No. 25-____

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

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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).

In an earlier appeal in this case, the Eleventh Circuit announced a novel rule under the first *Gingles* precondition: that a Section 2 plaintiff challenging a State's at-large method of electing a multimember commission must propose an at-large remedy that does not alter the State's preferred method of election. The petitioners promptly moved to amend their complaint to plead at-large remedies consistent with that new rule. The district court denied leave to amend, and the Eleventh Circuit affirmed.

The questions presented are:

1. Whether a district court may deny a Section 2 plaintiff leave to amend its complaint to meet a new legal standard announced for the first time in a prior appeal, when *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), *Gill v. Whitford*, 585 U.S. 48 (2018), and *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015) (*ALBC*), require that plaintiffs be given an opportunity to satisfy such a newly announced standard.

2. Whether the Eleventh Circuit's novel rule requiring Section 2 vote-dilution plaintiffs to propose a remedy that does not alter the State's chosen electoral model is contrary to Section 2, *Gingles*, and *Milligan*.

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 appellants 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 motion to dismiss)
- *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)
- *Rose v. Raffensperger*, No. 1:20-cv-02921-SDG (Mar. 7, 2025) (opinion and order denying plaintiffs' motion for leave to amend)

United States Court of Appeals for the Eleventh Circuit:

- *Rose v. Secretary, State of Georgia*, No. 22-12593 (Aug. 12, 2022) (granting stay pending appeal)
- *Rose v. Secretary, State of Georgia*, No. 22-12593 (Nov. 24, 2023) (reversing the district court's judgment for the plaintiffs)
- *Rose v. Secretary, State of Georgia*, No. 22-12593 (July 10, 2024) (denying rehearing en banc)
- *Rose v. Secretary of State of the State of Georgia*, No. 25-11233 (Nov. 25, 2025) (affirming the denial of leave to amend)

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. 23-1060 (June 24, 2024) (mem.) (denying certiorari)

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OPINIONS BELOW

The Eleventh Circuit's opinion in the current appeal was entered on November 25, 2025. It is reproduced at Pet. App. 1a and is unpublished. The district court's order denying the plaintiffs' motion for leave to amend was entered on March 7, 2025. It is reproduced at Pet. App. 9a and is unreported. The Eleventh Circuit's prior opinion, entered on November 24, 2023, is reproduced at Pet. App. 18a and is reported at 87 F.4th 469. The Eleventh Circuit's opinions on denial of rehearing en banc, entered on July 10, 2024, are reproduced at Pet. App. 103a and are reported at 107 F. 4th 1272. The district court's opinion after trial, entered on August 5, 2022, is reproduced at Pet. App. 49a and is reported at 619 F. Supp. 3d 1241.

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on November 25, 2025. Justice Thomas granted two extensions of time to file a petition for a writ of certiorari through April 24, 2026. 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

After years of litigation over the method of electing Georgia's Public Service Commission, the plaintiffs here—four Black voters—prevailed at a bench trial in 2022. The Eleventh Circuit later reversed, holding that the district court had committed an error of law by failing to apply a standard for racial vote dilution that no court had ever previously applied to a multimember commission like the PSC. The court of appeals did not hold that the plaintiffs could not meet that standard in this case, and it remanded the case to the district court without any instruction to dismiss.

The plaintiffs then sought to amend their complaint to conform to the Eleventh Circuit's new standard. But the district court denied leave to do so, concluding

(among other things) that the plaintiffs should have amended their complaint years earlier, after the district court had *rejected* the very standard that the Eleventh Circuit later adopted. The Eleventh Circuit then affirmed, ruling that the district court did not abuse its discretion in denying leave to amend. The court noted that "the plaintiffs are free to file a new suit" challenging PSC elections under the Eleventh Circuit's new standard, but it warned that they would face claim-preclusion issues if they sought to do so. Pet. App. 7a n.3.

STATEMENT OF THE CASE

A. Georgia's Public Service Commission

The Public Service Commission is a quasi-legislative, quasi-judicial "administrative body" that regulates utilities in Georgia. *Rose v. Secretary, State of Georgia*, 87 F.4th 469, 473 (11th Cir. 2023) (*Rose I*). The Commission "conducts some of its proceedings as an adjudicatory body," in that it "hears rate cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders." *Id.* It also occupies a "legislative role" in that it "sets utility rates, controls permitting for power plant construction, and regulates pole attachments and landlines for communications." *Id.* "Simply put, the PSC is important to the State and its citizens." *Id.*

The Commission consists of five members. Ga. Const. art. IV, § 1, ¶ I(a). Georgia's Constitution provides that commissioners "shall be elected by the people" for six-year terms, *id.*, but commits the "manner" of their election to the General Assembly, *id.* ¶ I(c). The General Assembly, in turn, provided that commissioners "shall be elected state wide." O.C.G.A. § 46-2-1(a), (d).

Although Georgia law provides that commissioners are elected at large by all voters in the State, they are "required to be residents of one of five Public Service Commission Districts." O.C.G.A. § 46-2-1(a). These residency districts are prescribed by statute and embrace whole counties within the State. O.C.G.A. § 46-2-1(c). District 3, which encompasses the Atlanta area, is majority-Black.

While residency districts were first adopted in 1998, the at-large, statewide manner of electing commissioners has been prescribed by state statute since 1906. *Rose I*, 87 F.4th at 473. After more than a century of at-large contests, and although Georgia's voting-age population is more than 32 percent Black, only one Black person had ever been elected to the Commission by the time of the trial in this case.

B. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act of 1965 provides that "[n]o 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." 52 U.S.C. § 10301(a). Section 2 thus forbids at-large elections that result in racial vote dilution. *Gingles*, 478 U.S. at 43-51.

To establish a Section 2 violation, a plaintiff must show, "based on the totality of circumstances," 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." 52 U.S.C. § 10301(b).

In *Gingles*, this Court identified three preconditions for a vote-dilution claim under Section 2. "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." 478 U.S. at 50. "Second, the minority group must be able to show that it is politically cohesive." *Id.* at 51. "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[]—usually to defeat the minority's preferred candidate." *Id.* If a plaintiff satisfies those preconditions, Section 2 then requires a court to determine, based on a review of the "totality of circumstances," whether the challenged practice results in unequal electoral opportunity for minority voters. 52 U.S.C. § 10301(b); *see Gingles*, 478 U.S. at 43-44, 79.

C. The Plaintiffs' Lawsuit

The plaintiffs are four Black voters who reside in District 3 and have voted in recent Commission elections. They filed this lawsuit in July 2020 alleging that the method of electing commissioners unlawfully dilutes the voting strength of Black Georgians, in violation of Section 2. In support of their allegations regarding the first *Gingles* precondition, the plaintiffs attached to their complaint an illustrative plan for replacing the at-large method with elections from five single-member districts. That plan included one majority-Black district encompassing the Atlanta area.

In August 2020, the Secretary moved to dismiss. He argued, as relevant here, that the plaintiffs could not establish a feasible remedy under the first *Gingles*

precondition because it was "beyond the capacity of federal courts" to alter a State's chosen "form of government" by converting Georgia's at-large method of election to one based on single-member districts.

After full briefing and oral argument, the district court issued a 47-page ruling in January 2021 denying the Secretary's motion. The court found the Secretary's feasibility argument to be premature for several reasons, including because "nothing in the language of Section 2" supported the Secretary's position that States should be treated differently from their political subdivisions. To the contrary, the court found, "the statute applies equally to states and their political subdivisions."

After the close of discovery, the Secretary moved for summary judgment. He argued again that the plaintiffs' proposed remedy was not feasible because it would "require the alteration of the form of government of the State of Georgia." After full briefing and oral argument, the district court issued a 37-page ruling in January 2022 denying the Secretary's motion for summary judgment and granting in part the plaintiffs' motions. The court deferred the Secretary's feasibility argument until trial. It largely granted summary judgment to the plaintiffs on the three *Gingles* preconditions, finding the essential facts underlying each to be undisputed.

D. The Bench Trial

The district court presided over a five-day bench trial from June 27 to July 1, 2022. At trial, the plaintiffs called a dozen witnesses, including two experts. The Secretary called only his expert. The court admitted more than 100 exhibits into evidence.

E. The District Court's Bench-Trial Ruling

In August 2022, the district court issued a 64-page decision concluding that Georgia's at-large method of electing Public Service Commissioners violates Section 2. Applying the well-established framework from *Gingles*, the court found 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. 77a-78a. After finding that the plaintiffs had also satisfied the remaining two *Gingles* preconditions based largely on undisputed evidence, the district court examined the nine Senate Factors as part of its totality-of-the-circumstances analysis. It found that six of the nine, including the two factors that *Gingles* instructs are "most important," weighed in the plaintiffs' favor. Pet. App. 94a.

Because the Secretary 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. Applying well-settled law, the district court explained that single-member districts were "a standard remedy for a Section 2 violation caused by at-large elections" that courts "must impose" unless they could "articulate such a singular combination of unique factors" that a different result is justified. Pet. App. 96a-97a.

The Secretary, relying on circuit precedent concerning the election of trial judges, had argued repeatedly that a remedy of single-member districts would impermissibly alter Georgia's chosen form of government. The district court rejected that argument, concluding that "the Eleventh Circuit has not extended its

application" of that precedent beyond the "unique context" of judicial elections and finding that the PSC "is by and large an administrative body with policy-making responsibilities that make it qualitatively different than courts." Pet. App. 93a-94a.

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. Plaintiffs then petitioned for a writ of certiorari, which was denied.

F. The Prior Appeal

In November 2023, a panel of the Eleventh Circuit reversed the district court's judgment on the sole ground that the plaintiffs had "offer[ed] only a single, dramatic remedy"—electing PSC members from single-member districts—which the panel found not viable under the first *Gingles* precondition given the State's asserted interest in maintaining at-large elections for the PSC. Pet. App. 26a.

Relying on circuit opinions about elections of trial judges and "general principles of federalism," the panel 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. 43a-44a. *See Nipper v. Smith*, 39 F.3d 1494, 1531 (11th Cir. 1994) (en banc); *SCLC v. Sessions*, 56 F.3d 1281, 1294, 1298 (11th Cir. 1995) (en banc); *Davis v. Chiles*, 139 F.3d 1414, 1423 (11th Cir. 1998). The panel applied those precedents for the first time to a multi-member commission and concluded that single-member districts failed the panel's new test because

"Georgia chose the statewide electoral model for the PSC, and plaintiffs' proposed remedy would alter that choice in contravention of the principles of federalism." Pet. App. 46a. The district court's earlier conclusion that the plaintiffs had satisfied the first *Gingles* precondition with a proposal for single-member districts was thus "a mistake of law" under the panel's new standard. Pet. App. 34a.

At the same time, the panel did not "suggest that Section 2 plaintiffs could never prevail when asserting a Section 2 vote dilution claim against a statewide body." Pet. App. 43a. Nor did the panel address the alternative race-blind remedies within the confines of a statewide electoral system—such as cumulative voting, limited voting, or ranked-choice voting—detailed in the amicus brief submitted by the United States. And because the panel "decide[d] this appeal on the remedy requirement at the first *Gingles* precondition," it did "not consider the Secretary's argument that the district court's finding of racial vote dilution was clearly erroneous" and did "not proceed to analyze the 'Senate factors' at *Gingles*'s totality of the circumstances stage." Pet. App. 34a n.11. The panel left those findings undisturbed.

Shortly after the panel issued its ruling, a judge of the Eleventh Circuit requested a poll on whether to rehear the case en banc, and the Court's mandate was withheld for almost seven months pending resolution of that poll. On July 10, 2024, the Eleventh Circuit denied rehearing. Judge Branch, joined by Judge Grant, issued a statement respecting the denial of rehearing in which she confirmed that the panel's holding "was based entirely on the impermissibility of plaintiffs' proposed remedy" and that the panel's ruling did not mean "that Section 2 plaintiffs could

never prevail when asserting a Section 2 vote dilution claim against a statewide body." Pet. App. 109a n.7, 110a.

Judge Wilson and Judge Rosenbaum, joined by Judge Pryor, dissented from the denial of rehearing. As Judge Rosenbaum explained, "the panel did not disagree with the district court's factual findings. Nor did it disagree with the district court's conclusion that the existing PSC elections result in racial bloc voting that prevents Black voters in Georgia from electing their preferred candidates to the PSC. Instead, the panel determined that the plaintiffs' challenge cannot succeed because their proposed remedy—a single-member districted election—is not the same as the State's existing electoral system." Pet. App. 127a. The Eleventh Circuit's mandate issued a week later. The plaintiffs unsuccessfully petitioned for a writ of certiorari, which was denied.

G. The Plaintiffs' Motion for Leave to Amend

On the same day the mandate issued, the plaintiffs filed their first motion for leave to amend their complaint to address the Eleventh Circuit's new standard. Four days later, the district court entered judgment. Out of an abundance of caution, the plaintiffs filed an additional motion for relief under Rules 59 and 60. The plaintiffs' proposed amended complaint added one paragraph plausibly alleging that "[t]here are numerous remedies that could be adopted within the confines of a statewide system of elections."

In March 2025, the district court denied the plaintiffs' motion for leave to amend. The district court did not find that the plaintiffs' proposed remedies were unviable or otherwise implausible. In fact, the district court did not evaluate the plausibility of the plaintiffs' proposed remedies at all. Instead, the district court

found that the plaintiffs had unreasonably delayed in bringing their motion, faulting the plaintiffs for not amending their complaint earlier in the case. The district court further ruled that the amended complaint would prejudice the Secretary and would be futile because, in the district court's view, the Eleventh Circuit had already spoken.

H. The Second Appeal

The plaintiffs appealed. On November 25, 2025, a panel of the Eleventh Circuit affirmed in an unpublished per curiam opinion. The panel assumed that Rule 15(a) applied and held that the district court had not abused its discretion because allowing the plaintiffs to amend "would severely prejudice the Secretary." Pet. App. 5a. The panel reasoned that permitting amendment "would require restarting several aspects of this case and would force the Secretary to bear repetitive litigation costs." *Id.*

The panel also rejected the plaintiffs' argument that *Pullman-Standard* required a different result. Pet. App. 7a. According to the panel, *Pullman-Standard* "did not impose a requirement—it merely stated 'the usual rule.'" *Id.* The panel also concluded that *Pullman-Standard* "provides an instruction to appellate courts, not district courts." *Id.* In a footnote, the panel observed that "the plaintiffs are free to file a new suit," though it added that the plaintiffs "fail to explain how that suit would survive the doctrine of claim preclusion." *Id.* at n.3.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the Eleventh Circuit has twice decided "important federal question[s]" in this case in ways that conflict with this Court's decisions. Sup. Ct. R. 10(a), (c). First, in the decision below, the Eleventh Circuit approved the dismissal of a voting-rights case without giving the plaintiffs any opportunity to meet a novel standard announced for the first time in a prior appeal in this very case. That result cannot be squared with this Court's repeated instruction that, when a lower court "has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." *Pullman-Standard*, 456 U.S. at 291; *see also Gill*, 585 U.S. at 72-73; *ALBC*, 575 U.S. at 262. Second, the novel standard itself—announced by the Eleventh Circuit in *Rose I* and grafted onto the first *Gingles* precondition—conflicts with this Court's decisions in *Gingles* and *Milligan* and with the decisions of at least five other circuits. That ruling is what forced the plaintiffs to replead in the first place. Had the Eleventh Circuit correctly applied *Gingles* and *Milligan* in *Rose I*, no amendment would have been necessary, and this case would already be over.

