in favor of Plaintiffs on the Secretary's Fifth and Sixth Affirmative Defenses.

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[76] ECF 36 (Jan. 5, 2021 Op. & Order), at 41, 44–46.

IV. Conclusion

The Court DENIES Defendant's motion for summary judgment [ECF 80] in its entirety and GRANTS in part and DENIES in part Plaintiffs' partial motions for summary judgment [ECF 56; ECF 79]. Plaintiffs' motions are GRANTED with regard to the *Gingles* prerequisites of (1) geography and compactness; (2) political cohesiveness; and (3) racial bloc voting [ECF 79, at 15–19]. To the extent that Plaintiffs' proposed remedy is considered part of the first *Gingles* prerequisite, Plaintiffs' motions are DENIED. Neither Plaintiffs nor the Secretary [ECF 80-1, at 15–21] are entitled to summary judgment on that issue.

Plaintiffs' motions are GRANTED as to the Secretary's First and Second Affirmative Defenses [ECF 56, at 5–6].

Plaintiffs' motions are DENIED as to the Secretary's Third and Fourth Affirmative Defenses [ECF 56, at 7–9; ECF 79, at 8–10].

Plaintiffs' motions are GRANTED as to the Secretary's Fifth, Sixth, and Seventh Affirmative Defenses [ECF 56, at 9–10; ECF 79, at 8].

Plaintiffs' motions are DENIED as to the Secretary's Eighth Affirmative Defense [ECF 79, at 10–14].

Plaintiffs' motions are GRANTED as to the Secretary's Ninth and Tenth Affirmative Defenses [ECF 79, at 7].

Finally, Plaintiffs separately move the Court to take judicial notice of certain census data that they assert is relevant to the fifth Senate Factor.[77] While the Secretary does not believe the data is relevant to the resolution of this case, he does not oppose the Court

[77] ECF 57 (Pls.' Mot. for Judicial Notice), at 2.

taking judicial notice of the data itself.[78] Accordingly, Plaintiffs' Motion for Judicial Notice of Census Data [ECF 57] is GRANTED.

Within seven days after entry of this Order, the parties are DIRECTED to file a joint scheduling proposal, to include pre-trial deadlines, a proposed timeframe for trial (including an estimated length of the trial), and post-trial deadlines. The joint proposal may note areas of disagreement. Following receipt and review of the joint scheduling proposal, the Court will enter a trial order or schedule a conference for further discussion.

SO ORDERED this 24th day of January, 2022.

/s/ Steven D. Grimberg
Steven D. Grimberg
United States District Court Judge

[78] ECF 61 (Def.'s Resp. to Pls.' Mot. for Judicial Notice).