Each error independently warrants review. Together, they have produced a manifestly unjust result: a case in which the plaintiffs proved racial vote dilution at trial has been dismissed without any meaningful opportunity to cure a pleading deficiency that was created entirely by a change in the law—and a change, moreover, that finds no support in this Court's precedents. The Eleventh Circuit's panel misread *Pullman-Standard* as a mere admonition to appellate

courts that district courts are free to ignore. But the rule is one of basic procedural fairness that applies whenever an appellate decision changes the law of the case, and this Court has expressly applied it in the voting-rights context to require that plaintiffs be given an opportunity to prove their claims under a newly announced standard. *See Gill*, 585 U.S. at 72-73; *ALBC*, 575 U.S. at 262. And the *Rose I* ruling that prompted the amendment in the first place cannot be reconciled with this Court's longstanding *Gingles* framework, which this Court "reaffirm[ed]" just three years ago in *Milligan*. 599 U.S. at 17.

I. The decision below conflicts with *Pullman-Standard, Gill,* and *ALBC*.

For more than forty years, this Court has recognized a "usual rule" that, when an appellate court announces a new legal standard, plaintiffs must be given an opportunity to meet that standard on remand. *Pullman-Standard*, 456 U.S. at 291. That rule is grounded in "elementary principles of procedural fairness." *ALBC*, 575 U.S. at 271. And it applies with special force in voting-rights cases, where this Court has twice required that plaintiffs be given an opportunity to develop their claims under newly announced standards. *See Gill*, 585 U.S. at 72-73; *ALBC*, 575 U.S. at 262. The Eleventh Circuit's decision here cannot be reconciled with any of those precedents.

1. In *Pullman-Standard*, this Court held that "[w]hen an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." 456 U.S. at 291. That is exactly what happened here. In *Rose I*, the Eleventh Circuit held that the district court had

committed "a mistake of law" about what the first *Gingles* precondition requires, and that a Section 2 plaintiff must now show, as a matter of fact, whether a remedy is possible "within the confines of the state's chosen model of government." 87 F.4th at 479, 484. The district court had made no such factual finding because it had applied previously well-settled circuit law under which no such finding was required.

That is the paradigm scenario in which the *Pullman-Standard* rule applies. The district court "failed to make a finding because of an erroneous view of the law." 456 U.S. at 291. The "usual" course is a remand "to permit the trial court to make the missing findings." *Id.* The record below indicates that a race-blind remedy within the confines of Georgia's chosen model of government is feasible; the United States detailed several such remedies—including cumulative voting, limited voting, and ranked-choice voting—in its amicus brief in *Rose I*. But the record on that issue is undeveloped precisely because the district court's legal error meant no one had reason to develop it. Under *Pullman-Standard*, the plaintiffs are entitled to an opportunity to do so.

2. This Court has twice made clear that the *Pullman-Standard* rule applies with full force in voting-rights cases. In *ALBC*, the Court held that when a district court's decision "reflects an error about relevant law," the plaintiffs in a voting-rights case must be permitted to "reargue" their claims and "introduce such further evidence" as appropriate to meet the new standard. 575 U.S. at 262. "[E]lementary principles of procedural fairness," the Court explained, "require" that plaintiffs be given "an opportunity to provide evidence" to meet the correct legal standard, particularly where there is "no reason to believe that the

[plaintiff] would have been unable" to do so "had it been asked." *Id.* at 270-71.

In *Gill*, this Court extended *Pullman-Standard* to a voting-rights case in which the plaintiffs were found to lack standing. Although the Court noted that the usual practice in such a case is to remand with instructions to dismiss, it "decline[d] to direct dismissal," but rather remanded the case "so that the plaintiffs may have an opportunity to prove [standing] using evidence" meeting a newly announced standard. 585 U.S. at 72-73. The Court did so because the case "concern[ed] an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved." *Id.* at 73. On remand, the plaintiffs in *Gill* were given leave to amend their complaint to allege facts necessary to satisfy the newly announced standard. *See* Am. Compl., *Whitford v. Gill*, No. 15-cv-421 (W.D. Wis. Sept. 14, 2018), ECF 201.

This case calls for precisely the same result. Like the plaintiffs in *Gill* and *ALBC*, the petitioners here faithfully pursued their Section 2 claim under well-settled law, only to be told on appeal that the law had changed and that they had failed to plead facts sufficient to meet a standard that did not previously exist. And like the plaintiffs in those cases, the petitioners here sought the opportunity to meet the new standard through a modest amendment adding one paragraph plausibly alleging "numerous remedies that could be adopted within the confines of a statewide system of elections." Under *Pullman-Standard*, *Gill*, and *ALBC*, they are entitled to that opportunity.

3. The Eleventh Circuit dismissed *Pullman-Standard* on two grounds, each of which is wrong. First, the panel reasoned that *Pullman-Standard* "did not impose a requirement—it merely stated 'the usual

rule.'" Pet. App. 7a. But that is a distinction without a difference. The rule is "usual" in the sense that it applies absent some extraordinary reason to depart from it. No such reason exists here. To the contrary, as Judge Branch herself emphasized in denying rehearing, *Rose I* did not mean "that Section 2 plaintiffs could never prevail when asserting a Section 2 vote dilution claim against a statewide body." Pet. App. 104a. The panel in *Rose I* left open the possibility that the plaintiffs might cure the readily fixable deficiency on remand—exactly as *Pullman-Standard* contemplates.

Second, the panel concluded that *Pullman-Standard* "provides an instruction to appellate courts, not district courts," and so "provides no guidance for whether a district court should grant a plaintiff leave to amend a complaint." Pet. App. 7a. That reasoning cannot be squared with either *Gill* or *ALBC*. In *Gill*, this Court did not instruct the district court to allow amendment; it instead applied the *Pullman-Standard* rule to remand for further proceedings, and the district court on remand understood its obligations under that remand order to include granting the plaintiffs leave to amend. 585 U.S. at 72-73. Similarly, in *ALBC*, this Court held that the district court itself had been required, as a matter of "procedural fairness," to give the plaintiffs an opportunity to provide evidence under the correct legal standard—even "acting *sua sponte*." 575 U.S. at 271. The rule thus reaches district courts as well as appellate courts; the panel's contrary reading would leave plaintiffs at the mercy of whichever court happens to speak last, without any meaningful opportunity to cure deficiencies created by a change in the law.

In any event, the district court here did misinterpret the Eleventh Circuit's mandate in *Rose I* in a manner

contrary to *Pullman-Standard*. When an appellate court intends for a case to be dismissed, it will leave no doubt and remand with instructions for dismissal. *See, e.g., Haaland v. Brackeen*, 599 U.S. 255, 296 (2023) ("[W]e vacate the judgment of the Court of Appeals and remand with instructions to dismiss for lack of jurisdiction."). The mandate in *Rose I* contained no such instruction. And the panel in *Rose I* expressly left open the possibility of alternative remedies. Under those circumstances, *Pullman-Standard* required the district court to permit further proceedings. The panel's ruling that the district court was free to disregard *Pullman-Standard*, *Gill*, and *ALBC* is an important and recurring error that this Court should correct.

4. The panel's alternative holding—that the Secretary would be "severely prejudice[d]" by an amendment (Pet. App. 5a)—is no more defensible. Any prejudice to the Secretary from a limited remand to develop the record on alternative remedies pales beside the prejudice to the plaintiffs, who have already proved racial vote dilution at trial but are now being denied any chance to cure a pleading deficiency created entirely by a change in the law. As Judge Rosenbaum observed, "the panel did not disagree with the district court's factual findings" in *Rose I*, "[n]or did it disagree with the district court's conclusion that the existing PSC elections result in racial bloc voting that prevents Black voters in Georgia from electing their preferred candidates to the PSC." *Rose v. Secretary, State of Georgia*, 107 F.4th 1272, 1283 (11th Cir. 2024) (*Rose II*) (Rosenbaum, J., dissenting). Denying leave to amend under these circumstances produces the manifestly unjust result of dismissing, without any opportunity for cure, a case in which liability has already been established on the merits. The Eleventh Circuit's suggestion that the plaintiffs are "free to file

a new suit" only compounds the injustice. Pet. App. 7a n.3. As the panel itself acknowledged, any such suit would raise serious questions of claim preclusion. *Id.* And forcing the plaintiffs to start over from scratch—re-litigating facts that have already been proved and findings that no court has ever questioned—would be a waste of the parties' and the courts' resources, not a cure for it.

5. The issue is of recurring importance. *Pullman-Standard*, *Gill*, and *ALBC* provide the procedural backstop that ensures plaintiffs are not punished when an appellate court changes the law underlying their claims. If the Eleventh Circuit's decision stands, plaintiffs in that circuit will be forced to plead every conceivable theory and remedy at the outset of their cases—just in case a court later changes the law—or else risk dismissal with prejudice. That rule is both wasteful and unjust, and it finds no support in this Court's precedents. Certiorari is warranted to restore *Pullman-Standard*'s usual rule and to ensure that Section 2 plaintiffs in particular, who often litigate their cases for years under evolving legal standards, are not deprived of a meaningful opportunity to meet those standards.

II. The Eleventh Circuit's ruling on the first *Gingles* precondition in *Rose I* conflicts with this Court's decisions in *Gingles* and *Milligan*.

The Eleventh Circuit's ruling on the merits is not a side issue. It is the reason the plaintiffs needed to amend their complaint in the first place. Had the Eleventh Circuit decided the first *Gingles* precondition properly in *Rose I*—consistent with this Court's decisions in *Gingles* and *Milligan*—no amendment would have been necessary. The district court's

judgment in the plaintiffs' favor would have been affirmed, and this case would be over. The Court should grant certiorari on this question as well, for the reasons explained in the plaintiffs' earlier petition. *See* Petition for a Writ of Certiorari, *Rose v. Raffensperger*, No. 23-1060 (U.S. Mar. 25, 2024).

1. The Eleventh Circuit's ruling in *Rose I* conflicts with *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. 46a. 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"). *Gingles* itself was a challenge to North Carolina's chosen electoral model for its General Assembly. *Id.* at 34-35. 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." *Id.* at 50; *accord Milligan*, 599 U.S. at 18. In the decades since *Gingles*, this Court has never required a plaintiff, as a threshold matter, to propose a remedy that does not alter a State's chosen electoral model. *See Milligan*, 599 U.S. at 18; *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 402 (2022); *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 v. Hall*, 512 U.S. 874, 880 n.1 (1994); *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 circuit has interpreted *Gingles* as the Eleventh Circuit did in *Rose I*. Every other circuit considers a State's interest in maintaining its electoral system as part of the required totality-of-circumstances analysis, not as a threshold requirement under the first *Gingles* precondition. *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*, 180 F.3d 476, 495 (2d Cir. 1999); *Sanchez v. Colorado*, 97 F.3d 1303, 1325-26 (10th Cir. 1996). And the Eighth Circuit has affirmed a vote-dilution challenge to a statewide legislative redistricting plan that used dual-member districts and at-large elections, without ever requiring the plaintiffs to stick with the State's chosen electoral model. *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1016, 1018 (8th Cir. 2006).

The Eleventh Circuit's formulation is an exception that swallows the rule. It admits of no limiting principle: it would seemingly apply to any county commission, school board, or other multimember body whose method of election has some basis in state law. And it would allow a State to insulate its legislative districts from challenge simply by converting some or all of them to multimember districts. That result cannot be squared with *Gingles* or with the text of Section 2, which contains no such exception.

2. The *Rose I* ruling also conflicts with *Milligan*. In *Milligan*, this Court 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 (quoting 52 U.S.C. § 10301(b)). That command—drawn from the text of Section 2—is no mere suggestion. Yet the panel in *Rose I* treated it as such. Relying on circuit "precedents" concerning judicial elections that are unique to the Eleventh Circuit, the panel held that the plaintiffs could not prevail because "Georgia chose the statewide electoral model for the PSC, and plaintiffs' proposed remedy would alter that choice." Pet. App. 46a. The panel did not analyze the three well-established *Gingles* preconditions as this Court described them in *Milligan*. Nor did it analyze the Senate Factors at the totality-of-circumstances stage. Instead, it 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." Pet. App. 40a.

"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 (per curiam) (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 in *Rose I* committed the same error; it simply fixated on a different circumstance—Georgia's asserted policy interests. By giving those interests "insurmountable weight" at the threshold, the panel effectively immunized Georgia's at-large system (and similar systems across the country) from any meaningful Section 2 challenge. That is not "the law as it exists," *Milligan*, 599 U.S. at

23, unless you are a minority voter in the Eleventh Circuit.

3. The merits question is inextricable from the question whether leave to amend should have been granted. The entire reason the plaintiffs needed to amend their complaint is that the Eleventh Circuit's *Rose I* ruling created—out of whole cloth—a new threshold requirement under the first *Gingles* precondition. Had the panel in *Rose I* correctly applied *Gingles* and *Milligan*, it would have affirmed the district court's judgment for the plaintiffs. There would have been no need to replead, and no occasion for the district court's denial of leave to amend or the Eleventh Circuit's affirmance of that denial. Reviewing only the procedural question thus risks leaving the underlying legal error uncorrected and forcing the plaintiffs (and courts) to expend further resources litigating under a standard that has no basis in this Court's precedents.

Granting review on the second question presented would also give the Court the opportunity to correct the broader harm the *Rose I* decision works on Section 2 enforcement in the Eleventh Circuit. Georgia is not the only State implicated. Nine other States have statewide boards or commissions like the PSC that are elected at large, and many more county commissions and school boards use at-large elections established by state law. The *Rose I* panel's rationale would effectively insulate all of them from Section 2 challenge. That is a sweeping and unprecedented change in Voting Rights Act enforcement that warrants this Court's review.

III. The Court should hold this petition pending the decision in *Callais*.

In the alternative, this Court should hold the petition pending its decision in *Louisiana v. Callais*, No. 24-109. *Callais* was reargued to this Court on October 15, 2025, and it directly involves the constitutionality of Section 2 of the Voting Rights Act and the standards that a Section 2 plaintiff must meet in order to establish liability. The decision in *Callais* could have a material effect on the first question presented here.

This case is a Section 2 vote-dilution case, and the threshold legal framework for Section 2 claims is squarely at issue in *Callais*. If the Court in *Callais* modifies the *Gingles* framework, alters the standards for proving a Section 2 violation, or addresses the constitutionality of Section 2 itself, its decision may change what the plaintiffs in this case must prove on remand—and, by extension, whether the amendment they sought was necessary, sufficient, or futile. Because the second question presented in this petition concerns the very substantive standards that are at issue in *Callais*, the Court's disposition of *Callais* may dictate or at least inform the proper disposition of this case.

Holding such petitions in such circumstances is routine. This Court has frequently held petitions that raise issues bearing on a pending case. *See, e.g., Oklahoma v. United States*, 145 S. Ct. 2836 (2025) (mem.). The procedural posture of this case makes a hold especially appropriate: the plaintiffs prevailed at trial on a theory of racial vote dilution that no court has since held to be factually infirm, and the only remaining question is whether they may amend their complaint to satisfy a newly announced threshold requirement that is itself bound up with the broader

Section 2 questions in *Callais*. Resolving this petition now—either way—risks either granting relief on a framework that *Callais* may recast or denying relief on assumptions about Section 2 that *Callais* may reject.

The practical effect of *Callais* on Section 2 litigation is already evident. This Court appears to be holding three appeals presenting the question whether private individuals can sue under Section 2. *See Turtle Mountain Band of Chippewa Indians v. Howe*, No. 25-253; *State Bd. of Election Comm'rs v. Miss. State Conference of the NAACP*, No. 25-234; *Allen v. Milligan*, No. 25-274. And the Eleventh Circuit has stayed an Alabama Section 2 appeal pending the resolution of *Callais*. *See* Order, *Alabama State Conf. of the NAACP v. Sec'y of State for the State of Ala.*, No. 25-13007 (11th Cir. Dec. 12, 2025), ECF 61-1. Holding this petition would follow that sensible course, conserving the parties' resources and those of this Court, while ensuring that any decision on the merits of this case is informed by this Court's latest pronouncement on Section 2.

A hold is especially warranted here because *Callais* may further change what a Section 2 plaintiff must plead and prove to establish liability—and the plaintiffs should have the chance to meet any such new standard. The plaintiffs have already been through one round of this exercise: after litigating and winning their case under then-settled law, they were told on appeal in *Rose I* that they had to plead something more to satisfy the first *Gingles* precondition. If *Callais* announces further changes to the *Gingles* framework, the elements of a Section 2 claim, or the standards for proving racial vote dilution, the plaintiffs will need an opportunity to meet those new standards as well. The same principles of procedural

fairness that underlie *Pullman-Standard*, *Gill*, and *ALBC* demand as much. Holding this petition pending *Callais* would ensure that the plaintiffs' case is ultimately evaluated under the correct legal framework and, if necessary, that they have the opportunity to plead and prove their Section 2 claim under whatever standard this Court ultimately adopts.

Accordingly, if this Court does not grant the petition outright, it should hold the petition pending its decision in *Callais* and then, if appropriate, grant, vacate, and remand in light of that decision.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari. In the alternative, the Court should hold the petition pending its decision in *Louisiana v. Callais*, No. 24-109, and then, if appropriate, grant, vacate, and remand in light of that decision.

Respectfully submitted,

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April 24, 2026

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 25-11233

Non-Argument Calendar

RICHARD ROSE, an individual, BRIONTE MCCORKLE, an individual, WANDA MOSLEY, an individual, JAMES MAJOR WOODALL,

Plaintiffs-Appellants,

versus

SECRETARY OF STATE OF THE STATE OF GEORGIA,

Defendant-Appellee.

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

Before JILL PRYOR, BRANCH, and BRASHER, Circuit Judges.

PER CURIAM:

Four black voters in Georgia brought this suit against the Secretary of State of Georgia (the "Secretary") to challenge Georgia's method of electing members to its Public Service Commission (the "PSC"). The plaintiffs argued that the statewide electoral system for PSC elections unlawfully dilutes black Georgians' votes in violation of Section 2 of the

Voting Rights Act (the "VRA"). They won their case after a bench trial before the district court, but after the Secretary appealed to this Court, we reversed and held that the plaintiffs did not have a legally viable theory under Section 2 of the VRA. *Rose v. Sec'y, State of Ga.*, 87 F.4th 469, 486 (11th Cir. 2023). After we reversed the district court, the plaintiffs tried to amend their complaint to plead a new theory of liability and get a second bite at the apple. The district court did not grant the plaintiffs leave to amend, and they appealed. We now review the denial of their motion for leave to amend their complaint. After careful review, we affirm.

I. Background

In July 2020, the plaintiffs brought this suit against the Secretary to challenge the "at-large method" of electing commissioners of the PSC. The PSC consists of five members and is a quasi-legislative and quasi-judicial body that regulates utilities in Georgia. For example, the PSC administers federal funds for pipeline safety, decides utility rates, and adjudicates rate disputes. Each PSC commissioner represents one of five districts and must be a resident of the district they represent, but candidates are elected by a statewide vote.

The plaintiffs alleged that the PSC election system dilutes the strength of black Georgians' votes and therefore violates Section 2 of the VRA. The plaintiffs proposed only one remedy, elections within single-member districts, as an alternative to the existing statewide elections. The parties litigated a motion to dismiss, motions for summary judgment, and motions *in limine*, and each side engaged in extensive fact and expert discovery. Three experts and each PSC commissioner testified at a five-day bench trial.

Following trial, in August 2022, the district court ruled for the plaintiffs and permanently enjoined the Secretary from administering PSC elections using the statewide method. The Secretary appealed that decision to this Court.

On appeal, we reversed the district court because the plaintiffs' failure to propose a viable remedy meant they could not establish a vote dilution claim under Section 2 of the VRA. *Id*. at 475, 486. We explained that a Section 2 claim requires satisfying three "*Gingles*" preconditions derived from *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Id.* at 475. We further explained that the first *Gingles* precondition is that "the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." *Id.* (quoting *Allen v. Milligan*, U.S. 599 U.S. 1, 18 (2023) (brackets in original)). We reiterated our previous holding that this precondition requires plaintiffs to "offer a satisfactory remedial plan." *Id.* (quoting *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302 (11th Cir. 2020)) (alterations adopted).

Ultimately, we held that the plaintiffs failed to satisfy the first *Gingles* precondition because they did not offer a satisfactory remedial plan. *Id.* at 480. Because the "plaintiffs offer[ed] only a single, dramatic remedy—transforming a statewide voting system into a single-member districted plan," we reversed. *Id.* at 475, 486. After our decision, there were no remaining claims or alternative theories that were unaddressed. The only action left for the district court to take was to enter a final judgment in favor of the Secretary.

Our mandate issued on July 18, 2024. That same day, the plaintiffs requested leave to amend their

complaint in the district court under Rule 15 of the Federal Rules of Civil Procedure. Along with their request for leave to amend, the plaintiffs filed a proposed amended complaint that challenged the existing method of electing members of the PSC and included several new proposed remedies that they argue would satisfy *Gingles*. On July 22, the district court entered judgment by adopting our mandate as its own. The plaintiffs then filed a motion for relief from judgment under Rules 59 and 60(b) of the Federal Rules of Civil Procedure so that they could amend their complaint. The district court denied the plaintiffs' motions because the plaintiffs could not meet the most lenient of those standards, Rule 15. The district court determined that the plaintiffs unduly delayed their effort to amend, allowing such an amendment would unduly prejudice the Secretary, and the amendment would be futile. The plaintiffs appealed.

II. Discussion

The plaintiffs argue that, while it is unclear what standard they must meet, they should be permitted to amend their complaint regardless of whether they must satisfy Rule 15(a), Rule 59(e), or Rule 60(b). The Secretary contends that the plaintiffs should not be permitted to amend their complaint even under Rule 15(a), the most lenient standard of the three rules.

We review the denial of a motion to amend a complaint for an abuse of discretion. *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1319 (11th Cir. 1999).[1] Even if we assume that Rule 15(a) applies, the district court did not abuse its discretion.

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[1] We also review motions under Rule 59(e) and 60(b) for abuse of discretion. *Shuford v. Fid. Nat'l Prop. & Cas. Ins. Co.*, 508 F.3d

Rule 15(a)(1) allows parties to amend a complaint once as a matter of course if the amendment is made within 21 days after an answer or certain other motions are filed. Fed. R. Civ. P. 15(a)(1). That deadline passed in 2021. Even when that deadline passes, the plaintiffs can still amend a complaint "with the opposing party's written consent or the court's leave," which "[t]he court should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). But amending a complaint is "not an automatic right." *Reese v. Herbert*, 527 F.3d 1253, 1263 (11th Cir. 2008) (quotations omitted). A district court can deny leave to amend if it concludes there was "undue delay," if allowing the amendment would cause "undue prejudice to the opposing party," or if the amendment would be futile. *Id.* (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Allowing the plaintiffs to amend their complaint at this stage of litigation would severely prejudice the Secretary, which justifies the district court's denial. *See id.*; *Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dep't of Educ. ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1287 (11th Cir. 2003) (affirming denial of leave to amend because of prejudice to defendant). After years of litigation that included extensive discovery, summary judgment motions, motions *in limine*, hiring expert witnesses, and a five-day trial, permitting the plaintiffs to amend now would require restarting several aspects of this case and would force the Secretary to bear repetitive litigation costs.

The following examples support the district court's decision by showing the time and resources the

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1337, 1341 (11th Cir. 2007) (Rule 59(e)); *Arthur v. Thomas*, 739 F.3d 611, 628 (11th Cir. 2014) (Rule 60(b)).

Secretary would need to spend if the plaintiffs were allowed to amend their complaint. First, the district court would need to re-open discovery so that the plaintiffs could develop a record to support their new allegations, which would force the Secretary to spend resources refuting them. The parties would need to take and defend new depositions and possibly retain new experts. Second, additional motions practice related to the plaintiffs' new legal theories would be necessary, yet another required investment by the Secretary. Third, the parties may need to spend considerable resources to retry the case. [2] The resulting prejudice to the Secretary would be significant, so the district court had discretion to deny the plaintiffs leave to amend. *See Maynard*, 342 F.3d at 1287 (finding undue prejudice would result from allowing amendment at the end of discovery but before trial).

The plaintiffs cannot overcome the fact that granting leave for them to amend their complaint will prejudice the Secretary, so they point to considerations of judicial economy. But that general policy concern does not refute the specific prejudice that the Secretary would face, which was a sufficient ground for the district court to deny leave for the plaintiffs to amend. [3] *Reese*, 527 F.3d at 1263 (holding that a

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[2] We additionally note that the plaintiffs' proposed amended complaint claims that Georgia's "existing" method of electing members of the PSC violates the VRA. If the plaintiffs are alleging that the existing method is different from the method used when it first brought this case, the parties would need to litigate how current the district court's three year old factual findings are and whether more timely proof would be required.

[3] The plaintiffs argue that "judicial economy weigh[s] in favor of deciding [issues presented by their amended complaint] in the existing lawsuit rather than in a new one." The plaintiffs do not

district court can exercise its "inherent power to manage the conduct of litigation" by denying leave to amend a complaint if it would result in undue prejudice to the opposing party).

Finally, the plaintiffs argue that the Supreme Court's decision in *Pullman-Standard v. Swint* compels a different result—that is wrong. *See* 456 U.S. 273 (1982). Specifically, the plaintiffs argue that the district court was required to grant them leave to amend because of the Supreme Court's instruction that "[w]hen *an appellate court* discerns that a district court has failed to make a finding because of an erroneous view of the law, *the usual rule* is that there should be a remand for further proceedings to permit the trial court to make the missing findings." (quoting *id.* at 291) (emphasis added). That argument fails for two reasons. First, *Pullman-Standard* did not impose a requirement—it merely stated "the usual rule." *Id.* Second, and fatal to plaintiffs' challenge, *Pullman-Standard* provides an instruction to appellate courts, not district courts. In *Pullman-Standard*, an appellate court determined that a district court overlooked relevant evidence, and the Supreme Court clarified that the proper course of action was for the appellate court to remand the case to the district court, not to make its own determination based on the relevant evidence that was ignored. *Id.* at 282–85, 291. That rule of appellate procedure provides no guidance for whether a district court should grant a plaintiff leave to amend a complaint.

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specify who would bring this hypothetical new case. While the plaintiffs are free to file a new suit, they fail to explain how that suit would survive the doctrine of claim preclusion. Nor do the plaintiffs identify others who would bring this hypothetical suit that might not ever be filed.

III. Conclusion

After years of litigation and a finding from this Court that the plaintiffs did not have a viable theory of liability, the plaintiffs now want to amend their complaint to allege a new legal theory. Permitting that amendment would unduly prejudice the Secretary. Accordingly, the district court did not abuse its discretion in denying the plaintiffs leave to amend their complaint.

AFFIRMED.

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, *et al.*,

Plaintiffs,

v.

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

Defendant.

OPINION AND ORDER

After completion of a five-day bench trial, entry of judgment, an appeal, and two petitions for review to the Supreme Court, Plaintiffs now move to amend their complaint [ECF 189] and for relief under Fed. R. Civ. P. 59 and 60 [ECF 195] to seek a new and different remedy for their claim under Section 2 of the Voting Rights Act. For the reasons set forth below, the motions are **DENIED**.

I. Applicable Legal Standard

To begin, the parties dispute the standard of review that applies to Plaintiffs' request—Rule 15, 59, or 60. Rule 15(a)(2) provides that a party may amend its pleading with the Court's leave, which should be granted when justice so requires. In contrast, Rule 59(e) permits a court to alter or amend

a judgment based only on newly discovered evidence or manifest errors of law or fact. *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). Rule 60(b)(1) permits relief from a final judgment due to mistake, inadvertence, surprise, or excusable neglect. Even under the most lenient standard available—Rule 15(a)—Plaintiffs' proposed amendment fails.[1]

II. Background

The procedural history of this case is relevant to understanding the extraordinary nature of Plaintiffs' request and why the Court declines to grant it. Plaintiffs are Black voters registered in the State of Georgia. In July 2020, they filed suit against the Georgia Secretary of State, challenging the statewide, at-large method of electing members of the Public Service Commission—the body responsible for supervising and regulating common carriers, railroads, and public utilities.[2] To prove their substantive claim and satisfy the *Gingles's* preconditions, Plaintiffs had to demonstrate a viable remedy.

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[1] The Court entered the first scheduling order four years ago and discovery started on February 25, 2021. ECF 40. The last day for Plaintiffs to amend was therefore March 29, 2021. LR 7.1(A)(2), NDGa. Given the current posture of the case, then, Plaintiffs would have to show good cause under Rule 16 before they could travel under Rule 15(a). Fed. R. Civ. P. 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."). The good-cause standard precludes modification of the Court's schedule unless it cannot be met despite the party's diligence. *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (citing Fed. R. Civ. P. 16 advisory committee's note). Since Plaintiffs cannot succeed even under the permissive standard of Rule 15(a), the Court does not address whether Plaintiffs have shown good cause (they have not), or if Rules 59 or 60 should be applied (they should not).

[2] *See generally* ECF 1.

Nipper v. Smith, 39 F.3d 1494, 1530– 31 (11th Cir. 1994) ("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."). They thus asked the Court to order that the Secretary administer future Commission elections "using a method of election that complies with Section 2 of the Voting Rights Act," *i.e.*, to require the Secretary to employ single-member districts rather than at-large elections.[3]

The Secretary moved to dismiss, arguing (among other things) that Plaintiffs could not state a claim because their proposed remedy was impermissible.[4] Plaintiffs, naturally, disagreed. Not only did they assert that single-member district elections were the proper cure for the alleged Section 2 violation, Plaintiffs argued that such districting was the ***required*** remedy.[5] They further emphasized that they were only challenging the statewide—*i.e.*, the at-large—nature of Commission elections.[6] After full briefing and argument on the Secretary's motion, the Court concluded that single-member districting was not, as a matter of law, a prohibited remedy.[7] The Court therefore denied the Secretary's motion.

Plaintiffs then litigated their case on the theory that the at-large election of Commission members

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[3] *Id.* at 10.

[4] ECF 22-1, at 1. *See also id.* at 16–19.

[5] ECF 23, at 14. *See also id.* at 14–18.

[6] ECF 35, at 20–22.

[7] ECF 36, at 34–42.

had to be replaced by single-member districting.[8] The Secretary, in turn, consistently objected that Plaintiffs' proposal failed as a matter of law.[9] At summary judgment, Plaintiffs asserted that they had satisfied the *Gingles* preconditions, in part, because Black voters in Georgia were "sufficiently numerous and geographically compact to constitute a majority of the voting-age population in at least one single-member district" (the first precondition).[10] For his part, the Secretary continued to argue that single-member districts were not a viable form of relief.[11] The Court reserved ruling on that issue for trial, noting that its assessment of the proposed remedy required consideration of the totality of the circumstances.[12] After trial, the Court held that single-member districts were appropriate and permissible, and entered a permanent injunction against at-large elections for members of the Commission.[13] The Secretary appealed,[14] and sought and was granted a stay of the injunction by the Eleventh Circuit.[15] The stay was

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[8] *See, e.g.*, ECF 39, at 1 ¶ 1.

[9] ECF 56-1, at 2–3, ¶ 3 ("Plaintiffs also seek to alter the method of election of statewide constitutional officers in Georgia. This impinges on the proper role of states and is improper for a federal court to order as a remedy.").

[10] ECF 79, at 3–4, 15–16.

[11] ECF 80-1, at 15–21.

[12] ECF 97, at 16 (citing *Davis v. Chiles*, 139 F.3d 1414, 1419–20 (11th Cir. 1998)). *See generally id.* at 16–24.

[13] ECF 151, at 56–60; ECF 159.

[14] ECF 152.

[15] ECF 160.

then vacated by the Supreme Court (allowing the injunction to take effect).[16]

Despite that loss, the Secretary prevailed on the substance of his appeal.[17] A panel of the Eleventh Circuit concluded that Plaintiffs had failed to propose a viable remedy and thus "failed to satisfy Gingles's first precondition."[18] The Court of Appeals declined to rehear the case en banc,[19] and Plaintiffs' second petition for review by the Supreme Court was denied. 144 S. Ct. 2686, *reh'g denied*, 2024 WL 3851078 (2024). The appellate mandate issued, and this Court adopted it—as undersigned is obligated to do.[20]

III. Discussion

Plaintiffs now seek leave to amend their Complaint to propose different remedies, such as cumulative voting, limited voting, ranked-choice voting, or single-transferable voting,[21] rather than single-member districting. Despite their characterization of this proposal as an "easy fix" to the "narrow legal question" ruled on by the Eleventh Circuit,[22] what Plaintiffs are really asking for is a complete redo of this litigation. Plaintiffs' argument ignores that a viable remedy was both a necessary element of establishing liability in the first instance and a significant factor in the Court's totality-of-the-circumstances analysis.

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[16] ECF 162.

[17] ECF 178.

[18] *Id.* at 18–19.

[19] ECF 183.

[20] ECFs 190, 193.

[21] ECF 189.

[22] *Id.* at 2–3.

By removing the viable remedy from the equation, the Court's analysis is no longer viable either.

Although Rule 15(a) generally favors permitting amendments, leave may be denied when there has been undue delay, where the amendment would result in prejudice to the opposing party, or the proposed amendment is futile. *Reese v. Herbert*, 527 F.3d 1253, 1263 (11th Cir. 2008). The Eleventh Circuit has made clear that "[p]rejudice and undue delay are inherent in an amendment asserted after the close of discovery and after dispositive motions have been filed, briefed, and decided." *Campbell v. Emory Clinic*, 166 F.3d 1157, 1162 (11th Cir. 1999) (citing *Jameson v. Arrow Co.,* 75 F.3d 1528, 1534 (11th Cir. 1996) (noting that the facts on which the amendment was based were available when the complaints were filed)). This case is well beyond those points. The delay, prejudice, and futility here are more than sufficient grounds on which to deny the relief Plaintiffs seek.

A. Delay

Plaintiffs assert that they did not unduly delay and that this would be the first amendment to the Complaint.[23] As the Secretary notes, however, Plaintiffs have long been on notice that the proposed single-member-district remedy was potentially problematic.[24] The case was not decided at an early stage before the parties had the opportunity to develop their evidence—the Court held a five-day bench trial and issued an extensive opinion on its rulings.[25] Plaintiffs never suggested that any other form of

[23] *Id.* at 5–8.

[24] ECF 196, at 9.

[25] ECF 151.

relief might be appropriate until after the Secretary prevailed on appeal.[26]

Having proceeded through trial, an appeal, and the denial of certiorari by the Supreme Court on their chosen remedy of single-member districts, Plaintiffs want to re-litigate a substantive aspect of their cause of action. But the Court "need not allow itself to be imposed upon by the presentation of theories seriatim." *Freeman v. Cont'l Gin Co.*, 381 F.2d 459, 469 (5th Cir. 1967) ("The facts on which the claim of fraud is based were fully known to Freeman from the outset of the lawsuit and, indeed, were relied on by him, though under a different theory, in his original answer. It was not until that theory was rejected by the trial court—correctly as we have held above—that the amendment was tendered seeking to make out a showing of fraud from those facts."). Parties cannot freely rely on one theory in an attempt to prevail on their claims and then, "should that theory prove unsound, come back long thereafter and fight on the basis of some other theory." *Id.* at 470. That an entirely new challenge to Georgia's method of electing Commissioners based on different theories and evidence could be brought is of no import. In *this* challenge, Plaintiffs were aware of the possible pitfalls of relying solely on single-member districting as a remedial theory. Dissatisfaction with the results of that decision is not a basis for the Court to grant a do-over.

B. Prejudice

Plaintiffs also argue that it would be prejudicial to them for the Court not to allow the proposed amendment because the Eleventh Circuit ruled only

[26] ECF 23, at 14; ECF 35, at 27–28.

on a narrow issue that can be corrected. In their view, the Court need "only" permit new discovery and motion practice related to the newly proposed remedies.[27] But as the Secretary points out, permitting Plaintiffs' amendment would (at a minimum) require reopening both discovery and the trial record,[28] since the Secretary did not have any opportunity to defend against the alternative remedies Plaintiffs now propose. Section 2 challenges are fact-intensive inquiries that require assessing the totality of the circumstances. The Secretary presented his arguments and prevailed. It would be extremely prejudicial to reopen discovery and retry the case under a theory Plaintiffs could have presented from the outset.

C. Futility

Finally, and perhaps most fundamentally, Plaintiffs' arguments minimize what the Eleventh Circuit actually held in reversing this Court's judgment and ignore that the appellate court's ruling necessarily affected this Court's finding of liability. Proposing a viable remedy is a substantive element of a Section 2 claim. *Nipper*, 39 F.3d at 1530–31. The Eleventh Circuit held that Plaintiffs failed to establish the first *Gingles* precondition, concluding that it was an error of law to hold that single-member districts were a viable remedy to the alleged vote dilution caused by Georgia's method of conducting Commission elections.[29] That conclusion overruled this Court's substantive liability determination.

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[27] *See generally* ECF 200, at 3–5.

[28] ECF 196, at 13 (citing ECF 189, at 15–16).

[29] ECF 178, at 18–19.

Without Plaintiffs having established a viable remedy, the Secretary cannot be liable under Section 2. So, the Court cannot leave all its prior determinations in place, exchanging only the originally proposed remedy with a new one. This is not a narrow technical issue—it is a substantive defect in Plaintiffs' case-in-chief. Further, the Court is not entirely convinced that it could pursue Plaintiffs' proposed course of action without violating the mandate rule. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 843 (11th Cir. 2018) ("The law of the case doctrine and the mandate rule ban courts from revisiting matters decided expressly or by necessary implication in an earlier appeal of the same case. It has its greatest force when a case is on remand to the district court. . . . A district court when acting under an appellate court's mandate, cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.") (cleaned up).

IV. Conclusion

Plaintiffs' proposed amendment is unduly delayed, inherently prejudicial, and futile. Accordingly, Plaintiffs' motion for leave to amend the complaint [ECF 189] is **DENIED**. Plaintiffs' motion for relief under Rules 59 and 60 [ECF 195] is **DENIED as moot**. The Clerk is **DIRECTED** to close this case.

SO ORDERED this 7th day of March, 2025.

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

APPENDIX C

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.

BRANCH, Circuit Judge:

The Georgia Public Service Commission ("PSC") consists of five commissioners elected through statewide, at-large elections.[1] Plaintiffs—four black resi-

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

[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

dents 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.

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

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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.

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 sys-

tem.[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

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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).

example, 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'

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[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 (1994). Notably, Section 2 explicitly

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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).

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 cumulative voting statewide 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;

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

"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 <u>each</u> of the *Gingles* preconditions <u>and</u> 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

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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; 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.

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 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 multimember, 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]

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[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

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 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.

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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."

[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.

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 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).

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

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[10] The Supreme Court stated:

> The August 12, 2022 order of the United States Court of Appeals for the Eleventh Circuit staying the district court's 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 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)

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).

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 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.

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[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.

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* 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.").

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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.

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 govern-

ment. *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-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

[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. 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.

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 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.

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[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.

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 provincialism 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

[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.

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.

[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,

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 Section 2 analysis once the *Gingles* preconditions are satisfied).

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§ 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.").

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 "long-time 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

[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.

PSC will 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 D

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. Comm'rs*) (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

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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).

2022, after the 2020 Decennial Census, pursuant to Georgia Senate Bill 472. 156th Gen. Assemb., Reg. Sess. (Ga. 2022). 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

[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).

throughout Georgia. The PSC can also assess fines and administer federal funds for pipeline safety across Georgia.[13] The PSC is therefore "an administrative 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

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

[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.

$40,348.[17] The poverty rate for Black Georgians is more than twice that of White Georgians—18.8% compared to 9%.[18]

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]

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[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.

[19] *Id.* ¶ 5.

[20] *Id.* ¶ 7.

[21] *Id.* ¶ 9.

[22] *Id.* ¶ 10.

[23] *Id.* ¶¶ 3-4.

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 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

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[24] *Id.* ¶ 2.

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

[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.

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 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

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[31] *Id.* 522:10–13.

[32] *Id.* 45:11–18.

[33] *Id.* 47:9–48:11.

[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.

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 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

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[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.

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

[41] *Id.* 165:3–6, 166:9–12.

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]

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

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[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.

[46] *Id.* 168:16–22, 197:12–19.

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

[48] *Id.* at 12.

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 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]

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[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.

[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.

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 gubernatorial 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

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[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.

[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.

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 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

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[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.

[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.

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 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]

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[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.

[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.

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 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

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[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.

[79] *Id.* 759:5–761:3.

[80] *Id.* 761:17–763:7.

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," 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 "maxi-

[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.

[85] *Id.* 386:23–387:12.

mize 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 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]

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

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

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 District3 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 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

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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).

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

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

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[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).

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

[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.

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

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.

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

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[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-executiveorders.

[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).

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 high-light[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 to run for the PSC and presumably has relationships and networks in that district, that person must

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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).

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

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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.

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 pre-conditions 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

[125] Trial Tr. 759:5–761:3.

best (albeit 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

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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).

representative of choice in district-based PSC elections. *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 Court has already found—and 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.

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 itself is exceeded by

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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*).

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

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]

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proposed findings), ¶ 181. The Secretary's position is directly contrary to precedent, which prioritizes Senate Factors 2 and 7 in 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.

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 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 sub-division 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

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[149] *Id.* ¶ 11.

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

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.

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] Maj-

[151] Trial Tr. 574:3–9.

[152] *Id.* 573:21–574:2.

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

ority-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 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 com-

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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.

missioners 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 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-eco-

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[156] Trial Tr. 611:13–16.

> nomic 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 discrimenation.[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

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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.

[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.

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

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[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*).

[161] *Id.* 464:14–465:20 (colloquy).

[162] *Id.* 465:21–24 (colloquy).

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 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]

[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).

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 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

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[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).

[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.

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 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

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

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 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

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

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

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, 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

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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.

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 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

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

[176] ECF 36 (MTD Order), at 20–21.

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 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 combin-

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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).

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

ation 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 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'

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[180] ECF 35 (MTD H'g Tr.), 40:12–24.

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

[182] ECF 97 (SJM Order), at 9–12.

[183] *Id.* at 12.

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 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

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

[185] *See supra* Section II.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 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

[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).

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 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

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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)).

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 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 E

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 William Pryor, Chief Judge, Wilson, Jordan, Rosenbaum, Jill Pryor, Newsom, Branch, Grant, Luck, Lagoa, and Brasher, Circuit Judges.*

BY THE COURT:

A judge of this Court having requested a poll on whether this appeal should be reheard by the Court sitting en banc , and a majority of the judges in active service on this Court having voted against granting

* Judge Abudu recused herself and did not participate in the en bane poll.

rehearing en banc, the Court sua sponte ORDERS that this appeal will not be reheard en banc.

BRANCH, Circuit Judge, respecting the denial of rehearing en banc, joined by GRANT, Circuit Judge:

A majority of the Court has voted not to rehear this case en banc. Although our opinion speaks for itself, *see Rose v. Secretary*, *State of Georgia*, 87 F.4th 469 (11th Cir. 2023), I write to respond to the dissentals on four points.[1]

I begin with a brief background of this case. In *Rose*, plaintiffs challenged Georgia's statewide, at-large elections for members of the Public Service Commission ("PSC")[2]—a quasi-judicial and quasi-legislative body—under Section 2 of the Voting Rights Act ("VRA"). Plaintiffs brought the instant lawsuit to challenge Georgia's system of statewide

[1] I note that the Supreme Court recently declined to take up this case by denying a petition for writ of *certiorari. See Rose v. Raffensperger*, No. 23-1060, 2024 WL 3089563 (U.S. June 24, 2024).

[2] The PSC is a Georgia constitutional body that dates back to 1879. Its quasi-judicial duties including hearing utility rate cases, holding hearings, listening to witnesses, making evidentiary rulings, and weighing testimony of stakeholders. Its quasi-legislative duties include setting utility rates, controlling permitting for power plant construction, and regulating pole attachments and landlines for communications. Since 1906, PSC Commissioners (and their predecessors on the Railroad Commission), have been elected statewide to staggered six-year terms. In the over 100 years since Commissioners began being elected, there has only been one change to PSC elections: in 1998, the Georgia General Assembly created a five-district system with a residency requirement which remains in place today. Under this system, PSC commissioners must live in one of five districts, but they are still elected statewide and serve the entire state.

PSC elections. They alleged that statewide elections diluted their votes in violation of Section 2 of the VRA because black voters consistently have been unable to elect their preferred candidate over the voting strength of white voters across Georgia. The district court granted partial summary judgment to plaintiffs, finding that they had satisfied the *Gingles*[3] preconditions, and set the case for trial. After a five-day bench trial, the district court found that under *Gingles'* totality of the circumstances test, Georgia's statewide elections for PSC commissioners diluted the strength of black voters in violation of Section 2. Thus, it permanently enjoined the Secretary from carrying out PSC elections under the statewide method. The district court also determined after the trial that the plaintiffs' *only proposed* remedy—changing the PSC from a statewide body into a body comprising single-member districts—was viable. The Secretary appealed.

On appeal, we unanimously found that the district court had committed an error of law by failing to properly apply our precedent regarding the first *Gingles* precondition. Specifically, we held that the district court erred because plaintiffs had "failed to propose a viable remedy and [could not] satisfy the first *Gingles* precondition[.]" *Rose*, 87 F.4th at 486. We so held because plaintiffs' proposed remedy of single-member districted elections would fundamentally alter the PSC's statewide structure and operations. *Id.* at 482-86.

With this background in mind, I now turn to the dissentals' issues with our opinion.

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[3] *Thornburg v. Gingles*, 478 U.S. 30 (1986).

First, judges Wilson and Rosenbaum argue that we misapplied *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), and its progeny because in their view, these cases should apply to judicial elections only. Not so. While our opinion recognized that these cases involved judicial elections, *Rose*, 87 F.4th at 484-85, we emphasized that their core teachings—forbidding courts from abolishing a state's chosen form of government and giving strong weight to this choice at the first *Gingles* precondition—have wider applications. *Id.* Indeed, as our opinion explained, *Nipper* emphasized that [n]othing in the [VRA] 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, and accordingly, a 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." *Rose*, 87 F.4th at 475 (quotations omitted). Nothing about these principles is limited to judicial elections only. And even if these principles were so limited, the PSC at issue in this case is a quasi-judicial body that "hears rate cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders."[4] *Id.* at 473.

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[4] Judges Wilson and Rosenbaum attempt to distinguish the PSC from the trial judges at issue in the *Nipper* line of cases by arguing that those cases were grounded in independent nature of the judicial role" whereas the PSC "operate[s] as a collegial body that makes decisions through majority rule." Judge Rosenbaum further argues that PSC commissioners are elected in partisan elections, whereas Georgia's elections of judges are non-partisan. But these distinctions are unconvincing. Many judicial bodies operate in a collaborative manner and not every state in the Eleventh Circuit elects its judges in a non-partisan

Second, Judge Wilson faults us for not reaching the totality of the circumstances analysis because we determined at the first *Gingles* precondition that plaintiffs had not met their burden of proposing a viable remedy within Georgia's chosen form of government. Judge Wilson asserts that we "functionally render[ed] the preconditions exhaustive" in contravention of the Supreme Court's decision in *Johnson v. De Grandy*,[5] which in his view "will deny many future plaintiffs meaningful review of their [Section] 2 challenges." Judge Wilson fundamentally misunderstands *De Grandy*, *Nipper*, and our opinion in *Rose*.

In *De Grandy*, the Supreme Court held that while the three *Gingles* preconditions are necessary, they are not sufficient standing alone to prove a Section 2 claim. *Id.* at 1009-13. In *Nipper* we noted that this decision "resolved any doubt as to the threshold nature of the *Gingles* factors." *Nipper*, 39 F.3d at 1513 (emphasis added). When a plaintiff cannot satisfy these preconditions, we need not reach the totality of the circumstances analysis. *See Wright v. Sumter County Board of Elections & Registration*, 979 F.3d 1282, 1288 (11th Cir. 2020) ("[O]nce all three *Gingles* requirements are established, the statutory text directs us to consider the totality of the

manner. For example, Alabama conducts partisan elections for its judges, *Butler v. Alabama Jud.* Inquiry *Comm'n*, 802 So. 2d 207, 214 (Ala. 2001), and state appellate courts, which are collegial, multi-member bodies, are often (although not always) elected statewide. if the dissentals' distinctions were accepted, Section 2 could be used to force states to draw their intermediate appellate and State Supreme Court judges into single member districts, thus reconfiguring their entire State court systems.

[5] 512 U.S. 997 (1994).

circumstances to determine whether members of a racial group have less opportunity than do other members of the electorate." (quotations omitted)). Because we, in *Rose*, assessed the plaintiffs' remedy at the first *Gingles* precondition stage, as Judge Wilson admits was required, we gave Georgia's interest in maintaining its chosen form of government the weight it was due and "reaffirm[ed] the principle that plaintiffs must propose a remedy within the confines of the state's chosen model of government" when bringing a vote dilution claim. *Rose*, 87 F.4th at 484. And because we held that the plaintiffs failed to satisfy the first *Gingles* precondition, we were not required to proceed to the totality of the circumstances analysis. Thus, contrary to the dissentals' views, future Section 2 plaintiffs will merely need to continue to satisfy the preconditions to prevail on their claims, a requirement which has been in place for decades.[6]

Third, Judge Wilson asserts that we did not sufficiently engage with cases where this Court has upheld Section 2 challenges to at-large elections for multi-member administrative bodies, like the school

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[6] Judge Rosenbaum reads our opinion as suggesting that if we had conducted a totality of the circumstances analysis we would have found no vote dilution based solely on the State's policy interests. She is incorrect. Instead, we simply pointed to other circuits which, despite evaluating the remedy at the totality of the circumstances stage, recognize the critical nature of the proposed remedy. Accordingly, we noted "in cases like this one, where plaintiffs offer only a single, dramatic remedy . . . 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." *Rose*, 87 F.4th at 475-76 (emphasis added). But our analysis stayed at the precondition stage.

board at issue in Wright.[7] He asserts that these cases demonstrate "that, even when a state has an important interest in maintaining an electoral system, this interest is not outcome determinative."[8]

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[7] Similarly, both Judges Wilson and Rosenbaum express concern that our analysis was influenced by our determination that this case was novel in that it dealt with a challenge to elections for a statewide body as opposed to county or municipal bodies. Judge Rosenbaum in particular takes issue with this determination, asserting that "[n]either Plaintiffs' claim nor their proposed remedy is 'novel.'" It is true we referred to the novel nature both of plaintiffs' challenge and proposed remedy. Our opinion, however, was based entirely on the impermissibility of plaintiffs' proposed remedy. *Rose*, 87 F.4th at 480 (noting that "plaintiffs cannot satisfy the first *Gingles* precondition because their novel application of Section 2 relies on a remedy that is not viable" and their "novel proposal is that we dismantle Georgia's statewide PSC system and replace it with an entirely new districted system."). Further, I note that the Supreme Court and the Fourth Circuit rejected a unique Section 2 challenge because the proposed remedy was not viable. *See Holder* v. Hall, *512* U.S. 874, (1994), *infra* at 9; *Baten v. McMaster*, 967 F.3d 345, 360-61 (4th Cir. 2020) (rejecting a Section 2 challenge to South Carolina's winner-take-all method of selecting presidential electors because "[t]he relevant geographic area for the selection of president [e]lectors [was] the entire State" and thus "there [was] no alternative of a 'single-member-district'").

[8] In a similar vein, Judge Rosenbaum argues that we 'effectively overrule[d] *Gingles"* by "disregard[ing] decades of binding precedent" and making "the state's interest in maintaining its existing electoral system dispositive." As discussed above, Judge Rosenbaum is wrong for the same reasons as Judge Wilson, namely a state's interest is not outcome determinative; rather the plaintiff is required to propose a remedy within the confines of a state's chosen model of government. And while Judge Rosenbaum believes that single-member districts would be an allowable remedy in this case because it is the default remedy for vote dilution claims, such a remedy "do[es] not map onto the type of challenge that the plaintiffs have mounted here" because "[t]he relevant geographic area for

Judge Wilson again misses the mark. For starters, we did not hold in *Rose* that a state's interest was outcome determinative. Indeed, we explicitly rejected such a reading of our opinion by stating "[w]e do not mean to suggest that Section 2 plaintiffs could never prevail when asserting a Section 2 vote dilution claim against a statewide body" and instead were "merely reaffirm[ing] the principle that plaintiffs must propose a remedy within the confines of a state's chosen model of government" when bringing Section 2 claims. *Id.* Furthermore, we explained that a state's provincialism concerns are much greater for statewide bodies like Georgia's PSC than county administrative bodies, like the school board at issue in *Wright* because "there is much greater potential for divisive problems to arise across an entire state . . . and the pertinent issues are more likely to be large-scale with huge significance." *Id.* at 483. And while Judge Wilson takes issue with the discussion of these provincialism concerns because PSC commissioners are required to live in one of five statutorily defined districts, State law makes clear that their constituency is the State as a whole and they perform statewide functions, unlike the school board members in Wright. Thus, far from not engaging with cases like Wright, our opinion distinguished cases involving elections of county administrative bodies with those involving elections of statewide bodies like the PSC at issue here. [9]

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the selection of [PSC commissioners] is the entire State." *Baten*, 967 F.3d at 360-61.

[9] Judge Wilson asserts that "[t]he inconsistent nature of our precedent's treatment of state interests" in *Wright* and *Nipper* warrants further en banc review. But there is no inconsistency. Building on Supreme Court precedent, the en banc. *Nipper*

Finally, Judge Wilson asserts that "[t]he injection of federalism in the context of voting rights is a problematic 'recent vintage.'" Yet, the Civil War Amendments and the VRA cannot be understood except by reference to federalism principles. Indeed, the Civil War Amendments altered our constitutional design, and the VRA enforces the Fifteenth Amendment. *Shelby Cnty.*, *Ala. v. Holder*, 570 US. 529, 536 (2013). Accordingly, the VRA must be read in light of this legal context. *See id.* at 534-35. When doing so, we see that the Civil War Amendments and the VRA changed the relationship between state and federal governments according to their terms, and no more. As the Supreme Court has recognized, even "the Fourteenth Amendment does not override all principles of federalism." *Gregory v. Ashcroft*, 501 US. 452, 469 (1991). Furthermore, as explained in our opinion, federalism principles under-gird *Nipper*, which made clear that the VRA does not "permit the federal judiciary to force on the states a new model of government." *Nipper*, 39 F.3d at 1531.

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court made clear that "[t]he inquiries into remedy and liability . . . cannot be separated" and therefore a 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." Nipper, 39 F.3d at 1530-31. The *Wright* court fully recognized this requirement. *Wright*, 979 F.3d at 1302-03. Furthermore, courts must evaluate a state's interests both at the precondition stage and, if the preconditions are met, again at the totality of the circumstances stage. *Nipper*, 39 F.3d at 1542. And white in many cases a state's interest will have "minimal relevancy in the totality of the circumstances analysis" those interests can "play[] a major role" in evaluating the viability of a proposed remedy. *Id.* In the instant case, Georgia's interests in preserving a statewide PSC played such a role at the precondition stage.

And the *Nipper* court did not go out on a limb in considering federalism principles in reaching its holding. Instead, it followed the Supreme Court's lead. In *Holder v. Hall*, the plaintiffs brought a Section 2 lawsuit challenging the size of a single-member county commission, arguing that their proposed remedy—a five-member county commission elected by single-member districts—should serve as the benchmark for the district court to compare the alleged dilution. 512 U.S. 874, 881 (1994). The Supreme Court held that "there [was] no principled reason why one size should be picked over another as the benchmark for comparison." *Id.* The *Nipper* court recognized that implicit in *Holder* was the principle that federal courts "may not alter the state's form of government itself when [plaintiffs] cannot identify a 'principled reason why one [alternative to the model being challenged] should be picked over another as a benchmark for comparison.'" *Nipper*, 39 F.3d at 1532. (second brackets in original) (quoting *Holder*, 512 U.S. at 881). As in *Holder*, the plaintiffs here failed to provide a principled reason for selecting a PSC comprising single-member districts as opposed to a statewide PSC as the benchmark. Accordingly, they failed to provide a viable remedy resulting in a failure to satisfy the first *Gurgles* precondition.

For these reasons, we did not err in reversing the district court's decision.

WILSON, Circuit Judge, dissenting from the denial of rehearing en banc, joined by ROSENBAUM and JILL PRYOR, Circuit Judges:

The Voting Rights Act strives to realize "an America defined by pluralism, where everyone's voice is heard, everyone's vote is counted, and everyone's interests are represented."[1] It is considered to be "the most successful civil rights statute in the history of the Nation," *Allen v. Milligan*, 599 U.S. 1, 10 (2023) (quotation omitted), and its continued success hinges on the good faith enforcement of its most litigated provision. Section 2 provides a necessary mechanism for challenging state and local electoral schemes that deny voters equal participation in the political process to elect representatives of their choice. *See* 52 U.S.C. § 10301. In its reversal of the district court's well-reasoned opinion, the panel improperly narrows § 2, eroding the guarantees of the Voting Rights Act. Accordingly, I dissent from this court's refusal to rehear this case en banc.

I.

I begin with our primary authority for evaluating § 2 voter dilution challenges. The Supreme Court "has long recognized that multimember districts and at-large voting schemes may operate to minimize or cancel out the voting strength of racial minorities in the voting population." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (internal quotations omitted and alteration adopted). The Court has faithfully applied *Gingles* "in one § 2 case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country." *Milligan*, 599 U.S. at 19.

[1] Eric Holder, Our *Unfinished March* 12 (2022).

The *Gingles* Court recognized that § 2 is a limited statutory sword, and did not disclaim at-large elections as *per se* violations of minority voters' rights. 478 U.S. at 48. Instead, the Court articulated three preconditions that plaintiffs must satisfy to obtain relief from the challenged electoral practice:

> First, the minority group must be suffice-ently 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.

Milligan, 599 U.S. at 18 (internal citation and quotations omitted) (alterations adopted) (citing *Gingles*, 478 U.S. at 50-51). Our circuit interprets the first *Gingles* precondition to implicitly require plaintiffs to propose a viable remedy to the challenged electoral system. *See Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994) (en banc). The remedy must fall "within the confines of the state's system of government." *See id.* at 1533.

Once a court has determined that the *Gingles* preconditions are met, "the statutory text directs us to consider the totality of circumstances to determine whether members of a racial group have less opportunity than do other members of the electorate." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425-26 (2006) (internal quotations omitted). The Supreme Court "'has provided some structure to the statute's totality of circumstances test' by adopting the Senate Report on the 1982 amendments to the Voting Rights Act," which identifies nine

"Senate Factors" typically relevant to a § 2 dilution claim, *Wright v. Sumter Cnty. Bd. of Elections and Registration*, 979 F.3d 1282, 1288-89 (11th Cir. 2020) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1010-11 (1994)). A state's interest in the electoral system is one of the nine factors considered.[2]

Nipper states that courts should give a state's interest significant weight when evaluating the viability of a proposed remedy at the preconditions stage, and in doing so, treats this analysis as separate from a totality of circumstances analysis. *See* 39 F.3d at 1533. Our decision in *Davis v. Chiles* similarly reviewed the state's interest in light of the proposed remedy, but employed the totality of the circumstances language at the outset:

> As part of any prima facie case under Section Two, a plaintiff must demonstrate the existence of a proper remedy. In assessing a plaintiffs 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.

139 F.3d 1414,1419-20 (11th Cir. 1998) (internal citations omitted). But in *Wright*, we did not consider the state's interest in assessing the remedy as a *Gingles* precondition. 979 F.3d at 1302-04. Instead,

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[2] The ninth Senate Factor is "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 (quotations omitted). It is referred to as "state interest" throughout § 2 jurisprudence.

we considered the state's interest only within our review of the totality of the circumstances. *Id.* at 1296-97.

Here, the panel places such great weight on the state's interest at the preconditions stage that they foreclose reaching the totality of the circumstances stage, where they would have weighed the state's interest against the other Senate Factors. The inconsistent nature of our precedent's treatment of state interests speaks to our need for en banc review.

II.

The Georgia Public Service Commission (PSC) is a five-member administrative body responsible for ensuring the safety, reliability, and affordability of utility services for Georgians. For nearly 100 years, commissioners were elected via an at-large, statewide vote and could reside anywhere in the state. But in 1998, the Georgia General Assembly amended the Georgia Code to create five PSC districts, requiring each commissioner to serve—and reside in—their respective district for the duration of their six-year term. Notably, commissioners continued to be elected by statewide vote.

In this case, Plaintiffs—Black residents and voters in District 3—sued Georgia's Secretary of State, alleging that PSC's at-large electoral system dilutes the strength of their vote in violation of § 2 and propose the standard remedy for § 2 violations: single-member districting. The Northern District of Georgia, finding that Plaintiffs satisfied the *Gingles* preconditions and that a balance of the Senate Factors compelled a finding of vote dilution, enjoined the state from conducting future PSC elections under an at-large method. *Rose v. Raffensperger*, 619 F.

Supp. 3d 1241,1260-69,1272 (N.D. Ga. 2022). A panel of this court reversed the district court's injunction. *Rose v. Sec'y*, *State of Ga.*, 87 F.4th 469 (11th Cir. 2023).

With that background, I begin by explaining how the panel misapplies our precedent before turning to its improper prioritization of federalism. But in order to frame my analysis, I must first note my concern with how the panel's insistence that this case is "novel" steers its analysis. *Id.* at 479. Because our precedent to date has only concerned § 2 challenges to municipal and county elections, the panel posits that Plaintiffs' proposed remedy to a statewide election "asks us to wade into uncharted territory." *Id.* at 479-80. However, § 2 explicitly protects voters from discriminatory electoral practices by a "State or political subdivision." *See* 52 U.S.C. § 10301(b) (emphasis added). Nothing in our precedent indicates that its underlying reasoning and logic should be cabined to local elections.

A.

Plaintiffs here proposed converting PSC's statewide, at-large elections to elections by single-member districts. They presented a map with one majority-Black district, [3] In reviewing Plaintiffs' proffered remedy, the district court engaged in a "fact-intensive" inquiry and applied "'an intensely local appraisal of the design and impact' of the electoral structure, practice, or procedure at issue." *See Nipper*, 39 F.3d at 1498 (quoting *Gingles*, 478 U.S. at

[3] Under the proposal, District 1 would cover Clayton, DeKalb, Fayette, and part of Fulton, Henry, Newton and Rockdale Counties. This proposed District 1 overlaps significantly with existing PSC District 3.

79). The district court noted that where the challenged system is at-large voting, single-member districting is the "standard remedy," and that Georgia's Secretary of State conceded that there was nothing "facially problematic" with Plaintiffs' proposed map. *Rose*, 619 F. Supp. 3d at 1269-70. The district court concluded that single-member districts were a viable remedy.

The panel reasons that Plaintiffs have not proposed a viable remedy because the identified remedy "would upset Georgia's policy interests that are afforded protection by federalism and our precedents." *Rose*, 87 F.4th at 479. This reflects a misunderstanding of circuit law for the following reasons.

* * *

In *Nipper*, this court, sitting en banc, struck down a § 2 challenge of at-large elections of judges in Florida's Fourth Judicial Circuit. 39 F.3d at 1546-47. *Nipper* established a requirement that plaintiffs must propose a viable remedy[4] to meet the first *Gingles* precondition. *Id.* at 1530. We noted that the "State's interest in linking the jurisdictional and electoral bases of its circuit and county court judges . . . plays a major role" in considering the plaintiffs' proposed remedies. *Id.* at 1542. Importantly, this court provided that "[t]he maintenance of the linkage between a trial court judge's territorial jurisdiction and electoral base serves to *preserve judicial accountability*," while subdistricting "would disen-

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[4] *Nipper* drew from the Supreme Court's decision in *Holder v. Hail*, 512 U.S. 874,880-881 (1994), to find that courts "cannot determine whether the voting strength of a minority group has been impermissibly diluted without having some alternative electoral structure in mind for comparison. 39 F.3d at 1533.

franchise every voter residing beyond a judge's subdistrict, thus rendering the judge accountable only to the voters in his or her subdistrict." *Id.* at 1543 (emphasis added). We placed significant emphasis on judicial independence, reasoning that the concern for disenfranchisement is "more pronounced [in the judicial context] because trial court judges act alone in exercising their power," whereas "[i]n the case of collegial bodies, all citizens continue to elect at least one person involved in the decisionmaking process and are, therefore, guaranteed a voice in most decisions." *Id.* at 1543. We reasoned that the "implementation of subdistricts would increase the potential for 'home cooking' by creating a smaller electorate and thereby placing added pressure on elected judges to favor constituents." *Id.* at 1544. Florida clearly explained how the existing at-large judicial selection process insulated judges from external pressures and facilitated impartial decision-making. We therefore concluded that the proposed remedy of single-district voting would undermine numerous, clearly identified state interests. *Id.* at 1546-47.

In *Southern Christian Leadership Conference of Alabama v. Sessions* (hereinafter *SCLC*), this court, again sitting en banc, considered another § 2 challenge to at-large judicial elections. 56 F.3d 1281, 1285 (11th Cir. 1995) (en banc). We collectively considered the plaintiffs' proposed remedies against the state's clearly identified interest in "maintaining the link between a trial judge's jurisdiction and elective base." *Id.* at 1294. One of the plaintiffs' remedial plans proposed carving existing circuits and counties into single-member and multi-member districts. *Id.* at 1296. We rejected this plan, finding that "in the context of circuit reconfiguration, sub-districting

would directly implicate the State's linkage interest." *Id.* Our reasoning in *SCLC* was like that in *Nipper*; we maintained that subdistricting "would strip every voter residing beyond a judge's subdistrict of his or her participation in the judicial selection process—leaving [a] judge accountable only to those voters in his or her subdistrict." *id.* at 1297. We recognized Alabama's value of "judicial independence," and found that subdistricting would "undermine the Alabama system of fostering an independent judiciary by holding judges accountable to a broad section of the population." *Id.* We went on to explain that subdistricting, which creates smaller electorates, would "increase the pressure to favor constituents," thus "increase[ing] the specter of 'home cooking. *Id.* Just as in *Nipper*, our consideration of a state's interest laboriously discussed the unique demands of the judiciary.

Turning to *Davis*, we see an inconsistency in how our court considers a state's interests at both the preconditions and totality of the circumstances stages. The panel here aptly points out that the *Davis* court acknowledged that *Nipper* and *SCLC* "placed an insurmountable weight on a state's interest in preserving its constitution's *judicial* selection system and in maintaining linkage between its judges' jurisdiction and electoral bases." *Rose*, 87 F.4th at 481 (quoting *Davis*, 139 F.3d at 1423) (alteration adopted) (emphasis added). But notably, this weight was applied for a limited and specific purpose—to preserve the particular interest states have in *judicial* elections. *Nipper* and *SCLC* explained why a state's interest in maintaining an election system is uniquely considered in judicial contexts, *i.e.*, the nature of the judicial role is distinct from other elected positions and the state has a heavy interest in

maintaining judicial independence. But in *Davis*, we criticized *Nipper* and *SCLC's* doctrinal development as unworkable, noting that 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." 139 F.3d at 1424 (emphasis added).

In considering the challenge brought before us here, what tied the *Davis* court's hands should not tie ours: states do not have the same interest in regulating elections for multi-member administrative bodies as they do the judiciary. The panel asserts that this line of cases has "equal force here because the PSC is a 'quasi-judicial' administrative body." *Rose*, 87 F.4th at 484. While it is true that the PSC conducts hearings and makes evidentiary rulings, those were not the dispositive functions of the judicial bodies there. Our decisions in *Nipper*, *SCLC*, and *Davis* were grounded in the independent nature of the judicial role. This case presents a fundamentally different situation. The panel admits that the PSC operates as a collective administrative body with both quasi-legislative and quasi-judicial functions. *Id.* at 473. However, unlike judges who adjudicate independently, decisions by the PSC are made by the body as a whole, informed not only by constituents but also by "a consumer affairs group that works for all five commissioners to field issues raised by consumers." *Rose*, 619 F. Supp. 3d at 1255.

This circuit has considered, and upheld, a § 2 challenge to an at-large system used to elect a multi-member administrative body like the one here. *See Wright*, 979 F.3d at 1311. The panel cites to *Wright* several times while not sufficiently engaging with its underlying reasoning. In Wright, we considered a § 2

challenge to a county's re-drawn school district map. *Id.* at 1287. The school board reduced its size and restructured to include at-large seats in what had previously been an all single-member board. A plaintiff brought suit, claiming that these changes diluted the strength of Black voters.[5] *Id.* at 1288. On review, this court affirmed the district court's holding that the plaintiff met the three *Gingles* preconditions and that the totality of circumstances weighed in favor of the plaintiff *Id.* at 1303, 1311. In relevant part, we affirmed the finding that a viable remedy was available. *Id.* at 1303-04. And while we did not discuss the state's interest in considering the viability of the remedy, we did consider it under the totality of the circumstances analysis. *Id.* at 1296-97. Importantly, we affirmed the district court's determination that the state's interest in reducing the board size weighed in its favor but did not outweigh the plaintiff's "showing through other factors that the challenged practice denie[d] minorities fair access to the electoral process." *Id.* at 1297 (quotations omitted and alteration adopted). *Wright* demonstrates that, even when a state has an important interest in maintaining an electoral system, this interest is not outcome determinative.

As a result, a fulsome reading of our precedent reveals two important points. First, while it's true that *Nipper* and *SCLC* stress the importance of ensuring that a state's interests are considered in

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[5] The district court originally denied the plaintiff's motion to enjoin the school board elections and granted the county's motion for summary judgment. *Wright*, *979* F.3d at 1290. We reversed and remanded, and following a bench trial on remand, the district court enjoined the upcoming election and drew a new district map. *id.* 1290-91. The school board appealed. *Id.*

assessing the viability of a proposed remedy, these cases do not render the presence of an identifiable state interest as dispositive. Accordingly, we should have found that the district court paid appropriate consideration to Georgia's interest in maintaining a statewide electoral system. The district court noted at trial that the Secretary failed to explain 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." *Rose*, 619 F. Supp. 3d at 1267. The state did not point to a policy statement or legislative history that explained why this particular electoral mechanism makes sense for Georgia. *Id.*

Second, our precedent suggests that a state's interest in maintaining its electoral scheme is heavily weighed only in judicial contexts. While our antipathy to "home cooking" is logical in limited contexts—i.e., a judge who adjudicates independently over an entire district should not be beholden to constituents from only one subdistrict[6]—it is illogical here. This precedent permits states to justify dilutive at-large elections merely because statewide, at-large elections allow for "insulation from localized special interests." *Rose*, 87 F.4th at 483. The panel's decision to defend this electoral system against provincialism, *see id.* at 483-84, is similarly unfounded. Each member of the commission already represents one of five statutorily defined districts. If we accept protection against provincialism as an overriding state interest

[6] "[T]rial courts [] do not operate as collegial bodies; rather, the judges exercise independent judicial authority, engaging in coordinated decisionmaking only for the handling of some administrative matters." *Nipper*, 39 F.3d at 1498.

in the context of statewide, at-large electoral systems, then it is hard to imagine that single-member districted elections will ever pass muster under *Gingles*.

In sum, *Nipper*, *SCLC*, *Davis*, and *Wright* deploy differing frameworks for weighing a state's interest at the preconditions and totality of the circumstances stages. The panel erred in acting as if our precedent clearly resolves the question of how to consider the state's interest in maintaining its form of government. Further, I am compelled to note an alarming consequence of the panel's decision. The Supreme Court dictates that the *Gingles* preconditions do not "exhaust[] the enquiry required by § 2." *De Grandy*, 512 U.S. at 1013. But in weighing state's interests so heavily at the *Gingles* preconditions stage, the panel functionally renders the preconditions exhaustive. Their decision to do so will deny many future plaintiffs meaningful review of their § 2 challenges. We should be wary of this outcome as it runs directly counter to precedent and undermines the purpose of § 2.

B.

The injection of federalism in the context of voting rights is a problematic "recent vintage."[7] In prioritizing state sovereignty, *see Rase*, 87 F.4th at 481-82, the panel ignores the constitutional and statutory framework underlying § 2 of the Voting Rights Act.

The Fourteenth and Fifteenth Amendments expressly limit state sovereignty in the design and administration of state elections. The Fourteenth Amendment's Equal Protection Clause ensures no

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[7] Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race, Federalism, and Voting Rights*, 2015 U. Chi. Legal F. 113, 113-14 (2015).

state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Fifteenth Amendment guarantees that the right to vote "shall not be denied by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV. Further, both Amendments provide that "Congress shall have the power to enforce" the Amendments' substantive terms. U.S. Const. amend. XIV, cl. 5; U.S. Const. amend. XV, cl. 2. Accordingly, while we have long understood that states have an important interest in regulating their elections, state sovereignty may *not* be used as an instrument for circumventing a federally protected right." *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (quotations omitted) (discussing the Fifteenth Amendment). Unfortunately, the panel's opinion permits such circumvention.

It is "not a great intrusion into state autonomy to require the states to live up to their obligation to avoid discriminatory practices in the election process." *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1561 (11th Cir. 1984). Ultimately, the panel's preoccupation with state sovereignty undermines the effectiveness of the Voting Rights Act,[8] undercutting oversight of election processes.

III.

The Voting Rights Act is a representation of the best of America, and a reminder of the worst of America. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Kagan, J., dissenting). This panel's opinion reminds us why the Act "was—

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[8] Franita Tolson, Reinventing *Sovereignty?: Federalism as a Constraint on the Voting Rights Act*, 65 Vand. L. Rev. 1195, 1200 (2012).

and remains—so necessary." *See id.* I therefore dissent from my colleagues' refusal to reconsider this case.

ROSENBAUM, Circuit Judge, joined by WILSON and JILL PRYOR, Circuit Judges, dissenting from the denial of rehearing en banc:

Before us is a challenge to the statewide, at-large elections that Georgia uses for its Public Service Commission ("PSC"). In a well-reasoned opinion following significant briefing and a five-day bench trial, the district court concluded that these elections constitute vote dilution in violation of Section 2 of the Voting Rights Act.

A panel of this Court reversed the district court's ruling. *Rose v. Sec'y*, *State of Ga.*, 87 F.4th 469, 486 (11th Cir. 2023).[1] In its opinion, the panel did not disagree with the district court's factual findings. Nor did it disagree with the district court's conclusion that the existing PSC elections result in racial bloc voting that prevents Black voters in Georgia from electing their preferred candidates to the PSC. Instead, the panel determined that Plaintiffs' challenge cannot succeed because their proposed remedy—a single-member districted election—is not the same as the State's existing electoral system. But given that the State's existing electoral system makes the PSC election "not equally open," 52 U.S.C. § 10301(b), to Black voters, that's the point.

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[1] The Branch Statement "note[s] the Supreme Court recently declined to take up this case by denying a petition for writ of *certiorari." See* J. Branch Statement at 1 (citing *Rose v. Raffensperger*, No. 23-1060, 2024 WL 3089563 (U.S. June 24, 2024)). Of course, "denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated." *State v. Baltimore Radio Show*, *inc.*, 338 U.S. 912, 919 (1950) (Statement of J. Frankfurter respecting the denial of certiorari).

The panel opinion commits several errors of law. It ignores binding and long-standing law governing Section 2 cases. It inappropriately extends our precedent. And it replaces the appropriate framework for Section 2 challenges with its own single-minded test. In making these errors, the panel opinion severely and unlawfully limits the application of Section 2 in this Circuit.

For these reasons, I respectfully dissent from the denial of rehearing en banc.

I. The Panel Opinion erroneously frames Plaintiffs' challenge as a novel Section 2 case.

Since 1982, Section 2 has prohibited the imposition of any "voting qualification or prerequisite to voting or standard, practice, or procedure . . . 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." 52 U.S.C. 10301(a). A violation occurs whenever, "based on the totality of the circumstances," the electoral processes "in the State or political subdivision are not equally open to participation by members" of a racial minority" *Id.* § 10301(b). To effectuate this goal of combatting racial discrimination in voting, Congress has charged us with giving these provisions "the broadest possible scope." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991).

Here, Plaintiffs have sued Georgia on the ground that its at-large elections for commissioners on the PSC prevent Black voters from electing their preferred representatives. *See Thornburg v. tingles*, 478 U.S. 30, 47 (1986). In fact, they allege that the at-large election system is so noxious that only one Black person has been elected to the Commission in

nearly 150 years—and that was only after he was originally appointed.[2]

According to the panel opinion, Plaintiffs' challenge presents an exceptional issue of first impression because PSC elections are statewide elections. *See Rose*, 87 F.4th at 486. The panel opinion strikes an almost incredulous tone in emphasizing that Plaintiffs have asked the Court to make what it calls a "novel application of Section 2" to statewide elections "for the first time ever." *Id.* at 479, 480. And the panel appears even more troubled by the so-called "extraordinary remedy" that Plaintiffs propose—single-member districted elections, a solution that the panel opinion chides for "strain[ing] both federalism and Section 2 to the breaking point." *Id.* at 479, 484. So the panel opinion characterizes itself as "wad[ing] into uncharted territory" to reject Plaintiffs' "novel proposal . . . that we dismantle Georgia's statewide PSC system" and "fundamentally change the PSC[]." *Id.* at 480, 482.[3]

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[2] That commissioner, David Burgess was appointed in 1999. After that, he narrowly won his first election in 2000 and, despite winning the plurality in the 2006 election, ultimately lost to a white candidate in the runoff election that same year.

[3] The Branch Statement defends the panel opinion for "reject[ing] a unique Section 2 challenge" in the same manner as *Holder v. Hall*, 512 U.S. 874 (1994), and *Baten v. McMaster*, *967* F.3d 345 (4th Cir. 2020). J. Branch Statement at 6 n.6. But these other decisions don't support the panel's reasoning. *Holder* rejected a Section 2 challenge because the voters proposed a change in the size of the governing body, not single-member districting. *Holder*, 512 U.S. at 878, 881-82. And *Baten* rejected a Section 2 challenge with a dangerous suggestion that Section 2 might not apply at all to at-large election systems. *See Baten*, 967 F.3d at 360-61 (rejecting challenge to elections for presidential electors).

That is wrong in every way. Neither Plaintiffs' claim nor their proposed remedy is "novel." First, and most importantly, Section 2 expressly applies to voting practices imposed "by any State." 52 U.S.C. § 10301(a). As Judge Wilson notes, the text of the statute draws no distinction between the electoral practices of "any State" and the electoral practices of any "political subdivision." *See id.;* J. Wilson Dissent at 5. This language "is straightforward." *Rose*, 87 F.4th at 474. The panel's insistence that we treat this challenge to a statewide system any differently than we treat challenges to other political subdivisions therefore finds no support in the statutory text. *Cf Brnovich v. Democratic Nat'l Comm.*, 592 US. 647, 666-67 (2021) (showing that our application of Section 2 always begins with the text of the statute).

Second, the caselaw on Section 2 clearly anticipates that the statute extends equally to statewide bodies. We have long recognized that we must defer to "Congress' considered judgment's that the statute presents an effective method of preventing States from undoing or defeating the rights" that Black Americans won with the passage of the Voting Rights Act. *City of Rome v. United States*, 446 U.S. 156, 178 (1980) (alterations and internal quotation marks omitted) (quoting *Beer v. United States*, 425 U.S. 130, 140 (1976)), *abrogated on other grounds in Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 557 U.S. 193 (2009). And following the 1982 amendment, we expressly contemplated that Section 2 applies equally to state and local governments and that we must "require the states to live up to their obligation to avoid discriminatory practices in the election process," despite their "important interest in determining their election practices." *United States v.*

Marengo Cnty. Comm'n, 731 F.2d 1546, 1561 (11th Cir. 1984).

Third, the relative rarity of *Section* 2 challenges to statewide bodies doesn't make them unique. Unlike other provisions of the Voting Rights Act, Section 2 depends on litigation, which "occurs only after the fact, when the illegal voting scheme has already been put in place and individuals have been elected pursuant to it." *Shelby County v. Holder*, 570 U.S. 529, 572 (2013) (Ginsburg, J., dissenting). For this reason, Section 2 "was supposed to be a back-up." *Brnovich*, 594 U.S. at 700 (Kagan, J., dissenting); cf. *id.* at 657 (detailing how Section 2 "was 'little-used' for more than a decade after its passage"). But since the Supreme Court invalidated Section 4(b) and dismantled Section 5 of the Voting Rights Act, *Shelby County*, 570 U.S. at 556-57; voters now must rely on Section 2 alone to remedy racial discrimination in voting, *Brnovich*, 594 U.S. at 700-01 (Kagan, J., dissenting). Given this backdrop, we should expect increased Section 2 litigation and claims that more frequently address a wider range of electoral practices.

And finally, the panel's focus on the novelty of this case ignores two general features of Section 2 litigation. One, the core challenge that voters may sustain under Section 2 is one that alleges vote dilution. *See id.* at 660 (recognizing the "steady stream" of vote-dilution claims under Section 2). Nearly every Section 2 case involves a claim that a districting plan, such as at-large elections, "dilute[s] the ability of particular voters to affect the outcome of elections." *Id.* at *657* (discussing legislative districts); *Houston Lawyers' Ass'n v. Att'y Gen. of Tex.*,

501 U.S. 419, 428 (1991) (applying Section 2 to judicial elections).

And two, the Supreme Court has instructed that, "absent special circumstances," we should "employ single-member districts" to remedy vote dilution that at-large systems cause. *Wise V. Lipscomb*, 437 US. 535, 540 (1978). This "remedial principle" has guided us for decades. *Id.* (citing *Connor v. Williams*, 404 U.S. 549, 551 (1972); *Mahan v. Howell*, 410 U.S. 315, 333 (1973); *Chapman v. Meier*, 420 U.S. 1, 18 (1975); *E. Carroll Parish Sch. Rd. v. Marshall*, 424 U.S. 636, 639 (1976)). And for good reason. "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." *Gingles*, 478 U.S. at 50 n.17. So we recognize single-member districts as the "simple, straightforward, and indisputably available" remedies for challenges to at-large systems. *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1310 (11th Cir. 2020); *see also Holder*, 512 U.S. at 888 (1994) (O'Connor, J., concurring in the judgment) ("[T]he alternative benchmark is often self-evident. In a challenge to a multimember at-large system, for example, a court may compare it to a system of multiple single-member districts.").

In short, all factors—from the text of the statute to the history of Voting Rights Act litigation—underscore that Section 2 embraces challenges to state-wide, at-large elections that propose single-member districting as a remedial measure.

II The panel opinion's decision to extend *Nipper* here is a mistake of law.

The panel opinion asserts that our decisions in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc), *Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281 (11th Cir. 1995) (en banc), and *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998), provide the applicable legal framework to evaluate Plaintiffs' challenge to the at-large elections for commissioners serving on Georgia's PSC. *Rose*, 87 F.4th at 480. But as Judge Wilson points out, all three cases concern judicial elections. *Nipper*, 39 F.3d at 1496; S. *Christian Leadership Conf. ("SCLC")*, 56 F.3d at 1283; *Davis*, 139 F.3d at 1416;1 Wilson Dissent at 10. Indeed, those decisions themselves explain that they find their basis in "the unique features of judicial elections and the manner in which they affect the vote dilution inquiry" *Nipper*, 39 F.3d at 1527-28. So we have limited our application of this line of precedent to judicial elections for the past thirty years.

Notwithstanding the clear language of our past decisions and three decades of precedent, the panel opinion concludes that *Nipper* and its progeny must guide our analysis here for two reasons. *Rose*, 87 F.4th at 484-85. First, the panel opinion baldly states—without reason or citation—that these cases are "not limited to judicial elections only." *Id.* at 484. And second, it claims that the *Nipper* line of precedent has "equal force here" because "the PSC is a `quasi-judicial' administrative body." *Id.* at 485 (quoting *Tamiami Trail Tours*, *Inc. v. Ga. Pub. Serv. Comm'n*, 99 S.E.2d 225, 233 (Ga. 1957)).

This move is novel, dramatic, and wrong. It belies a fundamental misunderstanding of our caselaw and

reflects a total failure to consider the consequences on future Section 2 litigation. Our failure to rehear the case and correct the panel opinion's doctrinal errors shirks our responsibility to clean up this mess.

A. *Nipper* and its progeny govern our consideration of judicial elections only.

The panel opinion's conclusory determination that *Nipper* and its progeny apply outside the context of judicial elections is at odds with our caselaw. I agree with Judge Wilson's analysis and write separately to emphasize a few points. *See* J. Wilson Dissent at 6-13.

We'll start with *Nipper*. There, this Court, sitting en Banc, considered a claim that the at-large elections for certain trial-level judges in Florida diluted the voting strength of Black voters in violation of Section 2. *Nipper*, 39 F.3d at 1496-97. Following a thorough review of the record, we determined that the plaintiff voters had presented sufficient evidence to "create[] a strong inference of racial vote dilution." *Id.* at 1541. Nevertheless, we struck the challenge on the ground that the remedies proposed by the plaintiff voters weren't viable. *Id.* at 1542-43.

One framework guided our analysis: *Gingles*. *See id.* at 1537-42 (reviewing the district court's factual findings and conclusions of law under *Gingles*). In fact, the *Nipper* decision dedicates nearly seventeen pages to reviewing *Gingles'* requirements. *See id.* at 1509-27. Rightly so. *Gingles* binds our consideration of any vote-dilution challenge because it faithfully interprets "the text and purpose" of Section 2. *Bartlett v. Strickland*, 556 U.S. 1,21 (2009).

But because *Gingles* requires more than a mechanical application, in *Nipper*, we set forth two additional principles to address "the unique features of judicial elections and the manner in which they affect the vote dilution inquiry" *Nipper*, 39 F.3d at 1527-28. First, we said that our *Gingles* analysis must include a "judicially-specific consideration—the state's interest in maintaining its judicial elections structure." *Id.* at 1530; *see also id.* at 1528-30 (discussing the Supreme Court's application of Section 2 to judicial elections in *Chisom v. Roemer*, 501 U.S. 380 (1991), and *Houston Lawyers' Ass'n v Att'y Gen. of Tex.*, 501 U.S. 419 (1991)). Second, we explained that we must make certain "modulations" to account for the judicial context. *See id.* at 1530-37.

Specifically, plaintiffs alleging vote dilution in judicial elections must show the following under *Nipper*: (1) that a remedy exists "within the confines of the state's judicial model that does not undermine the administration of justice," to satisfy the first *Gingles* precondition; (2) that racial bloc voting exists, to satisfy the second and third preconditions; and (3) that circumstantial evidence specific to the "unique features surrounding judicial elections" supports a finding of vote dilution. *Id.* Armed with these principles, we rejected all three of the proposed remedies for reasons that are unambiguously unique to the context of judicial elections. *See id.* at 1543-47.

Our decision in *SCLC* follows the same logic. Like *Nipper*, *SCLC* involved a challenge to the at-large system for electing trial-level judges in Alabama. *SCLC*, 56 F.3d at 1283. Once again sitting en banc, we concluded that the plaintiff voters hadn't established a Section 2 violation because the evidence

in the record failed to satisfy the third *Gingles* precondition. *Id.* at 1293-94.

In response to the district court's alternative holding, we also determined that the plaintiff voters had failed to propose a viable remedy. *Id.* at 1294. As in *Nipper*, we emphasized that we can't "[l]ump[] together all elections" and instead must consider the "significant differences" between judicial and non-judicial elections. *Id.* at 1293. We reasoned that single-member subdistricts that elected judges to serve district-wide would result in home-cooking, making judges responsive to the voters of their own subdistrict and violating judicial independence. *See id.* at 1296-97. So we rejected the plaintiff voters' two proposed remedies for their failure to maintain the link between a judge's electoral base and the trial court's territorial jurisdiction and for their adverse effect on the pool of qualified candidates for judicial office. *See id.* at 1294-97. Stated differently, we allowed the at-large judicial elections to continue because the proposed remedies didn't account for the 'unique features" of judicial elections. *See id.*

This pair of en banc decisions binds our evaluation of challenges to judicial elections today. *See Davis*, 139 F.3d at 1419-24. But accompanying our reliance on them are serious misgivings about their continued viability. In the past thirty years, we have rejected almost every conceivable remedy to Section 2 violations in at-large judicial elections, including, but not limited to, re-districting, sub-districting, modified sub-districting, cumulative voting, limited voting, and special nomination. *Id.* at 1423 (citing *Nipper*, 39 F.3d at 1542-46; *SCLC*, 56 R3d at 1294-97; *White v. Alabama*, 74 F.3d 1058, 1072-73 (11th Cir. 1996)). In practice, *Nipper* stands as an impregnable wall for

voters alleging vote dilution in at-large judicial elections in this Circuit. *Id.* at 1424 ("[I]n this circuit, Section Two of the Voting Rights Act frankly cannot be said to apply, in any meaningful way, to at-large judicial elections.").

Through *Nipper*, we have effectively created a bright-line rule that categorically exempts at-large judicial elections from federal law. And we've done so despite Congress's intention that, like all other elections, judicial elections fall within the scope of Section 2. *See Chisom*, 501 U.S. at 404. Now, the panel opinion pushes that line further, excluding a yet-to-be-defined group of state bodies from Section 2's purview without any textual or precedential basis. *See* J. Wilson Dissent at 12.

B. The panel opinion wrongly extended *Nipper* to apply to Georgia's PSC.

Perhaps recognizing the novelty of extending *Nipper* beyond the context of judicial elections, the panel opinion reasons that *Nipper* applies with "equal force here" because the PSC "operates in a distinctly judicial fashion." *Rose*, 87 F.4th at 484-85. To reach this conclusion, the panel opinion lists the PSC's -quasi-judicial functions" and claims that the unique features of a state's judicial system are also inherent "in the 'quasi-judicial' context." *Id.* at 485. But the panel's characterization of the PSC runs counter to Georgia law.

Georgia has long expressed that the PSC is entirely distinct from the state judiciary. In *Tamiami Trail Tours*, the Georgia Supreme Court established that the PSC -is an administrative body" empowered to perform both quasi-legislative and quasi-judicial functions. *Tamiami Trail Tours*, 99 S.E.2d at 232

(holding that the PSC isn't bound to follow the same rules of evidence and procedure that govern judicial proceedings when it hears cases). This is not an unusual structure. *See Starnes v. Fulton Cnty. Sch. Dist.*, 503 S.E.2d 665, 667 (Ga. Ct. App. 1998) ("A particular administrative body may at times exercise judicial or quasi-judicial functions and at other times exercise administrative, ministerial, or legislative functions."). In fact, administrative bodies are baked into the state's constitutional structure. Ga. Const. art. VI, § 1, ¶ 1. And as the Georgia Constitution makes clear, any "quasi-judicial powers" that administrative bodies exercise are distinguishable from the "judicial power of the state." *Id.* (stating that "[Ole judicial power of the state shall be vested exclusively" in various courts and that the legislature "may authorize administrative agencies to exercise quasi-judicial powers"); *see also Bentley v. Chastain*, 249 S.E.2d 38, 40 (Ga. 1978) (quoting *Dept of Nat. Res. v. Linchester Sand & Gravel Corp.*, 334 A.2d 514, 522 (Md. 1975)).

Not only that, but the panel opinion's decision to represent PSC's quasi-judicial functions as "distinctly judicial" doesn't even make sense when we clarify what those quasi-judicial functions are. *See Rose*, 87 F.4th at 485. True, the PSC "hears rate cases, holds hearings, listens to witnesses, makes evidentiary rulings, and weighs testimony from stakeholders" to come to a decision. *Id.* But the PSC takes these actions largely in the context of its regulation of the rates various utilities charge and the services utilities provide. These activities are distinctly legislative. *See*, *e.g.*, *Ga. Pub. Serv. Comm'. v. S. Bell*, 327 S.E.2d 726, 728 (Ga. 1985) (describing ratemaking as part of "the legislative domain"); *Tamiami Trail Tours*, 99 S.E.2d at 233 (describing the grant and

revocation of certificates of public convenience and necessity as an "exercise of administrative or legislative power").

Equally unpersuasive is the panel opinion's claim that elections for the PSC possess the same "unique features" as judicial elections. *See Rose*, 87 F.4th at 485; J. Wilson Dissent at 10. For starters, Georgia elects its PSC commissioners through partisan elections, *see* Ga. Code Ann. § 46-2-1(a); but it elects its judges through non-partisan elections, *see* Ga. Const. art. VI, § VII, ¶ I. And significantly, PSC commissioners operate as a collegial body that makes decisions through majority rule, *see* Ga. Comp. R. & Regs. 515-2-1-.10; but judges exercise their authority independently, *see Nipper*, 39 F.3d at 1534-35. So unlike in the hypothetical judicial scenario, a single PSC commissioner is unable to hometown her rulings to favor only her voters in a single-member district. *See* J. Wilson Dissent at 12. Indeed, Georgia voters understand that PSC commissioners are responsive to their concerns. *See Ga. Power Co. v. Allied Chem. Corp.*, 212 S.E.2d 628, 632 (Ga. 1975) ("It is said that Public Service Commissions and legislatures should be 'collectively responsive to the popular will.'" (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)). These "significant differences between the legislative and judicial arenas" animated our decision to deviate from *Gingles* in the context of judicial elections. *Nipper*, 39 F.3d at 1534. So in their absence, we have no reason to deviate.[4]

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[4] The Branch Statement claims that "these distinctions are unconvincing" because other states hold partisan elections for judges, and state appellate courts act as collegial, multi-member bodies. j. Branch Statement at 3-4 n.3. The Branch Statement misunderstands. I don't suggest that partisan elections or

The PSC's "quasi-judicial" functions do not transform this administrative body into a judicial body. *See* J. Wilson Dissent at 910. In holding otherwise, the panel disrespects both Georgia law and our decision in *Nipper*.

III. The panel's opinion effectively overrules *Gingles*.

Just last year, the Supreme Court confirmed that the framework it developed in Gingles continues to guide our assessment of claims alleging vote dilution under Section 2. *Allen v. Milligan*, 599 U.S. 1, 17-19 (2023). Together, *Milligan* and *Gingles* mandate that we assess whether plaintiffs have satisfied three "preconditions." *Id.* at 18 (citing *Gingles*, 578 U.S. at 50). First, plaintiffs must show that the minority group is "sufficiently large and geographically compact" to constitute a political group. *Id.* (alteration and internal quotation marks omitted) (quoting Wis. *Legislature v. Wis. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam)). Second, plaintiffs must prove that the minority group is "politically cohesive." *Id.* (internal quotation marks omitted) (quoting *Gingles*, 478 U.S. at 51). Third, plaintiffs must demonstrate that the majority group votes to defeat the preferred candidates of the minority group. *Id.* (citing *Gingles*, 478 U.S. at 51). And then, if they establish those three preconditions, plaintiffs also must show that "the political process is not 'equally

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collegial operations are dispositive factors in distinguishing between legislative and judicial bodies. Nor could *I; Nipper* expressly states that "significant differences" exist between the two "arenas, chief among them being the varied expectations of responsiveness and bias in favor of constituents." *Nipper*, 39 F.3d at 1534. To this point of law, the Branch Statement offers no satisfactory response.

open' to minority voters" based on the "totality of the circumstances." *Id.* (citing *Gingles*, 478 U.S. at 45-46). So each step requires a different showing from the plaintiffs and a different evaluation by the courts.

The panel opinion rejected Plaintiffs' challenge because it said their proposed remedy isn't viable in light of Georgia's asserted "policy interests" in maintaining at-large elections for the PSC. *Rose*, 87 F.4th at 480, 485. In coming to this conclusion, the panel opinion claims that Plaintiffs, in fact, failed to satisfy the first *Gingles* precondition. *Id.* at 480. The panel opinion also suggests that the outcome would be the same after consideration of the totality of the circumstances. *Id.* at 475-76 ("[W]here plaintiffs offer only a single, dramatic remedy . . 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.").

Yet the panel's opinion is nearly bereft of any discussion of the three well-established *Gingles* preconditions and of the various factors that make up our totality-of-the-circumstances analysis, as the Supreme Court described in *Milligan.* Rather than engage with this binding framework, the panel opinion instead focused its inquiry on only whether "the State's deliberate choice" of at-large PSC elections "was informed by significant policy considerations that would be undermined by a forced change . . . from a statewide body to a single-member districted body." *Id.* at 482.

But again, just last year, the Supreme Court announced that such a "single-minded view of § 2 cannot be squared with the [Voting Right Act]'s demand that courts employ a more refined approach." *Milligan*, 599 U.S. at 26. That is nothing new As

Judge Wilson recognizes, we have long understood that we may not reduce the *Gingles* framework to a solitary factor. *Wis. Legislature*, 595 U.S. at 405; J. Wilson Dissent at 13. The panel here focused on a single factor: the state's interest in maintaining its existing electoral system. *Rose*, 87 F.4th at 480-86. *Gingles* doesn't countenance this sort of evaluation of a Section 2 claim, and we should correct the panel opinion's contrary analysis.

A. The first Gingles precondition doesn't center on the state's interest in its existing system.

As I've noted, the panel opinion determined that Plaintiffs failed to satisfy the first *Gingles* precondition. *Id.* at 480. But its analysis completely disregards decades of binding precedent about the limited showing this step of the *Gingles* analysis requires.

Under the first *Gingles* precondition, plaintiffs alleging vote dilution in violation of Section 2 must show that the minority group is "sufficiently large and geographically compact" to make up a majority in some "reasonably configured district" *Milligan*, 599 U.S. at 18 (quoting *Wis. Legislature*, 142 S. Ct. at 1248). To satisfy this precondition, they must produce some illustrative map in which the minority group "make[s] up more than 50 percent of the voting-age population in the relevant geographic area." *Bartlett*, 556 U.S. at 18. This illustrative map may be useful to the defendant state in devising its ultimate remedial map if the court finds a Section 2 violation. *See Milligan*, 599 US. at 20 (explaining that the plaintiffs' illustrative maps were "example districting maps" that the defendant state could choose to enact).

But we impose this map requirement for a much simpler purpose: to determine whether at-large voting is responsible for the minority group's inability to elect its preferred candidates. *Gingles*, 478 U.S. at 51 & 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."); *see also Milligan*, 599 US. at 18 (explaining that the purpose of the illustrative map is "to establish that the minority has the potential to elect a representative of its own choice in some single-member district" (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993))).

As a result, satisfaction of the first *Gingles* precondition requires only that plaintiffs show a hypothetical alternative district that is "reasonably configured" and in which the minority population is "geographically compact" according to "traditional districting principles such as maintaining communities of interest and traditional boundaries." *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996)).

Despite this clear and consistent guidance, the panel opinion grafts onto the first precondition a new requirement that plaintiffs produce a map that respects "the state's interest in maintaining its form of government." *Rose*, 87 F.4th at 482. As Judge Wilson details, the panel opinion lifts this idea from *Nipper*, where we stated that the first precondition implies "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; J. Wilson Dissent at 11-12. But in *Nipper*, we recognized just two limits on the illus-

trative maps that Section 2 plaintiffs may propose. *See id.* at 1531-33. First, we explained that any proposed remedy may not alter the size of the governmental body at issue. *Id.* at 1532 (discussing *Holder v. Hall*, 512 U.S. 874 (1994)). And second, we determined that the first precondition requires that the proposed map fall "within the confines of the state's judicial model" and not "undermine the administration of justice." *Id.* at 1531.

In the decades since *Gingles*, the Supreme Court has never required that Section 2 plaintiffs produce an illustrative map that doesn't alter the state's "chosen form of government." *See*, *e.g.*, *Milligan*, 599 U.S. at 18; *Abbott v. Perez*, 585 U.S. 579,614 (2018); *Bartlett*, 556 US. at 11-12 (2009) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 US. 399, 425 (2006); *Holder*, 512 US. at 880 n.1; *Growe*, 507 U.S. at 40. Nor has any other federal appellate court adopted this rule. For good reason. The panel opinion's rule creates a Catch-22 for plaintiffs, both requiring them to show a single-member district in which voters of the minority group are the majority and then striking their challenge if the state doesn't already use single-member districts. To the extent that dicta in *Nipper* implies the broad rule that the panel opinion suggests, it is incompatible with *Gingles.* We should have "decline[d] to depart from the uniform interpretation of § 2 that has guided federal courts and state and local officials for" nearly forty years. *Bartlett*, 556 U.S. at 19.

B. By definition, any totality-of-the-circumstances analysis requires consideration of more than the state's interest alone.

The panel opinion says it would have reached the same answer had it considered the totality-of the-

circumstances analysis. *Rose*, 87 F.4th at 475-76. Again, this statement is inconsistent with binding Supreme Court precedent.

In cases where plaintiffs have satisfied the three preconditions, *Gingles* directs us to consider the "totality of the circumstances" to determine whether the challenged electoral system dilutes the minority group's vote in violation of Section 2. *See Johnson v. De Grandy*, 512 US. 997, 1010-11 (1994) (detailing the nine so-called "Senate factors" we must consider when analyzing the totality of the circumstances). Although the state's interest in maintaining its existing electoral structure is one of several "legitimate factor[s] to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred," *Houston Lawyers' Ass'n*, 501 U.S. at 426; this interest "does not automatically, and in every case, outweigh proof of racial vote dilution," *id.* at 427. As the Supreme Court clarified last year, Section 2 liability "must be determined 'based on the totality of circumstances, not a single factor. *Milligan*, 599 U.S. at 26. We have long followed this command. *See*, *e.g.*, *Wright*, 979 F.3d at 1304-11 (considering the various Senate factors and weighing them against each other).

But here, the panel opinion considered only one of the nine Senate factors: "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 1289 (quoting *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218,1226 (11th Cir. 2000) (en banc)). And despite the panel opinion's approving citation, its approach to this particular factor "place[s] . . . an insurmountable weight on [the] state's interest" in defiance of the Su-

preme Court's contrary command. *Rose*, 87 F.4th at 281 (quoting *Davis*, 139 F.3d at 1423).

The panel opinion makes the state's interest in maintaining its existing electoral system dispositive. In doing so, the panel opinion has erased the entirety of the *Gingles* framework, from the first precondition through the totality-of-the-circumstances analysis.

Our decision to let the panel opinion stand therefore renders Section 2 a dead letter in this Circuit.

IV. Conclusion

For the foregoing reasons, I dissent from this Court's denial of rehearing en banc.

APPENDIX F

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

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

[2] *Id.*

[3] ECF 1 (Compl.), ¶ 10.

the 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* pre-requisites.[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 less opportunity

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

> 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 candi-

> date 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

[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).

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.

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. 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

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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).

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 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

[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.

remedy (without which they will lack the necessary injury for standing purposes).

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,

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

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 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

[24] ECF 80-1 (Def.'s MSJ), at 11–12.

[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.

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).

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

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

[29] *Id.* ¶ 5.

[30] ECF 80-1 (Def.'s MSJ), at 13–14.

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

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).

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) (con-

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

cluding 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 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'

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

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 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]

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

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

[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.

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' 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

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

[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.

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 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

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[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.

[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.).

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 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

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

[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 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 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 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

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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.

[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.*

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).

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,

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

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 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

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[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.

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 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

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

[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).

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] 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.

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[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).

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

> [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 (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 inform-

[71] ECF 37 (Ans.), at 1–3.

ation 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 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)).

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[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.

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.

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

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

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

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

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

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